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THE
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thus allowed may be apportioned between the counsel on the same side, at their discretion; provided, always, that a fair opening of the case shall be made by the party having the opening and closing arguments. The plaintiff in error, or appellant, shall be entitled to open and conclude the argument; but, when there are cross-appeals, they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

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THE
SOUTHWESTERN REPORTER.
VOLUME 36.

GERKINS et al. v. KENTUCKY SALT CO.
et al.

(Court of Appeals of Kentucky. June 6, 1896.)

NATURAL GAS—RIGHTS OF LIFE TENANT AND REMAINDER-MEN—INJUNCTION.

One of the remainder-men having, at sheriff's sale, purchased the life estate for the benefit of the life tenant, and having leased the land for mineral purposes, and the tenants having made large expenditures in boring for gas, with the knowledge of the other remainder-men, such remainder-men cannot enjoin the tenants from removing the gas for sale, though they may be entitled, as against the remainder-man who purchased the life estate, to share in the royalties to be paid by the lessees.

Appeal from circuit court, Meade county.

"Not to be officially reported."

Action by William Gerkins and others against the Kentucky Salt Company and others. Decree for defendants. Plaintiffs appeal. Affirmed.

W. W. Thum, for appellants. Jas. P. Gregory and Fairleigh & Straus, for appellees.

PRYOR, C. J. This action in equity was instituted by the appellants against the appellees, seeking, by an injunction, to have a gas well closed up, located on a tract of land in which they are interested as remainder-men. The facts of the case are these: John O. Smith owned a life estate in 61 acres of land, on which this gas well was bored. Smith became involved in debt, and his life estate was sold at sheriff's sale, and purchased by W. J. Smith, his son, and, as the facts conduced to show, for his father's benefit, or, at least, that fact seems now to be unquestioned between the life tenant and his son, the purchaser. The sheriff's deed was made to the son, and there is but little doubt of his authority to sell. This son, W. J. Smith, was and is one of the remainder-men, owning a one-sixth interest in addition to his life estate. He leased the mineral privileges on this land to J. W. Lewis, and Lewis transferred his interest to the Natural Gas Company. This company bored for gas, and finally became bankrupt, and its rights were sold to the Kentucky Salt Company, that now owns the lease and uses the gas from the wells, by transporting it from the premises

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and selling it. Some question has been made as to the knowledge these remainder-men had of the work going on in the way of boring for gas on their land, and we will assume that those who were in possession knew of the discovery of that gas under their soil, and made no objections to it. In the midst of the excitement attending the appearance of this gas in the county of Meade, with one of these remainder-men on the ground, and a husband of the other, it is unreasonable to suppose they were ignorant of the discovery, and the expectation of realizing large sums of money from this gas, indulged in by those who undertook the task of developing it and finally became bankrupt. The question presented is: Upon this state of fact, can the life tenant open a gas well on the land in which he has this estate? or, assuming that these remainder-men were ignorant of the fact that large sums of money were expended in making improvements by these purchasers, are they (the lessees) guilty of waste by using this gas?

It must be conceded that this substance, if it can be called such, has a commercial value; and if, like coal oil and other minerals, it belongs to the owner of the soil, it is then plain the life tenant has no right to use more than necessary for his own benefit and convenience in furnishing light and heat. It appears the appellees purchased this lease without knowledge of the title in the father of these remainder-men. Still, they were in the county where the records of the title could have been readily ascertained, and, whether in the county or not, the will and deeds were of record, and therefore notice to the purchaser. They found these wells on the land, with the gas escaping, and those interested as the original lessees without the means of utilizing it, and, becoming the purchasers, have expended large sums of money in the attempt to make it a profitable investment, and whether it can be done is a matter of experiment. In the examination of the question as to whether the owner of the soil has the absolute property in the gas that may be beneath it, or only a qualified property, we find a case of much interest reported in 28 W. Va. 210, of Wood County Petroleum Co. v. West Virginia Trans-

portation Co., in which it is said: "If, on the other hand, gas is susceptible of absolute ownership, then it is a part of the realty, to which the appellant acquired no right under the lease." The case then proceeds to discuss the nature and properties of natural gas, and concludes that it approaches more nearly the character of the elements of air and water than of things the subject of absolute property; and in that case it is held that, like air and water, it is the subject of qualified property by occupancy, and, where the access to the land is rightful, the measure of damages will be limited to the injury done the land. In this case, the party had the right to enter and use the gas, at least for his own convenience; and the regulating and controlling of the natural pressure, so as to limit its escape, would be attended with much trouble and expense. And, whether gas is the subject of absolute or qualified property, there is certainly a distinction between that and such minerals as coal, iron ore, etc. And to say that the appellees are guilty of waste in developing the soil or its products, by making the land, otherwise worthless, valuable, is inconsistent with any just rule of equity that should prevail in this character of case. There is much plausibility in the reasoning presented in the West Virginia case; for such is the character of the flow of gas that it may well be said that these appellees may now be obtaining, by means of this well, the gas that is under their neighbors' land, and if the well is closed, the probability is the gas will find an exit at some other point. Like water flowing underground, it may be diverted, so as to leave the land of one and flow to the land of another. Whether this supply of gas may or not be exhausted is also involved in much doubt; and, while we are not disposed to go as far as the West Virginia case as to the property in gas, the facts of this case do not present a case for an injunction. The estate or land is made more valuable by reason of a large expenditure by these appellees, and to close up the well or stay the flow of gas would benefit none of the parties. The appellants may be entitled, as against their brother, to their part of the royalty agreed to be paid, but have no equity as against appellees. Affirmed.

**TRUSTEES OF CHURCH HOME FOR
FEMALES AND INFIRMARY FOR
SICK v. MORRIS et al.**

(Court of Appeals of Kentucky. May 29,
1896.)

**WILLS—CONSTRUCTION—LEGACIES—TIME OF PAY-
MENT—INTEREST.**

1. Testator devised the income of his entire estate to his wife, for life; the estate, upon her death, to be distributed among certain legatees, and the balance, if any, to go to certain of the legatees to whom specific legacies had been given. The wife elected to take under the law. Held, that payment of the legacies should not be postponed until the death of the widow, so

as to thereby increase the share of the residuary estate to the extent of the income of the legacies during the widow's life.

2. In such a case the legacies do not bear interest until after a contest of the will is decided.

Appeal from circuit court, Jefferson county.
"To be officially reported."

Action by the trustees of the Church Home for Females and Infirmary for the Sick against J. H. Morris and others. From the judgment plaintiff appeals. Reversed.

Helm & Bruce, for appellants. Burnett, Miller & Burnett and Samuel P. Kirby, for appellees.

HAZELRIGG, J. By the will of John P. Morton the net income of his entire estate was to go to his wife, so long as she lived. Upon her death the estate was to be distributed as follows (item 4): To J. H. Morton Morris, \$5,000; Ellen M. Goodloe, \$3,000; Mary Bell Griswold, Morton Morris, Jr., \$1,000; Morton Griswold, \$1,000; and Margaret M. Becher, \$500. Then follows a clause giving to the appellant, a charitable institution in Louisville, the sum of \$40,000. In a succeeding clause the sum of \$10,000 is set apart for the construction of buildings on the lot of the Orphanage of the Good Shepherd, where mechanical education might be furnished the inmates of the orphanage. This, however, was on condition that a like sum should be furnished by others, which was not done. By another clause the testator provided that if there still remained a surplus, and enough for that purpose, the sum of \$20,000 was to go to the appellant, for investment for the use of the boys cared for at the Orphanage for the Good Shepherd, and the income of which was to be paid them when they reached maturity, etc. Then, after disposing of a fruit grove in Florida to a number of persons, the last item of the will provided as follows: "After all the foregoing devises are provided for in full, in the order named, and there yet remains a surplus from any and all sources, the same shall be divided in five equal parts, and one part each shall pass to the first five several beneficiaries named in item (4) four." The will was probated in the county court of Jefferson county in July, 1889, but was contested; and the mandate of this court affirming the judgment below, establishing the will, was entered in October, 1892. Pending the contest, however, the widow renounced the provisions of the will. This was done on March 12, 1891. By appropriate proceedings the interest of the widow has been allotted to her, the effect of which allotment growing out of her renunciation of the will has been to withdraw from the estate some fifty-odd thousand dollars. If the distribution of the remainder of the estate is now made, the residuary legatees will get much less than if it is postponed until the widow's death, the income of it in the meantime be-

ing set apart for their benefit. The judgment below postponed the distribution until the death of Mrs. Morton, unless in the meantime the accretions of the estate shall equal the amount withdrawn by her, in which event the distribution was to be made; giving the appellant the \$60,000, without interest, and giving the residuary legatees, the appellees here, the entire balance. The correctness of this judgment is the sole question on this appeal.

The only reason we conceive for the testator's postponement of the distribution until the death of his widow was that she might be provided for, and when that reason for postponement ceased, as it did upon her renunciation, we cannot see why those who were the chief objects of the testator's bounty should be delayed in the enjoyment of their legacy. While the amount of the residuary estate is lessened to the extent of the widow's allotment, they cannot complain, because they were only to get what was left after payment in full of the specific legacies. They are benefited to some extent, because they get their specific legacies at once, instead of waiting until the widow's death; and it is not for the court to attempt an adjustment of their profit and loss account by withholding from the principal objects of the testator's solicitude the estate intended for them. To the extent that the testator intended to prefer the appellees, or make it certain that they should get a part of his estate, he provided for them in item 4 of his will. As to whether they would get any further estate, he left in uncertainty, and, indeed, expressed a doubt as to whether there would be enough to pay the \$20,000 mentioned in the will, and still further indicated a doubt, in the last clause, by basing the residuary devise on the questionable condition of there still remaining a surplus of the estate. The general rule is well settled that a renunciation of the will by the widow, under circumstances like the present, has the effect of precipitating the maturity of the legacies. The rule is thus stated in *Re Ferguson's Estate* (1890; Pa. Sup.) 20 Atl. 945: "It was held in *Cobaugh's Appeal*, 24 Pa. St. 143, that devises or bequests subordinate to a life estate in the widow, and contingent upon her death, or payment of which is postponed until then, become presently payable, upon her election to take under the intestate laws. As to its effect upon all claims under the will, her election is equivalent to her death. This is the general rule, and, if there are any exceptions, they must depend on the expression or unavoidable implication of a contrary intent of the testator." And the opinion of the lower court in that case—that "as the residuary legatees would be disappointed in the amount coming to them, which would be diminished by the half of the personality taken absolutely by the widow, they should be compensated out of the benefits intended to be conferred on

the widow"—was reversed, under the rule announced. We are aware that there are exceptions to the rule, but the intention of the testator must prevail, so far as it can be ascertained. That is higher than any equitable rule adopted to carry out what may seem to the court a more equal or just distribution of the estate. There is no reason whatever in this case to depart from the direct command of the testator to distribute this estate in the manner in which he directs it to be done. It might be different if an intention was apparent to benefit certainly the residuary legatees, and the bulk of the estate was expected to be left for them. In such event they, and not others, could be said to be the chief objects of the testator's bounty, and they would be protected, not because it would be equitable or just, but because such was the intention of the testator.

The question remains, when shall the legacies begin to bear interest? We have seen that they became due upon the renunciation of the will by the widow, which was in March, 1891; but there was a contest over the will, and the executors could not pay until that was settled. This was done in October, 1892, and then for the first time the payment could safely be made. It seems to us, interest should be computed from the last-named date. Judgment reversed for proceedings consistent with this opinion.

TREASY v. TREASY et al.

(Court of Appeals of Kentucky. May 29, 1896.)

WILLS—ELECTION BY WIDOW—RIGHTS OF DEVISEES.

Where, after renouncing the will, the widow is assigned dower in property, part of which was specially devised to others, such devisees, after her death, are entitled to contribution out of the residuary estate.

Appeal from circuit court, Jefferson county. "Not to be officially reported."

Action by Thomas F. Treasy and another against Martin Treasy. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. B. Dixon and Humphrey & Davie, for appellant. H. S. Barker, for appellees.

HAZELRIGG, J. James Treasy died childless and testate in 1890, leaving a widow to whom he gave, for life, in lieu of dower, the family residence, with its furniture and fixtures, and charged upon his estate the payment of all taxes, gas bills, and water rents of this property, together with the payment of \$100 per month for the additional support of the widow. By item second he gave his brother Martin, the appellant, certain specific lots of land, and also his interest in the firm of Treasy & Bro. In items 3, 4, 5, 6, 8, and 10, he gave to the various appellees certain specific lots of land, and to certain charities he made various bequests. By the eleventh item he provided that all property owned by

him, not devised by the will, should go to his brother Martin. The widow elected to renounce the will, and dower was allotted to her in property devised in the main to Martin, but part of which had been specifically devised to the appellees, Thomas F. Treasy and Mary Treasy. After some two years she died, and the sole question presented on this appeal is, are the legatees Thomas Treasy and Mary Treasy entitled to contribution out of the residuary estate for their losses occasioned by the widow's occupancy of their specific property? The chancellor properly answered the question in the affirmative. The residuary legatee can get only what is left after the specific legatee has been satisfied. That is the clear intent of the testator, and it must prevail. The general rule is that a specific devisee takes the particular thing given him, while the residuary legatee takes only such part as remains. The rule is founded on the supposed intention of the testator, and will not be deviated from unless an intent to the contrary appears in the will. These principles were considered in the case of *Trustees v. Morris* (this day decided) 36 S. W. 2. Judgment affirmed.

CITY OF OWENSBORO et al. v. SPARKS.

(Court of Appeals of Kentucky. May 29, 1896.)

PROHIBITION—CRIMINAL CASES—MUNICIPAL CORPORATIONS—PENAL ORDINANCES.

1. Cr. Code, § 25, authorizing the circuit court to restrain any court of inferior jurisdiction in the limits of the county from exceeding their criminal jurisdiction, does not authorize the circuit court to prohibit the police court of the city of Owensboro from proceeding in a prosecution for the violation of an invalid city ordinance; the penalty therefor being within the jurisdiction of the police court, and the offense similar to one prohibited by statute.

2. Const. § 168, prohibiting municipal corporations from fixing by ordinance a penalty for a violation thereof less than that imposed by the statute for the same offense, does not prohibit the municipality from increasing the minimum penalty fixed by statute.

3. A municipal corporation authorized to pass ordinances to prohibit and suppress gambling houses is not authorized to pass an ordinance prohibiting all gaming.

4. Without statutory authority, a municipal corporation cannot create offenses by ordinance, and enforce penalties for violating them.

Appeal from circuit court, Daviess county.
"To be officially reported."

Petition by J. A. Sparks against the city of Owensboro and another for a writ of prohibition. From a judgment granting the writ, defendants appeal. Reversed.

Powers & Atchison and La Viga Clements, for appellants. C. S. Walker, for appellee.

LANDES, J. The board of council of the city of Owensboro, which is a city of the third class, passed an ordinance, which was approved June 4, 1894, designated as "Ordinance No. 50," for the purpose of punishing

gaming in the city, and which is as follows: "That any person or persons, who shall, in or on any house, boat, float, tenement of such house, boat, float or premises, or shall on any of the streets, alleys, sidewalks or public grounds of the city, engage in any game of hazard at which money or property is bet, won or lost, such person or persons engaged in such game or games, shall each be fined for each game thus played not less than fifty, nor more than one hundred dollars." In the following August the appellee, who was charged with violating the said ordinance, was arrested by virtue of a warrant issued by the police judge of the city of Owensboro, and brought before the police court to answer the charge. A demurrer to the warrant was entered by him, which was overruled by the court; and, the court having set the case for trial, the appellee brought suit in the Daviess circuit court against the city and the judge of the police court, seeking to prohibit them from proceeding against the appellee under the ordinance, on the alleged ground that the police court had no jurisdiction to enforce the ordinance, which it was alleged was passed by the board of council without constitutional or legislative authority, and was therefore null and void. At the commencement of the action the judge of the circuit court issued a temporary order or writ of prohibition, and on final hearing of the case, adjudging that the ordinance was passed without authority, and that it was invalid, perpetuated the order of prohibition, and adjudged the costs of the action against the appellants; and that judgment is before us on this appeal.

We have not been able to find in the act for the government of cities of the third class, or in the Kentucky statutes, any special provision for testing the validity of ordinances passed by the municipal legislative board. In the absence of such provision with reference to ordinances of cities of this class, the only method for testing the validity of any such ordinance is that of appeal from the judgment of the police court enforcing it, and such appeal must be prosecuted in the way provided for prosecuting appeals in other cases. Section 25 of the Criminal Code authorizes the circuit court of any county, by writ of prohibition, to "restrain all other courts of inferior jurisdiction in the limits of the county from exceeding their criminal jurisdiction." But this remedy is not applicable in this case, because, under the statute (St. Ky. 1894, § 3359), the police court of the city of Owensboro has concurrent jurisdiction with the justices of the peace of all violations of the laws of the commonwealth, occurring within the corporate limits of the city. And justices of the peace have jurisdiction, exclusive of circuit courts, "in all penal cases, the punishment of which is limited to a fine not exceeding twenty dollars," and jurisdiction, concurrent with circuit courts, "of all penal cases, the punishment of

which is limited to a fine not exceeding one hundred dollars, or imprisonment not exceeding fifty days, or both." Id. § 1093. The statute punishing gaming (St. Ky. 1894, § 1977), which is manifestly the same offense which the ordinance in question was intended to apply to, is as follows: "If any person or persons, shall engage in any hazard or game on which money or property is bet, won or lost, such person or persons shall be subject to a fine of not less than twenty dollars nor more than one hundred dollars." It is clear that the violations of this statute committed within the limits of the city of Owensboro are within the jurisdiction of the police court of the city, and that the police court was not exceeding its criminal jurisdiction, conferred by statute, in proceeding with the trial of the offense charged in the warrant against the appellee. It is true that the proceedings were in the name of the city of Owensboro, and, conceding the ordinance to be invalid under the statute denouncing a penalty against the offense charged in the warrant, the proceedings ought to have been in the name of the commonwealth. St. Ky. 1894, § 3360. But the offense charged was the offense denounced by the statute, of which the police court had jurisdiction; and the prosecution in the name of the city, and not in the name of the commonwealth, was an error which might have been corrected by appeal. In such cases the remedy by writ of prohibition is not applicable, and for this reason the judgment of the court below must be reversed.

But the important question is presented as to the power of the board of council to pass the ordinance referred to, which ought to be settled. It is contended that the ordinance is invalid because the penalty provided exceeds the penalty provided by the statute for the same offense, which, it is claimed, is opposed to the provision of section 168 of the constitution. That section prohibits municipal corporations from fixing by ordinance a penalty "for a violation thereof at less than that imposed by statute for the same offense." In this case the penalty fixed by statute for gaming is "not less than twenty dollars, nor more than one hundred dollars," and the penalty fixed by the ordinance is "not less than fifty nor more than one hundred dollars." This is not prohibited by the constitution, and under its provisions, when a municipal legislative board is authorized by statute to pass an ordinance affixing a penalty to the violation thereof, it may, in its discretion, fix the penalty at any sum within the jurisdiction of the police court, provided it is not less than the penalty provided by statute for the same offense. St. Ky. 1894, §§ 3364, 3290, cl. 22. This ground of objection, therefore, cannot be entertained.

Another ground of objection is that the municipal legislative board had no statutory authority to pass the ordinance, and this objection, we think, is well taken. By the act for the government of cities of the third class, we

do not find that the boards of council of such cities have the authority to pass ordinances punishing gaming, which is fully covered by the statute quoted. They have the authority "to prohibit and suppress all gambling houses." St. Ky. 1894, § 3290, cl. 13. This clause also authorized the boards of council of such cities "to prohibit and suppress bawdy houses." Under this provision, we held in the recent case of *City of Owensboro v. Simms* (Ky.) 34 S. W. 1085, that the board of council of the city of Owensboro was empowered to pass the ordinance contested in that case, the object of which was to suppress bawdy houses. But in this case the ordinance is not to prohibit and suppress "gambling houses," but to punish gaming, which is not embraced in the authority conferred by the clause referred to, nor by any other provision of the act that we have been able to find, or that has been referred to by counsel. Without statutory authority plainly conferred, the board of council of cities of the third class cannot create offenses by ordinances, and enforce penalties for violating them. For the errors indicated, however, the judgment is reversed and the cause remanded, with directions to dismiss the petition.

LOUISVILLE & N. R. CO. v. DAUGHERTY et ux. (two cases).

(Court of Appeals of Kentucky. June 2, 1896.)

NUISANCE—NOXIOUS GASES FROM VEGETABLE MATTER IN DAM—SICKNESS FROM—LIABILITY.

Where one knowing that vegetable matter collects in a dam near his premises, from which noxious gases arise, and that the collection will be increased by the enlargement of the dam, aids another, whom he knows is going to enlarge the old dam, in procuring a sale to him of the site on which it is located, his consent to the maintenance by such other of the enlarged dam, with its increased unwholesomeness, will be presumed until withdrawn by notice, so that such other will not be liable to him for sickness caused by noxious gases therefrom unless prior to its inception he gave such notice.

Appeals from circuit court, Boyle county. "Not to be officially reported."

Action by James Daugherty and by James Daugherty and Jane Daugherty, respectively, against the Louisville & Nashville Railroad Company, for sickness caused by noxious gases from decayed vegetable matter which collected in a dam maintained by defendant. From judgments for plaintiffs, defendant appeals. Reversed.

R. P. Jacobs, John McChord, and H. W. Bruce, for appellant. John W. Rawlings and Robert Harding, for appellees.

HAZELRIGG, J. In 1890 the railroad company built a dam or embankment along its road, some 80 yards from the premises of the appellee James Daugherty, and constructed a large pond, from which it used water in the operation of its trains. Therefore there had been a smaller dam at the same place, but not so constructed as to

materially obstruct a small stream or rivulet which ran through it, though decayed vegetable matter accumulated there to some extent, and became offensive. This matter accumulated to a greater extent after the construction of the large pond, and in dry seasons became offensive and unhealthy. These actions were brought by appellee James Daugherty, and by him and his wife, Jane, for damages for impairment of their health caused by the construction of the pond. It may be assumed that the proof conduces to show that the sickness of the appellees was caused by the construction complained of, although somewhat similar conditions existed there prior to such construction. It is also well settled that the maintenance of dams in such way as to emit disagreeable or unwholesome odors affords a right of action to those who may be made sick or even inconvenienced. And this is true, however innocent of intentional wrong may be the party erecting the nuisance, or however needful the structure in his business. But here, in addition to the general issues presented by the answers, it is alleged, in paragraphs of the answers to which demurrers were sustained, that the company procured the ground for the purpose of constructing the pond as it was constructed, and confined the stream so as to make the pond complained of, with the consent of the appellee James Daugherty, and with full knowledge on his part of the company's purpose, and that he was active and influential in the negotiations resulting in the purchase of the ground where the pond was erected. It is therefore insisted by the company that, whether the appellees are estopped or not in maintaining these actions, the company was, at least, entitled to some notice from the complainants, before the institution of these suits, that the pond was offensive or obnoxious to them. And this we believe to be the law of the case.

If the ground on which the pond was constructed had been purchased from appellees, and used for the purpose for which it had been bought, the vendors knowing that purpose, and, from the condition of the old dam and previous accumulations of decayed matter, had reason to believe that such accumulation would continue or be increased by reason of the new structure, and they yet sold the ground for that purpose, and consented to the construction, then no action could be maintained at all; and where, though not the owners of the pond site they procured, or aided in procuring it for another, knowing or having reason to know, from previous observations of similar conditions there, that vegetable matter would work into the pond, and become offensive and unwholesome, their continuous consent to such use, by the parties so aided, will be presumed, until such consent is withdrawn by a notice to that effect, or until objection is made to such use. As said in *Johnson v. Lewis*, 13 Conn. 303, and quoted

with approval by this court in *West v. Railroad Co.*, 8 Bush, 408: "A plaintiff ought not to rest in silence, and finally surprise an unsuspecting purchaser by an action for damages, but should be presumed to acquiesce until he requests a removal of the nuisance." Here there was no acquiescence in the continuance of the nuisance, but there was an active participation by the plaintiffs in procuring the construction by the defendant of a dam, the results from which they must have foreknown. In *Ray v. Sellers*, 1 Duv. 256, it is said: "Generally, the creator of a private nuisance, like any other wrongdoer, is liable to any person he may injure, without notice to desist from the wrong or request to repair the injury. But if, during several years before the act complained of, the plaintiff permitted the place in question to be used by the neighbors generally as a common receptacle for carcasses, the defendant had a right to infer that she consented to such use of it by him; and we believe it would be unjust to hold him liable for damages unless she gave him some notice or request informing him of her dissent." That was a case of a continuance of a nuisance, and consent was inferred from previous acquiescence. Here, as we have seen, there was positive consent given and active part taken in the erection of the dam; and knowledge that it would likely prove offensive and unwholesome is fairly chargeable to the plaintiffs. The demurrers to the second paragraphs ought to have been overruled. For the reasons indicated, the judgment in each case is reversed, for proceedings consistent herewith.

LOUISVILLE & N. R. CO. v. ROBINSON.
(Court of Appeals of Kentucky. June 4, 1896.)
CARRIERS—LIVE STOCK—UNREASONABLE DELAY—
DAMAGES—LIABILITY.

Where a carrier undertakes to ship live stock, and, by unreasonable delay, fails to deliver the shipment at the market on the day intended, it is liable for resultant injuries to the stock, and for the keep of it till it can be offered in the first regular market succeeding its arrival.

Appeal from circuit court, Garrard county.
"Not to be officially reported."

Action by B. F. Robinson against the Louisville & Nashville Railroad Company for damages resulting from delay in the shipment of live stock. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Breckenridge & Shelby, for appellant.
Robert Harding and Mort Rothwell, for appellee.

HAZELRIGG, J. The company undertook to ship for the appellee two car loads of hogs and cattle from Lancaster, Ky., to Cincinnati, Ohio, the stock being consigned to appellee, "care Green & Embry, F. & D. Yards,

Cincinnati, Ohio." The stock left Lancaster at about 1:30 o'clock p. m. on December 6th, and reached its destination at about 9 or 10 o'clock next morning, and too late for that day's market, for which it was intended. Some of the hogs were dead, and all had to be kept over until disposed of at a subsequent market. For damages growing out of this delay, the appellee recovered a judgment for \$180, of which the appellant now complains. It appears that it is some 144 miles from Lancaster to Cincinnati, and giving a reasonable time for stopping for other stock, etc., the appellee's stock ought at least to have reached its place of consignment very early on the morning of the 7th; and this delay does not appear to be satisfactorily accounted for. The hogs appear to have died from suffocation consequent on the length of time they were on the road, and for their loss, and for the keep of the stock until it could be offered in the first regular market succeeding its arrival, the company should be held liable; and this though no written notice of the loss of the hogs was given the company as required by the contract, there being proof that such notice was waived by the general freight agent of the company. This question, as well as that of the unreasonable delay in the delivery of the stock, was properly submitted to the jury, and the judgment must be affirmed.

BRANDENBURGH v. LOUISVILLE TIN & STOVE CO.

(Court of Appeals of Kentucky. June 4, 1896.)

QUIETING TITLE—ACTION—LEGAL TITLE AND POSSESSION—EVIDENCE.

1. One in possession of lands under a bond for title, and claiming to be the owner, cannot maintain an action to quiet title, since it is required, by St. § 11, that plaintiff in such case must have both the legal title and the possession.

2. In an action to quiet title, it appeared that plaintiff was in possession of land at the time it was sold, as the property of his father, under an execution in favor of defendant, who purchased it at that sale; that plaintiff knew of the indebtedness, and that the property conveyed to him was all of the property owned by his father at the time out of which the debt could be made; that he claimed under an instrument denominated a "bond for title," but which was never acknowledged or recorded; that no part of the consideration was paid by plaintiff, and no provisions made for the payment of interest on installments, which were to run over a period of eight years. *Held*, that the possession of the land by plaintiff was not adverse to his father, and that the land was subject to the sale under the execution.

Appeal from circuit court, Lee county.

"Not to be officially reported."

Action by W. J. Brandenburg against the Louisville Tin & Stove Company to quiet title to land. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

H. L. Wheeler and W. H. Holt, for appellant. E. W. Hines and J. M. Beatty, for appellee.

LANDES, J. The facts presented in the record of this case show conclusively that the alleged purchase of the land in controversy by the appellant from his father, Patrick Brandenburg, was not a bona fide transaction, but that it was designed by both father and son to defeat the appellee in its efforts to collect its debt against the former. It is true that the appellant was in possession of the land at the time it was sold, as the property of his father, under the execution in favor of the appellee, and the purchase of it by the appellee at that sale. But, at the time of the alleged purchase of the land by the appellant, he was not of age, and was living with his father; and he knew of the existence of the debt due from his father to the appellee, and that the land he pretended to purchase was all of the property owned by his father at the time out of which the debt could be made. Besides, in his pleadings and testimony, while claiming to be the owner of the land, he did not claim to have the legal title to it, without which, under the statute, although holding the possession, he could not maintain his action to quiet his title to the land. St. Ky. § 11. The instrument of writing which was executed by his father, but which was never acknowledged by him, or put to record, although in the form of a deed of conveyance, is denominated in the petition and reply as a "bond for the title," and not as a "deed." The price he was to pay for the land was the sum of \$200, which, according to the evidence,—including the certificate of the appraisers who were appointed and sworn by the sheriff,—was far below the real value of the land. The so-called title bond shows on its face that the purchase money was paid, and the petition sworn to by the appellant states that it was paid. But the testimony of both father and son shows that it was not paid at the time, but that the agreement was that it was to be paid in installments of \$25 per annum, thus extending the time of payment over a period of eight years. In the meantime no notes were executed for it, and no provisions were made for paying interest on the installments; and at the time of giving their testimony, which was about two years after the alleged purchase of the land by the appellant, no actual payment had been made of any part of the purchase money, although, by some arrangement between the appellant and his father, a pretended credit of \$50 had been allowed on account of the purchase money. Under these circumstances, which it is not necessary to dwell upon, there is shown to be an utter lack of bona fides in the transaction; and the possession of the land by the appellant cannot be held to have been adverse to his father at the time of the execution sale, and the land was subject to sale under the said execution. It follows that the court below did not err in refusing to grant the relief prayed for in the petition. On the cross petition of

the appellee, the right of appellee to the land in controversy was fully shown, and the court properly adjudged that the father was entitled to the possession of the land. The judgment is therefore affirmed.

JOHNSON v. OWENSBORO & N. RY. CO.
(Court of Appeals of Kentucky. June 4, 1896.)
MUNICIPAL CORPORATIONS—POWERS—LIMITATION
—PLEADING—RIGHT TO JURY TRIAL.

1. Where a railroad company, by permission of a city, constructs its road on land outside the city limits, intended eventually to be an extension of a street, the city cannot, after the land is brought within the city limits, by ordinance, interfere with rights which had vested in the company before the extension of the city limits, not derived from the city government; and such rights are unaffected by an ordinance requiring the company to remove its track.

2. In an action against a railroad company for damages caused by the building of an embankment in the street in front of the plaintiff's lot, an answer that the embankment was constructed and had been in use for the purposes of the railroad for more than 22 years before the commencement of the action, and the claim is barred, is a sufficient plea of the statute, without stating the time or date of erection of the embankment.

3. Where it is evident, from the pleadings, that the right of action is barred, it is not error to deny plaintiff a jury trial.

Appeal from circuit court, Daviess county.
"Not to be officially reported."

Action by Fannie Johnson against the Owensboro & Nashville Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Sweeney, Ellis & Sweeney, for appellant. Wilbur F. Browden, for appellee.

LANDES, J. The appellant sued the appellee to recover damages to her property resulting from the construction of the appellee's railroad in front of her lot, and throwing up an embankment there for the roadbed, which, it was alleged, interfered with the use of her lot, and caused it to be flooded when it rained. The appellee is the successor of the Owensboro & Russellville Railroad Company, which latter company was incorporated by an act of the general assembly passed in 1867, and constructed the road and made the embankment complained of about the year 1869 as we gather from the indefinite information as to the time derived from the record. It seems that the appellant purchased her lot in 1869 from Griffith & Sweeney, but the deed of conveyance is not exhibited in the record. Soon after she purchased the lot she built a dwelling house upon it, and has been occupying it ever since, and the said roadbed and embankment in front of her lot has been used as the track of the railroad during all of that time. At the time the appellant bought the lot and the embankment was thrown up in front of it, the lot was not in the limits of the city of Owensboro, but was in what was called

"Griffith & Sweeney's Addition" to the city; and the roadbed and embankment in front of the lot was made in what was intended eventually to be an extension southward of Lewis street, one of the streets of the city, over and upon which the road was extended from the city limits to the bank of the Ohio river. It is alleged in the petition that the embankment was originally thrown up or constructed without authority, and that it has since been maintained unlawfully and without right. This allegation is denied by the answer, but the answer does not account for or attempt to show the authority upon which the embankment was made or the roadbed constructed on what was intended at the time to be an extension of Lewis street, and which was afterwards brought within the limits of the city by an act of the legislature extending the limits of the city southward. But it is alleged in the answer that the embankment was constructed and had been in use for the purposes of the railroad for more than 22 years before the commencement of the action, and the claim is made that the appellant's right of action is barred by the statute of limitations in such cases. A reply was filed to the answer, which was held bad on demurrer. It contained no denial of the allegation of the answer as to the length of time the embankment had been thrown up in front of the appellant's lot and had been used for the purpose of the railroad, upon which the plea of the statute of limitations was based. An amended petition and reply in one pleading, and also as separate pleadings, were offered; but the court refused to permit them to be filed. None of these proposed amendments negated the statement of the answer as to the length of time the embankment had been constructed and used by the company; but in them the facts were attempted to be set up showing the date of the permission of the common council of the city for the railroad to be constructed on and over Lewis street to the river bank, and the terms upon which the permission had been given, both to the Owensboro & Russellville Railroad Company and to the appellee, its successor, and showing, also, that the terms had not been complied with, and that, in consequence thereof, the common council of the city had passed one or more ordinances requiring the company to take up the track of its road from, and to relinquish the use of, the street, which the company had failed to do. The statements of the facts as made, however, show, also, that this permission was given to both companies to use Lewis street as aforesaid before the appellant's lot, and the embankment and roadbed in front of it were brought within the limits of the city by act of the legislature. For the trial of the case, counsel for the appellant demanded a jury, which was refused by the court, and on motion of counsel for the appellee the petition was dismissed, and the appellant adjudged

to pay the costs, and the case is before us by appeal from that judgment.

It is plain that the only material question in the case is upon the plea of limitation. At the time the roadbed was constructed in front of the appellant's lot, although it was in what was intended as an extension of Lewis street southward, that territory being outside the limits of the city, it was not necessary that the company should have the permission of the common council of the city to locate, construct, and use its road there. And, notwithstanding the fact that it was afterwards brought within the city limits, the common council of the city did not thereby acquire the right to compel the company to remove the track of its road from that part of Lewis street extended, by reason of the failure of the company to comply with the terms upon which it was permitted to use the original street, then one of the streets of the city, for the extension of its track to the river. It appears that counsel for the appellant base their claim mainly upon this alleged authority of the common council of the city to require the track of the railroad to be removed from the extension of Lewis street. But we hold that, whatever power and authority the common council had over the streets of the city, conferred by its act of incorporation, it had no power, by the passage of the ordinances referred to, to interfere with rights which had vested in the company before the extension of the city limits, and which rights were not derived, either directly or indirectly, from the city or its government; and the setting up of this alleged authority in the city government, or the pleading of the said ordinances, was not sufficient to avoid the plea of the statute. Therefore the court did not err in refusing to permit the proposed amended petition and reply to be filed.

But it is contended by counsel that, in order to make the defense of limitation good, it was necessary to state in the answer the time or date of the erection of the embankment, and that the statement that 22 years had elapsed from the making of the embankment before the commencement of the action was not a good plea of the statute, without a statement of the date or time when it was made. We cannot concur with counsel in this contention. The pleadings on both sides are indefinite and unsatisfactory, the one not more so than the other. But, as has been stated, there is enough in the pleadings to make it reasonably certain that the making of the embankment in front of the appellant's lot was coincident with, if not prior to, her ownership of it; and, in view of this fact, the statement that the embankment had been made and the roadbed there used for 22 years before the commencement of the action was a sufficient foundation for the plea of limitation. This statement was a statement of a traversable fact, but it was not put in issue by a denial,

or by the statement of any facts which raised the issue. A denial of the statement would have made the issue, and would have thrown the burden of proving it on the appellee. In this case the right of action, if any, of the appellant, accrued when the embankment and roadbed were constructed in front of her lot, if she owned it then, about which a doubt is raised by the pleadings. Such actions are barred in five years after the accrual of the right of action. *Railroad Co. v. Orr*, 91 Ky. 109, 15 S. W. 8. It was evident from the pleadings that the right of action was barred, and it was, therefore, not necessary to impanel a jury to try the case. This being the case, the court below did not err in dismissing the petition, and the judgment is therefore affirmed.

EMERY et al. v. VAUGHAN et al.

(Court of Appeals of Kentucky. June 3, 1896.)

MORTGAGES—PRIORITY OF LIENS.

V. gave a firm a mortgage for \$5,500, due in 12 months, on his interest in a warehouse, two lots, and a note for \$1,000. In 15 days V. sold his warehouse interest for \$5,500, of which \$3,500 was paid on the mortgage, and the firm released its lien on the warehouse. Five months afterwards V. sold one of the lots for \$2,675, and the firm delivered the \$1,000 note to V., and released its lien on such lot, receiving \$685. Before that date it had received on such note \$315, and it afterwards released the mortgage lien on the note. The firm had actual notice of a subsequent mortgage on V.'s unsold lot, or knowledge of facts sufficient to put it on inquiry. *Held*, that the lien of the subsequent mortgagees was superior to the lien of such firm on the unsold lot.

Appeal from circuit court, McCrackin county.

"Not to be officially reported."

Action by L. W. Emery and others, trading as Hobson & Co., and the First National Bank of Paducah, against E. W. Vaughan and others, trading as G. Vaughan & Co., and S. C. Vaughan. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

J. W. Bloomfield and Sam Houston, for appellants. Husbands & Husbands, for appellees.

GUFFY, J. This appeal is prosecuted by Hobson & Co. and First National Bank of Paducah from a judgment rendered by the circuit court of McCrackin county in the suit of appellants against G. Vaughan & Co. and S. C. Vaughan. It appears: That S. C. Vaughan had mortgaged to Hobson & Co. a certain lot in Paducah, known as "Lot No. 120," to indemnify them as his sureties in a note executed to the appellant bank, and perhaps to secure other debts. The amount due the bank at time of suit was near \$3,000. G. Vaughan & Co. also held a mortgage on the same lot, and claimed a superior lien thereon for the balance of a debt alleged to be due to them from S. C. Vaughan. The

firm of G. Vaughan & Co. was composed of E. W., J. P., and Q. D. Vaughan, all brothers (S. C. Vaughan being also a brother). All of them dealt, more or less, in tobacco, in Paducah. It is claimed by appellees that the firm of G. Vaughan & Co. loaned to S. C. Vaughan \$5,500, December 15, 1888, and, to secure the same, S. C. Vaughan mortgaged to the firm certain property. The note was due in 12 months, calling for 8 per cent. interest from date until paid. The property mortgaged was an interest in a warehouse known as the "Kentucky Warehouse," and lots No. 143 and 120. Also, a note on Frank L. Scott, a son-in-law of S. C. Vaughan, for \$1,000, dated December 15, 1888. And on the 1st of January, 1889, S. C. Vaughan, by consent of the mortgagees, sold the interest in the warehouse to one Terrell for \$5,500, of which \$3,500 was paid to the firm on the 2d of January, 1889, and credited on the note, and the lien on said property so sold released on the margin of the mortgage, in the clerk's office, by the firm; and on the 1st of June, 1889, S. C. Vaughan sold the house and lot No. 143 to Powell for \$2,675. That up to that time Scott had paid to the said firm, on said \$1,000 note, as follows: \$200, January 22, 1889; \$50, February 14, 1889; and \$65, March 7, 1889; in all, \$315. And on the 1st day of June, 1889, the said firm handed over to S. C. Vaughan the Scott note, and S. C. Vaughan paid them \$685, and S. C. Vaughan afterwards collected the balance of the Scott note. That on same day, viz. June 1, 1889, the said firm entered on the margin of the mortgage a release of their lien on lot No. 143, and on December 30, 1890, the said firm, on the margin of the mortgage book, released their lien on the Scott note. The contention of the firm of G. Vaughan & Co. is that they had no notice of appellants' mortgage until November, 1890, and that the release of their lien on the Scott note was made in December because S. C. Vaughan had collected it, and they supposed that they could be compelled to release the same; they having given over the note to S. C. Vaughan on June, 1889. They also claim that they acted in the utmost good faith in the matter. The contention of appellants is that the lien of G. Vaughan & Co. should be held inferior to that of appellees.

If both mortgages had been in full force at the institution of this suit, it is clear that the appellee company would have been required to look first to the property in lien to them alone, before they could have subjected lot No. 120, upon which both appellants and appellees had liens. *Glass v. Pullen*, 6 Bush, 349, and cases cited. It is contended by appellees that they were not required to take notice of the recording of appellants' mortgage, while appellants' contention is the reverse. It is not necessary to discuss the question of constructive notice to appellees, resulting from the recording of

appellants' mortgage, because other facts and circumstances seem to determine the rights and equities of the parties. It appears that, to secure the \$5,500, S. C. Vaughan mortgaged to the appellee firm about all of his property, when in fact much less would have been ample security, and although his note had 12 months to run, bearing a usurious rate of interest; yet within less than a month \$3,500 was paid on the note, a lien released on \$5,500 of the mortgaged property, and within less than 6 months another payment was made out of the proceeds of another piece of property, which the appellee firm had allowed S. C. Vaughan to sell for \$2,675, and the mortgage released on that piece of property, and the Scott note, also, as is claimed, given up, but the lien on it was not released of record until December 30, 1890. This Scott note was dated December 15, 1888 (same date of the mortgage), due in 12 months, interest from date, and yet, within but little over a month, Scott paid to the firm \$200 on the note, and during the next two months paid \$115 more; and yet as late as May, 1890, a considerable part of the Scott note was still unpaid. Only one of the firm of G. Vaughan & Co. testified in the case, but his testimony and that of S. C. Vaughan conduces to show that the other members of the firm had no knowledge of the business. It also seems that appellees were unable to give the time and manner in which S. C. Vaughan was furnished the sum of \$5,500, except the \$3,500 paid in a check. We think that the facts and circumstances in this case were such as to either charge the appellee firm with actual notice of appellants' mortgage, or such as to have caused a reasonably prudent man to have made some inquiry; and it does not appear that appellees made any investigation at all as to S. C. Vaughan's obligation to appellants, although the circumstances warrant the conclusion that they had good reason to know, or at least believe, that S. C. Vaughan was indebted to appellants. After a careful consideration of the facts and circumstances of this case, we are of the opinion that the court below should have held appellants' lien on lot No. 120 to be superior to that of G. Vaughan & Co. The judgment of the court below is therefore reversed, and the cause remanded, with directions to adjudge appellants' lien on the said lot, and the proceeds thereof, superior to that of G. Vaughan & Co., and for proceedings consistent with this opinion.

NATIONAL EXCH. BANK OF LEXINGTON v. BRIGHT.

(Court of Appeals of Kentucky. June 5, 1896.)

BENEFIT ASSOCIATIONS—ASSIGNMENT OF POLICY—INSURABLE INTEREST—CHANGE OF BENEFICIARY.

1. A benefit association, "organized for the purpose of assisting widows, orphans, and other dependents of deceased members by providing

for the payment by each member of a fixed sum to be held until the death of a member, then to be paid to the person or persons entitled thereto," etc., issued a policy which provided that it might be assigned "to any party having an insurable interest in the life of said member, with the assent thereto of the beneficiary herein," and with the assent of the proper officers of the association. *Held*, that a simple creditor of the member did not have an insurable interest in his life, within the meaning of the provision.

2. A benefit policy provided that "the beneficiary herein may at any time be changed, at the request in writing of the member above named, on the surrender of the policy, and a new one may be issued on payment to the association of one dollar." On the margin of the policy it was noted, "At the request of the holder of this policy, the beneficiary is hereby changed by the substitution of" a certain bank, a creditor, or its successor, "instead of the person therein named," and signed by the association's treasurer. *Held*, that the marginal notation was without any effect whatever.

Appeal from circuit court, Fayette county.
"Not to be officially reported."

Action by the National Exchange Bank of Lexington against Alice Bright to determine the ownership or right to moneys due on a policy in a benefit association. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Falconer & Falconer and Z. Gibbons, for appellant. Bronston & Allen, for appellee.

LEWIS, J. September 18, 1890, the Massachusetts Benefit Association, a corporation organized under statute of and doing business in that state, for the consideration recited, issued a policy showing William Bright to have been constituted a benefit member of said association, and its agreement to pay, in 90 days after proof of his death, to Alice Bright, his wife, if living,—if not, to the executors or administrators of said member, in trust, however, for and to be forthwith paid over to his heirs at law,—the sum of \$5,000. Upon margin of the original policy, filed and made an exhibit, there is the following writing: "Boston, Oct. 6, 1891. At the request of the holder of this policy the beneficiary is hereby changed by the substitution of the National Exchange Bank of Lexington, Kentucky, creditor, or its successors or assigns, as its claim shall appear, instead of the person therein named. W. E. Southell, Tr." William Bright died in 1894, and the present litigation is between Alice Bright, his widow, designated in the policy as beneficiary, and the National Exchange Bank, as to ownership or right to said sum of \$5,000, which has been by the Massachusetts Benefit Association paid into and made subject to order of court. The bank avers William Bright was indebted to it, at date of attempted transfer of the policy, in two sums, of about \$3,000 and \$2,500, and that a lien was acquired on the policy, and now exists on the fund in court, for satisfaction of that indebtedness. Upon back of the policy are printed conditions and rules upon which it was issued and accepted. Of these

rules, two are made subjects of discussion in this case, and we are required to determine the proper meaning and effect of them. The first is as follows: "This policy may be assigned to any party having an insurable interest in the life of said member, with the assent thereto of the beneficiary named herein; but every assignment shall be absolutely void unless it is assented to by the proper officers of the association in writing, but this policy shall not be invalidated thereby." Second: "The beneficiary herein may at any time be changed, at the request in writing of the member above named, on the surrender of the policy, and a new one may be issued on payment to the association of the sum of one dollar. The change of the beneficiary and the issuing of a new policy, as herein provided, shall cancel and render the policy null and void."

It is plain the writing on the margin of the policy did not, in meaning or substance, amount to an assignment of the policy, or any benefit therefrom, to the National Exchange Bank. For, first, the Massachusetts Benefit Association was, as expressly recited in the articles of association, "organized for the purpose of assisting widows, orphans, or other dependents of deceased members by providing for the payment by each member of a fixed sum, to be held until the death of a member, then to be paid to the person or persons entitled thereto," etc.; and, in our opinion, the National Exchange Bank did not, in the meaning of the rule quoted, have an insurable interest in the life of William Bright, as such member. Second, it is very questionable whether the mere signature of the treasurer of the association should be treated as assent to the assignment by the proper officers of the association. However, waiving all other inquiries, assent of Alice Bright, the beneficiary, was indispensable to the validity and efficacy of the assignment; and, as the National Exchange Bank did not, in its answer and cross petition, allege such assent was given by her, it contained neither ground of defense nor cause of cross action. Counsel, however, contends there was an issue made in the pleadings on that matter, as to which the lower court ought to have heard proof. But it seems to us too plain for dispute that Alice Bright did not assent to the assignment, and, if she had, the bank would and ought to have alleged it; for not only was time given for that purpose, but counsel was informed such allegation was necessary. There is no foundation whatever for the claim of the bank in virtue of the second rule we have quoted. For, in order to substitute another, without assent of the beneficiary designated and named in the policy, it is indispensable that the original policy be canceled and a new one issued. For, while the first contract exists, the original beneficiary cannot, without his or her assent, be displaced or deprived of the contingent interest thereby secured. The only way by which it can be done is after

lapse or forfeiture of the original policy, making a new contract, and issuing a new policy. And, as that has not been done, the writing on the margin of the policy, signed by the treasurer of the association, did not have any validity or effect whatever. Judgment affirmed.

BURCH v. CITY OF OWENSBORO.

(Court of Appeals of Kentucky. June 5, 1896.)

ORDINANCES — SPECIFYING PURPOSE OF LICENSE.

An ordinance providing that all moneys received from licenses hereunder shall be paid to the treasurer, and placed to the credit of the general revenue fund of the city, and shall be used in defraying current and incidental expenses of said government, except a certain proportion shall be paid to the treasurer of the board of education for the use of the public schools of the city, sufficiently complies with Const. § 180, requiring every ordinance levying a tax to specify distinctly the purpose for which the tax is levied.

Appeal from circuit court, Daviess county. "Not to be officially reported."

Action by J. G. Burch against the city of Owensboro. Judgment for defendant. Plaintiff appeals. Affirmed.

C. S. Walker and John Feland & Son, for appellant. J. D. Atchison, for appellee.

GUFFY, J. The appellant, Burch, instituted this action in the Daviess circuit court, seeking to enjoin the appellee from collecting from him the sum of \$100, license fee or tax. It is substantially alleged in the petition that the city council of Owensboro, a city of the third class, passed an ordinance fixing and regulating license in said city, etc., which act went into effect April 16, 1894. It provides, in section 45, as follows: "That all moneys received from licenses under the provision of this ordinance shall be paid to the treasurer and placed to the credit of the general revenue fund of said city, and shall be used and expended in defraying the current and incidental expenses of the said government, except 15 per cent. thereof shall be paid to the treasurer of the board of education for the use of the public schools of the said city, and shall be paid over by the said treasurer to the treasurer of the board of education monthly." The appellant is a wholesale dealer in poultry, butter, and eggs. No license was required of retail dealers. A demurrer was sustained to the petition, and the action dismissed, and from that judgment this appeal is prosecuted.

Appellant's contention is that the ordinance is unconstitutional and void, for the reason that it does not comply with section 180 of the constitution, which provides that every ordinance and resolution passed by any county, city, town, or municipal board, or local legislative body, levying a tax, shall specify distinctly the purpose for which said tax is levied. Section 3290 of the Kentucky Statutes, authorizing the imposition of licenses and taxes, is a substantial repetition of the

provisions and requirements of the constitution. It may be that the ordinance in question is not as specific as it might have been, yet we do not think it is so vague or indefinite as to render it void. It does not appear that the license is oppressive to the business, and the power of a city to require license fees seems to be beyond question. It results, therefore, that the judgment of the court below was proper, and the same is affirmed.

NEW ALBANY WOOLEN MILLS v. LEWIS.

(Court of Appeals of Kentucky. June 6, 1896.)

CHATTEL MORTGAGES—PRIORITIES.

A merchant executed a mortgage on his stock of goods and book accounts, which was recorded, authorizing the mortgagee to take possession of the mortgaged chattels, and further stipulating that, until possession was taken, the mortgagor could sell the goods in the usual course of trade, the proceeds to be applied in payment of the debt secured. After the mortgagee had taken possession, goods which were included in the mortgage were sold by the mortgagee's agent, and billed to the purchaser in the name of the mortgagor, whom he supposed was the seller. *Held*, that the lien of the mortgage was superior to that of a creditor of the mortgagor, garnishing the money due from the purchaser.

Appeal from circuit court, Warren county. "To be officially reported."

Action by J. D. Lewis against the New Albany Clothing Company, in which J. E. Burch was summoned as garnishee, and in which the New Albany Woolen Mills, etc., intervened. From a judgment for plaintiff, interveners appeal. Reversed.

Wright & McElroy, J. M. Moss, and T. W. Thomas, for appellants. W. E. Garth, for appellee.

LANDES, J. The appellee sued the New Albany Clothing Company, a nonresident corporation, in the Warren circuit court, to recover on an account for services as a traveling salesman, claiming the sum of \$270. The petition contains a prayer "for a general attachment herein to be levied on any of defendant's property in this state, and that J. E. Burch be summoned to answer as garnishee herein, and to state what amount he owes said defendant." The record, however, does not show that the affidavit and bond required in such cases were made and executed, nor does it show that any attachment was actually issued; but the answer of J. E. Burch, as garnishee, is copied in the record, in which it was admitted that he owed the New Albany Clothing Company \$230 for goods purchased from the company "at their place of business in New Albany, Indiana, for which goods he agreed to pay said New Albany Clothing Company the sum of \$230 on the 15th day of November, 1893." No notice was taken by counsel for the appellants in their brief of the ab-

sence of the affidavit and bond and attachment, and we may assume that they are in the original papers of the case, although not copied in the record before us. The New Albany Clothing Company was not actually summoned, and made no defense to the claim set up in the petition. The appellants, however, were admitted on their petition as defendants and claimants of the property of the defendant company, and afterwards, by amended answer, set up a mortgage executed to them by the defendant company on all of its property, alleging that the goods sold and shipped to Burch were part of the goods embraced in their mortgage, and claiming the amount due from Burch for the goods by virtue of the said mortgage; and, on their motion, the case was transferred to equity. On final hearing, the court below sustained the attachment of the appellee, and adjudged, in substance, that he was entitled to the money owing by Burch for said goods under his attachment, and dismissed the claim of the appellants, and gave judgment against them for costs, in favor of the appellee. From that judgment this appeal is prosecuted.

The instrument of writing executed by the New Albany Clothing Company, under date of August 14, 1893, to the appellants, is on its face a mortgage of the property and credits of the said company to secure the debts it owed to the appellants, aggregating the sum of \$28,837.83. The mortgage was executed and recorded in Floyd county, Ind., where the company was engaged in business under its charter, and the debts intended to be secured by the mortgage were all created before it was executed. It was provided in the mortgage that, under certain circumstances, the mortgagees (the appellants) might "take, have, and hold the absolute and exclusive control and possession of the property, rights, and credits hereinbefore mentioned," and might "sell the same at public or private sale, upon reasonable notice," to satisfy and discharge the indebtedness secured by the mortgage. After this provision, the following stipulations were made: "It is further stipulated and agreed between the parties hereto that until such time as the said parties of the second part, or either of them, shall choose to take the possession and control of said property hereby mortgaged, sold, and transferred to them, the said party of the first part may retain the possession and control of said property, and may use such property in the usual course of its business, or may sell or dispose of any part of the same in the usual course of trade and business; keeping an account of all such sales and transfers, and applying the proceeds thereof to the payment and satisfaction of the indebtedness hereby secured, and accounting to said parties of the second part, at any time and upon demand, for said proceeds of such sales." The transaction was not a secret one, and there is nothing

shown in this record that in the slightest degree impugns the good faith of the parties to it. They are not chargeable with a fraudulent purpose or intent by reason of the fact that the mortgagor retained possession of the mortgaged property; nor was there fraud in the attempt to secure the debts owing by the company to the appellants, even though the debts were in existence, and some of them were due at the time the mortgage was made. And although the statute of this state affords a remedy to an excluded creditor in case a debtor, in contemplation of insolvency, by mortgage or assignment, attempts to prefer one or more of his creditors, yet a mortgage or assignment made for such a purpose is not on that account fraudulent and void, but may be enforced for the exclusive benefit of the preferred creditors, unless the excluded creditor commences action within six months after the act of preference. *Whitehead v. Woodruff*, 11 Bush, 209; *Bank v. Jefferson*, 10 Bush, 328. There was no attempt to show that the mortgage was void, or even voidable, as an attempt to prefer creditors, under the laws of the state of Indiana; and counsel for the appellee has failed to show that it is opposed to the general policy of the laws of this state in this regard.

It conclusively appears from the evidence that, in pursuance of the stipulations of the mortgage, the appellants took possession of the mortgaged property, through the Fidelity Trust and Safety Vault Company, on the 9th day of November, 1893, and W. C. Nunemacher, who was the treasurer of the mortgagor company, was appointed the active agent of the appellants, to take charge of the mortgaged property, and conduct the business in selling and disposing of the property. Previous to that time, however, the goods were being disposed of, under the stipulations of the mortgage, in the regular course of business, by the mortgagor company, through its officers or agents, for the benefit of the appellants. And, about the last of October or the first of November, the said J. E. Burch, who was engaged in mercantile business in Bowling Green, purchased a bill of goods, amounting to \$230, as stated in his answer as garnishee and in the testimony of Nunemacher, the latter being then in charge of the business in the manner above indicated. But the goods purchased by Burch were not shipped to him until the 10th day of November, the day after the appellants took possession of the property, as above stated. And, according to Nunemacher's testimony, the goods shipped to Burch were on hand at the time the mortgage was executed, and were included in the schedule of property embraced in the mortgage. And notwithstanding the fact that Burch did not know, as testified by him, that the mortgage was in existence at the time of his purchase, and the further fact that they were billed to him in the name of

the New Albany Clothing Company, still it is clear that the appellants then had a lien on them under their mortgage; and the sale of them to Burch was actually made by Nunemacher, who was then conducting the business and disposing of the mortgaged property as the agent of the appellants, and for their benefit. It follows from this that the appellants were entitled, and are still entitled, to the money owing by Burch for the goods purchased by and shipped to him, and that their claim is superior to the claim of the appellee under his attachment.

For the foregoing reasons, the judgment of the court below is reversed, and the cause remanded, with directions to discharge the attachment of appellee as to the money garnished in the hands of Burch, and to require Burch, the garnishee, by appropriate orders, to pay the same to the appellants.

WITHERS v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 6, 1896.)

CRIMINAL LAW—APPEAL—REVIEW.

When the record contains no motion or grounds for a new trial, the appellate court can only look to the indictment and the testimony.

Appeal from circuit court, Boyle county.

"Not to be officially reported."

Wesley Withers was convicted of a crime, and appeals. Affirmed.

C. C. Bagby, for appellant. W. S. Taylor, for the Commonwealth.

PRYOR, C. J. Upon an examination of the record, we find no motion or grounds for a new trial, without which this court can only look to the indictment and the testimony. The indictment is good, and the charge sustained by the evidence heard. Judgment affirmed.

MCCLURG v. COMMONWEALTH.¹

(Court of Appeals of Kentucky. March 12, 1896.)

HOMICIDE—LEGAL PROVOCATION—SELF-DEFENSE.

1. On trial for homicide, an instruction to the jury that though they may believe that defendant willfully killed deceased, but entertain a reasonable doubt as to whether the same was done with malice aforethought, and may believe beyond a reasonable doubt that the same was done in a sudden affray or sudden heat of passion, brought about by considerable provocation, and not in necessary, or to defendant apparently necessary, self-defense, then they should find him guilty of manslaughter,—in the absence of any instruction as to the significance of the term "considerable provocation," and as to what constitutes legal provocation,—was improperly given.

2. Where it appears that defendant and deceased had had an altercation and a struggle, but had desisted and drawn apart when deceased stooped to pick up a pole to strike defendant, and the latter shot him, an instruction which makes defendant's right to self-defense depend upon whether deceased assaulted him at the outset is erroneous.

3. The jury were instructed that if defendant, while passing peaceably along a public

road, was assaulted by deceased with a stick or club, and, from the nature of the assault, defendant believed, and had reasonable grounds to believe, he was in danger of his life or of great bodily harm, "and there appeared to him no other safe means of escape from the impending danger" than by shooting deceased, defendant had the right to stand and defend himself; and if, in so doing, it was necessary, or upon reasonable grounds appeared to be necessary, to kill his antagonist, the killing was excusable. Held, that the instruction was erroneous, the right of self-defense existing upon the hypothesis stated, without the qualification that "there appeared no other safe means of escape from the impending danger."

Appeal from circuit court, Daviess county.

"Not to be officially reported."

William McClurg was convicted of murder, and appeals. Reversed.

The seventh instruction referred to in the opinion is as follows: "If the jury believe from the evidence that the defendant, McClurg, was passing peaceably along a public road, and that, while so passing, he was assaulted by the deceased with a tobacco stick or a club, a deadly weapon, and that, from all the circumstances and the nature of the assault, the defendant at the time honestly believed, and had reasonable grounds to believe, that deceased, Iglehart, would then and there take his life, or do him great bodily harm, and there appeared to him no other safe means of escape from the impending danger than by shooting the deceased, then the defendant was not obliged to retreat, but have the right to stand and defend himself; and if, in so doing, it was necessary, or upon reasonable grounds appeared to the defendant to be necessary, that he should kill his antagonist, then the killing, if the jury believe it occurred under the circumstances supposed in this instruction, was excusable, upon the ground of self-defense and apparent necessity."

Sweeney, Ellis & Sweeney, for appellant. W. S. Taylor and L. P. Little, for the Commonwealth.

LEWIS, J. This is an appeal from a judgment on conviction for murder, punishment being confinement in the penitentiary for life. Appellant and deceased had been, previous to the homicide, friendly and neighborly, residing about a quarter of a mile apart, their dwelling houses being on same side of a public road, and between them was a house occupied by Fulkerson, tenant of former. Deceased had early in morning of the day he was killed, which was Sunday, brought a team from another place, to be used by himself and family, making a visit to relatives, the horses being put in his stable, except a colt left loose in the road. Appellant, as he testified, had, after going to different parts of his farm to see about fences, returned to his dwelling house, when he saw or his attention was directed to the colt of deceased, that had gotten into his wheat field situated near to the house occu-

¹ Rehearing denied.

pied by Fulkerson. He immediately proceeded to put it out, and then went through the yard of Fulkerson to the road, and along it in front of the premises of deceased, intending, as he testified, to go to the house of a neighbor, to see about tobacco plants he had an interest in. He was seen and spoken to by Fulkerson and wife, passing through the yard, having two pieces of brick in his hand, and was also in their sight when he got opposite to where it turned out deceased was. Soon after he got to that position, they, as did also a boy named Henderson, saw him throw some sort of missile, probably a piece of brick, at or in direction of the place where deceased evidently was, though not then visible to them. But he immediately came in sight, having a tobacco stick in his hands, with which he struck, or struck at, appellant. They then clinched each other, being near the middle of the road, and were fighting, when Fulkerson and Henderson got to them, deceased having the beard of appellant grasped and one finger between his teeth, the tobacco stick having been dropped in the meantime. Fulkerson told them to stop fighting, when deceased said he would quit if appellant would let go his finger, which was done. But the evidence tends to show that deceased did not simultaneously quit the fight, but wrenched or tore clothing of appellant. After they separated, deceased went a short distance to where a pole was lying on the ground, and stooped, as if to pick it up. He did not, however, do so, but, according to the testimony of Fulkerson and Henderson, had straightened his body, and was going away, his head turned towards appellant, at the precise moment the latter fired the first pistol shot at him, there being two, both taking effect, and causing death in a short time. They also testified that deceased said to appellant, "Don't shoot, Mr. McClurg." No other witness than appellant stated what was said or done when the parties first met, nor who used the first provoking words or made the first hostile demonstrations. His account of the difficulty is that he had picked up the pieces of a broken jar, in order to drive the colt out of his wheat field; that, as he was going along the road, deceased, who was inside his own inclosure, observed him, and moved rapidly towards him and got upon his fence, having the tobacco stick; that, after some complaint by appellant about the colt getting into the wheat field and the roguish disposition of the animals of deceased, though not of an insulting character, deceased applied to him a vile epithet, and, getting off the fence, advanced, and struck him with the stick. He further testified that deceased was actually stooping to get the pole when he fired the pistol shot, and the range of the bullet in the body of deceased tends to sustain him. The evidence does not show that appellant drew the pistol before or while they were

clinched, nor until deceased stooped to get the pole. Nor does it show that appellant advanced towards deceased from the middle of the road along which he was traveling rightfully, and without apparent design of meeting or provoking an encounter or quarrel. In fact, as neither Fulkerson nor Henderson saw deceased until he got into the road, and advanced upon appellant, it is fairly inferable that the latter did not see or anticipate meeting deceased when he passed from Fulkerson's yard into the public road. But the testimony shows that deceased did see appellant while he was driving the colt out of the wheat field, and manifestly there would have been no encounter if deceased had not crossed his fence, and intercepted appellant in the middle of the public road. It is true, appellant had thrown the brickbat; but the evidence does not show that it was done before deceased got over or from the fence, and started towards him. Appellant was then 62 years old, and weighed about 140 pounds; deceased was 34, and weighed about 175 pounds. It is, however, the province of the jury to determine as to the sufficiency of the evidence to support the verdict; and we have stated substantially the circumstances under which the killing was done, in order to better decide whether any error of law, in the way of instructions or other rulings of the court, occurred at the trial prejudicial to his substantial rights.

We see no objection to the form or substance of the instruction to the jury defining "murder." But, in our opinion, the objection of counsel to instruction 2 is well taken. It is as follows: "Though they may believe from the evidence beyond a reasonable doubt that the defendant willfully shot and killed deceased, Columbus Iglehart, in the manner charged in the indictment, but entertain a reasonable doubt as to whether the same was done with malice aforethought, and shall believe beyond a reasonable doubt that the same was done in a sudden affray or sudden heat of passion, *brought about by considerable provocation*, and not in his necessary, or to him apparently necessary, self-defense, they should find him guilty of manslaughter," etc. The objectionable part of that instruction is the qualifying language we have italicized. The term "considerable," although generally used by text writers in describing that condition which will reduce a homicide from murder to manslaughter, is, at best, inexact and indefinite, and, unless explained by the court, well calculated to confuse or mislead the jury; for what one jurymen, in the absence of instruction on the subject, might regard "considerable," would, in estimation of another, fall short of that degree or character of provocation that would meet the requirement of the law. To make the best or most of the word "considerable," it certainly never was intended to mean more or

less than legal provocation; and this court has expressly held that the trial court should not leave the jury to determine for themselves what would constitute legal provocation. *Payne v. Com.*, 1 Metc. (Ky.) 371; *Donnellan v. Com.*, 7 Bush, 677. It has been also held erroneous to so instruct the jury as to restrict the application and meaning of the term "provocation" to that state of case constituting an excuse for killing in self-defense. *Donnellan v. Com.* And if a judge would thus misunderstand and misinstruct as to the actual character and degree of provocation necessary to reduce a killing from murder to manslaughter, as seems to have been done in the last case cited, much greater the probability of a jury doing so, having no instruction or explanation as to the meaning or significance of the flexible term "considerable"; and the circumstances of the present case are of the character most likely to confuse and mislead a jury on that subject. Instruction 5 is erroneous because it makes appellant's right of self-defense depend upon whether deceased assaulted him at the outset, when the evidence shows that they both desisted and drew apart, and appellant did not draw or fire his pistol until deceased stooped to pick up the pole with which to strike him. Upon the hypothesis stated in instruction 7, the right of appellant to defend himself existed without the qualification affixed in these words by the court, "And there appeared to him no other safe means of escape from the impending danger." For the errors indicated, the judgment is reversed for a new trial consistent with this opinion.

GRUBBS v. McILVAIN.

(Court of Appeals of Kentucky. May 28, 1896.)

PARTNERSHIP—ACCOUNTING—CREDIT.

In an accounting between partners, a member will not be entitled to credit for the amount paid by him to another for the latter's position in the firm.

Appeal from circuit court, Kenton county.

"Not to be officially reported."

Suit for accounting between M. Grubbs and J. F. McIlvain. From the decree rendered, M. Grubbs appeals. Affirmed.

C. H. Flisk, for appellant. Tarvin & Hall, for appellee.

PRYOR, J. While the commissioner's report in this case shows the stock on hand, when appellee became a partner, was worth \$3,500, and the Grant county land \$1,500, also outstanding notes and accounts, making \$5,000 exclusive of the notes and accounts, still we are not disposed to credit the appellee with the \$1,275 paid by him to Bramlage for his position in the firm, as it is doubtful whether the amount of assets would justify the conclusion that the parties regarded that sum as so much capital invested in the con-

cern by the appellee, as between himself and the appellant. We will assume, as the proof warrants, that the firm was out of debt when the appellee became a partner. He paid into the firm \$2,067.84 when he entered, and subsequently paid in the additional sum of \$1,000. The firm did a profitable business, but in about two years and eight months made an assignment of the firm property. The appellant seems to have managed and controlled the moneys of the firm, and in fact obtained the entire benefits resulting from the partnership. It is manifest that the firm should not be charged with the notes, amounting to \$10,550, discounted at the German National Bank, as the money was applied to the individual use of the appellant. This finding of the chancellor will not be interfered with. It accounts for the firm's financial wreck, the one partner appropriating the entire profits to his own use. The chancellor finds, upon a settlement between these partners, that the appellant is indebted to the appellee in the sum of \$5,278.55; but this sum should be credited by the amount paid Bramlage by the appellee for his interest, as it should not have entered into the settlement, and would leave the appellant indebted to the appellee in the sum of \$4,003.55, with interest from December 22, 1890, instead of the sum adjudged. In all other respects the judgment below is affirmed, and is remanded, that this credit may be entered.

BULLITT et al. v. EASTERN KENTUCKY LAND CO.

(Court of Appeals of Kentucky. May 29, 1896.)

VENDOR AND PURCHASER—RESCISSION—RIGHT OF VENDOR TO LIEN—VENUE—SPECIAL JUDGE.

1. On the rescission of a contract for the sale of land for default of the vendor, the vendee is entitled to a lien on the vendor's interest in the land for repayment of the amount paid on the contract, though not in possession.

2. Under Civ. Code, § 62, providing that an action for the sale of real property under a mortgage lien or other incumbrance or charge must be brought in the county in which the subject of the action, or some part of it, is situated, an action brought by a purchaser for the rescission of a contract for the sale of land, in which he seeks to enforce a lien on the land, may properly be brought in the county where it is situated.

3. Where a special judge is selected by the parties or elected to preside in a case, such orders as are made in the case are presumed to have been made by him, unless the contrary appears in the record.

Appeal from circuit court, Menifee county.

"To be officially reported."

Action by the Eastern Kentucky Land Company against Thomas W. Bullitt and others. Judgment for plaintiff, and defendants appeal. Reversed.

W. B. Dixon and T. W. Bullitt, for appellants. A. T. Wood, for appellee.

PAYNTER, J. By executory contract the Bullitts conveyed to the Eastern Kentucky

Land Company a boundary of land situated in Menifee county, supposed to contain 3,000 acres, for the sum of \$5,000. Twenty-five hundred dollars was cash, and the balance to be paid under certain conditions of the contract. If there were less than 3,000 acres in the boundary, then the price was to be at a given sum per acre, and in no event was the price for the whole boundary to be more than \$5,000. This action was instituted by the appellee in the Menifee circuit court to rescind the contract, to recover the sum paid thereon, and to enforce a lien therefor on whatever part of the boundary of land belonged to the Bullitts. The contract required the vendors to free the land of squatters, and place the vendee in possession of it. It was alleged that the vendors had failed to do either, that part of the land was in possession of squatters, that the vendors could not comply with the terms of the contract by making a deed with covenants of general warranty, etc. The alleged squatters were made defendants to the action, and served with process in Menifee county. The Bullitts, who resided in Jefferson county, were served with process in that county.

If the contract was rescinded, and any part of the land embraced in the contract belonged to the vendors, we are of the opinion the vendee had a lien thereon to reimburse it for any sum which it had paid the vendors on the purchase money, notwithstanding the vendors failed to place it in possession of the land. In many cases in this court, when the vendee had taken possession of land under a purchase, and afterwards the court rescinded the contract, the vendee was adjudged a lien for such purchase money as he had paid the vendor. In these cases, the court recited the fact in its opinion that the vendee was in possession under his purchase. While the court recited the fact of the vendee's possession, it did not hold, in terms, that the vendee would not have been entitled to the lien except for such possession. One who enters upon land under a parol contract cannot maintain an action to enforce it, but he has a lien upon it for whatever he may have paid for, or improvements made on, it. *Speers v. Sewell*, 4 Bush, 239; *Usher's Ex'r v. Flood*, 83 Ky. 563. It is a resisting equity, and the court will not deprive the vendee of his possession until he is reimbursed. In such states of case, courts of equity endeavor to place the parties in statu quo, as they do in cases of rescission of contracts of sales of land. We can see no reason for the rule which would deny a vendee a lien upon the land for the money he had paid the vendor, simply because the vendor had broken his contract in failing to place the vendee in possession of the land. The equitable title to whatever land the vendors actually owned within the boundary sold was conveyed to the vendee. If there is a rescission of the contract, the vendee should not be compelled to surrender this equitable title to the land

until it has been reimbursed the sum paid the vendors. In *Bibb v. Prather*, 1 Bibb, 316, it does not appear whether or not the vendee had been placed in possession of the land. The contract was rescinded, and the court adjudged that the lien existed. In *Miller v. Hall*, 1 Bush, 237, the inference is that the bidder at a judicial sale did not get possession of the land; but the court held that, for the money he paid before the judgment under which the sale was made was superseded or appealed from, he was entitled to a lien on the land. In *Vaughan v. Myers*, 2 Dana, 113, the conveyance was set aside, which was made under a sale by the sheriff under an execution against Myers, and the court held, as Myers was insolvent, it was proper to allow Vaughan, the purchaser, a lien on the land conveyed to him to recover the payment of the sum paid by him to the sheriff. The vendee does not appear to have been in possession of the land, but, as Myers was insolvent, the court adjudged the lien. The question of possession did not enter into the consideration of the case. The court, in adjudging a rescission and allowing a lien to the vendee for reimbursement, in *Barbour v. Morris' Adm'r*, 6 B. Mon. 120, did not state whether or not the vendee was in possession, and, of course, did not adjudge the lien because the vendee was in possession of the land.

An action purely for a rescission of a contract of sale of land or its specific execution is transitory,—not in rem, but in personam. *Kendrick v. Wheatley*, 3 Dana, 34; *Parish v. Oldham*, 3 J. J. Marsh. 544. When, in the action, it is sought to enforce a lien on land which results from the rescission, then the action becomes local. In *Kendrick v. Wheatley*, supra, the court held that the action could not be maintained in the county where the land was situated, as the defendants neither resided in that county, nor were they served with process therein, and that the allegations of the bill were not sufficient to authorize a decree for the sale of the land. It was alleged that the vendor of the land had no title to it. Certainly, if the vendor had no title to the land, there could not be a lien adjudged upon it. Hence the court would not be authorized to decree a sale of the land belonging to one other than the vendor. In this case it was not alleged, in the petition, that the vendors had no title to the land, but that squatters were in possession of and claiming a part of it. It follows that some part of it is conceded to have been the property of the vendors, and upon which a lien could be adjudged and enforced. The petition was not as definite as it should have been, but the court, upon motion, would have compelled the plaintiff to have made it more so. "Actions must be brought in the county in which the subject of the action or some part thereof is situated: * * * (3) For the sale of real property * * * under a mortgage lien or other incumbrance or charge except for

debts of a decedent." Civ. Code, § 62. Having reached the conclusion that there is a lien upon a part of the boundary sold, if a rescission was adjudged, therefore the Meniffee circuit court had jurisdiction. We cannot believe that the vendee should be required to bring its action in Jefferson county, or some county in which the vendors could be served with process, and if it succeeded in having the contract rescinded, then to bring another action in Meniffee county to enforce its lien.

The plaintiff failed to take any testimony to sustain the allegations of its petition as amended. The report of the surveyor simply showed the boundaries of the tracts of land sold by the Bullitts to the plaintiff, and the boundaries claimed by the defendants other than the Bullitts within that boundary. It was not evidence of the character of the claims of the several defendants to their respective boundaries. It did not furnish evidence that their claims were valid or adverse to the Bullitts' title. The depositions taken by the defendants could not be read against their co-defendants, the Bullitts. It follows, from these conclusions, that the evidence did not authorize the judgment. In the contract of sale, T. W. Bullitt warranted generally as to 40 per cent. of the land, and Joshua F. Bullitt as to 60 per cent. of it. The judgment for \$2,500 and interest was against them jointly, did not specify what part each should pay. This was an error. If, upon a retrial of the case, the court should rescind the contract, then the court should adjudge that T. W. Bullitt should pay 40 per cent. of the amount and Joshua F. Bullitt 60 per cent. of it. When, from any cause, the regular judge cannot act, and a special judge is selected by agreement of the parties, or elected to preside in the case, then such orders as are made in the case are presumed to have been made by such judge, unless the contrary appears in the record. If such special judge fails to attend and try the case, an election can be held to select another special judge for the purpose. Upon a return of this case, either may amend their pleadings, or file such additional ones as the court may deem necessary to complete the issues. The case is reversed, with directions that further proceedings conform to this opinion.

SMITH v. KENNEDY.

(Court of Appeals of Kentucky. June 2, 1896.)

ATTACHMENT BEFORE JUDGMENT AND RETURN—WHEN PROPER.

An attachment of mortgaged realty, before judgment and return of "No property found," on the ground that the debt will be lost by delay, will be sustained, where personal property seized is insufficient to satisfy the debt, and the evidence is conflicting as to whether the value of the land is sufficient to pay the mortgage and plaintiff's debt, after an allotment of homestead, and there is evidence that defendant drinks to excess and gambles.

Appeal from circuit court, Nicholas county.

"Not to be officially reported."

Action aided by attachment by W. J. Kennedy against G. C. Smith. From a judgment for plaintiff for the debt and sustaining the attachment, defendant appeals. Affirmed.

B. H. Robinson and John P. Nordell, for appellant. W. H. Holt and Hanson Kennedy, for appellee.

PAYNTER, J. There was no defense interposed to the debt upon which the action is based. An attachment was sued out on the alleged grounds that the defendant did not have sufficient property subject to execution to satisfy the plaintiff's demand, and that it was endangered by a delay in obtaining judgment or a return of "No property found." The order of attachment was levied on certain real estate in Nicholas county, subject to two mortgages, amounting to nearly \$3,500. There was a conflict in the evidence as to the value of the land. A number of witnesses testified in relation to the matter. The testimony of the witnesses for plaintiff tended to prove that the land, after allotting the homestead to defendant, was not of sufficient value to pay the mortgage debts and that due plaintiff, while the testimony of the witnesses for defendant tends to prove the value of the land, after the allotment of the homestead, to be a little greater than the aggregate amount of the mortgages and plaintiff's debt. The defendant's personal property had been seized under execution. The testimony conducted to prove that the defendant drank to excess, and that he gambled. The defendant did not deny that he drank, but said, "I don't know as I ever was so drunk that I could not attend to business." And he also testified that he had not gambled for the preceding three years. We cannot reach the conclusion that the court erred in sustaining the attachment. Judgment affirmed.

OHIO & M. RY. CO. v. TABOR.

(Court of Appeals of Kentucky. June 5, 1896.)

CARRIERS—CONTRACT LIMITING COMMON-LAW LIABILITY—SHIPMENT OF LIVE STOCK—INTER-STATE COMMERCE.

1. Under Const. § 196, providing that "no common carrier shall be permitted to contract for relief from its common-law liability," provisions in a contract by a railroad company for the shipment of stock, making its liability as carrier dependent on the giving of a written notice by the shipper of any injury to the stock, or claim for damages, before the stock is unloaded, and an agreement that the value of the stock did not exceed a certain sum per head, are illegal and void.

2. Such constitutional provision is not a regulation of interstate commerce, and applies to a contract for shipment into another state, where the contract is made and to be partly performed in Kentucky.

Appeal from circuit court, Hardin county.
"To be officially reported."

Action by J. Tabor against the Ohio & Mississippi Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Opinion on rehearing. For former opinion, see 32 S. W. 168.

W. H. Marriatt, Walker D. Hines, and Chas. H. Gibson, for appellant. Hobson & O'Meara, for appellee.

GUFFY, J. We have considered the very earnest and able petition of appellant for a rehearing in this case, and its brief in support of the same, but we fail to see that the former opinion delivered herein is in any respect erroneous. The contract relied on by appellant, if enforced, would practically relieve it from all the responsibility of a common carrier. The notice required to be given as a condition precedent to appellee's right to sue or recover, if enforced, would clearly limit the liability of appellant for injury to the cattle to a much shorter time than the common law allowed, and would, if enforced, relieve appellant from all liability in this case, however gross or negligent appellant might have been; and, this being true, the stipulation is void, because prohibited by section 196 of the constitution. And this case illustrates the propriety and justice of the provision *supra*. The cattle were injured in the car, one being dead and the others injured, and the bottom of the car broken, thus making it important to unload and dispose of the cattle as soon as possible, and it was the privilege, if not the bounden duty, of appellant's agents or servants to see to the unloading of the cattle, and it is fair to conclude that the agents did see to the unloading, and were therefore well aware of the damage sustained; and it further appears that the shipper was not in fact aware of any such provision being in the bills of affreightment, and, besides, it nowhere appears that appellant was in any way injured, or any advantage taken of it, by appellee's failure to give the notice. The case of *Railway Co. v. Gaan*, 8 Tex. Civ. App. 620, 28 S. W. 349, was a case where the shipper had signed or accepted a bill with a condition requiring notice of damage before suit should be brought, but a Texas statute provided, in substance, that such agreement should be invalid; and the court sustained the validity of the statute, and allowed the shipper to recover, notwithstanding he had failed to give the stipulated notice. In *Railway Co. v. Johnson* (decided by the same court Jan. 23, 1895) reported in 29 S. W. 428, substantially the same question was raised, and decided adversely to the contention of appellant. The shipment was made from Texas to another state. The opinion of the court was delivered by James, C. J. We quote as follows: "The first assignment presents the action of the court sustaining plaintiff's (appellee's) exception to that part of the answer which set up that plaintiff

was barred of his action by reason of a clause in the contract of shipment providing that suit should be commenced within forty days after the damage occurred, or such lapse of time should be conclusive against the validity of the claim. The pleadings showed an interstate shipment of live stock, and the position that appellant takes, in making this defense, is that our statute of March 4, 1891, prohibiting the making of a stipulated contract or agreement by which the time is limited to a shorter period than two years, has no application to such contracts. The provision plainly does not in any manner attempt to regulate commerce. It imposes no burden or restraint on trade or transportation, but does that which every state has power to do, namely, to provide and regulate the remedy within its jurisdiction when a cause of action arises. It would not be contended that its statutes of limitation prescribing a period of time within which suits may be brought do not apply to actions growing out of a transaction of interstate commerce as well as to others. It must follow from this that the states may make such statutes absolute; that is to say, not subject to be varied by a contract. The provision above referred to is within the scope of such powers, and it applies to actions growing out of interstate character. *Railway Co. v. Dwyer*, 75 Tex. 572, 12 S. W. 1001; *Railway Co. v. Eddins* (Tex. Civ. App.) 26 S. W. 161." In *Armstrong v. Railway Co.* (decided Feb. 27, 1895) reported in 29 S. W. 1117, the same question was presented and decided in the same way. See, also, *Railway Co. v. Vandeventer*, 26 Neb. 222, 41 N. W. 998. If a mere statute of a state can render null and void such contracts, surely a constitutional provision can do the same. In the case of *Railroad Co. v. Hedger*, 9 Bush, 645, it was held that if live stock should be lost or injured while in the custody and care of the company or its agents, for transportation, this should be *prima facie* evidence of negligence, and the burden of proof is on the carrier to rebut this presumption. It was also held that a carrier cannot release himself by contract for ordinary negligence. Former decisions of this court, quoted by appellant to sustain its contention, have no application to this case, because they were rendered before the adoption of the present constitution.

The case of *McDaniel v. Railway Co.*, 24 Iowa, 416, was an action against the railroad to recover for injury to cattle shipped from Clinton, Iowa, to Branch Station, Chicago, Ill. The contract of shipment contained a provision exempting the company from any liability over \$100 on horses or valuable live stock, except by special agreement. The damage claimed was over \$100. We quote as follows from the opinion in that case: "By chapter 113 of the Laws of the Eleventh General Assembly, it is enacted 'That in the transportation of persons or property by any

railroad or other company, or by any person or firm engaged in the business of transportation of persons or property, no contract, receipt, rule or regulation shall exempt such railroad or other company, person or firm from the full liabilities of a common carrier, which, in the absence of any contract, receipt, rule or regulation would exist with respect to such persons or property.' Laws 1866, p. 121. No question is made but that under the operation of this statute the special contract in this case would be void, so that the rights and liabilities of the parties would be measured by the common law, as applicable to common carriers. But it is claimed by appellant's counsel that the contract, though made in Iowa, was to be, by its terms, wholly performed in Illinois, and that the law of the place where the contract is to be performed must govern, in determining its validity and effect. The general rule is that, in conformity to the presumed intention of the parties, the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance. Story, Conf. Laws, § 280. But it is also a general rule that, if the contract is void or illegal by the law of the place where it is made, it is held void and illegal everywhere. Id. § 243, and authorities cited. In this case, however, it is unnecessary to rest the decision upon any general rule; for by the express terms, as well as by the necessary implication, of the contract, it was to be partly performed in Iowa. The cattle were received in Clinton, Iowa, 'to be delivered at Chicago, Ill.' To do this, it was necessary to transport them some distance, more or less, in Iowa, before they could reach Illinois. The contract being entire and indivisible, made in Iowa, and to be partly performed here, it must, as to its validity, nature, obligation, and interpretation, be governed by our law. And by our law, so far as it seeks to change the common law, it is wholly nugatory and inoperative. The rights of the parties, then, are to be determined under the common law, the same as if no such contract had been made." The foregoing opinion was quoted with approval by the supreme court of United States in *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 457, 9 Sup. Ct. 463, in the following language: "In *McDaniel v. Railway Co.*, 24 Iowa, 412, 417, cattle transported by a railroad company from a place in Iowa to a place in Illinois, under a special contract made in Iowa, containing a stipulation that the company should be exempt from liability for any damage, unless resulting from collision or derailing of trains, were injured in Illinois by the negligence of the company's servants; and the supreme court of Iowa, Chief Justice Dillon presiding, held the case to be governed by the law of Iowa, which permitted no common carrier to exempt himself from the liability which would exist in the absence of the contract. The court said: 'The contract being entire and indivisible,

made in Iowa, and to be partly performed here, it must, as to its validity, nature, obligation, and interpretation, be governed by our law. And by our law, so far as it seeks to change the common law, it is wholly nugatory and inoperative. The rights of the parties, then, are to be determined under the common law, the same as if no such contract had been made.' "

The case of *Hart v. Railroad Co.*, 69 Iowa, 485, 29 N. W. 597, was a suit to recover damages for injury to horses shipped from Des Moines, Iowa, to the town of Miller, in Dakota territory. The contract provided, in substance, that the defendant should not be liable for more than \$100 damages to each horse. Section 1308 of the Code of Iowa provides that no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier or carrier of passengers which would exist had no contract, receipt, rule, or regulation been made or entered into. We quote the third and final paragraph of the decision in the above-named case: "The evidence tended to prove that two of the horses were worth \$150 each, and that two others were worth \$125 each, and that the others were worth \$100 each. Defendant asked the circuit court to instruct the jury that, under the contract, defendant's liability for the horses could not exceed \$100 per head. The court refused to give this instruction, and ruled that, if plaintiff was entitled to recover, the jury should award him the full value of the property. Whether a common carrier, in the absence of any statute restricting his powers in that respect, can, by rule, regulation, or contract, limit his liability for the property received by him for carriage, has been the subject of much discussion, and there is great conflict in the decision of the courts on the question. We have no occasion, however, in this case, to enter into that question. No one would question that, in the absence of a contract limiting the amount of his liability, the shipper would be entitled, in case of the destruction or injury of the property under such circumstances as that the carrier was liable for the loss, to recover full compensation for injuries sustained. The statute quoted above prohibits the making of any contract that would exempt him from the liability of a common carrier which would exist if no contract, rule, or regulation existed. If the statute is applicable to a contract in which the undertaking is to transport the property from this state into another state or territory of the United States, it cannot be doubted, we think, that the provision of the contract in question, by which it was sought to limit the liability of defendant for the horses to an amount less than the actual value of the property, is repugnant to its provisions, and consequently invalid. It is contended, however, that the state has no power to place a restriction of that character upon the carrier who contracts for the transporta-

tion of property from this state into another state or territory. The position is that the restriction, if applicable to a contract of this character, would be a regulation of commerce among the states,—a subject which, under the federal constitution, is within the exclusive jurisdiction of the congress of the United States. In our opinion, however, this position cannot be maintained. The provision is in no just or legal sense a regulation of commerce. It prescribes no regulation for the transportation of freight upon any of the channels of communication. It leaves the parties free to make such contracts as they may choose to make with reference to the compensation which shall be paid for the services to be rendered. The carrier is left free to demand such compensation for the carriage of the property as is just, considering the responsibility he assumes when he receives it. He is forbidden to make any contract that would exempt him from any of the liabilities which arise by implication from his undertaking to carry the property. But no burden is placed upon the property which is the subject of the contract, nor is any rule prescribed for his government respecting it. That it is within the power of the state to prescribe such a limitation upon his power to contract, we have no doubt. The statute was enacted by the state in the exercise of the police power with which it is vested, and it is applicable to all contracts entered into within its jurisdiction. The question involved is not different in principle from that decided by the supreme court of the United States in what are known as the 'Granger Cases.' See *Munn v. Illinois*, 94 U. S. 113; *Chicago, B. & Q. R. Co. v. Iowa*, Id. 155; *Peik v. Railway Co.*, Id. 164."

It seems clear to us that the contract relied upon by the appellant is in violation of section 196 of the constitution, and therefore void where the contract was made; and, being void in this state, it is void everywhere. *Story, Conf. Laws*, § 243; 7 *Lawson, Rights, Rem. & Prac.* § 3873. Section 196, *supra*, is in no sense an attempt to regulate or interfere with interstate commerce. It does not seek to impose any condition on commerce, nor to regulate freight charges, rate of speed, or kind of cars, nor change or define the duties or responsibilities of common carriers, but is merely the exercise of the undoubted right of states to determine what shall be a valid contract, and to control the remedy in her own courts. *Owen v. Railroad Co.*, 87 Ky. 626, 9 S. W. 698. Judgment affirmed.

WILKINS et al. v. WORTHEN et al.

(Supreme Court of Arkansas. May 16, 1896.)

WRITS—SERVICE OF SUMMONS—LIMITATION OF ACTIONS.

Under *Sand. & H. Dig.* § 5657, providing that a civil action is commenced by filing a complaint, and causing summons to be issued thereon, the filing of a complaint and the mere

signing and sealing of the summons by the clerk are not an institution of an action tolling the statute of limitations, since the summons must be delivered to the sheriff, or to some one for him, with the intent and purpose of having it served by the sheriff.

Appeal from Jefferson chancery court; James F. Robinson, Chancellor.

Action by V. D. Wilkins and others against W. B. Worthen, administrator of the estate of J. B. Bowman, deceased, and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

In the year 1879, the Memphis & Great Southwestern Railway Company was incorporated under the laws of this state. Afterwards J. B. Bowman subscribed for 16,670 shares of the capital stock of said company, of \$100 each. The company did nothing but organize and make a preliminary survey. The last meeting of the stockholders was held in 1880, and all attempts at carrying on the operations of the company were soon thereafter abandoned. The company owned no property except the subscription for its stock, not more than 5 per cent. of which was paid. On November 16, 1882, the appellants Wilkins & Bro. recovered judgment in the Jefferson circuit court against the company for \$1,725.77. On this judgment an execution was issued January 27, 1883, and returned nulla bona March 27, 1883. On March 29, 1883, Wilkins & Bro. filed a complaint in equity in the Jefferson circuit court, against Bowman and other subscribers to stock of the company, to compel them to pay a pro rata share of their respective subscriptions, sufficient to satisfy this judgment. Upon this complaint a summons was issued for certain of the defendants, who were residents of this state, and it was served upon some of them, in Jefferson county. Bowman was at the time a resident of Lexington, Ky., and the following summons was made out by the clerk of the Jefferson circuit court, for service upon him in Kentucky: "In the Jefferson Circuit Court. In Equity. State of Arkansas, County of Jefferson. The State of Arkansas to J. B. Bowman, of Fayette County, Kentucky—Greeting: You are hereby warned to appear in the circuit court of Jefferson county, Arkansas, within sixty days after the service upon you of this writ, and answer the complaint in equity, a copy whereof is hereto attached, which has been filed in said court against you and others, by V. D. Wilkins and E. T. Wilkins, as partners, under the name and style of Wilkins & Bro.; and you are warned that, upon your failure to answer, said complaint will be taken for confessed as to you. Given under my hand and the seal of said court, at my office, in the city of Pine Bluff, county of Jefferson, state of Arkansas, on this 29th day of March, A. D. 1883. Ferd Havlis, Clerk. R. H. Stanford, D. C. [Seal.]" Here followed a certified copy of the complaint and interrogatories. This summons was not.

delivered to the sheriff, but was sent to Kentucky by said clerk, and there, on December 3, 1883, it was served on Bowman, with a copy of the complaint attached. No other summons was issued for Bowman, and no further steps were taken against the other defendants, until after Bowman's death. Bowman died in 1891, leaving property in Pulaski county; and W. B. Worthen was appointed administrator of his estate with the will annexed, by the Pulaski probate court. The plaintiffs, on May 19, 1892, amended their complaint, and alleged the death of Bowman, and that Worthen was administrator of his estate. A summons was then issued on this amended complaint, and served on Worthen. Worthen pleaded the statute of limitations, and that the claim was barred by laches. On the hearing, the chancellor sustained the plea, and dismissed the complaint, for want of equity.

W. P. & A. B. Grace, for appellants. Ratcliffe & Fletcher, for appellees.

RIDDICK, J. (after stating the facts). The only question we need consider is whether the action against Bowman is barred by laches and the statutes of limitations. At the time Wilkins & Bro. recovered judgment against the Memphis & Great Southwestern Railway Company, it owned no property excepting the amounts due from subscribers to its stock, had suspended operations of all kinds, and ceased to be a going concern. The right of action against Bowman and other subscribers to the stock of said company accrued in favor of Wilkins & Bro. at least so soon as their execution was returned nulla bona, which was on the 27th of March, 1883. *Marsh v. Burroughs*, 1 Woods, 468, Fed. Cas. No. 9-112; *Thompson v. Bank* (Nev.) 3 Am. St. R. 804, and note; s. c., 7 Pac. 68; 3 *Thomp. Corp.* § 3371. This was not an action upon a judgment, for there was no judgment against the stockholders, but an action upon the written contract of subscription to take and pay for the stock of said company. This action would be barred unless commenced within five years after it accrued against the stockholders of a company which had disbanded and permanently ceased operations. *Curry v. Woodward*, 53 Ala. 376; *Payne v. Bullard*, 23 Miss. 88; *Thomp. Stockh.* §§ 290, 291. The right of action accrued in 1883, and the summons was not issued against Worthen until 1892, and the action is barred unless the making out and serving the summons upon Bowman, in Kentucky, was a commencement of an action, within the meaning of our statute. The statute provides that "a civil action is commenced by filing in the office of the proper court a complaint, and causing a summons to be issued thereon." *Sand. & H. Dig.* § 5657. But the mere signing and sealing a summons by the clerk is not sufficient. It must be delivered to the sheriff, or to some one for him, and with the intention and pur-

pose of placing it in the hands of the sheriff to be served. *McLarren v. Thurman*, 8 Ark. 316-318; *Bank v. Cason*, 10 Ark. 479; *Hallum v. Dickinson*, 47 Ark. 125, 14 S. W. 477. In this case the writ was not directed or delivered to the sheriff, nor was there any intention to deliver it to him. The object in filing the complaint was to obtain a personal judgment against Bowman, which required either an appearance on his part, or the service of a summons by an officer of this state; yet no summons was directed or delivered to an officer of the state. We are therefore of the opinion that an action was not commenced against Bowman, within the meaning of our statute. It is true that, when property is attached, a nonresident defendant may be constructively summoned by delivering him a copy of the summons with the complaint attached; but no personal judgment can be rendered on such summons. *Sand. & H. Dig.* § 5887; *Ford v. Adams*, 54 Ark. 137, 15 S. W. 186. No property was seized, or intended to be seized, in this case; and the constructive summons had nothing to rest upon, and was without effect. It was well known to plaintiffs that Bowman was a resident of Lexington, Ky.; and, if they desired a personal judgment, the way was open by a suit in that state. We conclude that the chancellor was right in holding that, after a delay of nine years, the appellants were barred by laches and the statute of limitations. The decree is affirmed.

JONES v. MELINDY.¹

(Supreme Court of Arkansas. March 28, 1896.)

CHATTEL MORTGAGE—PROOF OF RECORD—RECORD ON APPEAL—EXCEPTION.

1. An exception merely stating that defendant objected to the reading of a mortgage, without specifying any grounds of objection, is insufficient.

2. The record of a chattel mortgage of another state cannot be proved by the testimony of the register of deeds in whose office it was filed, but only by an authenticated copy, as provided by Rev. St. U. S. § 906, or by an examined copy, made and sworn to by a competent witness.

3. An instrument cannot be considered to have been read as evidence on the trial, there being no mention of it in the bill of exceptions, though it is sent up in response to a writ of certiorari, and the clerk, in his return thereto, certifies that it was filed and read in the case; no amendment to the bill of exceptions having been made.

Appeal from circuit court, Jefferson county; John M. Elliott, Judge.

Replevin by N. H. Melindy against Will Jones. Judgment for plaintiff. Defendant appeals. Reversed.

The appellee recovered a judgment in replevin for the possession of two horses, to reverse which the appellant has brought the

¹ Rehearing denied May 23, 1896.

case to this court. The appellee (the plaintiff below) relied upon a mortgage executed to him upon the horses, in the state of Kansas, and read in evidence what purported to be the original mortgage, over the objection of the appellant, to which he excepted in general terms only. The appellee was permitted, over the objection of the appellant, to prove by J. R. Brown that he was register of deeds of Sedgwick county, Kan.; that the instrument read in evidence was a chattel mortgage given by E. H. Ward to N. H. Melindy for \$486.88, dated the 5th day of March, 1889, and filed for record March 7, 1889, at 2:55 p. m., and renewed the 18th day of February, 1890, at 9 o'clock a. m., and entered in Volume R; and that a true copy of this instrument is recorded in the office of the register of deeds of Sedgwick county, Kan.; and that he knew it to be a true copy, because he had compared it with the original chattel mortgage. The appellant excepted to the ruling of the court in admitting this evidence of Brown. A writ of certiorari was issued by the clerk of this court upon the application of the appellee, to bring up a copy of said mortgage duly proven and certified according to law, which the appellee alleged in his petition for certiorari was filed and read in evidence in the court below, and which he says in his brief was filed and read as evidence in the case, and which the clerk of the Jefferson circuit court certifies, in his return in answer to the writ of certiorari, was filed and read in the case. But we can find no mention of this in the bill of exceptions, nor any reference whatever to this authenticated copy. In the exception by the appellant to the ruling of the court in permitting the mortgage to be read in evidence, it is stated that "the defendant objected to the reading of the mortgage from Ward to Melindy," without any specification of the grounds of his objection. His objection was overruled, and he excepted.

The laws of Kansas in relation to chattel mortgages (Gen. St. 1868, c. 68) were proven and read in evidence, the ninth, tenth, eleventh, and twelfth sections of which are as follows:

"Sec. 9. Every mortgage or conveyance intended to operate as a mortgage of personal property, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof, shall be forthwith deposited in the office of the register of deeds, in the county where the property shall be situated, or, if the mortgagor be a resident of this state, then in the county of which he shall at the time be a resident.

"Sec. 10. Upon the receipt of any such instrument, the register shall endorse upon the back thereof the time of receiving it, and

shall file the same in his office, to be kept there for the inspection of all persons interested.

"Sec. 11. Every mortgage so filed shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year after the filing thereof, unless, within thirty days next preceding the expiration of the term of one year from such filing, and each year thereafter, the mortgagee, his agent, or attorney, shall make an affidavit exhibiting the interest of the mortgagee in the property, at the time last aforesaid, claimed by virtue of such mortgage, and if the said mortgage is to secure the payment of money, the amount yet due and unpaid. Such affidavit shall be attached to and filed with the instrument or copy on file to which it relates.

"Sec. 12. If such affidavit be made and filed before any purchase of such mortgaged property shall be made, or other mortgage deposited, or lien obtained thereon, it shall be as valid to continue in effect such mortgage, as if the same had been filed within the period above provided."

The defendant's motion for a new trial, so far as it relates to the introduction of evidence, is as follows: "(2) That the court erred in refusing to sustain his objections to certain parts of the evidence, both oral and depositions herein, and in admitting improper and illegal evidence to go to the jury at the trial thereof, being all the evidence objected to at the trial, as shown from the bill of exceptions."

The second instruction given by the court at plaintiff's request was as follows: "(2) If the jury believe from the evidence that the mortgage was properly renewed within one year previous to the institution of this suit, then there was no necessity for any further renewal; the right of the parties being fixed by the condition of the mortgage at the time of the institution of this suit."

N. T. White, for appellant. H. K. White, S. M. Taylor, and Crawford & Hudson, for appellee.

HUGHES, J. (after stating the facts). The exception of the appellant to the court's ruling permitting the original mortgage from Ward to Melindy to be read in evidence was too general and indefinite. As was said in *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885: "Appellant should have been ingenuous and fair to the court, 'laying his finger' upon the particular point in the court below which he is insisting upon here." See, also, *Railway Co. v. Murphy*, 60 Ark. 333, 30 S. W. 419; *Elliott, App. Proc.* 728.

It was not competent to prove by Brown, the register of deeds, the records of his office. They might have been shown by a certified copy thereof, authenticated as required by the laws of congress, or by an ex-

amined copy, duly made and sworn to by any competent witness. The best evidence must be resorted to, and secondary evidence is not admissible, until it is shown that the primary evidence cannot be obtained.

The record relating to this mortgage should have been authenticated, as required by section 906 of the Revised Statutes of the United States (which is familiar to the bar), before it could be read in evidence; and not having been so authenticated, and there being no examined copy, made and sworn to as required by law, it was error to admit it, to show a lien in favor of the plaintiff upon, or a right to possession of, the property in controversy by the plaintiff, under the laws of Kansas. There being no showing or mention in the bill of exceptions that the duly-certified copy sent up in response to the writ of certiorari was filed or read as evidence in the case, we cannot find that it was read as evidence on the trial, as we must look alone to the bill of exceptions for the evidence in the case. If it had mentioned that this authenticated copy was read in evidence, the fact that it had been left out would make no difference, after it had been supplied by certiorari. If it was read as evidence in the trial of the case, the bill of exceptions might have been amended to show that fact.

We find no error in the instructions of the court.

There was no evidence to support the findings below, wherefore the judgment is reversed, and the cause is remanded for a new trial.

WARING v. CITY OF LITTLE ROCK.

(Supreme Court of Arkansas. May 16, 1896.)

STREETS—CREATION BY PRESCRIPTION—EVIDENCE.

Evidence that a street was platted over plaintiff's land 25 years before suit; that it was used for public travel; that subsequent sales of adjacent lands were made with reference to such street as a boundary; and that 10 years before suit the city authorized the use of the street by a street railroad,—shows a prescriptive right to use the land as a street.

Appeal from chancery court, Pulaski county; David W. Carroll, Chancellor.

Action by C. W. Waring against the city of Little Rock for an injunction. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

This is a controversy concerning the right of the city of Little Rock to control and keep open a street across a piece of land claimed by appellant, Waring. The suit was brought by Waring to enjoin the city from interfering with his possession of such land. The city claimed that Eighth street extends across said land, and that it has been established across said land both by dedication and prescription. The land was at one time owned by Mrs. Matilda Johnson. In the year 1868,

Edwin H. Hilliard recovered a judgment against said Matilda Johnson. An execution was issued thereon, and the sheriff levied the same upon a tract of land belonging to Mrs. Johnson, containing six acres. The land in controversy lay adjoining the land levied upon, but had been previously transferred by Mrs. Johnson to A. H. Sevier. Before selling the land levied upon, the sheriff divided it into lots and streets, and platted the same with other land adjoining it, as "Johnson's Addition." The land in controversy was a part of the tract owned by Sevier, and was included in the plat of said addition made and recorded by the sheriff. The plat of said addition showed Eighth or Holly street as extended across the land in controversy. This plat of Johnson's addition was filed for record on the 9th of December, 1868. There is nothing to show that the sheriff had authority to make and record this plat, but, after the same was made, the owners of land included therein described such property in all subsequent conveyances thereof as in Johnson's addition to the city of Little Rock. Waring and Fletcher (from whom Waring purchased the land) testified on the trial that the land had never been used as a street by the public; that the travel was not over it, but diagonally across the adjoining lots; that the city had done no work on the property, nor repaved it as a street. Fletcher also testified that, about a year after the street railway had been built, he served notice on the president of the company that the company had built on his property, and the president, for the company, recognized his rights, and promised not to plead the statute of limitations. On behalf of the city, J. N. Jabine testified as follows: "I have known Eighth street since 1861. It was an open street at that time, to the best of my recollection. It has been used as a street continuously since. I never heard of any dispute about it being a street until this suit was brought. East and west of the property in controversy the houses and fences are all built evenly with reference to Eighth street being a regular street. * * * The street railroad threw up a track in the center of Eighth street, and injured the travel very much, but the people could and did travel it on either side of the dump. Before the track was built, there was, I suppose, as much travel there as on any of the out streets, with the exception of Ninth street. I sometimes rode over Eighth street in the street cars, and sometimes walked over it. I live two blocks from the property in controversy. So far as I know, this street has been used continuously since 1861." John E. Geyer, who stated that he lived near the property in controversy, testified for the city as follows: "I have known Eighth street as projected through or by the property in controversy about 21 years. I bought the property that I live on now about that time, and Eighth street was a street then. It was a street then through the property in controversy. Prior to the time the

street railway threw up their levee or dump on Eighth street, it was as good as three-fourths of the streets in the city, and it was used as a public street by wood wagons, buggies, and other wagons. There was not much travel over it. I never heard of any objection to its being used as a street until to-day, as I thought Mr. Waring was suing for damages for the dump being put and left there. I have heard Mr. Jabine's testimony read. The statements made by him in reference to the fences and buildings, condition, and travel of the street for the last fifteen years are true, and I adopt it as my deposition." The testimony of W. D. Holtzman was substantially the same as that of Jabine and Geyer. He also testified that, "before the street railway was built, Eighth street, over the property in controversy, was worked by the city as much as other streets. The ditches were cleaned out, and property drained. It was not done often, as not much work was done on the streets." The following facts were also proved: About the year 1882, the city, by an ordinance, permitted a street-railway company to build a street railway over this property, as part of Eighth street. The cars of the company were run over it regularly for several years, until the track was changed to Ninth street. A telephone company was permitted to erect its poles along Eighth street without the consent of either Waring or his grantor. H. L. Fletcher, the grantor of Waring, in the year 1887, made application to the city council to be paid for the use of this property by the city, stating that the city had taken possession of it. Appellant, Waring, afterwards, in 1891, made a similar application, to be paid for the use of the property by the city. The city paid them nothing, and in no way recognized their right to obstruct the street. The other facts sufficiently appear in the opinion. The chancellor dismissed the complaint of appellant for want of equity.

Marshall & Coffman, for appellant. J. W. Blackwood, City Atty., for appellee.

RIDDICK, J. (after stating the facts). The question in this case is whether Eighth street of the city of Little Rock extends across the land claimed by appellant. The appellant, Waring, contends that it does not, and brought this suit to enjoin the city from interfering with his possession, and from keeping open a street across said property. On the other hand, the city contends that such street does extend across the land claimed by Waring; that it was platted across such land over a quarter of a century ago, and has been used continuously since as one of the public streets of the city; and that now it is established by prescription. It is settled law in this state that a street or highway may be established by prescription. "If the public, with the knowledge of the owner of land, claim and continuously exercise the right of

using the same for a public street or highway for a period equal to that fixed by the statute for the limitation of real actions, which in this state is seven years, the highway thereby becomes established, unless it appears that such use was by fear, leave, or mistake." *Howard v. State*, 47 Ark. 431, 2 S. W. 331; *Patton v. State*, 50 Ark. 53; 6 S. W. 227; *Onstott v. Murray*, 22 Iowa, 458.

Eighth street was platted over the land in controversy, as shown by the plat of Johnson's addition to the city of Little Rock, in the year 1868; and the proof tends to show that it was used as a street long before it was platted as such. The plat was made by the sheriff of the county, and duly recorded. It is said that the sheriff had no authority to make and record this plat, and that his action in that regard could not affect the owners of land who never assented to its execution. There is nothing to show whether or not the sheriff had authority to make and record this plat. Such an act, if unauthorized, could of itself alone have no effect upon the rights of nonassenting landowners; but we find here that the landowners recognized this action of the sheriff, by describing such lands in all subsequent conveyances executed by them as located in Johnson's addition. This shows conclusively that they knew of the existence of this record, and tends to show that they assented to its execution. From 1868, the time when said plat of Johnson's addition was made and recorded, the public have continuously exercised the right of using Eighth street as shown on said plat, over the land in controversy, as a public street, and it is now too late to deny that right. There is nothing in the evidence to show that such use was by leave, favor, or mistake. On the contrary, we think the evidence shows that such use was under a claim of right, and adverse to the claim of appellant. A plat made and recorded by the sheriff of the county showed Eighth street as extended across the land. The city exercised the right of controlling the street across the land, as it did other portions of Eighth street, by permitting a street-railway company to lay its tracks and operate its cars over said street and the land in controversy. A telephone company was allowed to erect its poles along the street, and over this property. The street railway was laid in the year 1882, and one of the witnesses testified that, "before the street railway was built, Eighth street was worked by the city over the property in controversy, as much as other streets." This action of the city in permitting a street-railway company to lay its rails and operate its cars along this street, and over the property in controversy, was adverse and opposed to the claim of appellant, and shows clearly that the city and public claimed a street over this land. The testimony of Fletcher, the grantor of appellant, that, a year after the street railway had been built, he gave notice to the company that he claimed the land, and that the presi-

dent of the company acknowledged his claim to the extent of promising not to plead the statute of limitations, can have but little effect upon the right of the city or public to use such street, for the president was the agent of neither city nor public. The action of the city in granting the right to the company to lay its tracks along Eighth street on this property was known to Fletcher, the grantor of appellant, and was notice to him of the adverse claim and use by the city and public, and this was over 10 years before suit was brought. Fletcher afterwards, in 1887, made application to the city council to be allowed pay for the use of this property by the city. But the city ignored his claim, and the public continued to use the street. This application of Fletcher shows that he knew that the city had taken possession of the property as a street, and the fact that the city ignored the application tends to show that the use of the street was under a claim of right. In the year 1887, Fletcher, before selling to Waring the land in controversy, sold and conveyed him other lots adjoining and bounded on the north by this land, which the city now claims as Eighth street. In the deed which Fletcher then executed to Waring, he described such land as in Johnson's addition, and bounded on the north by Eighth street. It is apparent from this that both Fletcher and Waring then knew of the plat of Johnson's addition, and recognized the fact that the public were using a street across this land. They located it exactly as it is shown on the recorded plat of Johnson's addition, and as the city now claims that it is located. This tends to contradict their statement that the public had not been using the land as a street. If it was not known and used as a street, why should they call it a street, and describe land bounded on the north by this property as "bounded on the north by Eighth street." This knowledge on their part is again shown by the fact that, when Waring purchased the land in controversy from Fletcher, it was conveyed by quitclaim deed, and for a consideration dependent upon the result of this lawsuit, which was then in contemplation.

It is said that there is no proof of the acceptance of the street by the city. If this was necessary to be proved, it is shown by the action of the city in controlling it, and by the continuous use thereof by the public for a long period of time. *People v. Loehfelm*, 102 N. Y. 1, 5 N. E. 785; *Elliot, Roads & S. 115*, and cases cited. Section 5209, Sand. & H. Dig., which provides that no street dedicated to public use by the proprietor of ground in any city shall be deemed a public street unless the dedication shall be accepted by an ordinance, does not apply to streets established by prescription. The object of that statute was to prevent the public from being burdened with the care of unnecessary streets. The long and continuous use by the public of a street or highway affords conclusive

evidence of its necessity and usefulness. It was probably for this reason that the statute was confined in its operation to the streets "dedicated by the proprietor of ground." *Jennings v. Inhabitants of Tisbury*, 5 Gray, 73; *Com. v. Coupe*, 128 Mass. 63; *Patton v. State*, 50 Ark. 53, 6 S. W. 227.

In their motion for rehearing, counsel for appellant contend that there is no evidence to establish the width of this street, and ask, why has the court not adopted 60 feet as the width of the street, instead of 50 feet? The answer to that is that the court has not determined, nor is it necessary to determine, what is the width of this street, 50 or 60 feet. Appellant built a fence across this street, and it was removed by the city, and he thereupon brought a suit to enjoin the city from entering upon or interfering with his possession of the land. There was no allegation concerning the width of the street made by either plaintiff or defendant. The only question at issue between the parties was whether Eighth street extended across the land of appellant.

We fully agree with counsel that the doctrine that roads may be established by prescription should be cautiously applied to roadways across wild land or vacant city blocks, but the argument does not apply to the facts of this case. Judge Dillon stated the rule in *Onstott v. Murray*, 22 Iowa, 457, as follows: "A block of land often lies open in a town or city, and, for mere convenience, foot passengers or even wagons may pass over it diagonally, making thereon a well-defined path or road. Ordinarily, there would be no dedication, however long this continued. But if the same amount of travel was at the end of a recorded street, and between that and another street, long use and long acquiescence would be evidence, and, if continued sufficiently long, might be conclusive evidence, of a dedication." If the contention of appellant is correct, Eighth street was never properly laid out or established over the land in controversy, but was cut in two parts, bisected by such land. There is no dispute that the street came up to the land on both sides, and that, if continued in a straight line until the two ends met, it would pass over this land. Without the use of a street across this land, the two parts of the street would be separated by a space of 150 feet, and the public would be put to much inconvenience. The roadway or street used by the public connected the two ends of the street, and made the street continuous. Under these circumstances, the use of this land by the inhabitants of the city as a part of a public street was, when taken in connection with the control exercised by the city, well calculated to notify the owner, who knew of such use, that it was done under a claim of right. As there was no gate nor anything to show to the contrary, he ought to have known that the public would reasonably suppose that all portions of such street were owned by the city,

and would use it as a public street. But the same grounds for such a belief would not exist in the case of a road passing across a vacant block. Public streets do not usually run diagonally across blocks, and the indications in such a case would be that the use of the road was permissive, and not adverse to the rights of the owner of the block. For this reason, it requires less proof to establish a street in a case of this kind than when one undertakes to show that a road has been established by prescription across vacant land in the country, or where the street claimed runs diagonally across a block. *Harding v. Jasper*, 14 Cal. 647; *Onstott v. Murray*, 22 Iowa, 457.

We are not called on to determine whether a street can be established by mere use on the part of the public without evidence of any control or acceptance by the city, for such control is shown here. The city exercised the same control over this land as it did over other portions of Eighth street. This case seems to be one to which the doctrine of prescription is peculiarly applicable. We find here an ancient recorded plat of Johnson's addition, made by the sheriff of the county, showing the street as it is now located, and afterward long and continuous use by the public. It is not unreasonable to believe that the sheriff had authority to make and record this plat, but the evidence of that authority is lost. The doctrine of prescription, which rests on the presumption arising from long and continuous use by the public, "that the street was at some anterior period laid out and established by competent authority," may, under such circumstances, justly be invoked to supply the place of this lost evidence, and to show that the right to the use of the street is now established. *Reed v. Northfield*, 13 Pick. 98.

We have twice considered this case and the learned briefs furnished us by counsel for appellant, but we still feel convinced that the chancellor properly refused to enjoin the city from the use of a street over the land claimed by appellant. The decree is affirmed, and motion to rehear denied.

WILLIAMSON et al. v. CROSSETT et al.
(Supreme Court of Arkansas. May 9, 1896.)
LANDLORD AND TENANT—SURRENDER—OFFER AND ACCEPTANCE.

Where, a year before the expiration of a lease for a term of years, the lessees wrote the lessor that, by reason of business reverses, they were unable to furnish hands and teams to work the leased premises, and advised him that, as it was early in the season, he could rent it out to some one else, and lose nothing by reason of their failure, and the lessor did not reply, but soon afterwards took charge of the place, and induced a subtenant to take up a rent note he had executed to the lessees, and execute a new note direct to him for the rent, and gave no notice to the lessees that he was managing the place on their account, or that he expected them to make good any deficiency

in the rent, it constituted an offer on the part of the lessees to surrender the premises, and an acceptance thereof by the lessor. *Battle, J.*, dissenting.

Appeal from circuit court, Woodruff county; Grant Green, Jr., Judge.

Action by Benjamin H. Williamson and others against W. A. Crossett and others, partners as W. A. Crossett & Co. From a judgment for defendants, plaintiffs appeal. Affirmed.

In the year 1888, the appellants Benj. H. and Louis S. Williamson leased a farm in Mississippi to the appellees, W. A. Crossett and others, who were engaged in farming and mercantile business, under the firm name of W. A. Crossett & Co. The lease was for a term of five years, commencing with the year 1889, and the consideration therefor was an annual rental of \$650, to be paid by appellees in November of each year during the existence of the lease. W. S. Martin, one of the appellees, who was a member of the firm of W. A. Crossett & Co. at the time the lease was executed, retired from the firm in 1890, and moved to this state. The rents for the first four years were paid, but in 1893 the firm of W. A. Crossett & Co. failed. Shortly afterwards, W. A. Crossett, the senior member of the firm, sent the following letter to B. H. Williamson: "Hernando, Miss., Jan. 29th, 1893. Mr. B. H. Williamson—Dear Sir: I write to inform you that it will be impossible for us to furnish hands and teams to work your place, which we have a lease on for this year. We have rented to Mr. W. B. Counts that part of the lands on the hills for four bales of cotton, and to a negro, by the name of John Floy, some land in the valley, for four bales of cotton. He is a good negro, and has nearly corn enough to feed three mules; and if you would go there at once, and see the parties, may be you could get them to stay. We have sold out our entire effects to Fulmer & Thornton, to pay our indebtedness; and it would be folly in you to try to make us keep it, for it would have to lay out, and we could not pay the rent next fall. And, as it is early, you can rent it out to some one else, and thereby lose nothing. Sorry we are in this condition, but can't help it. Yours, truly, W. A. Crossett & Co., per W. A. C." Williamson did not reply to this letter, but, soon after receiving it, he went down, and took charge of the place. W. R. Counts, who had rented a portion of the land from Crossett & Co., testified: "Some time in February or March, Williamson came to me, and told me that Crossett & Co. had failed, and turned him back the place." Counts thereupon requested Crossett & Co. to return the note he had executed to them, which was done, and he gave a new note to Williamson for the land rented. Williamson also rented a portion of the place to one Clapp, and tried to rent out the remainder, but failed to do so. He afterwards brought

this suit against Martin for the rent of the place for the year 1892, less the amounts received by him after taking charge of the place. Martin filed an answer to the action, and alleged: "That early in the year 1893, the defendant firm of W. A. Crossett & Co. agreed with the plaintiffs that the plaintiffs might take and use the land during the year 1893, the consideration being that the defendants should be released from the payment of the rent for 1893; * * * that the plaintiffs under this agreement took charge of the land, and used and controlled it themselves during the year 1893." There were a verdict and judgment for the defendants.

Fletcher Roleson, for appellants. N. W. Norton, for appellees.

RIDDICK, J. (after stating the facts). We need not discuss the instructions given by the learned judge to the jury in this case. In our opinion, he was justified in holding, as a matter of law, that the letter of W. A. Crossett & Co. to Williamson was an offer to surrender the place for the year 1893. The appellees, by that letter, stated to Williamson, in substance, that they were unable to furnish hands and teams to work the place which they had rented from him for that year, and advised him that, as it was early in the season, he could rent it out to some one else, and lose nothing. This could mean nothing else than an offer to surrender the premises to him. Williamson did not reply to this letter, but soon afterwards took charge of the place, and controlled it for the remainder of the year, without any notice to appellees that he was managing the place on their account, or that he expected them to make good any deficiency in the rents. This conduct on his part amounted to an acceptance of the offer to surrender, made by Crossett & Co. The evidence conclusively shows that this was the understanding of the parties at the time Williamson took possession. He himself says that, at the time he received this letter from Crossett & Co., he supposed that they were "totally insolvent." Upon arriving at the place, he stated to Counts, a tenant who had rented a portion of the place, that Crossett & Co. "had failed, and turned him back the place." He thus induced Counts to take up the note he had executed to Crossett & Co., and to execute a new note direct to him for the rent of a portion of the land. This proves that he was not managing the place for the account of Crossett & Co., and that he considered that they had no further rights in the premises. When the tenant offers to surrender his lease, and the offer is accepted by the landlord, the tenant is not liable for rents accruing afterwards. The facts of

this case show that Williamson had no right of action against Crossett & Co. for rents accruing after he took possession. *Talbot v. Whipple*, 14 Allen, 180; 2 Wood, Landl. & Ten. § 494.

We have not overlooked the case of *Meyer v. Smith*, 33 Ark. 627, cited by counsel for appellants. It was held in that case that when the tenant abandons the premises, refuses to pay rent, and repudiates the tenancy, before the expiration of the lease, the landlord may take possession, and rent for the benefit of whom it may concern, and hold the tenant liable for any portion of the rent unpaid at the end of the term. There was no offer to surrender made in that case by the tenant, and nothing to show that the landlord had accepted a surrender of the lease by the tenant, as there is in this case. It was said in that case that the tenants "refused to respond to all letters concerning the rents, withdrew from the occupancy, and left the house open and unprotected"; that "they never acknowledged any liability for rent after a short occupation to serve their business purpose, but acted in such a manner as to indicate beyond doubt their fixed purpose to repudiate the tenancy." It was held that the landlord, by taking possession under those circumstances, did not, as a matter of law, accept the surrender of the tenants' lease. There are cases in other states opposed to the rule announced in *Meyer v. Smith*. As supporting it, see *State v. M'Clay*, 1 Har. (Del.) 520; *Breuckmann v. Twibill*, 89 Pa. St. 58. Opposed to it, see *Schulzler v. Ames*, 16 Ala. 73; *Rice v. Dudley*, 65 Ala. 68; *Hackett v. Richards*, 13 N. Y. 140. But the facts here are different. There is no repudiation of the tenancy here. On the contrary, there is an express acknowledgment of the tenancy in the letter of Crossett to Williamson, and an offer to surrender. "I write to inform you," he says, "that it will be impossible for us to furnish hands and teams to work your place which we have a lease on for this year." He admits the contract and the liability, but states that, by reason of business reverses, they will be unable to comply with the contract, and, in effect, offers to surrender the place to appellants. By taking charge of the place soon after receiving this letter, and controlling it for the remainder of the year, without further notice to Crossett & Co., appellants accepted the offer to surrender. Their holding was not for Crossett & Co., but for themselves; and the rights and liabilities of Crossett & Co. as to rents thereafter accruing were at an end. *Hall v. Burgess*, 5 Barn. & C. 332. The judgment of the circuit court is therefore affirmed.

BATTLE, J., dissents.

HOWLAND v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Missouri, Division No. 2.
June 2, 1896.)

**DEBTS—SITUS—FOREIGN JUDGMENT—JURISDICTION
—COLLATERAL ATTACK—EXEMPTION—GARNISH-
MENT—PROTECTION OF GARNISHEES.**

1. Debts have no situs, but may be attached in any state other than that in which the debtor is a resident.

2. Though a justice of the peace in Iowa refused to allow an exemption, to which the debtor was entitled under the laws of Iowa, in a garnishment action against a resident of Missouri, commenced by publication of summons, and in which the debtor did not appear, the justice's judgment cannot be impeached on that ground in an action brought in this state by the debtor against the garnishee.

3. An exemption is a personal privilege, and can only be pleaded and taken advantage of by the execution or attachment debtor.

4. Where defendant, in an action to recover a debt, answers that the debt has been garnished in another state, the proper practice, before the debt has been condemned, is to render judgment against defendant, and award a stay of execution until the entry of judgment in the garnishment action.

Appeal from circuit court, Grundy county; P. S. Stepp, Judge.

Action by D. W. Howland against the Chicago, Rock Island & Pacific Railway Company to recover for services rendered. There was a judgment for plaintiff, and defendant appeals. Modified.

W. E. Clark, for appellant. Jos. S. Parker, for respondent.

SHERWOOD, J. Action in Grundy county, Mo., before a justice of the peace, by plaintiff against defendant company, brought July 31, 1894, for work and labor done on the road of that company in the county named, the account amounting to \$31.20, being for 26 days' labor, at \$1.20 per day. On the cause coming up to the circuit court, in September, 1894, it was submitted to the court on the agreed statement of facts, which, in substance, is the following, so far as necessary to be stated: During the months of June and July, 1894, plaintiff, the head of a family, and resident of Grundy county, Mo., did work and labor for defendant company, for the time and amount and in the county as heretofore stated. He did not, during the time mentioned, own property exceeding \$50 in value. As much as \$20 of the amount earned was earned within 30 days of the 17th of July, 1894, and the residue of the amount sued for was earned more than 30 days before the last-mentioned date. Defendant company, organized and existing under the laws of Illinois and Iowa, operates a line of railroad extending from Chicago, Ill., through that state and the states of Iowa and Missouri, and passing through Lineville, in Wayne county, Iowa, and Trenton, Grundy county, Mo., having station agents at each of said towns. On the forementioned 17th of July, one Briegel, though resident in Grundy county, Mo., instead of suing plaintiff in that county, went up into

Iowa, and brought suit by attachment and publication in Lineville, Wayne county, against plaintiff, as a nonresident, before a justice of the peace, on an account for goods sold plaintiff in Grundy county, Mo., while both plaintiffs were residents of the county of Grundy. In such attachment suit, defendant company was garnished in Lineville, Iowa, as the debtor of plaintiff, which suit was still pending and undetermined at the time this action was tried. Under the law of Iowa, nonresidence is a valid ground for attachment, and all the proceedings had in Iowa in about the attachment suit were in usual form. Defendant company answered as garnishee, admitting its indebtedness to plaintiff in the sum of \$31.20, and claiming that such sum was due plaintiff, the attachment debtor, and that said amount was due for wages, and was exempt from garnishment in its hands. Shortly after the institution of the attachment suit already mentioned, plaintiff in the present action made affidavit, setting forth that he was the head of a family, etc., that the sum in controversy was for wages, and therefore exempt from attachment, garnishment, etc., and delivered such affidavit to defendant company, with its answer, who filed the same with the justice before whom the attachment was pending; but that officer refused to allow the exemption. No personal service was had on plaintiff, the attachment debtor in the action in Iowa, nor did he enter his personal appearance. Each party was granted permission to use in evidence the statutes of Iowa. On the trial, plaintiff herein read in evidence the following section from those statutes, to wit (Acts 25th Gen. Assem. c. 102): "Sec. 3. And whenever in any proceedings in any court in this state to subject the wages due any person to garnishment, it shall appear that such person is a non-resident of the state of Iowa, that the wages earned by him were earned outside of the state of Iowa, the said person, whose wages are so sought to be subjected to garnishment, shall be allowed the same exemption as is at the time allowed to him by law of the state in which he resides."

At the conclusion of the evidence, defendant company asked these declarations of law: "(1) Under the agreed statement of facts and evidence in this case, the court declares the law to be with the defendant, and the finding and judgment must be for the defendant. (2) There is no evidence in this case that defendant herein is colluding with the plaintiff in the Iowa suit, or that it is willingly doing any act or encouraging any act tending to defeat plaintiff herein in his just rights,"—of which declaration No. 2 was given, but No. 1 refused.

These preliminaries of fact form the basis for the discussion of the following points of law:

1. In *Manufacturing Co. v. Lang*, 127 Mo. 242, 29 S. W. 1010, we approved the ruling of the Kansas City court of appeals in the same

case, wherein it was held that debts have no situs, but may be attached in any state other than that in which the debtor is resident. 54 Mo. App. 147. This point being settled in this way leaves free for examination the other questions involved in this record.

2. The justice of the peace in Iowa had jurisdiction over the subject-matter of the action, to wit, over that class of cases; and, when that jurisdiction created by the law was put in motion by the filing of the necessary papers, publication, and the service of process on the garnishee, then jurisdiction over that particular case and the res therein involved was acquired. The justice of the peace, then, having jurisdiction,—that is, the power to hear and determine all the issues presented in the cause before him,—had the authority, privilege, and prerogative of rejecting the evidence showing that the present plaintiff was entitled, under the statute of Iowa, to hold the debt garnished as wages earned in Missouri. And the fact that a portion of the debt, to wit, \$20 of it, was in truth exempted under the laws of Missouri, because of having been earned within 30 days at the time of suit brought in Iowa, did not have the effect to abate by one jot or tittle the jurisdiction of the justice of the peace to decide to the contrary of what the statute of Iowa required. His jurisdiction to decide contrary to law was just as great as to decide in conformity with law. His power to decide right necessarily included the power to decide wrong. Error does not diminish jurisdiction. There is a broad and turnpike-like distinction between the existence of jurisdiction and its mere exercise. *Hunt v. Hunt*, 72 N. Y. 217; *Hagerman v. Sutton*, 91 Mo. 519, 4 S. W. 73, and cases cited; *Works, Courts & Jur.* p. 1819 et seq., § 8; *Brown, Jur.* §§ 1, 1a; *Freem. Judgm.* (4th Ed.) §§ 135, 136. From these premises it follows that the jurisdiction of the justice of the peace in Iowa was full and complete, and consequently his judgment in the cause before him, even if partly or totally erroneous, rests, speaking generally, on as secure a basis as would the judgment of a circuit or other court of general jurisdiction, and cannot, at least in the method attempted, be overthrown by a collateral attack.

3. Besides, it has been ruled in the state of Iowa, as well as in this state, that an exemption is a personal privilege, and can only be pleaded and taken advantage of by the execution or attachment debtor. Such plea of exemption cannot be pleaded for him by his debtor, the garnishee. *Moore v. Railroad Co.*, 43 Iowa, 385; *Osborne v. Schutt*, 67 Mo. 712. To the same effect is *Conley v. Chilcote*, 25 Ohio St. 320. This being the case, the justice in Iowa did not err in rejecting any evidence of exemptions; but whether he erred or not could not, as heretofore seen, defeat his lawfully existing and lawfully acquired jurisdiction.

4. This leads to the consideration of the

question whether the circuit court erred in the refusal of defendant company's first declaration of law. There is no doubt that, under the provisions of section 1 of article 4 of the constitution of the United States, full faith and credit must be accorded the public acts, records, and judicial proceedings of a sister state; and had the debt in this instance been condemned by a court of competent jurisdiction in the state of Iowa in a proceeding which is, or is equivalent to, a proceeding in rem, there can exist no doubt that a judgment thus rendered could not be contested in this state by a party to the record in Iowa, claiming the debt or property. *Moore v. Railroad Co.*, supra. In this case, however, no judgment has yet been rendered. The attachment proceeding in Iowa is, as the agreed statement recites, "still pending and undetermined"; but, though undetermined, the proceeding is a judicial one in a sister state, to which full faith and credit are due. The declaration of law was therefore properly refused. But, while this is so, yet the subsequent action of the circuit court does not meet with our entire approval, and for these reasons: "In England the doctrine has long been that where one has been summoned as garnishee, and the defendant in the attachment, before judgment of condemnation of the debt, sues the garnishee for that debt, the latter may plead the attachment in abatement, but not in bar until judgment be recovered against him. The courts in this country have generally taken the same view." *Drake, Attachm.* (7th Ed.) § 700. And the basis of these rulings, as expressed by the learned author just quoted, is that "in this proceeding it is an invariable rule that the garnishee shall not be prejudiced or placed in any worse situation than he would have been in if he had not been subjected to garnishment; that is, if obliged, as garnishee, to pay to the plaintiff the debt he owed to the defendant, he shall not be compelled again to pay the same debt to the defendant. When, therefore, he is sued for that debt, either before or after he has been summoned as garnishee, he must be allowed to show that he has been, or is about to be, made liable to pay, or has paid, the debt, under an attachment against the defendant, in which he has been charged as garnishee." *Id.* § 699.

The question now being considered was determined at an early day in New York. A citizen of Baltimore was summoned as garnishee at that place. Afterwards, on going to New York, the defendant in the attachment sued him there for the same debt, and he pleaded the attachment. Thereupon it was agreed in the latter case that, if the court should consider the plea good in abatement or in bar, the plaintiff should be nonsuit. *Kent, C. J.*, after noticing the English decisions, said: "If we were to disallow a plea in abatement of the pending attachment, the defendant would be left without protection,

and be obliged to pay the money twice; for we may reasonably presume that, if the priority of the attachment in Maryland be ascertained, the courts in that state would not suffer that proceeding to be defeated by the subsequent act of the defendant going abroad, and subjecting himself to a suit and recovery here. The present case affords a fair opportunity for the settlement and application of a general rule on the subject. * * * If the force and effect of a foreign attachment is, then, in any case to be admitted as a just defense, it would be difficult to find a sufficient reason for overruling a plea in abatement in the present case." *Embree v. Hanna*, 5 Johns. 101. Expression has been given to the like views in *New Hampshire (Haselton v. Monroe)*, 18 N. H. 598; *Maine (Ladd v. Jacobs)*, 64 Me. 347; *Pennsylvania (Fitzgerald v. Caldwell)*, 1 Yeates, 274, and other cases; *South Carolina (Mars v. Insurance Co.)*, 17 S. C. 514; *Michigan (Near v. Mitchell)*, 23 Mich. 382; *Iowa (Clise v. Freeborne)*, 27 Iowa, 280; *Maryland (Brown v. Somerville)*, 8 Md. 444; by the circuit court and supreme court of the United States (*Cheongwo v. Jones*, 3 Wash. C. C. 359, Fed. Cas. No. 2,638; *Wallace v. McConnell*, 13 Pet. 135; *Mattlingly v. Boyd*, 20 How. 128). In *Massachusetts*, though, it is denied that the pendency of an attachment is good cause to abate the writ, "for non constat that judgment will ever be rendered in the attachment suit"; yet the fact of such pendency was held good ground for a continuance while the attachment was pending. *Winthrop v. Carlton*, 8 Mass. 456. In *Louisiana* a like result was worked out, by ordering a stay of further proceedings until the decision of the attachment. *Carrol v. McDonogh*, 10 Mart. (La.) 609. Substantially the same end is attained in *Vermont*, by giving judgment in favor of the creditor, the attachment defendant, against the garnishee, with stay of execution until the garnishee is released from the garnishment. *Morton v. Webb*, 7 Vt. 123. So, in *Alabama* the court will either suspend all proceedings until the attachment suit is determined, or render judgment with a stay of execution, etc. *Crawford v. Slade*, 9 Ala. 887; *Gaslight Co. v. Merrick*, 61 Ala. 534. And an intimation was there given that such a course would be pursued after judgment, notwithstanding an omission or an ineffectual attempt to plead the matter in abatement. So, in *California* the doctrine announced in *Alabama* is fully concurred in. *McFadden v. O'Donnell*, 18 Cal. 160. In *Georgia*, while the pendency of an attachment is not pleadable in bar, yet, when pleaded, it will induce the court so to mold the judgment as to stay execution, so as to protect the garnishee against double payment. *Shealy v. Toole*, 56 Ga. 210. Upon consideration, we are of opinion that the ends of justice can be best attained by following the course authorized by the courts in *Vermont*, *Alabama*, *California*, and *Georgia*. To allow the defendant in the sec-

ond suit to plead the attachment in the first in abatement would frequently lead to unavoidable embarrassment, because, as suggested in the *Massachusetts* case, peradventure no judgment might ever be rendered in the attachment suit, and consequently the plaintiff in the second suit would have his suit abated, and he be mulcted in costs, and then have to renew his suit, perhaps, after great delay.

Guided by these reasons, we reverse the judgment, and remand the cause, with directions to the circuit court to enter judgment for plaintiff for the amount due him, to wit, \$31.20, and grant a stay of execution, so as to protect the defendant garnishee, as hereinbefore indicated. All concur.

STEFFEN v. CITY OF ST. LOUIS.

(Supreme Court of Missouri, Division No. 2.
June 2, 1896.)

APPELLATE JURISDICTION—CONTRACT FOR IMPROVEMENTS—LIABILITY OF CITY—CITY OFFICER—POWERS—CONTRACT—PERFORMANCE.

1. Under Const. 1875, art. 6, § 12, and the subsequent amendment adopted in 1884, the supreme court has jurisdiction, by direct appeal, of an action to which a city is a party.

2. St. Louis Charter, art. 6, § 15, empowers the board of improvements to contract for the construction and repair of streets. Article 4, § 35, provides that the street commissioner shall have under his special charge the construction and reconstruction of streets. *Held*, that as plaintiff's contract with the city for the construction and repair of sidewalks provided that plaintiff should do the work "whenever and wherever directed by the street commissioner," and that the prices for extra work should be approved by said street commissioner, plaintiff was entitled to recover from the city for work done under direction of and approved by the street commissioner, though no special tax bills were issued to him, as required by the charter, on the ground that the work was not completed, he having stopped by order of said street commissioner.

3. The contract having bound plaintiff to obey the instructions of the street commissioner, he was not precluded from recovering for the work done before he stopped, though the contract reserved the right to the city to stop the work "for want of means or other substantial cause," and the referee found that there was no substantial cause for stopping the work.

4. The contract having provided that the material furnished should be of a certain size, and free from dust and dirt, plaintiff is entitled to recover for sifting said material, where the referee found that he did so under order of the street commissioner, and that there was no other reason for doing so than that the said officer desired to make an experiment, though it was asserted by the city that the material contained dust and dirt.

Appeal from St. Louis circuit court; L. B. Valliant, Judge.

Action by John J. Steffen against the city of St. Louis on a contract for the construction and reconstruction of certain sidewalks. There was a judgment for plaintiff, and defendant appeals. Affirmed.

W. C. Marshall, for appellant. Alex. Young and Chester H. Krum, for respondent.

GANTT, P. J. This is an action against the city of St. Louis on a contract for the construction and reconstruction of sidewalks within a designated district. The contract was entered into July 22, 1890, under Ordinance No. 15,109, approved July 3, 1889, by and between plaintiff Steffen, on the one hand, and the city, on the other, by the president of the board of public works, and countersigned by the comptroller. By the contract, plaintiff obligated himself to do the work of constructing sidewalks with artificial stone flagging, and repairing sidewalks with brick, within the district bounded north by Franklin avenue, south by Clark avenue, west by Twelfth street, and east by Third street, for a term ending July 1, 1891. This contract was made in pursuance of a public letting by the board of public improvements, and required plaintiff to do said work "whenever and wherever directed by the street commissioner." The contract was made in conformity to article 6, § 15, of the scheme and charter of St. Louis. An itemized account accompanied the petition, showing the details of the work done. The answer was as follows: "Now comes said defendant, and, for answer to plaintiff's petition, admits that it entered into an agreement set out in plaintiff's petition, on, to wit, the 22d day of July, 1890. Further answering, defendant denies each and every other allegation in plaintiff's petition contained. For further answer and defense, this defendant says that it was provided by the seventh section of the general stipulations of said contract that this defendant should have the right, on ten days' notice, to suspend or stop the work contemplated by said contract, without cost to or claim against the city of St. Louis; that, pursuant to said power, the board of public improvements of the city of St. Louis, with the approval of the mayor, did order the plaintiff to stop work under said contract, but that the said plaintiff was paid in full for all work and labor done and materials furnished up to the time of the stopping of said work." To this answer, respondent filed a reply by way of a general denial. The cause was referred, and the referee, in due time, made his report, and recommended a judgment for plaintiff for \$2,362.92, with interest at 6 per cent. from the commencement of this suit. The defendant moved to set aside the referee's report, but its exceptions were overruled, and judgment rendered as recommended by the referee. The facts will be best noted in the further consideration of the errors assigned by the city counselor.

1. Jurisdiction of this court to determine this appeal is conferred by that provision of the constitution which originally provided for an appeal to this court from the St. Louis court of appeals in cases where a county or other political subdivision of the state is a party to an action. Article 6, § 12, Const. Mo., 1875, and the subsequent amendment adopted in 1884, whereby such appeals were

made reviewable by direct appeal to this court (Const. Amend. 1884, § 3; Laws 1883, p. 215); City of St. Louis v. Robinson, 55 Mo. App. 256; Kansas City v. Neal, 122 Mo. 232, 26 S. W. 695; Northcutt v. Eager (Mo. Sup.) 33 S. W. 1125.

2. The action is at law, and the referee's finding of facts has the effect of a special verdict, and, when there is substantial evidence to support it, is conclusive as to the facts; but his conclusions of law, if erroneous, may be set aside, and the law properly applied to the facts found by either the trial or appellate court. *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 73 Mo. 389; *Gamble v. Gibson*, 83 Mo. 290; *Lingenfelder v. Brewing Co.*, 103 Mo. 578, 15 S. W. 844.

We proceed, then, to examine the errors of law assigned by defendant. Grouping the items according to the plan employed by the referee in his report, the first group for consideration is composed of items 5, 6, 8, 9, 10, 11, 12, and 13, amounting to \$195.42. The referee found that the separate bills presented by the respondent for these items were all approved by the street commissioner. It is now insisted by the city counselor that the referee erred in allowing these items, because the street commissioner had no authority to order this work done; that parties dealing with city officials act at their peril. The charter and the ordinances constitute the power of attorney of the street commissioner. By section 15, art. 6, of the scheme and charter, the board of public improvements, through the proper officer thereof, is empowered to let and enter into contracts annually on the 1st day of July of every year, for the grading, constructing, reconstructing, and repairing streets, alleys, and gutters, paving, and such other similar work which may be ordered by ordinance, or may become necessary to be done during the year. By section 35, art. 4, of the charter, "the street commissioner shall have under his special charge the construction, reconstruction, repairing and cleaning of the public streets, alleys and places, excepting parks." It was stipulated by the respondent in his contract with the city that he would construct sidewalks "whenever and wherever directed by the street commissioner within the designated district covered by the contract"; and, by subdivision 4 of the contract, "extra work" is provided for, with the stipulation that the prices therefor shall be approved by the street commissioner. The referee found the work was performed in obedience to orders from the street commissioner, and each item approved by that officer. The argument of the city counselor is that, while the board of public improvements is authorized by the charter to provide for repairing of sidewalks by public letting, these walks must be paid for by special tax bills against the owners of the adjoining property. Let this be conceded, the power is vested in the city to require and compel the repairing of sidewalks. Her

board of public improvements is the body created to secure the performance of this work, and make contracts therefor. This was done, as admitted by the pleadings. That board made this contract, by which this plaintiff was bound to do this repairing at prices specified, "whenever and wherever required by the street commissioner." It is conceded the street commissioner directed this work, and that, in obedience to the contract and the orders of the street commissioner, plaintiff, in good faith, did this work, and his bills were approved by the commissioner. Under these circumstances, we cannot see that there is any want of corporate power to contract, or that the street commissioner exceeded his authority in directing these particular repairs. He is a charter officer. Every presumption must be indulged that they were proper and necessary. He has so certified. No special tax bills have been issued to plaintiff, because, after he had entered upon the performance of his contract and proceeded so far, he was, without any just cause, prohibited from completing the whole sidewalk; and it is now urged by the city, whose chosen official stopped this work, that the contractor cannot recover, because he obeyed the officer who had the superintendence of the street. We hold this plea to be unconscionable under the circumstances. Plaintiff seeks to recover only for the work done under the orders of the superintendent, and for the amounts allowed by that officer. The city, having by its own act prevented the issuing of a special tax bill, must respond upon its own contract.

3. What has already been said applies with equal force to the group of items numbered 1, 2, and 3. As to these, the city counselor says: "These are all charges against the city for work properly begun under a proper notice, and stopped before the completion, by authority other than the board of public improvements, with the approval of the mayor; and, as already herein shown, the city cannot be made liable therefor, whether the work was stopped by any other person, it matters not who." In this connection it is well to keep in view that no such defense as is here made is contained in the defendant's answer. In its answer, the city relied upon the seventh section of the contract, which gave it the right to stop the work "for want of means or other substantial cause." This provision is also to be found in the charter. The referee found there was no substantial cause for stopping the work. If the argument of the city counselor is to prevail, the plaintiff occupied a peculiar position. By his contract, he had agreed that all persons employed on the work under his contract should obey the instructions of the street commissioner; and yet, when he obeyed this order, he must forfeit all compensation for the work done under his contract in good faith. We know of no principle of law which would permit the city to thus violate its contracts, and escape lia-

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bility therefor, and the exception to these items is overruled.

4. Group 3, composed of items 4, 7, and 15, falls within the principle of the group considered in the last preceding paragraph; and the exceptions, for the same reason, must be overruled.

5. It remains to consider the fourteenth item of the exhibit. This item is for labor in sifting crushed granite used in executing several of the orders of the street commissioner. This sifting was done on the order of the street commissioner, who had been informed by one of the inspectors of the work that the granite contained dust or dirt. Plaintiff, however, did not understand this was the reason for the sifting. He testified that the city officials desired to try an experiment, and so had the granite sifted, so as to exclude the finest part of granite. The contract provided that the crushed granite should consist of irregular shape edged pieces, so broken that each piece will pass through a three-fourths of an inch ring in all its diameters, and should be free from dirt and dust. The contract gave the street commissioner ample powers to decide all questions relative to the execution of the contract. He was authorized to require the material to be of the standard called for in the contract; and, had he himself determined there was dust or dirt in the gravel being used, he could have required plaintiff to clean it at his own expense; but this was not done. The street commissioner could not require plaintiff to do this extra work at his own expense merely to test what size granite made the best walk, nor can we say, as a matter of law, that it was not competent for the city to try the experiment, and, under the plenary powers conferred, that the street commissioner could not order it, and bind the city. The referee finds that the granite did not contain dust or dirt; that the plaintiff did do this screening, as he understood, to enable the city to make the test; and there was no reason for this sifting but the order of the commissioner. We find no error in the finding of the referee. Upon the whole case, we find no error in the principles of law adopted by the referee and circuit court in ascertaining the liability of the city; and, as there was substantial evidence upon which to base the referee's finding, the judgment is affirmed.

SHERWOOD and BURGESS, JJ., concur.

ROBINS v. LATHAM, County Treasurer.
(Supreme Court of Missouri, Division No. 2.
June 2, 1896.)

INJUNCTION—DISBURSEMENT OF TAXES—PAYMENT
—TAXES—DURESS.

1. A petition by a taxpayer to enjoin the disbursement of a tax, on the ground that the proceedings by which it was levied and collected were invalid, must show the amount of

the tax paid by petitioner, as, to entitle him to an injunction, he must show substantial damage.

2. To entitle a taxpayer to recover taxes alleged to have been paid under duress, the fact that the taxpayer, at the time he paid them, stated that he paid under protest, is insufficient. He must show a payment to escape either arrest or seizure of his property.

Appeal from circuit court, New Madrid county; H. C. Riley, Judge.

Action by James M. Robins against H. C. Latham, county treasurer of New Madrid county. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Robt. Rutledge and W. H. Miller, for appellant. R. B. Oliver, for respondent.

BURGESS, J. This is an appeal from the judgment of the circuit court of New Madrid county sustaining a general demurrer to plaintiff's petition. Omitting the caption, the petition is as follows:

"The plaintiff herein, first having obtained leave of court, filed this, his amended petition, and for cause of action says that he sues for himself and others similarly situated within the limits of the territory hereinafter designated. For their cause of action these plaintiffs say that, at the August term, 1892, of the county court of New Madrid county, Missouri, there was presented to the county court as aforesaid a petition, as plaintiff is informed and believes, asking that the township of Lessieur and Portage in said county be formed into a levee district, in conformity with the provisions of section 6669 of the Revised Statutes of 1889. That said petition was fatally defective, and conferred on said court no jurisdiction to act, in that it was not signed by a majority of the taxpaying citizens of said township; in that there was no notice given of the intention to present said petition, as by law required; and in that the territory sought to be organized into a levee district was not composed of overflowed or submerged real estate. That, upon the presentation of said pretended petition, as aforesaid, and without notice to the parties in interest, the county court, while without jurisdiction to act in that behalf, pretended and attempted to, by its order of record, organize said territory into a levee district. That said pretended order is void and of no effect, for the reason that said court had no jurisdiction to act in the premises. That by said pretended order the county court, as aforesaid, designated and attempted to appoint J. J. Williams, John C. Huffman, and J. F. Grlvin a board of directors for said pretended levee district. That said levee board so designated and appointed were without any authority in law to act, and all its pretended acts were in law void and of no effect. That, notwithstanding it had no legal existence or authority in that behalf to act, the said pretended levee board, so as aforesaid created and appointed, undertook to levy a tax of two and one-half mills on the dollar on all of the taxable property

within the territorial limits aforesaid, to defray the expenses of a survey or pretended survey. That, in pursuance of said illegal and void action of said pretended board, the clerk of the county court of New Madrid county, as aforesaid, extended on the tax books of said county the levy as aforesaid made. That the collector of the revenue of said county collected the tax so extended, and has covered the fund so collected into the county treasury. That the defendant is the treasurer of said county, and as such acting as the treasurer of said pretended levee district, and in that capacity is now sued. That this plaintiff and others similarly situated paid said tax under protest. That plaintiff is a resident taxpayer of said pretended levee district, and is a large landowner therein. That the great bulk of his realty, and of those in whose behalf this suit is instituted, is not submerged or overflowed land, and cannot, under the law, be included in a levee district. That, notwithstanding this fact, all of their said land, indiscriminately, is included and made to bear a part of the pretended tax, so as aforesaid levied and collected. That said pretended action of the county court and of its creature, the pretended levee board, is void, and in contravention of the provision of section 20, art. 2, of the constitution of the state of Missouri, in that it seeks to take and appropriate private property for private use without compensation. Said pretended action is likewise void and of no effect for the further reason that it is in contravention of section 1, art. 10, of the constitution of Missouri, in that it seeks to confer upon said levee board the power of taxation. That said pretended levee board, nor none of them, ever took and subscribed the oath of office, as provided and required by the law under which they were pretending to act. That said board has been succeeded by what is known as the 'Board of Directors of the St. Francis Levee District of Missouri,' who are now claiming the right to appropriate and use said money, so as aforesaid illegally and unlawfully levied and collected. That no survey of said levee was ever made. That said levee directors, claiming the right, and in violation of the law, threaten to draw warrants, and have drawn warrants, against said fund, so illegally and unlawfully collected. That, unless restrained and enjoined from so doing, this defendant as aforesaid will honor and pay said warrants, to the great and irreparable damage of complainant. That said warrants are drawn, not to defray the expenses incident to a survey, as contemplated by law, but for a foreign and ulterior purpose, to wit, the pay of officers of said pretended board. Plaintiff says that he is without any relief other than through the medium of a court of equity. The plaintiff therefore prays an injunction, restraining the illegal action of the treasurer in paying out said funds on the illegal warrants so as aforesaid drawn, and that said officer be restrained and enjoined from pay-

ing out said money, and for all proper orders."

Admitting all material allegations in the petition which are well pleaded to be true, there are a number of insuperable barriers in the way to the relief which plaintiff asks. The suit seems to be prosecuted on the idea that the law under which the taxes were collected is absolutely null and void, as well, also, as everything that was done thereunder, and therefore plaintiff, and all other persons who paid taxes which were assessed, levied, and collected in pursuance of said law, are entitled to injunctive relief against the defendant, who has such moneys in his hands in his official capacity, to prevent him from paying out the same upon warrants drawn by the board of directors of said levee district. One of plaintiff's contentions is that to pay out the moneys thus collected upon warrants so drawn by the levee board in payment of the officers of said board for their services, which said defendant is about to do, would be a misapplication or diversion of the funds, and without authority of law. Section 6693, Rev. St. 1889, provides for the payment per day of each director of the board of said levee district, and the following section provides for the payment of the engineer appointed by said board, while section 6675 provides by whom and the manner in which all warrants shall be drawn, so that there is no force in this contention, and plaintiff is not entitled to relief, unless he is in position to contest the legality of the law and the proceedings thereunder by which the taxes were levied and collected.

In deciding the case, it will not be necessary to pass upon the validity of the law, nor the proceeding thereunder by which the taxes in question were assessed, levied, and collected, because, from our standpoint, we deem it wholly unnecessary, for the very obvious reason that plaintiff is not in position to raise any such questions. The petition contains no allegation as to the amount of taxes paid by plaintiff, and it is not enough that a nominal injury be apprehended in order to entitle him to this peculiar and extraordinary remedy. It is not controlled by arbitrary and technical rules, but the application for its exercise is addressed to the conscience and sound discretion of the court, and must be seasonably made. In *Bigelow v. Bridge Co.*, 14 Conn. 565, it was held "that, to authorize an interference by injunction, there must be, not only a violation of plaintiff's rights, but such a violation as is or will be attended with substantial and serious damage, and not merely a technical or inconsequential injury." *Bassett v. Salisbury Co.*, 47 N. H. 426. As the petition fails to show any substantial injury to be apprehended by plaintiff, he is not entitled to injunctive relief; nor is he entitled to have the taxes paid by him returned if paid voluntarily. It is true the petition avers that plaintiff paid said tax under protest, but

how or in what way does not appear. The petition in regard to this matter, as in respect to many others, avers merely conclusions of law rather than statements of fact. With respect to what constitutes duress, we quote the following from *Clafin v. McDonough*, 33 Mo. 412: "To constitute duress, there must be a seizure of the property or arrest of the person, or a threat or attempt to do one or the other, or facts must be stated which tend to show or which warrant the conclusion that such an arrest or seizure could be avoided only by the payment of the tax demanded." See, also, *Smith v. Inhabitants of Readfield*, 27 Me. 145; *Mayor v. Lefferman*, 4 Gill. 425; *Mays v. Cincinnati*, 1 Ohio St. 268. So, in *Sheldon v. School Dist.*, 24 Conn. 88, it is said: "It stands on no higher ground than it would if the plaintiff, when the tax was demanded of him by the collector, had said to him: 'I know your tax is illegal and void. I am under no obligation to pay it, but I shall pay it under protest, and with an intention to sue for and recover it.' All the authorities agree that money paid under such circumstances cannot be recovered." From all that appears from the petition, plaintiff was fully advised of all the facts with regard to the assessment and levy of the tax at the time he paid the same, and, in the absence of affirmative allegations showing that he paid it under duress, he is not entitled to have it returned to him, although it may have been collected without authority of law. *Wolfe v. Marshal*, 52 Mo. 167. From these considerations, it follows that the judgment must be affirmed. It is so ordered.

GANTT, P. J., and SHERWOOD, J., concur.

EZELL v. PEYTON et al.

(Supreme Court of Missouri, Division No. 2.
June 2, 1896.)

DEED—REFORMATION—MISTAKE.

In the sale of land, a mutual mistake of the parties in supposing land, fenced and pointed out as the land to be conveyed, to consist of one lot and a portion of another only, whereas, in fact, there was also included therein a portion of a third lot, owned by the grantor, authorizes the grantee to have the deed, which conveyed only the first lot and a portion of the second, reformed, so as to include the portion of the third lot included within the fence.

Appeal from circuit court, Cass county; W. W. Wood, Judge.

Action by J. W. Ezell against Horace E. Peyton and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Burney & Burney and Noah M. Givan, for appellants. W. L. Jarrott, for respondent.

BURGESS, J. This is a suit in equity to reform two deeds,—one dated October 16, 1889,

and executed by E. N. Peyton and wife to John L. Harrison and John Hamilton; the other, dated November 27, 1889, executed by said Harrison and Hamilton and their wives to plaintiff, both deeds conveying lot 3 and the west half of lot 2, in block 29, in Freeman, Cass county, Mo. The petition, in effect, avers that 16½ feet off the east side of lot 4, which lies immediately west of lot 3, in said block, was also sold and intended to be conveyed by said deeds, but that, by mutual mistake of the parties thereto, as well, also, as the scrivener who drew them, they were incorrectly written, and did not express the mutual intent of the parties. The defendants, with the exception of the grantors in the deed to plaintiff, and John R. Dolan, are the heirs of said E. N. Peyton, now deceased. Dolan was made a party defendant after the suit was commenced. Exactly how, or for what purpose, is not disclosed by the record, other than there seemed to be an impression that he owns that part of lot 4 in question. The answer is a general denial. From a judgment and decree correcting the deeds as prayed for, defendants appealed.

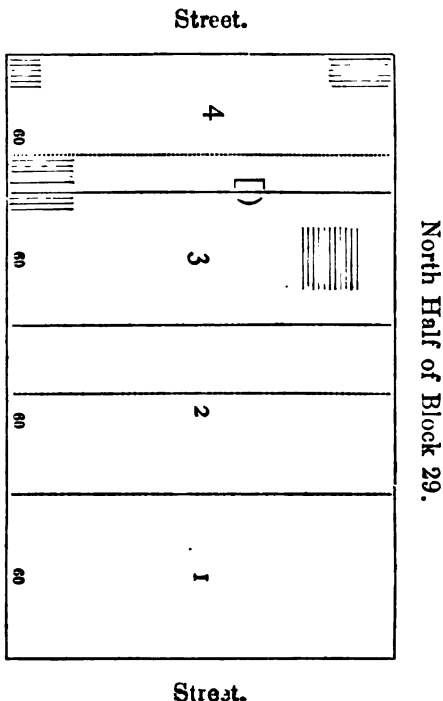
At the time of the sale of the property and the execution of the deed therefor by Peyton to Harrison and Hamilton, he was the owner of lots 2, 3, and 4, in the north half of block 29. The following plat will show the location of the lots, as well, also, as the location and boundary of that portion in controversy.

The dotted line running north and south through lot 2 is the east line of the property described in the deeds, and the dotted parallel line in lot 4 represents the true western

line of the land that plaintiff claims to have purchased, including the land described in the deeds; so that the real controversy is over that part of lot 4 lying east of the dotted line running north and south through that lot. When Harrison and Hamilton bought from Peyton, all of that part of lot 4 east of the dotted line, and lot 3, and the west half of lot 2, were inclosed by a fence, and so remained until after plaintiff's purchase from them. There was also on the property described in the deed to them a three-room frame dwelling house. At the same time there were on the land in dispute a small stable and cistern, which were used in connection with the house, and the fence which then stood on the dotted line in lot 4 was pointed out to them by Peyton as being the western boundary line of the land.

Hamilton testified that, during his negotiations for the property, he and Peyton were on the west fence, and he said to Peyton: "Ed., I want to know how much land there is here,—how much is it?" And he said, "There is a lot and a half of a lot." And he says, "It is all inside of this fence,—inclosed in this fence. What you see in here embraces that." And I took it for granted that that fence was around a lot and a half of ground." He also testified as follows: "Q. Did he tell you what lot and a half it was? A. Yes, sir; just what was described in the deed. Then I looked at the deed, and found it corresponded with what he told me about it. Q. What did he tell you? A. He told me all of lot 3 and half of lot 2, in block 29. That is the way I understood it. I did not know anything about the lines, how they run, and I did not take any time to investigate it, and I took it for granted that the fence was on the line,—that west fence was on the line,—and I thought all of the fences were as near on the line as we get them in Freeman, and so we got the deed, and after that— Q. Tell the court whether or not there was anything said about selling you any more land than lot 3 and the west half of lot 2. A. No, sir; not at that time." He further testified that, when he and Harrison purchased the property, they were put in possession, by Peyton, of all that was inclosed by the fence, and that they placed plaintiff in possession of the same property when they sold to him.

It does not appear that Peyton knew where the lines between the lots were, but that he sold to Hamilton and Harrison all the land inclosed by the fence; and that they so bought, not only seems clear from the evidence of Hamilton, but is shown by all the evidence in the case. And it makes no difference, so far as their rights, and plaintiff's, who claims under them, are concerned, that the deeds do not embrace the land actually sold. Hamilton and Harrison did not buy the land as described in the deed to them, but bought the land that was inclosed by the fence, which they and Peyton understood to be correctly described by the deed from him.



self and wife to them, when it was not. It was a mutual mistake between the parties to the deed from Peyton to Harrison and Hamilton, in that the land in question is not a part of lot 8 and the west half of lot 2; and the same mistake entered into the sale of the lot by Harrison and Hamilton to plaintiff. The grantees in both deeds had the right to rely upon the statements and representations of their respective grantors with respect of the boundaries of the land purchased by them. Even though the deed or deeds to Peyton for the land may have been on record, they furnished no information as to the exact location of its boundaries, and the purchasers were not in fault in relying upon his statements and representations with respect thereto; they having no reason to believe the same to be untrue.

In *Butler v. Barnes*, 60 Conn. 170, 21 Atl. 419, it was held that a mutual mistake of grantor and grantee in supposing land staked and pointed out to the grantee by the grantor belonged to the latter, while in fact it included a strip belonging to an adjoining owner, whose land was made a boundary by a description of the premises in the deed, entitled the grantee to have the deed reformed. In the case in hand, the land was inclosed by a fence, and presents a much stronger case for equitable relief than that case did. It is immaterial whether the error in the description of the land actually pointed out and sold was the result of intentional or unintentional misstatement, on the part of Peyton, as equity will afford relief, as well in the one case as in the other. *Smith v. Jordon*, 13 Minn. 270 (Gil. 246); *Botsford v. McLean*, 45 Barb. 478; *Bush v. Hicks*, 60 N. Y. 298; *De Peyster v. Hasbrouck*, 11 N. Y. 582. Our conclusion is that the evidence clearly shows that there was a mutual mistake between Peyton and Harrison and Hamilton, in that the description of the land, as contained in the deed by him to them, does not embrace all the land pointed out and represented by him as being inclosed by the fence and part of lot 3 and the west half of lot 2, and that the same mutual mistake existed in the sale and deed from Harrison and Hamilton to plaintiff, and that he is entitled to the relief sought. The judgment is affirmed.

GANTT, P. J., and SHERWOOD, J., concur.

ETTLINGER et al. v. KAHN et al.

(Supreme Court of Missouri, Division No. 2.
June 2, 1896.)

APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE—FRAUDULENT CONVEYANCES—EVIDENCE.

1. Where a verdict is not supported by substantial evidence, it is the duty of the trial court to set it aside on motion, and on its failure to do so the supreme court will reverse the judgment.

2. In an action in which the issue was whether a trust deed was fraudulent as to creditors, it appeared that the four beneficiaries in the deed were the grantor's wife, his nephew and niece, and a bank of which he was vice president. The grantor was a witness for the creditor attacking the deed, and the only one who testified with regard to the debts owing to the preferred creditors; and none of his evidence tended in the slightest to show that they were not bona fide, other than what suspicion, if any, might arise from the fact of his relationship to them; and he explained how, when, and for what the debts were contracted. *Held*, that a verdict to the effect that the deed was fraudulent was not supported by substantial evidence.

Appeal from circuit court, Barry county; J. C. Lamson, Judge.

Action in attachment by M. Ettlinger & Co. against Isaac Kahn, in which P. J. Lehnhard interpleaded, claiming the attached property under a deed of trust executed to him by defendant. From a judgment in favor of plaintiffs, the interpleader appeals. Reversed and remanded.

On the 13th day of November, 1893, the defendant, Kahn, who was at that time, and had been for about eight years prior thereto, the owner of and operating a general mercantile store in Monett, Barry county, Mo., being heavily indebted, and unable to meet his liabilities as they became due, executed a deed of trust to the interpleader, Lehnhard, by which he conveyed to him said stock of merchandise, of the value of from \$6,000 to \$12,000, two shares of bank stock which he held in the Commercial Bank of Monett, of which the interpleader was president, of the value of \$100, and building and loan stock of the proximate value of \$150, to secure his wife, Flora Kahn, in the sum of \$4,000; his nephew, Sig. Solomon, \$930, which he owed him for services rendered as clerk in the store; his niece, Sdonia Solomon, \$2,000; and said bank, \$1,500,—all of which was then past due. Defendant was indebted to plaintiffs in about the sum of \$42,700, about \$1,600 of which was due on the note sued on, and the balance on account of goods purchased, which was not due at the time of the execution of the deed of trust. At the time of the execution of said deed defendant was, and had been for some two years prior thereto, vice president and the owner of two shares of stock in said bank. Immediately upon the execution of the deed of trust, interpleader, Lehnhard, took possession of the stock of goods, and was in possession thereof when they were seized, under the writ of attachment sued out in this case, as the property of the defendant, Kahn. Interpleader retained possession of the attached property by giving bond for its delivery, as provided by statute in such circumstances. The grounds of the attachment were that defendant had fraudulently conveyed or assigned his property or effects, so as to hinder or delay his creditors, and that he had fraudulently concealed, removed, or disposed of his property or effects, so as to hinder or

delay his creditors. At the return term of the writ, defendant pleaded in abatement to the attachment, and Lehnhard interpleaded, claiming the attached property under the deed of trust. At the close of the evidence the court was asked to instruct the jury to find a verdict for the interpleader, which was refused, and exceptions duly saved. Under the instructions given, the jury returned a verdict for plaintiffs, and judgment was rendered in accordance therewith, and the interpleader, having unsuccessfully moved for a new trial, has appealed the case to this court.

Cloud & Davies and Pepper & Steele, for appellant. L. Beasley and J. S. Davis, for respondents.

BURGESS, J. (after stating the facts). The first insistence is that the court committed error in refusing to instruct the jury to find for the interpleader. This insistence is predicated on the ground that there was no evidence showing or tending to show fraud in the execution of the deed of trust. This same question is raised in the motion for a new trial; so that it is immaterial from which standpoint it be considered,—whether upon the refusal of the court to instruct the jury to find for the interpleader, or upon its refusal to set aside the verdict and grant the interpleader a new trial. It has been uniformly held by this court that, where the evidence is conflicting, we will not weigh it for the purpose of determining whether the verdict is supported by the weight of the evidence or not, but, where a verdict is not supported by substantial evidence, that it is the duty of the trial court to set it aside on motion, and, upon its failure to so do, this court will in such circumstances reverse the judgment. *Powell v. Railroad Co.*, 76 Mo. 80; *Avery v. Fitzgerald*, 94 Mo. 207, 7 S. W. 6; *Jackson v. Hardin*, 83 Mo. 175; *Long v. Moon*, 107 Mo. 334, 17 S. W. 810; *Landis v. Hamilton*, 77 Mo. 554.

We have looked in vain through the record to find any substantial evidence of a purpose on the part of defendant to hinder, delay, or defraud his creditors in the execution of the deed of trust to Lehnhard for the purpose of securing the creditors named in said deed. Even if such was the purpose and intention of Kahn, there is not the slightest evidence that either of the beneficiaries participated in such scheme. Kahn, although insolvent, had the right to prefer one or more of his creditors to all others, provided the debts thus secured were bona fide, and said creditors were not parties to any fraudulent act on the part of Kahn to defraud, hinder, or delay his other creditors. His intention seems not to have been to defraud his cred-

itors, but to prefer certain of them, and this he had the unquestionable right to do. While there may arise a suspicion of fraud on the part of Kahn in the execution of the deed of trust, because of the fact that one of the four creditors preferred thereby is his wife, one his nephew, and another his niece, that, of itself, does not show fraud; and while it may be shown by facts and circumstances, it is never presumed, but must be proven. Kahn was introduced as a witness by plaintiff, and was the only witness who testified with regard to the debts owing to the preferred creditors; and not one word or syllable can be found in his evidence which tends in the slightest to show that they are not bona fide, other than what suspicion, if any, may arise from the fact that one of them is his wife and two others his relatives, and this, even, is dispelled by his evidence, which explains how, when, and for what the debts were contracted. The burden of proof was upon plaintiffs to show that the deed of trust was executed by Kahn for the purpose of hindering, delaying, or defrauding his creditors; and, while fraud is rarely ever susceptible of direct proof, and may be shown by facts and circumstances, if sufficient, there was a total absence of such proof in this case.

T. S. Frost, clerk of the circuit court of Barry county, was introduced as a witness on the part of plaintiffs, and, over the objection of the interpleader, was permitted to produce and read to the jury the numbers, title of causes, and the amounts sued for by different firms, claiming to be creditors of Kahn, upon which suits had been brought against him, and which were then pending in that court. Such evidence was held to have been improperly admitted on the trial of an interplea in a suit by attachment in *Albert v. Besel*, 88 Mo. 150, in which it is said: "Again, if the plaintiff desired to show that Besel was indebted to other persons, he should have done so by competent evidence. The production, merely, of accounts sued upon, and upon which judgment had not been recovered, was not sufficient proof. It does not appear that the accounts were admitted by the debtor to be correct." It is true this evidence was somewhat cumulative, as defendant himself admitted that he was indebted to the same parties in different amounts; and while, under such circumstances, the judgment should not be reversed on that ground alone, we pass upon the question in order that the error may not be repeated on another trial of the cause. The judgment is reversed and the cause remanded.

GANTT, P. J., and SHERWOOD, J., concur.

STATE v. GRITZNER.

(Supreme Court of Missouri, Division No. 2.
June 2, 1896.)

GAMING—OPTION CONTRACTS—PROSECUTION—EVIDENCE—STATUTE—CONSTRUCTION—CONSTITUTIONALITY.

1. Evidence of telegrams to a foreign commission firm from a grain dealer, directing the purchase of "five wheat," which do not state for whom it is to be bought; that the several witnesses did not know, but "understood" them to mean 5,000 bushels of wheat; that the dealer, in conversation with witnesses regarding his dealings with the firm, spoke of buying "five or ten of wheat"; and evidence of one witness that he "thought" the dealer was engaged in purchasing both cash and future grain; and statements of the dealer regarding option sales and purchases to and from other parties than the said firm,—is insufficient to support a conviction of the dealer for option purchases or contracts with the said firm, under Rev. St. 1889, § 3931, making option sales and purchases of grain, and contracts therefor, criminal offenses, and section 3932, providing that the offense is complete whether the offer to sell or buy is accepted or not.

2. On a prosecution for offering, in violation of Rev. St. 1889, §§ 3931, 3932, to make an option purchase of wheat, where the offer was by telegram, the telegram is inadmissible without proof of its receipt by the telegraph company at its office at the point of delivery.

3. Where an offer is telegraphed to a foreign state to purchase grain on option, the offer to purchase is made in the foreign state, and therefore not an offense, within Rev. St. 1889, § 3931, making option sales and purchases of grain, and contracts therefor, criminal offenses, and section 3932, providing that the offense is complete whether the offer to sell or buy is accepted or not.

4. Rev. St. 1889, § 3931, declaring all option purchases and sales, and contracts therefor, "of the shares of stocks or bonds of any corporation, or petroleum, provisions, cotton, grain or agricultural products," gambling and criminal offenses, is not a special law.

5. Nor does it violate Const. art. 2, § 30, providing that no person shall be deprived of liberty or property without due process of law.

Appeal from criminal court, Saline county; John E. Ryland, Judge.

F. A. Gritzner was convicted of dealing in options, and appeals. Reversed.

Davis & Duggins, for appellant. R. F. Walker, Atty. Gen., Robt. M. Reynolds, John G. Miller, and T. H. Harvey, for the State.

SHERWOOD, J. The defendant appeals to this court, having been convicted under the provisions of sections 3931 and 3932, Rev. St. 1889, of the crime of what is colloquially called "dealing in options," and was fined in the sum of \$300. The appeal to this court, as the offense charged is only a misdemeanor, proceeds on the theory that those sections are unconstitutional. Those sections are as follows: Section 3931, Rev. St. 1889: "Option Dealing Prohibited—Punishment for. All purchases and sales, or contracts and agreements for the purchase and sale, of the shares of stocks or bonds of any corporation, or petroleum, provisions, cotton, grain or agricultural products whatever, either on margin or otherwise, without any intention of

receiving and paying for the property so bought, or of delivering the property so sold, and all the buying or selling or pretended buying or selling of such property on margins or on optional delivery, when the party selling the same does not intend to have the full amount of the property on hand or under his control to deliver upon such sale, or when the party buying any of such property or offering to buy the same does not intend actually to receive the full amount of the same if purchased, are hereby declared to be gambling and unlawful, and the same are hereby prohibited. Any company, copartnership or corporation, or member, officer or agent thereof, or any persons found guilty of a violation of the provisions of this section, shall be fined in a sum not less than three hundred dollars nor more than three thousand dollars." Section 3932: "What Necessary to Constitute Offense. It shall not be necessary, in order to commit the offense defined in the preceding section, that both the buyer and seller shall agree to do any of the acts above prohibited, but the said offense shall be complete against any corporation, association, copartnership or person thus pretending or offering to sell, or thus pretending or offering to buy, whether the offer to sell or buy is accepted or not; and any corporation, association, copartnership or person, or agent thereof, who shall communicate, receive, exhibit or display in any manner any such offer to buy or sell, or any statements or quotations of the prices of any such property, with a view to any such transactions as aforesaid, shall, for each offense, be deemed and held to be an accessory thereto, and, upon conviction thereof, shall be fined the same as the principal; and any such corporation, association, copartnership or person or agent permitting any such communication, reception, exhibit or display, shall, for every such offense, be fined a sum not less than three hundred dollars nor more than two thousand dollars."

The indictment contains several counts, the substance and effect of which will be here inserted. The first count charges that F. A. Gritzner, on the 10th day of July, 1894, at the county of Saline, in the state of Missouri, did unlawfully contract and agree with J. A. Edwards & Co. for the sale of 10,000 bushels of grain, to wit, 5,000 bushels of wheat and 5,000 bushels of corn, to be delivered by the said F. A. Gritzner to the said J. A. Edwards & Co., at Chicago, Ill., on the 10th day of December, 1894, at and for the price and sum of 55 cents per bushel for said wheat, and 40 cents per bushel for said corn; and that, by said contract and sale, the said F. A. Gritzner then and there unlawfully agreed to sell to said J. A. Edwards & Co. said 5,000 bushels of wheat and said 5,000 bushels of corn, at and for the price and sum of 55 cents per bushel for said wheat, and at and for the price and sum of 40 cents per bushel for said corn, to be de-

livered at Chicago, Ill., on the 10th day of December, 1894, as aforesaid, without any intention on the part of the said F. A. Gritzner to deliver said wheat and said corn at said time and place, or to receive the said purchase price therefor; and that the sale and purchase and delivery of actual wheat and corn, or of any wheat and corn, were never contemplated by either the said F. A. Gritzner or said J. A. Edwards & Co., but it was understood then and there between them that settlement should be made on the said 10th day of December, 1894, by one party paying to the other the difference between the said contract price of 55 cents per bushel for said wheat and 40 cents per bushel for said corn, and the market price of said wheat and said corn at the said time and place of delivery, according to the fluctuations and conditions of the market at that time; and that, if the market price of said wheat and said corn at that time and place should exceed 55 cents per bushel for said wheat and 40 cents per bushel for said corn, the said F. A. Gritzner, by said contract of sale, unlawfully agreed to pay to said J. A. Edwards & Co. the excess, and, if the market price of said wheat should be less than 55 cents per bushel and the market price of said corn should be less than 40 cents per bushel at said time and place of delivery, the said J. A. Edwards & Co., by said contract, unlawfully agreed to pay to said F. A. Gritzner a sum of money equal to the difference between the market price of said wheat and said 55 cents per bushel, and a sum equal to the difference between the market price of said corn and said 40 cents per bushel,—against the peace and dignity of the state. The second count charges, in shorter terms, an absolute sale of wheat, etc., by defendant to Edwards & Co., of Chicago, to be delivered at the option of defendant to Edwards & Co., without intention on his part to have the full amount of the wheat, etc., on hand, or to deliver the same on, etc., to Edwards & Co., at Chicago, Ill., etc., and that Edwards & Co. did not intend to receive same at time of making the contract. The third count charges that defendant did unlawfully contract and agree with Edwards & Co. to purchase of them 10,000 bushels of grain, etc., to be delivered by Edwards & Co. to defendant at Chicago, Ill., on the 10th of December, 1894, without any intention on the part of the defendant to receive said grain or to pay the purchase price therefor, etc. Then follow allegations similar to those in the first count. The fourth count charges defendant with having bought 10,000 bushels of grain, of whom is not stated, to be delivered at the option of Edwards & Co., at Chicago, Ill., on the 11th of December, 1894; and that defendant did not intend to receive, etc., nor did Edwards & Co. intend to have said grain on hand, etc.

The evidence disclosed by the record is, in substance, the following: That in July, 1894,

certain messages were occasionally wired by defendant, then at Slater, Saline county, Mo., to J. A. Edwards & Co. (among others), at Chicago, Ill., of the following purport and effect: "Buy five wheat," or "Buy five corn." Whether the month was mentioned in these messages the witness (who was the telegraph operator) did not know; and neither did the witness know what the expressions "five wheat" or "five corn" meant. He would not say further than this: "I suppose it means five thousand;" "five thousand, as I understand it; five thousand bushels." This witness also stated that defendant was in the grain business; he shipped some grain, and was also in the general merchandise business; but did not know of any elevator where he kept grain stored. This witness also stated that Edwards & Co. was a commission firm in Chicago. Nor did the telegram say for whom the grain was to be bought. The next witness stated that defendant had spoken about buying or selling some wheat or corn; that defendant would say he had bought "five" or "ten" of wheat or corn; and against the objection of defendant, as with the previous witness, was allowed to state what he "understood" "five" or "ten" of wheat or corn to mean, by answering: "My understanding of that was five or ten thousand bushels of wheat or corn, as the case might be." "That is my understanding of what it means (among dealers); they mean five or ten thousand bushels, so far as I have any knowledge on the subject." "I don't know whether anybody else would put a different construction on the subject or not." These conversations, as this witness stated, were had with defendant in reference to Edwards & Co., of Chicago. The next witness stated, in response to a question suggesting the answer, that in 1894 he thought that defendant was engaged in transactions involving the purchase of both cash and future grain. This witness, against defendant's objection, was permitted to testify about conversations regarding the purchase from or selling grain to other persons than Edwards & Co. In regard to the amounts defendant spoke of buying or selling, witness said, "Five or ten thousand bushels would be the best of my recollection;" and that he did not remember that defendant told him who the parties were that he bought from or sold to. This witness also states that "future transactions is bought and sold on margins, whatever amount of margin is required to protect the deal to buy or sell"; and that margins meant "two or three or four or five cents a bushel"; asked what was meant by the words "five" or "ten," said it depended upon what scale the parties were dealing; it might mean 500, 5,000, or 5,000,000; and that he understood defendant to mean 5,000, and that he supposed he got that from defendant's conversation.

It seems hardly necessary to say that such "evidence" as the foregoing, to dignify it by that title, is wholly insufficient on which to

base a conviction. In regard to letters, it has long been settled law that a letter properly addressed, postpaid, and deposited in the mail, is presumed, *prima facie*, to reach its destination, such destination being the residence or place of business of the party thus addressed, for this is the usual course and order of business in that department of the public service. 1 Greenl. Ev. § 40. And the like rule has been held to apply, for like reasons, in similar circumstances, to telegrams. *Com. v. Jeffries*, 7 Allen, loc. cit. 563; *U. S. v. Babcock*, 3 Dill. 571, Fed. Cas. No. 14,485. In the latter case, however, the telegrams were properly addressed to Babcock by name, care of the executive mansion, Washington, D. C., and were only admitted in evidence on proof that they were received by the telegraph company in Washington, and delivered to the doorkeepers at the executive mansion, it being shown that the defendant had an office therein, as the private secretary of the president, and that the usage of the doorkeepers was to deliver such messages to the persons to whom they were addressed, or place them on their desks; these circumstances being regarded sufficient to dispense with direct proof of the actual delivery to the defendant of the telegrams, or of their actual receipt by him. This latter ruling we cannot but regard as exhibiting far more of that wise conservatism which should ever attend the administration of the criminal law, which refuses to convict on preponderating probabilities. *Ogle-tree v. State*, 28 Ala. 693; 3 Greenl. Ev. (14th Ed.) § 29; *Am. Lead. Cas.* 659; *State v. Newman*, 7 Ala. 69. Ruling thus, it must be held, inasmuch as there is no evidence showing receipt of the telegrams by the telegraph company in Chicago, nor other evidence of similar probative force to that in *Babcock's Case*, that, looking at the matter from any point of view, an important and essential link is absent from the chain of inculpatory evidence in this case. But, taking it for granted that the telegrams were admissible, it is not seen how this concession can affect defendant, because, for aught that appears to the contrary, these telegrams were entirely within the lines of legitimate business and lawful transactions; and this because defendant was engaged in the grain business, and it will be presumed that those telegrams were respecting lawful business matters and grain affairs. 1 Greenl. Ev. (14th Ed.) § 34. It has been frequently ruled in this state, in a civil action, that, where a transaction on its face is as consistent with honesty as with fraud, the finding of the court ought to be in favor of the former view, and against the latter. *Dallam v. Renshaw*, 26 Mo. 533; *Chapman v. McIlwrath*, 77 Mo. 38; *Webb v. Darby*, 94 Mo. 621, 7 S. W. 577; *Page v. Dixon*, 59 Mo. 43; *Rumbolds v. Parr*, 51 Mo. 592. If this is the case in mere civil actions, certainly a more rigorous rule should not prevail in criminal prosecutions. Besides, the language of the witnesses is that they "understood" so and so.

Such "understandings" are not allowed to pass for evidence, even in civil cases. *Phares v. Barber*, 61 Ill. 271. See, also, *State v. Miller*, 44 Mo. App. 159. And this is so a fortiori in criminal cases. Similar observations apply touching the probative inefficacy of testimony as to what the witnesses "supposed." Suppositions and understandings have not hitherto been accounted a sufficient basis for a verdict of guilty. For these reasons, defendant's instruction in the nature of a demurrer to the evidence was improperly refused.

Other considerations touching the insufficiency of the evidence tend to the same conclusion as the one previously announced. The instructions are all based, and correctly based, on the theory that the offense charged was committed in Saline county, where the indictment was found. This theory is in conformity, not only with the statute now being canvassed, but with the theory generally prevalent. "As, under the unwritten rule, and in the absence of special circumstances, the laws of a state are for the government only of persons and things within it, statutes in mere general terms will be construed as not intended to create offenses, or otherwise regulate the conduct of persons, beyond its territorial limits. Even where legislation in one country may properly bind its citizens in another, express words are required, or distinct implication, to give it this effect." *Bish. St. Crimes*, § 141, and cases cited. To the same effect, see 1 *Bish. New Cr. Law*, §§ 109, 110; *Cooley, Const. Lim.* (6th Ed.) 149. It seems quite apparent from the language of the statute that there is no intimation therein contained that it was intended to operate extraterritorially, even granting such power in the legislature thus to make it operative. Indeed, it appears very obvious from section 3933 that the offense cognizable by it and its associate sections is one perpetrated alone and punishable alone within our borders. Furthermore, the offense, if one was committed, was committed alone within the jurisdiction of the sovereignty of the state of Illinois. One state cannot, speaking generally, "provide for the punishment as crimes of acts committed beyond the state boundary, because such acts, if offenses at all, must be offenses against the sovereignty within whose limits they have been done." *Cooley, Const. Lim.*, supra. Now, no offense, certainly, was committed until and unless communication was established between the mind of defendant and the brokers in Chicago, to wit, when the telegram reached that point, because until that juncture no offer to buy or to sell or otherwise agree could have been made. In a word, the case stands here, conceding the reception of the telegrams, as if defendant, in Slater, had spoken to his brokers, in Chicago, over a long-distance telephone, when, of course, but one opinion could be enter-

tained as to the locus where the offer was made, and consequently the crime committed. And it has been ruled in this state, as well as elsewhere, that a person cannot be punished in this state where the offense was actually consummated in another state, even though some act constituting a part of the offense, or making the offense possible, was committed within this state. *State v. Shaefter*, 89 Mo. 271, 1 S. W. 293; *Works*, Jur. 470, and cases cited. Moreover, as criminal and penal statutes are to be strictly construed, construed strictly, if not strictissimi juris; as no one is to be made subject to such statutes by implication (*State v. Bryant*, 90 Mo. loc. cit. 537, 2 S. W. 836, and cases cited; *Bish. St. Crimes*, §§ 190, 193, 194, 227); as they are nonelastic, as only such transactions are covered by them as are within both their spirit and letter (*State v. Schuchmann* [Mo. Sup.] 33 S. W. 35); as the statute in question does not make it punishable for a citizen of this state to communicate with a citizen of and in another state, with a view to deal in options,—it stands to reason as well as to authority that no such offense as that just mentioned is by the statute created; the rule being that, where a statute defining an offense designates one or more classes of persons as subject to its pains and penalties, all others not thus mentioned are to be deemed excluded from the prescribed punishment. *Howell v. Stewart*, 54 Mo. 400.

Now, in regard to the constitutionality of the statute before us: We are not of opinion that it violates section 53, art. 4, of the constitution, which prohibits the passage of a special law in certain cases, therein enumerated. That it is not special is shown by the cases of *State v. Tolle*, 71 Mo. 650, and *State v. Herrmann*, 75 Mo. 340; since, under the rule laid down in those cases, it relates to persons or things as a class, not to particular persons or things of a class. Nor can it be regarded as a special law, because of attempting "to legislate against the trading and dealing in certain articles of personal property." A similar objection was unsuccessfully urged against the double damage act in *Hume's Case*, 82 Mo. 221; the claim being that it was special, "because it was directed against railroads alone, while no other common carriers were brought within its operation." Now, if this law is not a special law, as pointed out in the cases already cited, then, clearly, that other provision of the constitution prohibiting the passage of a special law when a general law could be made applicable, and making that a judicial question, etc., can have no place in this discussion. The constitution was intended to be a practical instrument, one for every day's use, and not one which would hamper legislation at every turn, and restrict it in every enactment. The statute at bar embraces within its scope all such arti-

cles as ordinarily are employed in "dealing in options," and this is sufficient. It need not, in order to its constitutional validity, "embrace all kinds of personal property," whether such kinds of personal property were usually the subjects of option dealing or not. Had it attempted such a comprehensive, world-encircling task, it might possibly have run counter to another section of the constitution (section 28, art. 4), requiring that a bill contain but one subject, to be clearly expressed in its title. The objection now put forward, in the form of the assertion that a general law could be made applicable in this case, would, if carried to its logical extreme, invalidate the statute for licensing druggists, because, forsooth, the act does not include a provision for licensing dramshop keepers, merchants, peddlers, and auctioneers. But it is needless to multiply examples by way of illustration; our Revised Statutes abound with them. The object of the constitutional provisions under review would seem to be—First. To prevent the passage of a special law; that is, a law which does not deal with what might be termed "natural classes" of persons or things, but which splits a natural class in twain, and forms therefrom two or more artificial or arbitrary classes, thus making what, in *Wheeler v. Philadelphia*, 77 Pa. St. 338, is aptly termed "classification run mad." Of this sort was the statute in *Granneman's Case* (Mo. Sup.) 33 S. W. 784, which took from a large class of laborers a single kind, to wit, barbers, and forbade them, only, to work on Sunday. And, second, the object of the other provisions already adverted to would seem to be, if it be given (what a familiar rule imperatively demands) a reasonable construction, to compel the passage of a general law not where human ingenuity might, by some possibility, frame a law covering a variety of congruous subjects, but where alone such a law can reasonably, and without needless and serious embarrassment or legislative complications arising from a diversity of objects, be passed. If this is not what the constitutional provision means, then the contemporaneous, as well as the continuous, construction given it for the last 20 years, is wrong, and a large percentage of our statutes are obnoxious to constitutional objections.

The other point, that the statute is violative of that provision of the constitution which commands that "no person shall be deprived of life, liberty or property without due process of law" (section 30, art. 2), may be very briefly disposed of by saying: While that section secures the undoubted liberty to contract in a lawful way, yet that this does not include nor grant a license to gamble.

For the foregoing reasons, and because of an entire failure to establish the guilt of defendant, the judgment is reversed, and he discharged. All concur.

STATE ex rel. ST. LOUIS, K. & N. W. RY.
CO. et al. v. WITHROW, Circuit Judge.

(Supreme Court of Missouri. March 17, 1896.)

SPECIAL JURY—WHAT CONSTITUTES—METHOD OF
DRAWING—RULES OF COURT—PROHIBITION.

1. A special jury, under the common law, is one nominated and selected by the proper officer, by the exercise of judgment and discretion, and not one drawn by lot or chance, as in case of ordinary juries.

2. Act March 17, 1885 (Rev. St. 1880, p. 2169, § 29), authorizing special juries, provided that certain other sections of the act, designated by number, relating to the summoning of common juries, should be construed as applying to the summoning of special juries; but the section providing that the names of the jurors should be drawn from the jury wheel was not included in those so designated. *Held*, that the omission must be construed as an expression of the intent of the legislature that special juries should not be drawn in the same manner as common juries.

3. Rule 37 of the St. Louis circuit court, providing that, when a special jury is ordered, the jury commissioner shall draw the number designated from the jury wheel in the same manner as juries for ordinary service are drawn, is invalid, in that it contravenes the statute authorizing special juries.

4. Act March 17, 1885 (Rev. St. 1880, p. 2169, § 29), provides that special juries shall be selected by the jury commissioner as he may be directed by the court. *Held*, that the authority given by Const. art. 6, § 27, to the circuit court to make rules, does not empower the court to direct by rule that special juries shall be drawn from the jury wheel, such a method being clearly opposed to the spirit of the statute authorizing special juries.

5. An application for a writ of prohibition will lie to prevent the enforcement of a rule of the lower court which it had no jurisdiction to adopt.

Barclay, J., dissenting.

In banc. Application by the St. Louis, Keokuk & Northwestern Railway Company and others for a writ of prohibition against James E. Withrow, judge of the circuit court of the city of St. Louis. Writ granted.

Application for prohibition against James E. Withrow, one of the judges of the circuit court of the city of St. Louis, on the ground that the Knapp, Stout & Co. Company had applied for a special jury in a certain condemnation proceeding wherein the said St. Louis, Keokuk & Northwestern Railway Company was plaintiff and the Knapp, Stout & Co. Company was defendant, and that the respondent judge had denied such application, except in a manner as qualified by a rule of court, which is claimed to be in violation of the statute in such cases made and provided. Both parties to the condemnation proceeding are relators in the present one.

The petition for the writ, omitting caption, is the following: "Now, at this day come the St. Louis, Keokuk & Northwestern Railway Company, plaintiff, and the Knapp, Stout & Co. Company, defendant, who respectfully represent to the supreme court of the state of Missouri, and give said court here to understand and be informed, that there is now pending in the circuit court of the city of St.

Louis, and in division No. 3 thereof, whereof the Honorable James E. Withrow is the presiding judge therein, a certain cause instituted by the St. Louis, Keokuk & Northwestern Railway Company, plaintiff, v. The Knapp, Stout & Co. Company, defendant, the object and purpose of which is to condemn for railroad purposes, for the use of the plaintiff, a tract of land claimed to be of great value by the said defendant, in the city of St. Louis and state of Missouri, belonging to the defendant, the Knapp, Stout & Co. Company. Your petitioners further represent and show to the court: That said cause was set for trial in said division No. 3 of the said circuit court of the city of St. Louis on the 14th day of October, 1895, and that on the 7th day of October, 1895, the same being more than three days before the day set for the trial of said cause, the defendant in said suit, the said Knapp, Stout & Co. Company, in pursuance of section 29 of article 21 of the Appendix of the Revised Statutes of 1880 and the laws of this state, made request of said court, and of the said James E. Withrow, judge thereof, for a special jury. That in pursuance of said request the said James E. Withrow, judge, as aforesaid, made the following order: 'The court, having considered the defendant's application for a special jury for the trial of this cause, doth grant the same, and doth order said defendant to deposit forthwith \$75 with the clerk of this court, and from time to time such further sum as may be required to meet all expenses hereunder. And the court doth direct the jury commissioner of the city of St. Louis to draw and furnish to the sheriff of the city of St. Louis the names of 45 good and lawful men, and said sheriff is ordered to summon the persons so named to be and appear in room 3 of this court on Monday, October 14, 1895, at 10 o'clock a. m., then and there to serve as special jurors until discharged by the court.' That in pursuance of said order the jury commissioner delivered to the sheriff of the city of St. Louis the names of 45 persons to be summoned as jurors, from whom a jury of 12 men was to be selected for the trial of said cause. That the persons whose names were furnished as aforesaid, were duly summoned by the sheriff aforesaid. That when said cause was called for trial in said court the respondent herein, the said James E. Withrow, judge thereof, announced from the bench that the parties to said cause would be required to select a jury for the trial thereof in accordance with the following rule, which said judge announced had been adopted by all the judges of the circuit court of the city of St. Louis sitting in general term, to wit: 'Rule 37. (1) When a special jury is ordered, the court making the order will designate therein the number of jurors to be drawn, not less than forty nor more than fifty, and thereupon the jury commissioner shall draw

the number so designated from the jury wheel in the same manner as jurors for ordinary service are drawn, and shall furnish a list of the names so drawn to the sheriff, to be summoned; and shall also furnish four other lists, two for the court, one for the plaintiff, and one for the defendant. (2) On the day of the return of the special venire, after the sheriff, on order of the court, shall have called the list, and ascertained who of them are present in court, the lists for the parties will be given them or their attorneys, showing those jurors who have answered the call. Then, when the trial is to begin, all the jurors of that venire present, except such as may have been excused by the court, will be called into the box, to be questioned of their *voir dire*, and the court will hear and determine all challenges for cause, if any, and purge the list of the disqualified. Then, from the list so purged, the plaintiff and defendant, or their attorneys, respectively, will select eighteen jurors, to wit, nine each. This selection will be made as follows: The plaintiff will mark on the list nine names, then the defendant will mark nine names. This selection will be so conducted that the jurors selected will not know by whom they are chosen. From this array of eighteen jurors so selected each side will strike off three names, and the remaining twelve will be the jury to try the cause. Should either party decline to participate in the selecting or striking off the names of jurors as above prescribed, the sheriff will perform that duty for him; and, should both sides decline, the sheriff will do so for both. (3) If, after the list has been purged as provided in paragraph 2, *supra*, there should remain less than twenty-seven names of qualified jurors from which the eighteen are to be selected as above prescribed, the court will postpone the trial to a convenient time later, and order an additional number of jurors, who will be drawn, summoned, and selected in like manner as above provided, so as to bring the number of qualified jurors from whom the array of eighteen are to be selected up to at least twenty-seven. Thereupon the relators herein, the said St. Louis, Keokuk & Northwestern Railway Company, plaintiff, and the said Knapp, Stout & Co. Company, defendant, filed their respective motions to vacate and annul the order so made as aforesaid by the said James E. Withrow, judge, requiring the jury commissioner to furnish the names of 45 persons to the sheriff of said court as jurors in said cause, which said motions were, by said court, overruled. Thereupon the said St. Louis, Keokuk & Northwestern Railway Company, plaintiff, as aforesaid, and the Knapp, Stout & Co. Company, defendant, as aforesaid, filed their several and respective motions to quash the said panel of jurors, for the reason that the same had not been selected in pursuance of any statute or valid rule of court, authorizing such

selection, which said several motions were, by the said James E. Withrow, judge, as aforesaid, overruled and disallowed. And thereupon the said James E. Withrow, judge, announced from the bench that your relators would, in accordance with the rule hereinbefore set out, each be required to select nine persons from the list of names so returned by the sheriff as aforesaid, for the purpose of making a panel of 18 from which to make their peremptory challenges of three each. And thereupon the relators, the said St. Louis, Keokuk & Northwestern Railway Company and the said Knapp, Stout & Co. Company, declined to proceed further in the selection of a jury for the trial of said cause in which they are respectively plaintiff and defendant, in accordance with the requirements of the said judge, respondent herein, and the said rule so adopted as aforesaid by the circuit court sitting in general term, for the reason that the same were without authority of law, and in violation of the constitution and statutes of this state. Your petitioners further show to this court that said cause is still pending in the circuit court, and has been passed until Monday, the 21st day of this month, and at which time said jurors, illegally selected as aforesaid, have been ordered to return for further proceedings therein; and said respondent, James E. Withrow, judge, as aforesaid, has announced his determination to enforce said rules, and require the relators herein to select a jury in the said cause in conformity thereto. Your petitioners herewith exhibit to this court an exemplification under the seal of the said circuit court, and under the hand of the clerk thereof, of the record and proceedings had in the circuit court in said cause, as to the matters stated in this petition. Your petitioners further state that the action of the said respondent, and the action proposed to be taken by him in the selection of a jury for the trial of the cause to which the relators herein are parties, are in excess of the jurisdiction and authority of the said circuit court. Your petitioners would further state that said cause is one of great moment, both to plaintiff and defendant, and involves, according to the contention of defendant, property of great value and damages in a very large sum; that the witnesses in said cause are numerous, and many of them reside at a considerable distance from the city of St. Louis, and can only be made properly available to the respective parties for whom they are witnesses by being personally presented in court; that the trial of said cause, though conducted with the utmost expedition, will, in all probability, occupy a period of from ten days to two weeks; that it is therefore of vast importance, and in the interest of a speedy determination of this pending litigation, that the same shall be legally and properly conducted, and that the proposed action of the respondent, James

W. Withrow, which is in excess of his jurisdiction and authority as judge, as aforesaid, will, if carried into effect, invalidate and render useless the trial of said cause, and undoubtedly cause loss and hardship to your petitioners. Whereupon your petitioners, imploring the aid of this honorable court, pray to be relieved, and that they may have the state's writ of prohibition directed to the said James E. Withrow, judge of the said St. Louis circuit court, to prohibit him from enforcing the rule hereinbefore set out, as being without authority of law, and the attempted exercise of legislative power by the said court, and a repeal of the statutes of this state in relation to the selection of juries, and a substitution of a rule of court in lieu of said statutes. J. H. Drabelle and E. S. Robert, for the Plaintiff, the St. L., K. & N. W. R. R. Co. Warwick Hough, Rowell & Ferriss, for the Knapp, Stout & Co. Company."

Respondent, in his return to the rule to show cause why the writ should not go, admits the facts set forth in the petition, and for further return says: "That the rule was unanimously adopted by the judges of said court in general term, by authority of section 27, art. 6, of the constitution of Missouri, authorizing them to make rules, and of section 29 of article 21 of the Appendix to the Revised Statutes of 1889, directing that special juries shall be selected by the jury commissioner in the manner directed by the court, which provision of the statute is found on page 2169, Rev. St. 1889. That it was formulated and adopted by said judges as the result of their long experience in the practical operation of the special jury law applicable to the Eighth judicial circuit. That the same is a valid exercise of judicial power under the constitution and laws of this state, and is binding upon him, and he deems it to be his duty to enforce the same, unless prohibited therefrom by this honorable court. James E. Withrow, Judge of the Circuit Court for the 8th Judicial Circuit."

Hough & Hough and Rowell & Ferris, for relator.

SHERWOOD, J. (after stating the facts). The foregoing pleadings, supplemented by statutes to be presently quoted, tender the issue and form the basis on which this cause is to be determined. Section 29, referred to and relied on by respondent in this return as justifying and validating rule 37, is the following: "In every city in the state of Missouri having over one hundred thousand inhabitants, all courts of record in which juries are required shall have power, upon the application of either party, to order a special jury for the trial of any cause, if the application be made at least three days before the trial, and when ordered, the jury commissioner, as he may be directed by the

court, shall select and furnish to the proper officer of said courts the names of the persons to be summoned for such special jury, and said officer shall summon them according to the order of the court, and make out and deliver to each party, or his attorney, a panel of the jury so summoned; but the costs of such special jury shall be paid by the party so applying, irrespective of the result, unless the judge presiding at the trial shall, at the close thereof, or within two days thereafter, certify that the costs of the special jury shall be taxed as other costs against the losing party. The provisions contained in sections 17, 18, 19, 20, 21, 23, 24 and 25 of this act, in relation to the summoning and service of common jurors and to the duties and liabilities of persons in said sections respectively mentioned, and to the penalties in said sections respectively provided for in respect to common juries, shall, in like manner, be construed to apply also to the summoning and service of special juries, as by this section provided for." Rev. St. 1889, p. 2169. As seen by the statement therein, the act which section 29 formed was passed March 17, 1885, and is now to be found in 2 Rev. St. 1889, p. 2169, as well as on pages 74, 75, Laws 1885. The sections referred to therein are sections to be found in the Laws of 1879 (pages 28-37), approved April 11, 1879, and contains sections 1-29, inclusive; and the act of 1885 was amendatory of the act of 1879, and refers to some other sections of that act, which is to be found in 2 Rev. St. 1889, pp. 2160-2170, inclusive, substantially as enacted in 1879, with the exception of section 29 aforesaid. The act of 1879, until amended by the act of 1885 aforesaid, related solely to common juries, providing, as it does, for a canvass of the city, and the ascertaining by personal inquiry, etc., every person qualified in the city for jury duty, save those which are otherwise excluded or excused by the act. A clause in section 8 of the act designates who shall be enrolled: "And every male citizen of this state, resident in such city, sober and intelligent, of good reputation, over twenty-one years of age, and not exempt from jury duty by the general laws of this state, or otherwise disqualified or excused as provided in this act, shall be deemed to be qualified for and subject to the performance of jury duty under the provisions thereof." Section 16 of the act makes provision for drawing the names of those who have been enrolled from the wheel,—a method, as will readily be seen by reference to that section, which wholly precludes any possibility of arrangement or selection of the names of those to be thus drawn. This section, at the time of the enactment of the act of April 11, 1879, was only intended for the drawing of common juries. No part of the act as it then stood having any reference or making any mention of special juries. With matters in this

posture, the act of March 17, 1885, was passed. It is specially noteworthy of section 29 of that act, heretofore quoted, that it makes a distinction in terms between a special jury and common jurors, and while it retains certain specified sections used for the purpose of the "summoning and service of common jurors," yet it wholly and very significantly omits to mention or allude to section 16, *supra*, which is the one alone which describes and prescribes the method to be employed by the commissioner when he draws the names of common jurors from the wheel. This omission, after such specific mention and enumeration of eight other sections of the same act, invites and justifies the application of the maxim "Expressio unius," etc., or, "affirmative specification excludes implication." Dwar. St. 605; Maguire v. Association, 62 Mo. 344; State v. Laughlin, 73 Mo. 443; Ex parte Snyder, 64 Mo. 58; State v. Woodson, 128 Mo. loc. cit. 514, 31 S. W. 105. At the same session of the legislature at which the act of April 11, 1879, was passed—it being revising session—another act was passed, which was a general law giving all parties the right to a special jury upon certain conditions being complied with, which act still remains in force, and is the following: "Either party to a cause pending in the circuit court, or court of common pleas or criminal court of any county or city, and triable by a jury, shall be entitled, as of course, to an order for a special venire on motion made therefor, three days before that on which the case is set for trial; but the cost of such special jury shall be paid by the party so applying, irrespective of the result, unless the judge presiding at the trial shall, at the close thereof, or within two days thereafter, certify that the case was one for the trial of which a special jury should have been ordered, in which case the costs of the special jury shall be taxed as other costs against the losing party. This section shall apply to cities having over one hundred thousand inhabitants, as fully as to all other parts of the state." 1 Rev. St. 1879, § 2802. This section just quoted is the same in the revision of 1889 (section 6089), except that the number of inhabitants is raised to 300,000. There can be no question that this section applies to the city of St. Louis, because we take judicial notice of the fact that that is the only city in this state having such population. State v. Herrmann, 75 Mo. 340, and cases cited; State v. Wofford, 121 Mo. 61, 25 S. W. 851. It follows from the foregoing that section 2802, Rev. St. 1879, now section 6089, Rev. St. 1889, must be construed in connection with section 29, p. 2169, Rev. St. 1889, and as forming part and parcel of the same law, and as being in *pari materia* (Suth. St. Const. §§ 284, 288), saying nothing about section 6089 making direct reference to cities of the class of St. Louis.

In our earlier statutes—Rev. St. 1835, 1845,

1855, and Gen. St. 1865—it appears to have been optional with the trial court whether an order for a special jury should go, but under statutory provisions existing from the revision of 1879 the party applying for such jury, upon complying with the statutory conditions, is entitled thereto as a matter of right. And so it has been ruled by this court, when passing on section 2802, that, if timely application be made under its provisions for a special jury, the trial court has no discretion to refuse such request. State v. Leabo, 89 Mo. 247, 1 S. W. 288. Such was the adjudged state of the law when the revision of 1889 occurred, which incorporated therein all of the provisions of the act of April 11, 1879, touching common juries, together with the amendment made by the act of March 17, 1885, relating to special juries, as well as section 2802, Rev. St. 1879, now section 6089, which also relates to special juries over the whole state as well as to juries of that sort of cities of the population of St. Louis. And the legislature having received the statutes of this state in 1889, and reincorporated a section which it had been adjudged left a circuit court no discretion when asked for a special jury, it must be presumed that the legislature was familiar with that ruling, and by retaining that section as it stood in the revision of 1879 intended that it should continue to bear the meaning given to it by this court; and by changing the number of inhabitants in cities to which it applied to "over three hundred thousand inhabitants" it will be presumed also that the legislature intended to embrace the city of St. Louis within the terms of the amended section as much so as if that city had been directly named. Special juries, as contradistinguished from common juries, have received legislative recognition and sanction in this state from an early period of its history. Thus in Rev. St. 1835 appears this section: "Sec. 14. The court shall have power to order a special jury for the trial of any civil cause; in such case the sheriff shall summon eighteen jurors, according to the order of the court, and make out and deliver to each party or his attorney, a list of the jury so summoned, and each party shall have the right to strike off three of the names on such list." Rev. St. 1835, p. 343. Such recognition and sanction have been repeated at every revision of our laws ever since, as witness: Rev. St. 1845, p. 628, § 14; 2 Rev. St. 1855, p. 912, § 24; Gen. St. 1865, p. 599, § 23; 1 Rev. St. 1879, § 2802; 2 Rev. St. 1889, § 6089; Id. p. 2169, § 29. Special juries, it need scarcely be said, were familiar adjuncts and adjuvants in the administration of justice from the earliest period of the common law. This is but the assertion of what might almost be termed a prehistoric legal truism, since their origin is too remote in the mists of authority to be now successfully traced. Rex v. Ed-

monds, 4 Barn. & Ald., loc. cit. 476. Blackstone says: "Special juries were originally introduced in trials at bar when the causes were of too great nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality, though not upon apparent cause, as to warrant an exception to him. He is, in such cases, upon motion in court and a rule granted thereupon, to attend the prothonotary or other proper officer with his freeholder's book, and the officer is to take indifferently forty-eight of the principal freeholders in the presence of the attorneys on both sides, who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel." 3 Comm. *357. In *Rex v. Edmonds*, supra, Abbott, C. J., said: "It is the very object of a special jury to obtain the return of persons of a somewhat higher station in society than those who are ordinarily summoned to attend as jurymen at nisi prius. And a similar practice has long prevailed, even in the execution of writs of inquiry of damages, before the sheriff, wherein a party obtains, on application, a rule of the court, in obedience to which the sheriff summons persons of a somewhat higher class than those by whom he is ordinarily attended. This object is accomplished in the mode open to the smallest portion of suspicion or objection, by advertising to the addition placed against the name. And we have no doubt that the officer has the power of nomination, and of nominating only from the highest classes according to the ancient practice, and that he acts wisely in doing so, unless there be some special reason for adopting a new and different course." In *Rex v. Wooler*, 1 Barn. & Ald. 193, when considering the topic under discussion, Lord Ellenborough said: "The rule is directed against the mode of proceeding and the conduct of the officer. As to the mode, it is said the jurors are improperly and illegally struck; and as to the officer, he is charged with partiality. Can any man who has heard the detail of the affidavits say that there is a colour for any part of the application? As to the mode, is it a mode that has obtained to-day for the first time? On the contrary, has it not obtained from all times to which the practice of the court can be traced? The rule itself is not modern, nor has its form been varied. It required 'that the sheriff shall attend the coroner with the books or lists of persons qualified to serve on juries, and that he shall name thereout forty-eight good and sufficient men, of whom twelve shall be struck out on each side, and the remaining twenty-four returned to try the issue.' * * * Then, as to the juries being struck illegally, is there any illegality in the officer rejecting some and substituting others? That will depend upon the fifteenth section of the statute 3 Geo. II. c. 25, which enacts 'that the court may, on motion, ap-

point a jury to be struck for the trial of any issues in such manner as special juries had been usually struck in trials at bar.' The question, then, is, in what manner, before the passing of this statute, special juries were struck upon trials at bar? Now, it appears from *Lil. Abr.* and from the rule of court, 8 W. 3, that it was the practice of the court upon trial at bar to make a rule for the secondary to name the forty-eight. That was the form of the rule before the statute. It is authorized by the statute, and has continued to be the uniform practice of the court to the present day; and the rule in this very instance, as in all others, directed the master to name the forty-eight. The officer, therefore, is to nominate, not to copy, nor to take the names in sequence as they stand upon the page. That would not accomplish the design of the legislature and the court. That would not secure a special jury. The situations, habits, and education of men vary. He is to nominate; and the very word implies that he is to exercise a judgment upon the subject. The mode in which the coroner proceeded was by putting his pen into the book, and taking the name nearest his pen of the person coming within the description of a merchant. The law does not absolutely require that the jurors shall be merchants, but the practice certainly has been within the city of London to take such only as come within that description, and in counties those who come within the description of esquires or persons of higher degree. That has been the mode in which the officers have at all times exercised their judgment as to the class from which special jurors are to be selected, and the conduct of the officer would have been liable to exception if he had departed from that practice in this instance. But it is said, that he had rejected a rag merchant, and substituted in his place a wine merchant. I am of opinion that if he did this in the honest exercise of his judgment, with a view of obtaining competent, special jurors, he did only what was his duty. If he were even mistaken in this instance, he was not to blame. If this rag merchant were, of all men, the most enlightened, and the best informed, and the master had taken another in his place, less competent, it was an error in judgment, but no crime. I, however, think that the officer, in rejecting the rag merchant, exercised a sound discretion; for, though the individual might possibly be a person of the best education and greatest intelligence, yet his description does not certainly denote that class of persons where those qualities are generally found. The description of a wine merchant generally marks a person of a higher rank in society. Upon the question of legality, I am of the opinion that the coroner had the right to select fairly and honestly, with a view to obtain the object of the rule, persons who, in his judgment, were, from their

better education and superior intelligence, calculated to decide upon questions of difficulty." See, also, to the same effect, 2 Tidd, Prac. 788; Black, Law Dict. 1111; Thomp. & M. Jur. §§ 12, 13; 12 Am. & Eng. Enc. Law, 320.

Our legislature, by adopting as it did, the term "special jury," must be presumed to have done so with a full understanding of the meaning, force, and effect which that expression had acquired during its long sojourn at common law. And section 28 of our bill of rights declares "that the right of trial by jury as heretofore enjoyed, shall remain inviolate," which means that all the substantial incidents and consequences which pertained to the right of trial by jury are beyond the reach of hostile legislation, and are preserved in their ancient, substantial extent as existing at common law. *Cooley, Const. Lim.* (6th Ed.) 389, 504; *Copp v. Henniker*, 55 N. H. 179; *Work v. State*, 2 Ohio St. 299; *Greene v. Briggs*, 1 Curt. 311, Fed. Cas. No. 5,764; *Railroad Co. v. Story*, 96 Mo., loc. cit. 621, 10 S. W. 203; *East Kingston v. Towle*, 43 N. H. 64; *People v. Justices*, 74 N. Y. 406.

We are thus brought to consider rule 37, pleaded by respondent. We need not say much on this point, since it is too plain for argument that that rule abrogates the statute, and, while seemingly it endeavors to carry it into execution, really evades its provisions by causing such a course to be pursued, and such a method of procedure taken, as leads to the same result as if the applicant had applied in the first instance for a common jury. History is said to repeat itself, and this incident forcibly recalls something which affords a striking parallel to the operation of rule 37. The English judges had been accustomed for a long period to treat bequests to a "family" as presumptively intended for the heir of such family, and in *Wright v. Atkins*, 1 Turn. & R. 143, Lord Eldon, when speaking of the English rule of construction just noticed, whereby "heir at law" and "my family" were held convertible terms, says: "The court, in its anxiety to find out the meaning of the testator, has found out that what he has said has the same meaning as if he had said nothing at all." Rule 37 operates in a similar way on the statute. It so construes it that, were it repealed to-morrow, a party desiring a special jury could have one by accepting a common jury in lieu thereof, and this would be all he could get to-day. If this is the true meaning of sections 29, 6069, supra, then the legislature has obviously expended in print a great deal of ineffectual verblage. There can be no question but that the term "special jury," under the authorities, bears with it, as an inevitable concomitant, the idea of selection, of choice, of the exercise of judgment and discretion, by the jury commissioner; not the blind turn-

ing of a wheel. Indeed, as already shown, section 16—the only one authorizing a resort to the wheel—is plainly eliminated from the provisions of section 29. It is true of that section that "the jury commissioner, as he may be directed by the court, shall select and furnish to the proper officer of said courts the names of the persons to be selected for such special jury, and said officer shall summon them according to the order of the court," etc. But certainly those words in italics cannot be allowed to defeat the very end and object which gave origin to the section itself. Nor will they, on any reasonable and fair construction, do so. The judge, under the provisions of section 29, has no more power or rightful authority to direct the jury commissioner to disobey the law in selecting a special jury than he would have to direct the sheriff to summon on a common jury those whom the law declares to be incompetent or disqualified to serve thereon. But it is said in the return that section 27 of article 6 of the constitution of Missouri authorized the judges of the St. Louis circuit court to make rules. It is true that under the provisions of that section the judges of said circuit court may sit in general term for the purpose of making rules of court. But that was simply intended to confer power on the general term to secure a uniformity of rules in the several divisions of the circuit court. That this was what was designed by that section is apparent from two other considerations: First, that no such power was conferred on other courts to make rules; and, second, the power merely to make rules is an inherent power belonging to all courts of record, because they are courts of record. *Works, Courts & Jur.* 177. So that, if the framers of our constitution intended simply to confer authority on the judges of the circuit court of St. Louis "to make rules," such attempted conferring of a power already existent was a vain and useless thing, very strongly resembling of an endeavor "to gild refined gold; to paint the lily," etc. But it is beyond the power of any court to make rules or take action which come into collision with either the organic or statutory law. *Gormerly v. McGlynn*, 84 N. Y. 284; *Works, Courts & Jur.* 177, and other cases there cited. On frequent occasions this court has thus ruled the same point, to wit: In *State ex rel. Partridge v. Lewis*, 71 Mo. 170, the statute required all appeals taken from the St. Louis court of appeals to this court to be taken within 15 days after judgment rendered, but the statute allowed an appeal bond to be filed "during the term" at which the judgment appealed from was rendered. *Partridge*, upon judgment being rendered against him in that court, took an appeal within the 15 days, and during the term tendered his appeal bond, but the court of appeals refused to accept it, because, the appeal having been granted, that court had

no further jurisdiction of the cause. This view was corrected by our writ of mandamus. So, also, in *State v. Underwood*, 75 Mo. 230, it was held that a rule of court which makes a change of venue case nontriable unless the transcript is filed at least 15 days before the term was null, because of being in conflict with section 1870, Rev. St. 1879. See, also, to the same effect, *State v. Gideon*, 119 Mo. 94, 24 S. W. 748; *Colhoun v. Crawford*, 50 Mo. 458; *Purcell v. Railroad Co.*, Id. 504; 4 Am. & Eng. Enc. Law, 450, note 7, and cases cited.

But one point remains to be considered, and that the method of relief resorted to by relators, as to which it is well-settled law that such manner of redress as is prayed for by relators may be granted when the action of the lower court exhibits evidences of excess of jurisdiction, as well as when exhibiting absolute absence of jurisdiction. *Appo v. People*, 20 N. Y., loc. cit. 541; *Jac. Dict. tit. "Prohibition"*; *Ward v. Kelsey*, 14 Abb. Prac. 106; *State v. Ridgell*, 2 Bailey, 560; *People v. Supervisors of Kern Co.*, 47 Cal. 81; *People v. Whitney*, Id. 584; 2 Spell. Extr. Relief, § 1726, and cases cited; 1 Spell. Extr. Relief, § 626.

For the reasons aforesaid, we award prohibition.

BRACE, C. J., and GANTT, MACFARLANE, BURGESS, and ROBINSON, JJ., concur.

BARCLAY, J. (dissenting). My view of this case was given in an opinion filed in the First division. 34 S. W. 245. Notwithstanding what has since been written by my learned brother who has expressed the judgment of the court in banc, my conclusion remains, with due respect, as announced in the divisional proceedings. So my former opinion, together with the suggestions of the St. Louis circuit judges accompanying it, will be filed along with this for publication in the official report.

But some observations occur in the learned opinion in banc which lead me to add to my former comment on the case.

1. The final judgment of the court places in the hands of the St. Louis jury commissioner the power to select the jury (when a special jury is ordered), and holds that the rule or order of the circuit court undertaking to direct the mode of that selection by lot is illegal and void. That ruling, it appears to me, does not give sufficient force to the part of section 29, Rev. St. 1889, p. 2169, which declares that the selection of a special jury by the commissioner shall be "according to the order of the court." If the court sees fit to order a special jury to be selected by the commissioner by drawing names by lot from the list of qualified jurors, the effect of the order is to make the special jury merely one for the trial of the particular case. That is the undoubted effect of the course prescrib-

ed by law in some other parts of the state (Laws 1891, p. 173, § 7), and it does not appear to me to be prohibited by the law applicable to St. Louis.

2. The statute furnishes the sole authority for a special jury. The right to a jury trial, which the constitution preserves, does not, in my opinion, include the right to have a special jury as an essential feature of trial by jury at common law. So the rule of court should not be held invalid as infringing any constitutional right of the plaintiffs. The body of the general common law was formally adopted as part of our jurisprudence in 1816, but only so far as "not contrary to the laws of this territory." 1 Terr. Laws, p. 436, c. 154. Even at that day, jury trial was a cherished Missouri institution. The qualifications of jurors and mode of selection had been subjects of serious attention already. The law of 1804 granted a trial by "jury of 12 good and lawful men" in criminal prosecutions, and "in all civil cases" if required. Id. p. 61, § 13. With slight modifications, the grant was repeated in other congressional and territorial acts applicable to the people of the territory now included in the state of Missouri. Id. p. 7, § 3; Id. p. 89, § 1; Id. p. 123, § 62; Id. p. 307, § 4. In 1808 an act of Louisiana territory provided an elaborate scheme for the selection of juries, one leading feature of which was that only payers of taxes (upon property rated at \$100 or more) should be eligible as jurors. Id. p. 198, c. 60. That property qualification was not only repealed in 1810 by the territorial legislature, but in a later act of congress (1812) for the government of Missouri territory that repeal was clinched by the following section, the intent of which is by no means obscure: "Sec. 11. And be it further enacted, that all free male white persons of the age of twenty-one years, who shall have resided one year in the said territory, and are not disqualified by any legal proceeding, shall be qualified to serve as grand or petit jurors in the courts of the said territory; and they shall, until the general assembly thereof shall otherwise direct, be selected in such manner as the said courts shall, respectively, prescribe, so as to be most conducive to an impartial trial, and least burthensome to the inhabitants of the said territory." Id. p. 12, § 11. So the law of Missouri territory stood when the first constitution of the new state proclaimed "that the right of trial by jury shall remain inviolate." Article 13, § 8. The right thus secured was the right of jury trial already enjoyed by the people whose representatives made that declaration. And although the common law may properly be considered in determining the nature of some of the historic features of jury trial (not covered by local legislation before Missouri had a constitution of her own), the common-law qualifications of jurors did not become part of the jury system protected by the constitution, for the very plain reason that the local

law had already dealt with and defined those qualifications. And as the mode of selecting jurors was also a topic treated by the local law, the common law, as to the right to a special jury, was not adopted as part of the Missouri trial by jury. In the early days of this court it was called upon to consider what jury trial was meant by the first constitution in a case wherein a jury had been demanded to try a summary proceeding on motion, depending on disputed facts. It was insisted that a jury trial was not sanctioned in such a case by the common law, but the court replied: "This doctrine would be good in England and in this state if it were not for a provision in our constitution which says the trial by jury shall remain inviolate; the meaning of which is that, with respect to facts, the trial shall be by twelve men, and they shall all and each of them be good and lawful men. They must have a good fame, possess integrity and intelligence. They must not be aliens, vagrants, outlaws, nor under conviction of crimes. They must all be under oath when they try a fact or cause. They must all agree in their verdict. And the right to have disputed facts tried by such a jury, and in such a manner, is to remain inviolate." *Bank v. Anderson* (1822) 1 Mo. 244. That opinion was written by Judge McGirk, to whom tradition imputes the authorship of the already mentioned act of 1816, introducing the common law as part of the law of the territory. Bay, Bench & Bar Mo. p. 537. The other members of the court, at the time of the decision quoted, had both been members of the convention that ordained the first constitution of Missouri. It is likely, therefore, that those pioneers of our law knew, at least, as well as any of their successors, the proper meaning of our earliest organic charter on the subject of jury trial; and in announcing that not the English, but the Missouri, trial by jury was guaranteed to our people, they probably made no mistake. Special juries had been known to our law by name before the adoption of the first constitution; but they were provided simply for particular cases to avoid a change of venue, and were to be drawn from a different county when an impartial jury could not be had in the county where the court was sitting. 1 Terr. Laws, p. 276, § 18. But the local law touching the qualifications and selection of jurors applied to all juries. *Bank v. Anderson* was later approvingly cited in *Vaughn v. Scade* (1860) 30 Mo. 600. There is a remark in that case, however, that the common-law trial by jury was the one adopted in the bill of rights, although the decision also approves *Bank v. Anderson*, which held that it was not so adopted. Judge Scott probably intended to refer to the common law only for these essential features of jury trial that were not touched by Missouri law before the adoption of the first constitution, which was the substance of Judge McGirk's ruling in the *Anderson Case*. But it is not

necessary to reargue the present case at length. My dissent is respectfully recorded to the order for a prohibition.

The opinion filed by BARCLAY, J., in division No. 1, and the suggestions of the seven circuit judges of St. Louis, will be found in 34 S. W. 245.

STATE ex rel. KANSAS CITY & S. RY. CO.
v. SLOVER, Circuit Judge.

(Supreme Court of Missouri. June 2, 1896.)

CONSTITUTIONAL LAW — SELECTION OF JURORS BY
LOT—SPECIAL JURIES.

1. Act April 1, 1891 (Laws 1891, p. 172), provides for the manner of selecting petit jurors, and prescribes their qualifications, in counties within certain limits of population. It requires the county court to cause the county clerk to make, under its supervision, a complete list of all qualified jurors of the county, to cause him to write each name on a stiff card, and to place them in a box or wheel, provided under the direction of the court, which shall be kept securely locked, and retained constantly under the control of the clerk. The act further provides that, when jurors are to be drawn, the judge shall order and designate the number of jurors desired, and that thereupon the clerk, so situated as to be unable to see the names on the cards, shall, in the presence of the judge, draw that number from the wheel or box, for whom a venire shall be issued. *Held*, that the act did not abridge or deny any essential of a jury trial as understood at common law, and was, therefore, not in violation of Const. art. 2, § 28, providing that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate."

2. Laws 1891, p. 173, § 7, provides that the name of every juror drawn for a special venire shall be returned to the box or wheel, unless the judge shall order to the contrary. *Held*, that the act was intended to govern the selection of special juries as well as juries in general, and hence does not deny the right to a special jury.

Sherwood, J., dissenting.

In banc. Proceeding on the relation of the Kansas City & Southern Railway Company for a writ of prohibition against James H. Slover, circuit judge. Writ denied.

Johnson & Lucas, for relator. Trimble & Braley, for respondent.

GANTT, P. J. This is an original proceeding in this court to obtain a writ of prohibition against Judge Slover of the circuit court of Jackson county to prevent the drawing and impaneling of a petit jury to try the case of Milton Tootle and others against relator, now pending in his court. In a word, it is a direct attack upon the constitutionality of an act of the general assembly of date April 1, 1891 (Laws Mo. 1891, p. 172), providing for the manner of selecting petit jurors, and prescribing their qualifications, in counties which contain more than 50,000 inhabitants and less than 300,000 inhabitants. Relator charges that said act is a denial of the right to a special jury as guaranteed to relator by the constitution and laws of this state. By article 2, § 28, of the constitution of Missouri, "the right of trial by jury, as heretofore enjoyed, shall remain

inviolable." By the act of 1891, which relator assumes is in contravention of the constitutional guaranty just quoted, the county court is required to cause the county clerk to make, under its supervision, a complete list of all qualified jurors of the county. After the list is prepared, the county court shall cause each name to be written by the county clerk on a stiff card, all of the same size. These cards are then placed in a box or wheel provided under the direction of the court, which shall be kept securely locked, and retained constantly under the control of the clerk. Whenever any circuit court or court having jurisdiction of felonies desires a panel of jurors or any part of a panel, the said court or judge in vacation shall so order, and designate the number of jurors so desired. Thereupon the clerk, so situated as to be unable to see the names on such card, in the presence of the judge, shall draw that number of cards from the wheel or box, and thereupon the county clerk shall make a list of said jurors so drawn, and preserve the same in his office, and deliver a certified copy thereof to the clerk of the court for which said jury was drawn, who shall issue a venire therefor to the sheriff or other proper officer of said court. By section 7 it is provided that the name of every juror drawn for a special venire shall be returned to the box or wheel unless the judge shall order to the contrary, and any name returned to the box or wheel is erased from the list of those who have served as jurors. It is apparent, we think, that it was intended by section 7 that the act should govern in the selection of special juries, and it was so held by this court in *State v. Withrow* (promulgated March 17, 1896, but not yet officially published) 36 S. W. 43, but that case does not apply, for two reasons: First. Section 2802, Rev. St. 1879, and section 6089, Rev. St. 1889, amendatory thereof, simply conferred upon all parties the right to a special jury upon certain conditions, without defining what constituted a special jury, or the manner of selecting it, while the act of April 11, 1879, did provide specifically for selecting a common jury, and did not so provide for a special jury; and it was held that, as the legislature had adopted the common-law term, "special jury," without defining it, resort must be had to the common law to ascertain its significance, and the difference in the mode of selecting it and the qualifications of special jurors; whereas by the act of April 1, 1891, under consideration, the legislature has designated exactly how a special venire is to be obtained in counties having more than 50,000 and less than 300,000 inhabitants. Second. In *State v. Withrow*, supra, the effect of a rule of court was before us for construction, whereas in this case a statute, enacted by the legislature itself, is the matter for consideration. As already said, in-

asmuch as the learned judge of the circuit court conformed his practice to the statute, the only point for serious consideration is the constitutionality of the act itself. Has the legislature the power and right to define the qualifications of jurors, whether on the regular panels or summoned for a special case? Has it the right to prescribe and regulate the mode of selecting and summoning jurors? By "the right of trial by jury as heretofore enjoyed" in our organic law is meant that the people of this commonwealth shall not be denied the essential features of the jury system as understood and practiced at the common law, chief among which have been esteemed the right to have a jury composed of 12 men, that they should be unanimous in their verdict, that they should be impartial, and that the case triable by a jury at common law should continue to be so tried in this state. With these great essentials preserved, the legislature is not deprived of the power to regulate the manner of the selection or the qualification of jurors. In *Vaughn v. Scade*, 30 Mo. 600, Judge Scott says: "The term 'trial by jury' was well known and understood at the common law, and in that sense it was adopted in our bill of rights. Of course, that nonessentials of that institution, such as concern the qualification of jurors, the mode of summoning them, and many other such matters, were left to the regulation of law. The constitution is preserved in retaining the substance of that form of trial as it was known and practiced among those from whom we derived it." Unquestionably, under the guise of regulation, legislation which, in effect, would destroy the great feature of the common-law jury, would not be tolerated; but no reason can be given why the people in their sovereign capacity may not improve the method of selecting a jury by excluding from the list those unfit by crime or immorality, or by repealing the freehold qualification of the common law, or any property qualification. Nor can we perceive how the impartiality of the jury can be lessened by the fact that the duty of selection is no longer confided to one man,—the sheriff or coroner,—but a list of all qualified citizens is placed in a box or wheel, well mixed, and the panel drawn therefrom by the clerk in the presence of the court or judge. It would seem, on the contrary, to insure absolute impartiality. The system removes all opportunity of packing a jury in the interest of either party or of permitting those who solicit the duty from disgracing the system. In *Copp v. Henniker*, 55 N. H. 179, loc. cit. 198, it is said: "The exercise of the right may be regulated by legislation. Without some legislative regulation of it, or provision for it, it cannot be enjoyed at all. The constitution merely guarantees the right and leaves to the legislature the duty of providing the means and methods by which it is to be enjoyed. The time and place, the qualifications of jurors, and the manner in which the twelve

shall be selected for the trial of a case, including all the steps from the venire to the challenge, are subjects of legislation subject to the limitation that the substance of the jury trial of 1792 is preserved." In *Hayes v. Missouri*, 120 U. S. 68, 7 Sup. Ct. 350, Mr. Justice Field, in discussing sections 1900, 1902, Rev. St. Mo. 1879, allowing the state in a murder case 15 peremptory challenges in St. Louis and only 8 in the counties of the state, said: "The constitution of Missouri, and, indeed, every state in the Union, guaranties to all persons accused of a capital offense or of a felony of a lower grade the right to a trial by an impartial jury, selected from the county or city where the offense is alleged to have been committed; and this implies that the jurors shall be free from all bias for or against the accused. * * * To secure such a body, numerous legislative directions are necessary, prescribing the class from which the jurors are to be taken, whether from the voters, taxpayers, and freeholders, or from the mass of the population indiscriminately; the number to be summoned from whom the trial jurors are to be selected; the manner in which the selection is to be made; the objections that may be offered to those returned, and how such objections shall be presented, considered, and disposed of; the oath to be administered to those selected; the custody in which they shall be kept during the progress of the trial; the form and presentation of their verdict and many other particulars. All these, it may be said, in general, are matters of legislative discretion. But to prescribe whatever will tend to secure the impartiality of jurors in criminal cases is not only within the competency of the legislature, but is among its highest duties." See, also, *Com. v. Dorsey*, 103 Mass. 412; *State v. Wilson*, 48 N. H. 398. Now, it is the historical jury of 12 that is guarantied by the constitution and bill of rights, and we have seen that when the essentials are preserved, all other matters looking to their selection are confided to the legislature. The special jury was not a matter of right at common law, but was within the discretion of the court; nor has it been, in this state, an absolute right, save when prescribed by statute. If it is competent for the legislature to change the qualifications and prescribe new methods for selecting the constitutional jury, how can it be maintained it may not also determine in what cases a special venire may be had, and how it should be selected; and what obstacle is there to the abolition of the special jury system absolutely? The historical 12 was an absolute legal right. It was this "right" which our constitution secures; but a special venire was not a legal right, but rested in the discretion of the court, and hence has not passed into a constitutional right; and, in the absence of a limitation upon the people in their legislative capacity, they can abolish the right to a special jury altogether. Whether we construe this act of April 1, 1891, as abolishing

all distinction between common and special juries, or as conferring upon a party the right to a jury different from the regular panel, and special only in that sense, or as prescribing the qualifications and method of selecting a special jury when allowed by the court in its discretion, in neither case is it obnoxious to the charge of being unconstitutional. The right to an impartial jury does not vest in any suitor the right to select his own jury. We discover nothing in the act that is calculated to abridge or deny any essential of a jury trial as understood at common law, and hold that its various provisions were clearly within the province and discretion of the legislature. The writ of prohibition is denied.

BRACE, C. J., and MACFARLANE, BURGESS, and ROBINSON, JJ., concur. SHERWOOD, J., dissents.

BARCLAY, J., concurs, referring to his dissenting opinion in the recent *Withrow* prohibition case from St. Louis (*State v. Withrow* [Mo. Sup.] 36 S. W. 43).

VERDIN v. CITY OF ST. LOUIS.

(Supreme Court of Missouri. April 9, 1896.)

In banc. Concurring opinion. For decision on rehearing, see 33 S. W. 480.

BARCLAY, J. Considering the close division of opinion in this court, and the probability of further proceedings in the circuit court, it seems appropriate to indicate the grounds of my concurrence in the judgment here. The discussion of disputed points has been already so prolonged that it is unnecessary to do more now than to merely indicate my position towards them as shortly as possible, without elaborate argument.

1. A special tax bill of the sort mentioned in this case is by law *prima facie* evidence of liability of the property for the charge it purports to impose (Rev. St. 1889, p. 2125, § 25), and it is an ostensible lien on the land for two years from the date of its issue by the municipal authorities (Id. § 26). In my opinion, injunction is available to prevent the issuance of such a tax bill, when about to be issued under an illegal ordinance, or to cancel it as a cloud on the title after issue, in the circumstances shown in this case.

2. The scheme of procedure adopted by the board of public improvements under ordinance 542 (Rev. Ord. St. Louis, 1887), in respect of reconstruction and maintenance of the proposed street, is illegal, because the plain effect and obvious intent of the scheme are to put upon the owner of the real property, properly chargeable by special tax with the cost of reconstruction, a portion of the expense of repairs of the improved street for a long term of years. The latter expense the city is bound by the charter to bear, and can-

not shuffle off upon the adjacent property in the mode attempted by the scheme referred to, as described in the petition in this suit.

3. "Maintenance" is a word whose meaning is greatly influenced by its context. As used in the ordinance (542) before the court, it appears to me to include the idea of putting on the repairs needed to maintain the street in its completed condition. The city cannot lawfully cast upon the adjacent property, under the guise of reconstruction, a part of the burden of repairs, which the charter requires the city to bear. By calling that burden "maintenance," the nature of the work is not changed, nor is the liability of the property owner under the charter enlarged.

4. The two charges for reconstruction and maintenance have been so blended, by the scheme of special taxation adopted in the case before the court, that the valid charge for reconstruction cannot be definitely ascertained and severed from the invalid charge for repairs sought to be thrown upon the adjacent property. Some part of the expense properly chargeable to the city for repairs is embodied in the special tax laid upon plaintiff's property for alleged reconstruction of the street. That is the effect, and obviously the intended effect, of the scheme originating in ordinance 542, as worked out by the board of public improvements, according to the account given of it by the petition. Hence the assessment for reconstruction, as now made, cannot be enforced, containing, as it does, an unascertained and uncertain illegal element.

5. The city may lawfully contract for the purchase of a monopolized article, no less than for articles protected by letters patent. The method prescribed for letting public work does not require, as an essential to a valid contract, that there should be at least two bidders for any proposed work. The steps indicated by the charter as necessary to a final contract show that the municipal authorities are invested with a discretion to approve the offer of a single bidder for such work, if the price is reasonable, and the bid otherwise satisfactory and correct. If this was not so, the city, in projecting public improvements, would be deprived of the right to enjoy the benefit of many modern inventions and discoveries,—a conclusion which we should not suppose was intended, without a very clear expression of such intent in the charter. Moreover, the proposition stated at the opening of this paragraph was declared most positively in *Paving Co. v. Hunt* (1890) 100 Mo. 22, 13 S. W. 98, by a unanimous court. Prior to that time, in *McCormack v. Patchin* (1873) 53 Mo. 33, a special tax bill for Nicholson pavement in a street had been sustained by the supreme court, without any such question being started. Since the *Hunt* Case, the published court reports give us a glimpse of the large investments that have been made in public work of the kind referred to in that judgment. It appears to me that we should

closely adhere to that decision on the rule *stare decisis*, though by that remark no doubt is intended to be cast upon the correctness of the ruling as an original one.

6. Upon the sufficiency of notice of the meeting of the board to consider the reconstruction of Jefferson avenue, my concurrence is fully given to the views expressed in the second paragraph of the learned opinion of Judge BURGESS.

7. The acts of plaintiffs in respect of the proposed improvements seem to me to furnish no basis for holding plaintiffs estopped to enjoin the enforcement of the special tax in question.

RIESNER v. GULF, C. & S. F. RY. CO. et al.
(Supreme Court of Texas. June 8, 1896.)

COURTS—CONFLICTING JURISDICTION—PROCEEDINGS FOR APPOINTMENT OF RECEIVER—WHEN JURISDICTION IS ACQUIRED.

The presentation to a judge of a federal court of a bill asking the appointment of a receiver for a railroad company, which is examined by the judge, and ordered filed, gives that court exclusive jurisdiction from that time over the property and assets of the corporation, when followed by the appointment of receivers in the case; and a debtor of the railroad company, garnished in an action in a state court after the filing of such bill, should be discharged on application of the receiver therefor.

Certified questions from court of civil appeals, First supreme judicial district.

Action by B. A. Riesner against the Texas, Louisiana & Eastern Railway Company and the Gulf, Colorado & Santa Fé Railway Company, garnishee.

Coleman & Ross, for appellant. Hutcheson, Campbell & Sears, for appellees.

BROWN, J. The court of civil appeals for the First supreme judicial district has certified to this court the following statement and questions: "Appellant sued the Texas, Louisiana & Eastern Railway Company in the county court of Harris county for a debt, and on the 30th day of December, 1893, sued out a writ of garnishment against the Gulf, Colorado & Santa Fé Railway Company, which was duly served on the 2d day of January, 1894. The garnishee filed its answer March 10, 1894, admitting that at the date of the service of the garnishment it was indebted to the Texas, Louisiana & Eastern Railway Company, but set up the facts stated below to show that the fund was not subject to the writ, and asked that the receivers of the defendant company's property be made parties to the suit, in order that the questions involved might be adjudicated. The receivers, Putnam and Lazarus, intervened, also setting up the facts stated, to show that the debt in question was not subject to garnishment, and that they, as such receivers, were entitled to collect and administer it under the orders of the court which appointed them. The facts shown in

support of the claim of the receivers are as follows: On the 25th day of December, 1893, there was presented to Hon. David E. Bryant, one of the judges of the circuit court of the United States for the Eastern district of Texas, a bill in equity in behalf of Samuel A. Walker v. The Texas, Louisiana & Eastern Railway Company, requesting the appointment of receivers for said company, its assets and property. The nature of this bill is not further shown by the record before us. It was ordered filed by Judge Bryant, and was filed in said circuit court on the 26th day of December, 1893. No other action was taken upon it until February 1, 1894, when Judge Bryant appointed the interveners as receivers of the defendant railway company, with power to take possession of same and all of its property, and ordered that such property be delivered to them. The receivers qualified, and took possession of the properties before the trial of this suit in the county court. Plaintiff, Riesner, recovered judgment against the defendant company for his debt, but the county court held that it had no jurisdiction to subject the fund in the hands of the garnishee, and dissolved the garnishment and discharged the garnishee. Upon these facts the following questions are certified for decision: (1) Was the fund in the hands of the garnishee at the time of the service of the writ subject to the garnishment, or did the application for the appointment of receivers of the property of the defendant, considered in connection with the subsequent action of the federal court, put such fund beyond the reach of the writ? (2) If the fund was subject to garnishment when it was served, must the fund be subjected by the ordinary statutory judgment rendered by the court issuing the writ, or should the garnishment be simply sustained by the judgment rendered, leaving the plaintiff to seek satisfaction through the orders of the court having charge of the receivership?"

It is generally held by the courts and stated by the text writers that when the jurisdiction of a court attaches to any subject-matter of litigation, although concurrent with another or other courts, it becomes exclusive for all purposes necessary to the accomplishment of the objects of the suit. *Walt, Insol. Corp.* § 261; *High, Rec.* § 52. That is, if a bill be filed in one court, which has for its object the appointment of a receiver to take into custody the property of the defendant, and to pay and discharge the debts of such defendant from the time that the jurisdiction attaches to the property, no interference on the part of other courts will be allowed. But this general statement leaves open the question as to when and under what circumstances the jurisdiction of the first court does in fact attach so as to give it exclusive control of the property sought to be subjected. In this state it has been established that whenever a court of

competent jurisdiction has appointed a receiver for a corporation or for an individual or co-partnership, the jurisdiction of that court attaches to the property of such corporation, person, or firm, although the receiver has not qualified, or taken possession of the property. *Railway Co. v. Lewis*, 81 Tex. 1, 16 S. W. 647. In the case last cited, Chief Justice Stayton, speaking for the court, quoted from the case of *Maynard v. Bond*, 67 Mo. 315, as follows: "The counsel for the sheriff only objects that he was prior in right to the receiver, because his levy was made before the receiver had executed and filed the bond to be given by him. When the court in such cases appoints a receiver, it is because the court has first adjudged that the property is no longer to be under the control of the parties to the suit, but is thenceforth to be and is in the custody of the court. A receiver then becomes merely an agent through whom the court acts; and whether he be forthwith appointed by the court, as in this case, or a reference be made to a master or a referee to appoint one, in either case the effect is the same,—the title of the receiver is of the date at which it is ordered that a receiver be appointed. Then the title of the parties to control dies, and then the title of the court and of its agent and officer immediately succeeds." This, in substance, asserts the proposition that whenever the judge of the court has acted upon the application in such way as to indicate that he has determined that he will investigate the matter, and may appoint a receiver at some future date, the property is thereafter considered in the custody of the law, and not liable to the process of any other court pending such investigation. This doctrine is sustained in the cases of *May v. Printup*, 59 Ga. 128, and *Adams v. Trust Co.*, 15 C. C. A. 1, 66 Fed. 617, as well as other cases. In the former case the United States circuit court for the state of Georgia had appointed a receiver for a railroad company, and, after administering the property in the hands of the receiver for a time, discharged him therefrom, after which another application was filed in the same cause, asking the appointment of another receiver, which second application was pending in that court, and a time set for hearing it, when a like application was made in a state court in the state of Georgia, asking the appointment of a receiver for the same railroad company. The state court made the appointment of a receiver in the case, who took possession of the property, and afterwards the United States circuit court also appointed a receiver in the case therein pending, the latter court directing its receiver to apply to the state court for possession of the property. The receiver appointed by the federal court intervened in the state court, setting up the facts, and asked that the property be delivered into his possession in accordance with the appointment made by the United States circuit court. The state court of Georgia ordered

its receiver to turn over the property to the receiver of the federal court, which order, upon appeal, was affirmed by the supreme court of that state. In the case of *Adams v. Trust Co.*, opinion delivered by Judge Pardee, the United States circuit court of appeals reversed the judgment of the circuit court of the United States in the state of Florida, and directed it to turn over to the receiver of the state court the property of the defendant in that suit upon a state of facts very similar to that which existed in the case of *May v. Printup*. Judge Pardee quoted from the opinion of Judge Wood as follows: "Is actual seizure of the property necessary to the jurisdiction of the court? In my judgment, it is not. In this case I think the jurisdiction of the United States circuit court for the Northern district of Georgia first attached to the property, because the suit in that court was first commenced, and service of subpoena made, and because (1) one of the main objects of the suit was to obtain possession of the property, and such possession was necessary to the full relief prayed by the bill, and (2) because by the service of the restraining order enjoining the defendant company from delivering possession of the trust property to any person except a receiver appointed by this court in this cause the court acquired constructive possession, and from the moment of the service of the restraining order the property was in gremio legis." Of this Judge Pardee expressed his approval, saying: "The views expressed by Judge Wood have been accepted and followed in this circuit, at least, and we fully concur therein as the correct exposition of the law, and one particularly applicable to the present case; while the decision of Mr. Justice Bradley, doubted by himself, is open to the objection that thereby jurisdiction is frequently made to depend upon a race between marshals and sheriffs, likely to result in unseemly controversies between the state and the federal courts." In accordance with the expression quoted from the opinion of Judge Wood above, it has been generally held by the federal courts that when a bill has been filed which seeks to subject the property of a corporation, person, or co-partnership to the payment of the debts of all creditors, and prays for the appointment of a receiver to administer the same, and when service of citation has been had upon the defendant, the jurisdiction of the court attaches to such property so as to exclude the interference of any other court therewith. *Belmont Nail Co. v. Columbia Iron & Steel Co.*, 46 Fed. 8; *Shields v. Coleman*, 157 U. S. 168, 15 Sup. Ct. 570; *President of Atlas Bank v. President of Nahant Bank*, 23 Pick. 480; *Gaylord v. Railroad Co.*, 6 Biss. 202, Fed. Cas. No. 5,284; *Union Mut. Life Ins. Co. v. University of Chicago*, 6 Fed. 443; *Owens v. Railway Co.*, 20 Fed. 10; *Chittenden v. Brewster*, 2 Wall. 191; *Adams v. Trust Co.*,

15 C. C. A. 1, 66 Fed. 617; *Fost. Fed. Prac.* § 9. In the case of *Railway Co. v. Lewis*, our supreme court went no further than to decide that the appointment of a receiver without his qualification operated to place the property in custodia legis, but it was strongly intimated that this was not the limit at which this court would stop on the question of jurisdiction. From the statement which accompanies the questions propounded we conclude that no service of process was had in the case pending in the federal court when the writ of garnishment was served in this case, and the question as to what would be the proper rule in case process had been served before the service of the writ of garnishment is not before us for decision.

It does appear from the statement that the petition in the case instituted in the federal court seeking the appointment of a receiver was presented to the Honorable David E. Bryant, judge of the United States circuit court for the Eastern district of Texas, which petition he acted upon so far as to examine it and order it filed, from which we conclude that he determined that the allegations of the petition were sufficient to show a prima facie case for the appointment of a receiver, and that by his action he sent the petition to be filed in his court for future consideration. This action of the judge was sufficient, if followed up in due time by the appointment of a receiver, to fix the jurisdiction of that court upon all the property of the defendant in that suit as to liens thereafter attempted to be acquired through the process of other courts. Under such circumstances the appointment, when made, would relate back to the filing of the bill. *Levi v. Insurance Co.*, 1 Fed. 206. Of course, what we have said might not apply to a case where third parties had acquired rights in the property for a valuable consideration without notice, as, for instance, by purchase from the defendant or by a contract lien for a valuable consideration paid. If such a case should arise, we feel sure that the equities of such persons would be properly recognized and protected by that honorable court. In *Railway Co. v. Lewis*, supra, Chief Justice Stayton strongly intimates that the filing of a bill or petition asking for a receiver might be held to fix the jurisdiction of the court in which it was filed from the time of such filing and before the service of process or action by the court; but it is not necessary for us to decide that question in this case, and we leave it an open question, as we find it under the authorities. While there are many expressions in the text-books and in the decided cases which would lead to such a conclusion, we have not been able to find any case in which the question was involved and decided. Counsel for the receivers, interveners in this case, urge upon this court, as authority settling the question that the filing of a bill fixes the jurisdiction

of the court over the property of the defendant, the cases of *Chittenden v. Brewster*, 2 Wall. 191, and *Gaylord v. Railroad Co.*, 6 Biss. 286, Fed. Cas. No. 5,284. In the former case a bill had been filed in the circuit court of the United States attacking the validity of an assignment made by the debtor defendant to which the assignees were parties. The purpose of the bill was to set aside that instrument, and to have a receiver appointed to administer the assets. Service of process was had upon all of the defendants. The assignees appeared in court, and answered before any proceeding was instituted in the state court for the appointment of a receiver for the same property. That case differs from the one now before the court in this: that the instrument under which the assignees held the property was attacked directly in the proceeding, and sought to be annulled, which necessarily gave the court jurisdiction of the property involved, and, in addition thereto, the court had acquired jurisdiction of the debtor and the assignees by service of process and answer filed before the proceeding in the state court was inaugurated. In this case no service had been had upon the defendant when the writ of garnishment was issued, and there was no specific attack made upon the title or claim of any person to the property, but simply for the general purpose of placing all of the property of the defendant in the hands of a receiver for due administration. In the case of *Gaylord v. Railroad Co.*, cited above, service had been made upon the defendant before any proceeding was inaugurated in the state court. The court said: "Of course, in all that has been said it is assumed—what was the fact in this case—that the bill was not only filed first in this court, but that the process was issued and duly served upon the parties, and that they were in court subject to its jurisdiction before any proceeding was instituted in the state court." Neither of these cases involves the point insisted upon by counsel for the receivers in this case,—that the filing of the bill of itself gave jurisdiction to the court over the property of defendant. They, however, tend to support the position. On the other hand, there are expressions by high authority which would lead to the conclusion that no such result would follow the filing of a bill without service of process and without action by the court. Whenever that question shall arise in any case in the future, we feel confident that the courts will, in the true spirit of comity and fairness, determine and settle it with proper limitations so as to guard against the perpetration of fraud and the jeopardizing of the rights of others to which it might be peculiarly liable unless properly guarded. It is fortunate for the country, for the interests of public justice, and to the credit of the judiciary, both federal and state, that with few exceptions the courts, both federal and state, have been lib-

eral and just in determining questions which involve the conflict of jurisdiction. So long as these tribunals manifest the spirit of comity and fairness displayed in the cases of *Adams v. Trust Co.* and *May v. Printup*, above cited, there can be no serious disturbance of that harmony which should prevail between these independent, but co-ordinate, jurisdictions, and "races between marshals and sheriffs, likely to result in unseemly controversies between the state and federal courts," will be avoided, because, when either court may feel that its jurisdiction has been invaded, upon application by its receiver to the court which has taken possession of the property the wrong will be righted in a spirit of fairness and justice, as was done in the cases cited above and in this case in the county court.

It will be unnecessary to answer the second question and to the first question we answer that the funds in the hands of the garnishee at the time of the service of the writ should be held not to be subject to garnishment when presented upon the application or intervention of receivers as in this case, and the county court properly held that such funds should not be thus subjected to the payment of the plaintiff's debt. We do not mean to say that, if no intervention had been filed by the receivers, or action taken to bring the question before the county court, and it had rendered judgment against the garnishee, such judgment would be void, so as not to protect it when paid; but we hold that upon such application or intervention it was the duty of the county court to order that the garnishee be discharged.

MORRILL v. SMITH COUNTY.

(Supreme Court of Texas. May 25, 1896.)

COUNTIES—BONDS ISSUED TO RAILROADS—VALIDITY—POWERS OF RAILROAD COMPANIES TO CONSOLIDATE—RIGHTS OF BONDHOLDERS.

1. Under Act April 12, 1871, authorizing the issuance of bonds by counties in aid of railroads, providing that no such bonds should be issued until the court should have first levied an annual tax sufficient to pay the interest thereon, and not less than 2 per cent. annually of the principal, but containing the further provision that if such levy should at any time be ascertained to be insufficient the comptroller should see that an additional tax was levied, it was contemplated that the court should exercise its judgment as the rate of levy required, and bonds issued are not rendered invalid by the fact that the levy made before their issuance was insufficient.

2. The fact that after the voting of bonds to a railroad company by a county, when its road was nearly completed, but before the issuance of the bonds, other companies, owning short lines, remote from such county, whose property or stock had been acquired by such company, were consolidated with it by act of the legislature, did not release the county from the issuance of the bonds, nor render them invalid.

3. A railroad company, which by its charter is given the right to "unite with any other

railroad company," by consolidating with another company exhausts the power, which does not pass, with its other powers or privileges, to the consolidated company.

4. Authority given a railroad company, by its charter, to consolidate with any other company, does not confer authority upon another company to consolidate with it; and the power is, in effect, limited to a union with another company having like power.

5. The holder of bonds issued to a railroad company two days after an attempted consolidation with another company is not estopped, as against the county, to assert the invalidity of such consolidation.

6. A statute authorizing the issuance of bonds by counties to railroad companies provided for the levy of an annual tax sufficient to pay the interest and at least two per cent. of the principal, when collected to be paid into the state treasury for the benefit of the holders of the bonds, to whom the interest and 2 per cent. of the principal of their bonds should be paid annually by warrants drawn by the comptroller, and the excess, if any, to be used in the purchase of bonds for cancellation. In a particular case, no payments were made by the comptroller on the principal of the bonds, but all above interest was treated as excess, and used in the purchase of bonds for cancellation. *Held*, that the bonds purchased with such 2 per cent. would be treated as still in force, and were the property of the bondholders whose money was used in their purchase.

Error to court of civil appeals of First supreme judicial district.

Action by M. A. Morrill against Smith county. From the decision of the court of civil appeals, on appeal (33 S. W. 899), both parties bring error. Reversed.

Dickson & Moroney, T. W. Gregory, and D. W. Doom, for plaintiff in error. Jas. M. Edwards and H. C. & Cone Johnson, for defendant in error.

GAINES, C. J. This suit was brought by the plaintiff in error to recover of Smith county upon certain bonds issued to the Houston & Great Northern Railroad Company. The substantial defenses were (1) that the bonds were issued without the levy of a sufficient tax to pay annually the interest and at least 2 per cent. of the principal, as required by the statute then in force; (2) that at the time the bonds were issued the Houston & Great Northern Railroad Company had been consolidated with the International Railroad Company, and had ceased to have a corporate existence, and that the bonds were therefore void; (3) that, if the bonds are valid, they have been in part paid by the collection of a tax to pay an annual installment of 2 per cent. of the principal thereof, and the payment of the same into the treasury for the use of the bondholders; and (4) that certain installments had matured more than four years before the institution of the suit, and were therefore barred by limitation. The trial court held the bonds void, and gave judgment for the defendant. Upon appeal it was held by the court of civil appeals that the tax levy was insufficient in amount to pay in full the interest and sinking fund upon

the indebtedness, but that the bonds were valid for such sum as the levy was sufficient to pay, and that the bonds were payable in annual installments of 2 per cent., and that 16 of such installments were barred by limitation. Each party has sought and obtained a writ of error,—the plaintiff claiming that the court of civil appeals erred in holding that the bonds were not valid for the full amount, and in holding that the 16 installments were barred; the defendant assigning that the court of civil appeals erred in not holding the alleged obligations void in toto.

The debentures in question were a part of a series of 400 bonds for \$500 each, and purported to be issued pursuant to an act of the legislature approved April 12, 1871, entitled "An act to authorize counties, cities and towns to aid in the construction of railroads and other works of internal improvement." The constitution of 1869 was then in force, and it contained the following provision: "The inferior courts of the several counties in this state shall have the power, upon a vote of two-thirds of the qualified voters of the respective counties, to assess and provide for the collection of a tax upon the taxable property, to aid in the construction of internal improvements: provided, that said tax shall never exceed two per cent. upon the value of such property." Const. 1869, art. 12, § 32. Section 23 of the same article provided that "It shall be the duty of the legislature to provide by law, in all cases where state or county debt is created, adequate means for the payment of the current interest, and two per cent. as a sinking fund for the redemption of the principal; and all such laws shall be irrepealable until principal and interest are fully paid." The act cited above authorized the respective counties of the state to aid in the construction of railroads or other internal improvements; by taking stock or making a donation, upon the submission of the proposition to the voters of the county at an election, and upon a two-thirds vote in favor thereof. The act further prescribed that no bonds should issue until the county court should have levied an annual tax to pay the annual interest, and 2 per cent. annually of the principal, of such bonds. It was further provided that, in case the levy made by the county court should prove insufficient, it should be the duty of the comptroller to see that a sufficient levy was made. We shall have occasion hereafter to discuss these provisions. We refer to them in this place merely for the purpose of showing that the legislature, in authorizing the creation of the debt, fully complied with the section of the constitution which required that provision should be made for the payment annually of the interest and at least 2 per cent. of the principal, as a sinking fund. Upon a proper petition, on the 27th day of March, 1872, the county court of Smith county ordered an

election, in pursuance of the statute, upon the proposition to donate \$200,000 in bonds to the Houston & Great Northern Railroad Company,—one half to be delivered when the railroad should be completed to Tyler, and the other half when it should be completed to the northern or western boundary of Smith county. The election having been held on the 6th day of May next thereafter, the court declared the result in favor of the proposition. On the 26th day of May, 1873, the president of the company presented a petition to the county court, alleging a compliance with the terms of the proposition on the part of the company, and asking that the bonds should be issued. Action was taken at that term of the court, and an order entered levying an annual tax of three-fourths of 1 per cent. upon the taxable values of the county, and directing an issue of the bonds. Certain recitals, and the words "three-fourths," were stricken out of the minutes, and the judge before whom this case was tried found that this was done by direction of the county court at the same time at which the original entry was made. But we pass over this proceeding, since we do not find a determination of its effect necessary to a decision of the case. After some further negotiations the county court, on the 2d day of October, 1873, entered an order directing that the bonds should bear date as of the 15th day of May next preceding, and also levying an annual tax of one-half of 1 per cent. upon the property of the county for the payment of the annual interest, and 2 per cent. annually of the principal, of such bonds. The trial court found that the tax so levied was not sufficient to pay the annual interest and installment of the sinking fund provided for by the statute, and that, therefore, the bonds were void. That court also found that the tax rolls for the year 1872, in which the election was ordered, showed property in Smith county, subject to taxation, of the aggregate value of \$2,665,426, and for the year 1873, during which the bonds were issued, of the value of \$3,158,281. The correctness of the court's ruling upon this point presents the leading question in the case. We will now quote such sections of the act under which the bonds were issued as bear upon the question:

"Sec. 5. A special meeting of the county court shall be held on the first Monday after the return day of such election when the court shall ascertain and record the result of the election, and if two-thirds of the qualified voters of the county shall have voted in favor of the proposition at such election, then it shall be the duty of the court to make such orders and adopt such regulations as will give practical effect to the proposition so voted for, and for that object the court shall have power to issue county bonds to draw interest not exceeding ten per cent. per annum, and to levy a tax upon all real and personal property situated in the

county, not to exceed two per cent. on the assessed value of such property in any one year.

"Sec. 6. All county bonds that may be issued in giving effect to such proposition, shall be signed by the presiding justice of the court and shall be attested by the clerk with the seal of the court. But no such bonds shall be issued until the court shall have first levied an annual tax upon all real and personal property situated in the county, which shall be sufficient to pay the annual interest, and not less than two per cent. annually of the principal of said bonds, besides the expenses of assessing and collecting the same, which levy shall continue in force until the whole amount of the principal and interest of said bonds shall have been fully paid; provided, that no bonds shall be issued or donation made under the provisions of this act except for such portions of the work in aid of which it is proposed to issue bonds or make a donation, as shall have been completed at the time when the bonds are issued or donation made."

"Sec. 14. If it shall be ascertained at any time that the tax which has been levied, for the payment of county bonds issued under the provisions of this act is insufficient to pay the annual interest and two per cent. annually of the principal of such bonds, besides the expenses of assessing and collecting such tax, it shall be the duty of the comptroller to see that such additional tax is levied and collected as will be sufficient to make such payments, which levy shall be continued in force until the whole amount of the principal and interest of said bonds shall have been fully paid.

"Sec. 15. No county shall aid in the construction of any one railroad or work of internal improvement to an amount exceeding ten per cent. of the assessed value of the real and personal property situated in the county, to be ascertained by reference to the latest assessment of said property for state taxes; and no county shall aid in the construction of any such works of internal improvement to an amount exceeding, in the aggregate at any one time, twenty per cent. on the assessed value of all the real and personal property situated in the county, to be ascertained in like manner." Gen. Laws Reg. Sess. 1871, pp. 30, 31.

Section 15 contains the only express limitation found in the act as to the amount of the indebtedness which a county is empowered to create. It was not to exceed, for any one work of internal improvement, 10 per cent. of the taxable values of the county, as shown by the latest official assessment, nor 20 per cent. on the aggregate, if there should be more than one. It was not shown in this case that aid was extended to any other work under the statute, nor did it appear that the indebtedness sought to be created by the proposition submitted to the voters of Smith county exceeded 10 per cent.

of its taxable values, as shown by the last assessment. The per cent. of the amount shown by the assessment rolls of 1872 was largely more than the amount voted. Section 5 contains an express grant of power to levy a tax, not exceeding 2 per cent., for the payment of the debt when created. The tax levied in this case was one-half of 1 per cent., and the complaint is that it was not enough. Now, it must be borne in mind that section 6 contains a proviso that no bonds should issue, except for such portions of the work as should have been completed according to the terms of the proposition, at the time of their issue. The power to issue the bonds was made dependent upon a compliance on part of the company with the terms of the proposition submitted by the county court, and approved by the vote of the people. When the work was completed a debt was created, and it became the imperative duty of the county court (or the police court, as it was then called) to issue the bonds, or make the donation, as the case might be. The statute had limited the amount of the indebtedness. It had also fixed a limit to the tax to be levied, and had provided for the levy of a tax to pay the annual interest and installments upon the bonds. Under such circumstances, it is unreasonable to presume that the legislature intended to make the validity of the bonds dependent upon the sufficiency of the tax levied for the payment of the annual interest and installments, or, in other words, to provide that in case the court should, either intentionally or through error of judgment, make an insufficient levy, the bonds should be absolutely void. It is true that the words, "no such bonds shall be issued, until the court shall have first levied an annual tax," etc., make it the imperative duty of the court to levy what they should deem a tax sufficient in amount for the purpose. They are words of command, and, in a sense, mandatory. But they are not necessarily mandatory in the sense that the bonds should be void in the event the tax, for any reason, should not be sufficient. We should be loath to hold that any such result was ever intended, even had section 14 been omitted from the act. In determining the amount of indebtedness which the county could create under section 15, it is provided that the court is to be guided by the assessed values as shown by the latest rolls. There is no such provision in section 6, and the omission is significant. If it had been intended that the county court should not exercise their best judgment as to the amount of the tax to be levied,—that they should have no discretion,—it seems to us that words would have been inserted in section 6 so as to make it read, "No bonds shall be issued until the court shall have first levied an annual tax upon all the real and personal property situated in the county, as shown by the last official assessment rolls of the county, which

shall be sufficient to pay," etc. In such a case the doctrine announced in the case of *Citizens' Bank v. City of Terrell*, 78 Tex. 450, 14 S. W. 1003, would have applied. But such is not the language of the section. It does not confine the court to the assessed valuation. The court, in determining the amount of the levy, are left, as we think, to act upon their own judgment, and to consider any probable increase or decrease in the taxable values of the county. The fact that section 15 provides, in effect, that in creating a debt for internal improvements, and in fixing the limits of the amount to be created, as that it should not exceed 10 per cent. of the value of the property situate in the county, the county court were to be governed by "the latest assessment of said property for state taxes," is not an argument that they should be controlled by the previously assessed official valuation, in determining the rate of tax to be levied for the payment of the bonds. On the contrary, the mention of the final assessment in section 15, and its omission in section 6, tend rather to show that the court was not bound to take the assessment as the basis of the levy. We are of opinion, therefore, that the section must be construed as if it had read that the court should levy a tax which in their judgment shall be sufficient to pay the annual interest, and an annual installment upon the principal of at least 2 per cent. If there were any reasonable doubt as to this construction, it is swept away by the fourteenth section of the act. That section provides for the contingency of an insufficient levy by the court, and evidently contemplates that, in the exercise of their discretion in determining the amount, they might commit an error. It is unreasonable to presume that the legislature intended that the bonds should be invalid if a sufficient levy was not made, when in the same act it is provided that the comptroller should see that an additional tax was levied in the event that such contingency should happen.

It is next insisted that the Houston & Great Northern Railroad Company had consolidated with other companies, and that because of the alleged consolidation the purported obligations were void. On the 8th day of May, 1873,—which was probably a few days before the work contemplated in the proposition submitted to the voters of the county had been fully completed,—the legislature passed an act which incorporated three other companies into the Houston & Great Northern Railroad Company. Since much stress is laid upon this statute, we copy it in full. It reads as follows:

"An act to consolidate the Houston Tap and Brazoria Railway, the Huntsville Branch Railway, and the Victoria Columbia Railroad with the Houston and Great Northern Railroad.

"Whereas, the Houston and Great Northern Railroad Company are the owners, by

purchase at sale on foreclosure of mortgage by the state, and otherwise, of the Houston Tap and Brazoria Railway; and whereas, said Houston and Great Northern Railroad Company own all the stock of the Huntsville Branch Railway, and are operating eight (8) miles of road under the charter thereof; and whereas, said Houston and Great Northern Railroad Company are the owners of the stock of the Columbia and Victoria Railroad Company; therefore,

"Section 1. Be it enacted by the legislature of the state of Texas, that the Houston Tap and Brazoria Railway, and the Huntsville Branch Railway, and the Columbia and Victoria Railroad, are hereby made and declared to be, to all intents and purposes in law, a part of the Houston and Great Northern Railroad, and shall be under the control and management of the said Houston and Great Northern Railroad, in like manner as every other part of their railroad; and all rights, privileges and franchises granted or secured in the charter of either or all of the aforesaid corporations shall inure to and be exercised and enjoyed by the said Houston and Great Northern Railroad Company, as fully and to the same extent as they could have been by either of said companies; provided that nothing herein contained shall have any effect to relieve said consolidated company, or said Houston Tap and Brazoria Railway, from any debt or liability whatever, to which either of said roads may be liable without this act.

"Sec. 2. Be it further enacted, that this act shall take effect from and after its passage. Approved May 8th, 1873." Sp. Laws 1873, p. 399.

Did this act have the effect to absolve Smith county from the obligation entered into in its behalf by virtue of the authority conferred by the voters of the county? It has been held by the supreme court of the United States that where the county court had been authorized by a vote of a township to subscribe to a certain railroad company, and where the company, before the subscription was made, consolidated with another company, thus forming a third, the extinction of the company in favor of which the subscription was valid worked a revocation of the power, and that the subscription to the new company was void. *Harshman v. Bates Co.*, 92 U. S. 569. But in subsequent cases it is held by the same court that, where a subscription by a county is authorized when made, the subsequent consolidation of the company to which it is made does not release the subscription, unless the consolidation works a material and fundamental alteration in the organization and purpose of the company. *Town of East Lincoln v. Davenport*, 94 U. S. 801; *County of Callaway v. Foster*, 93 U. S. 567; *County of Scotland Co. v. Thomas*, 94 U. S. 682. See, also, *Kenicott v. Supervisors*, 16 Wall. 464; *Smith v. Clark Co.*, 54 Mo. 58; *Branch v. City of Charleston*, 92 U. S. 677; *Bates Co. v. Win-*

ters, 112 U. S. 325, 5 Sup. Ct. 157. It is to be inferred from the act itself, and from facts of which we have judicial knowledge, that the companies which were absorbed by the Houston & Great Northern Railroad Company owned short and insignificant lines, remote from Smith county, the operation of which by the principal company could in no manner have affected detrimentally the interests of the people of the county. If there was any result flowing from the consolidation in question which was calculated to impair in the slightest degree the consideration which may be presumed to have induced the favorable vote upon the proposition, we may safely say that this record does not show it. For the reasons given, we think the consolidation effected by the act last cited did not release the county from its promise to donate the bonds.

The bonds were issued on the 2d day of October, 1873. Two days before their delivery, articles of agreement for the consolidation of the Houston & Great Northern Railroad Company and the International Railroad Company were adopted by each of those corporations, in a meeting of their respective stockholders, and were signed by the president and secretary of each. Now, it is also insisted not only that by this action the contract to deliver the bonds was released, but also that the bonds were void because of the fact that they were issued to a purported corporation, which, by reason of its consolidation with another company, had ceased to exist at the time of their delivery. This contention involves the proposition that the consolidation attempted to be accomplished by the action of the two companies on the 30th day of September was legal. Was it a lawful consolidation? Before two corporations can consolidate, both must have legislative authority for their action. Let us first inquire, did the Houston & Great Northern Railroad Company have the power? It is not claimed that such authority was conferred upon it by its original charter. But it is contended that the power was acquired through the consolidation of the Houston & Great Northern Railroad Company with the Houston Tap & Brazoria Railroad Company and other companies, which was effected by the act of May 8, 1873. The charter of the Houston Tap & Brazoria Company contained the following provision: "And said company is hereby authorized by the vote of a majority of the stockholders, to unite with any other railroad company, converting the stock, assets and property with that of any other company into one railroad company, and said road so united, or any portion of the same, may be managed and controlled by one board of directors, and as one road and under such name and style as may be fixed upon by agreement; provided the name of one of said companies so uniting, shall be retained." Sp. Laws 1856, p. 269. The argument is that this power of consolidation

passed to the Houston & Great Northern Railroad Company by virtue of that provision in the act of May 8, 1873, which reads as follows: "And all rights, privileges and franchises granted or secured in the charter of either or all of the aforesaid corporations, shall inure to and be exercised and enjoyed by the said Houston & Great Northern Railroad Company as fully and to the same extent as they could have been by either of said companies." The power of consolidation may be conceded to be a right or privilege, within the meaning of those words as there employed. But the question arises, did the power of consolidation granted to the Houston Tap & Brazoria Railroad Company continue after it had once been consolidated with another company? Was it intended to confer upon the company a continuing authority to make successive consolidations? A fair construction of the provision heretofore quoted from the company's charter does not admit of an affirmative answer. The authority is "to unite with any other railroad company." This means any one company, and not any one or more companies. Such meaning cannot be given to the language, save by a very liberal construction; and it would require a still more liberal construction to imply an authority to unite first with one company, and then with others, in succession. The rule is that where there is a reasonable doubt as to the extent of the privilege conferred in a charter of a private corporation, it is to be construed most favorably to the public. 4 Thomp. Corp. § 5345. But, even had the language under consideration been more favorable to the construction claimed by the defendant in error in this case, we should gravely doubt whether the legislature had ever intended to give to any company the power, by successive consolidation with other companies, to acquire all the railroads of the state, and to organize them into one vast monopoly of its carrying trade. Our conclusion being that the Houston Tap & Brazoria Railroad Company had the power to make but one consolidation, it follows that when it was consolidated with the Houston & Great Northern Railroad Company its power was exhausted, and that the right did not pass to the consolidated company. The discussion of this branch of the case might appropriately end here; for if the Houston & Great Northern Railroad Company did not have the power to consolidate with the International Company, there was no lawful consolidation when the bonds were issued. But there is still another view of the question, which, under the decisions of this court, leads to the same result. It has been held that the power given to one railroad company to consolidate with any other like company, without naming any, authorizes any other company to consolidate with it. In re Prospect Park & C. I. R. Co., 67 N. Y. 371. But a contrary rule is recognized in

this state. *Railway Co. v. Rushing*, 69 Tex. 306, 6 S. W. 834. See, also, *Railway Co. v. Morris*, 67 Tex. 699, 4 S. W. 156. It does not follow that because the charter of a railway company empowers it, in general language, "to consolidate with any other railroad company," these words should be construed as conferring the power upon any other company to consolidate with it. They reasonably admit of the construction that the company named is empowered only to unite with any other company which has a like power, and it would seem that, under the general rule previously announced, the construction least favorable to the corporation should control. At all events, when we attempt to adopt the construction insisted upon on behalf of Smith county, in respect to the grant in the charter of the Houston Tap & Brazoria Railroad Company, we encounter a grave constitutional difficulty. The contention is that the special charter of the company not only confers power upon the company to consolidate with any other railroad company, but also upon any other such company to consolidate with it. The title of the act (already quoted) is clearly sufficient to embrace the grant of any powers to the company incorporated which were appropriate to its purposes. But is there anything in the title that indicated that it was one of the objects of the act to confer power upon all the railroads of the state to consolidate with that company? That involved a distinct grant and enlargement of power to every other railroad company in the state, and it seems to us that, if such was the intent of the legislature, it comes within the scope of the very evil which was intended to be suppressed by that section of the constitution which required that the object of every act be expressed in its title. *Giddings v. City of San Antonio*, 47 Tex. 548; *Peck v. City of San Antonio*, 51 Tex. 490. Before we dismiss this subject, we may add that the act of the 8th of May, 1873, indicates that neither the managers of the corporations named in the act, nor the legislature which passed it, seemed to have given the charter of the Houston Tap & Brazoria Railroad Company the construction here contended for in behalf of the county; for if the charter gave it the power of successive consolidation, and gave all other companies the power to consolidate with it, no legislation was necessary to accomplish that which the statute in question was evidently intended to effect. But it is also claimed that by virtue of section 14 of its charter the International Railroad Company had an independent power of consolidation with any other company. That section is as follows: "Said company shall have the right to connect itself with any other railroad company within or without the state, and under such terms as it shall deem best, to operate and maintain its said railroad in connection or consolidation with any such

other railroad company." Sp. Laws 1870, p. 109. Does this mean that the company is authorized merely to operate its road in connection with that of another company, under such arrangements for a division of profits as may be agreed upon, or that it may merge its corporate existence with another company, and thus become a new corporation? By a very liberal construction, it may be held to confer the power of corporate consolidation; but here, again, the rule that in case of doubt it must be resolved against the corporation applies. By a liberal and strict construction, the section authorizes merely a traffic consolidation, and under the rule announced that construction should prevail. Upon this branch of the case our conclusion is that no lawful consolidation was effected between the Houston & Great Northern Railroad Company and the International Railroad Company prior to the execution and delivery of the bonds.

But the proposition is also asserted that there was a de facto consolidation, and that the parties are estopped from disputing the fact in a collateral proceeding. It may be gravely doubted whether the de facto consolidation had gone into effect when the bonds were issued. It is true that the agreement between the two companies was not an agreement to consolidate in future, but an agreement of present consolidation. But at the time it was entered into a resolution was passed by the Houston & Great Northern Company that it should not take effect until the directory of the new company was organized. The fact that two days after this the bonds were issued to the Houston & Great Northern Railroad Company would indicate that the consolidation was not then complete. However this may be, we are of opinion that the plaintiff in this case is not estopped to show that the consolidation was ultra vires and hence invalid as to her. If the bonds had in fact been issued to the consolidated company, and if there had been an attempt on part of the original company, with which the county had contracted, to ignore the consolidation, and to claim that the bonds should be issued to it, then the county might well claim an estoppel. But, if there be an estoppel here, it must be upon the other fact. The county has issued the bonds to the original company, and it may be seriously doubted at this late day whether it should be permitted to deny that at the date of the issue the obligee was an existing corporation. See *Bank v. Trimble*, 6 B. Mon. 599; *Receivers of Bank of Circleville v. Renick*, 15 Ohio, 322; *John v. Bank*, 2 Blackf. 367; *Society v. Perry*, 6 N. H. 164. Our conclusion is that the bonds, as issued, were valid obligations against the county for the full amount for which they were executed. This brings us to the question whether the 2 per cent. which was annually collected for a payment upon the principal of the bonds, and which was

should be credited upon the bonds. The eighth, tenth and eleventh sections of the statute under which the bonds were issued provided, in effect, that a sufficient sum should be raised annually, by taxation, to pay for each year the interest, and at least 2 per cent. of the principal, of the bonds; that the money so raised should be paid to the treasurer of the state, and should be paid by him to the parties entitled to receive the same, upon a warrant drawn for that purpose by the comptroller. Any surplus not necessary to pay the interest and the 2 per cent. was to be used in the purchase and cancellation of the bonds. It was made the duty of the comptroller and of the treasurer to see to the proper disbursement of the fund. In pursuance of the act the bonds, which were to run for 20 years, provided for the payment of the interest and of the 2 per cent. of the principal annually. The interest payable was evidenced by coupons. The money which was collected by taxation for the payment of the debt was paid into the state treasury as required by the statute. From the sum so collected and turned into the treasury, the interest was paid, but the 2 per cent. which it was contemplated should be paid to the bondholders was not in fact paid. The eighth section of the act under which the bonds were issued provided that any excess which might remain after the payment of the interest and 2 per cent. of the principal for the current year should be used in the purchase and cancellation of the bonds. But, instead of paying the installment of 2 per cent. to the bondholders, the comptroller treated all that remained after the payment of the interest as such excess, and used it in the purchase of bonds, presumably for cancellation. The purchases began in the year 1880, and were continued during the remainder of the 20 years for which the bonds were to run. Some of the purchases were made at the instance of the county court, and presumably all were made with their concurrence, and, so far as appears by the record, with the acquiescence of the bondholders. In fact, the parties at interest, as well as the comptroller, seem to have treated the 2 per cent. installment as a sinking fund, and not as payment on the bonds. If the payment of the 2 per cent. of the principal had been optional with the county, or with the comptroller, this course would have been proper; and, although the law required the installment to be paid to the bondholders, it worked no injustice to any party, provided the bonds so bought were purchased at par, and the installments which did not in fact come to the holders of the other bonds were not considered discharged. As to the county, it was all one debt, though, by reason of the transfer of the several evidences of parts of the indebtedness to different holders, it became payable in part to different parties. That the use of the money which should have been applied to the payment of the principal in the purchase of bonds at par was all the same to the county,

becomes apparent when we treat the question as if all the obligations had been in the hands of one holder. But we think that it is true, as is contended, that the collection of the tax for the payment of the several installments, and its payment into the state treasury, was, as to the county, a payment of such installment, and a discharge of the obligation of the county pro tanto. The installments so paid became the money of the bondholders, and the statute made the comptroller and treasurer their trustees; and when the one, by drawing his warrant for that money, and the other, by paying it, invested the trust funds in bonds, the bonds, to the extent of the funds so invested, became, in equity, the property of their owners. It is true that a trust of this character is ordinarily created by an investment of the fund by the trustee in property in his own name, and for his own benefit. It is also true that in this case the comptroller did not buy the bonds for his own use, but bought them in the interest of the county, for the purpose of cancellation. But we think the same principle applies. In so far as the 2 per cent. which had been paid into the treasury, and which belonged to the bondholders, was invested in bonds purchased for the purpose of cancellation, the bonds, in proportion to the amount so invested, became the property of the bondholders, and neither the comptroller nor the county had the right to cancel them. The mere fact of the physical destruction of the evidences of debt did not destroy the right of those whose money had been used in the purchase, nor did it affect the debt. To the extent that the money properly under the control of the comptroller for that purpose—that is to say, the excess over a sufficiency to pay the interest and 2 per cent. of the principal—was invested in the bonds which were purchased, they should have received a credit, but they should not have been wholly canceled. Therefore the bondholders, upon the first purchase, became entitled to so much of the bonds so purchased as was paid for with their money, and were entitled to a sufficiency of the tax collected each year thereafter to pay 2 per cent. of the balance due upon the purchased bonds, and their rights were the same upon each successive purchase. To further illustrate the rights of the parties, we will say that, if all the bonds that were bought had been purchased at par, the original principal of each outstanding bond would have represented the exact amount due its holder. But some of the bonds were purchased at a discount, while for others a premium was paid. It results from the view we take of the case that the holders of the outstanding bonds should receive the benefit of the discount upon the bonds purchased below par, and must bear the loss where a premium was paid.

The judgment must be reversed, but we are not inclined to undertake to make a calculation so as to render judgment here. Besides, the pleadings of plaintiff, though setting up

the facts above stated in a general way, do not seem to be drawn with a view to claiming an equity in the purchased bonds. The facts of the investment of plaintiff's money in the purchase of bonds should have been averred in an original petition, and not in a supplemental petition, as was done. Since we hold that the annual payments of the tax money, when sufficient to pay the annual interest and installment, discharged the installment, and the rights of the holders of the securities were transferred to the bonds which were purchased for cancellation, we are of opinion that the statute of limitations does not apply to the case. For the reasons given in the foregoing opinion, the judgment of the district court and that of the court of civil appeals are reversed, and the cause remanded.

LEE v. INTERNATIONAL & G. N. R. CO.
(Supreme Court of Texas. May 25, 1896.)

RAILROAD COMPANIES—INJURIES TO PERSON ON
TRACK—CONTRIBUTORY NEGLIGENCE—SUPREME COURT—JURISDICTION.

1. One who for years was accustomed to walk on the tracks of the defendant railway company through its switchyard, with the knowledge of the company, and knew the position of the frogs and switches, and who was killed, at night, by a train, on account of his foot catching in an unblocked frog, was not, as a matter of law, guilty of contributory negligence.

2. In an action against a railway company for personal injuries, the burden of showing contributory negligence is on defendant.

3. Under Rev. St. 1895, art. 941, authorizing a case to be taken to the supreme court, when reversed and remanded by the court of civil appeals, if the judgment of reversal practically settles the case, an action for personal injuries, in which a judgment for plaintiff was reversed by the court of civil appeals on the ground that, as a matter of law, plaintiff was guilty of contributory negligence, may be taken to the supreme court.

Error to court of civil appeals of First supreme judicial district.

Action by Martha Jane Lee against the International & Great Northern Railroad Company and another. There was a judgment of the court of civil appeals (34 S. W. 160) reversing a judgment for plaintiff against the defendant railroad company, and said plaintiff brings error. Case remanded to district court for trial.

Jones & Garnett, for plaintiff in error. Robert G. Street and John M. Duncan, for defendant in error.

BROWN, J. Martha Jane Lee and her minor daughter, Margie Lee, sued the International & Great Northern Railroad Company, and the Galveston, Houston & Henderson Railroad Company to recover damages for the death of Louis G. Lee, husband of Martha Jane, and father of Margie. Before the trial Margie Lee died, and the suit was prosecuted by Martha Jane Lee. The petition alleged that the deceased, Louis G. Lee,

was killed by the negligence of the employes of the defendants in a switch yard within the corporate limits of the city of Houston. The grounds of negligence alleged were that the switch yard and tracks of the railroad companies at the point in question had been for a long time used by the people as a pass-way in going to and from the said city, which was well known to the defendants, and that they failed to block or otherwise guard the frogs of the switches in the said yard, by reason of which the deceased, in passing over the said yard, and in attempting to get off the track of the railroad to permit the train to pass, got his foot fastened in a frog of a switch in the said track, whereby he was run over by the train of the defendants and killed. It was also alleged that there was an ordinance of the city of Houston forbidding trains upon all railroads to be run within the limits of said city at a greater rate of speed than six miles per hour; that, at the time the deceased was killed, the employes of the defendants were running the train at a speed of from 25 to 30 miles per hour; that, if they had been running the train at a proper speed, they could have discovered the deceased, and stopped the train in time to prevent running over him, but, on account of the speed of the said train, the employes failed to stop the said train, or to discover the deceased upon the track. Upon a trial before a jury, verdict and judgment were rendered for the Galveston, Houston & Henderson Railroad Company against the plaintiff, and in favor of the plaintiff against the International & Great Northern Railroad Company, from which judgment the International & Great Northern Railroad Company appealed to the court of civil appeals. The facts, as found by the court of civil appeals, material to the question to be considered by us, are, in substance, as follows: The International & Great Northern Railroad Company had a switch yard within the limits of the city of Houston, situated on its own property, and in which yard there was a frog, connecting a switch with the track, which was unblocked, and not otherwise protected, so as to prevent the foot of any person stepping therein from becoming fastened. At the point where this frog was located there was no street crossing. Along the side of the track there was a beaten path, where people walked in passing through the yard. Louis G. Lee lived in the suburbs of the city of Houston, and was employed in the said city. He had for seven years, in going to his home from the city, passed through the switch yard of the defendant, and was familiar with the yard, and location of its tracks, switches, and frogs. For several years people who lived in the same direction as Lee from the city had been accustomed, day and night, to pass through the yards on foot, which was known to the defendants. On the night of the accident, about 9:30 o'clock,

the deceased was going home, and passing through the yards, when a freight train of the defendant the International & Great Northern Railroad Company was coming in, and passing through the said yards, within the limits of the city of Houston, running at a speed of about 25 or 30 miles per hour. There is no evidence that there was any light in the yards, except that which was afforded by the headlight of the locomotive pulling a freight train. There was but one eyewitness to the accident, who testified that, by the headlight of the train, he saw Lee at a distance of about 600 feet from him, exerting himself, and standing about the place where his foot was afterwards found fastened in the frog. When the body of Lee was found, it was badly mangled, and one of his feet was found fastened in the frog of the switch. The engineer and fireman did not discover Lee, and never knew that he was run over and killed until they had reached the depot. There was an ordinance of the city of Houston, in force at the time, which prohibited railroad trains to be run within the limits of the city at a speed greater than 6 miles per hour. The frog of the switch in which deceased's foot was found was not blocked, or otherwise protected, to prevent the foot of any person who might step therein from being fastened. The court of civil appeals reversed the judgment of the district court, and remanded the cause, and in the opinion stated the following grounds, which we here copy: "Upon the other charge of negligence, that the servants of appellant, in control of the engine, were running the train at an excessive rate of speed, and but for such excessive speed could have discovered the deceased in time to have prevented the injury, there is sufficient evidence to support the verdict of the jury. It therefore becomes necessary to inquire whether the deceased was guilty of negligence contributing to the accident which resulted in his death. Appellant's servants were bound to use reasonable care to discover the deceased upon its track. The use thereof as a footway was not negligence of itself, and the circumstances under which he went upon it are merely evidence upon the issue of contributory negligence. * * * Giving full effect to the verdict upon the testimony before the jury, the accident resulted from the fact that Lee's foot was caught in the switch; but the evidence shows that it was caught under such circumstances as to imply negligence on his part, and fails to develop facts as to how it got caught, or to show that the deceased was exercising proper care at the time. He was well acquainted with the yard, the location of the switch, and condition of the track. It was dark at the time, and it does not appear that the place was at all lighted. The conclusion necessarily follows that the deceased came to his death by his own negligence." Martha Jane Lee brings the case to this court upon

allegation that the decision of the court of civil appeals practically settles the case.

The court of civil appeals found as a fact, in this case, that the employes of the defendant were guilty of negligence in operating the train which caused the death of Louis G. Lee, and that the railroad company was liable to the plaintiff, unless the deceased was guilty of such negligence, contributing to his death, as would have prevented a recovery by him if alive. In order for the railroad company to relieve itself from liability for the negligence of its servants, the burden was upon it to prove the contributory negligence of the deceased, unless it appeared from the pleading of the plaintiff or the evidence introduced by her. *Railway Co. v. Shieder*, 88 Tex. 152, 30 S. W. 902. That court said: "The accident resulted from the fact that Lee's foot was caught in the switch, but the evidence shows that it was caught under such circumstances as to imply negligence on his part, and fails to develop facts as to how it got caught, or to show that the deceased was in the exercise of due care. He was well acquainted with the yard, the location of the switch, and the condition of the track. It was dark at the time, and it does not appear that the place was at all lighted. The conclusion necessarily follows that the deceased came to his death by his own negligence." We understand, from this language, and the trial court to which the case was remanded would no doubt understand, that the court held that the facts constituted negligence, as a matter of law, which, under the same state of facts, would require the district judge, upon another trial, to charge the jury to return a verdict for the defendant. From the language used by the learned judge who delivered the opinion, the conclusion arrived at must have been largely influenced by the view of the law held by some courts, that it devolved upon the plaintiff in all cases to show that the injured party was, at the time of the injury, in the exercise of due care, and that it rested upon the plaintiff to prove that, in taking the step which put deceased's foot in the frog, he was exercising such care. It is true that the court recites the facts that Lee was well acquainted with the yard, the location of the switch and the frog, and that it was dark at the time; but it had previously, in that opinion, correctly held that these facts did not, of themselves, constitute negligence, but were circumstances to go to the jury to prove negligence on his part. The conclusion that "deceased came to his death by his own negligence" could not "necessarily follow" from these facts, and, they being the only circumstances bearing upon the question, that conclusion must have been based upon a presumption of negligence in the act of stepping into the frog. Suppose that the deceased had not stepped into the frog, but had been struck by the train in some manner not ac-

counted for; what would have been the difference in the law applicable to the case? We can see none; and, by the same reasoning, the court must in that case have held that, while his being on the track, under the circumstances, did not constitute negligence of itself, and as matter of law, yet the fact that he was struck by the train on the track, and no proof being made as to whether or not he was exercising due care at the time, would constitute contributory negligence. Upon no ground can the conclusion of the court be sustained, except that, as matter of law, the burden was upon plaintiff to explain how the very act of stepping occurred; and, in the absence of such proof, negligence will be implied,—that is, presumed. The law presumes that the servants of the defendant were exercising due care in the operation of the train which killed Lee; but the plaintiff proved that they were not, which established her case. Upon the other hand, the law presumes that deceased was in the exercise of due care when he was killed, and it devolved upon the defendant to prove that he was not, in order to relieve itself of the liability fixed upon it by its negligent acts causing the death. 4 Am. & Eng. Enc. Law, p. 91, "Burden of Proof," note 5; *Railway Co. v. Shieder*, 88 Tex. 152, 30 S. W. 902. Negligence, whether of the plaintiff or defendant, is generally a question of fact and becomes a question of law, to be decided by the court, only when the act done is in violation of some law, or when the facts are undisputed and admit of but one inference regarding the care of the party in doing the act in question. In other words, to authorize the court to take the question from the jury, the evidence must be of such character that there is no room for ordinary minds to differ as to the conclusion to be drawn from it. *Railroad Co. v. Kane*, 69 Md. 11, 13 Atl. 387; *Railroad Co. v. Griffith*, 16 Sup. Ct. 105; *Railway Co. v. Ives*, 144 U. S. 417, 12 Sup. Ct. 679; *Railway Co. v. Gasscamp*, 69 Tex. 547, 7 S. W. 227; *Chatham v. Jones*, 69 Tex. 746, 7 S. W. 600. Do the facts of this case fill the requirements of the law, in order to constitute negligence, as matter of law? The man was walking through the switch yard, where he and the others had been accustomed to walk, both at night and in the daytime, for years. He knew the location of the switch and the condition of the yard, and it was dark. Up to the point when he reaches the frog, a jury might find that he was not guilty of negligence, and the court may not take the question from them; but, when he steps into the frog, in a manner unexplained (under the decision of the court of civil appeals), the question ceases to be one of fact, and the jury would not be permitted to find that a man of ordinary prudence, under the same circumstances, would have taken the same step. There is neither proof nor presumption of law that deceased was negligent in taking

that step, and we cannot see how it can be said that he was negligent in the act of stepping into the frog. Being there, he must step somewhere, and, seeing the train coming, he would naturally step off the track, when, it may be, by misfortune, he got his foot fastened in the frog. These facts, to our minds, strongly indicate negligence, but they are not so conclusive as to exclude a difference of opinion among ordinary men as to whether the deceased did what a man of ordinary prudence would have done, at that time and under like circumstances, and they did not warrant the holding, as matter of law,—a necessary conclusion,—that deceased was negligent in taking that step. In so holding, the court of civil appeals was in error.

Article 941, Rev. St. 1895, so far as it relates to the question under consideration, reads thus: "All causes shall be carried up to the supreme court by writs of error upon final judgments, and not on judgments reversing and remanding causes, except in the following cases, to wit: * * * (8) When a judgment of the court of civil appeals practically settles the case, and this fact is shown in the petition for writ of error, and the attorneys for petitioner shall state that the decision of the court of civil appeals practically settles the case, in which case, if the supreme court affirms the decision of the court of civil appeals, it shall also render final judgment accordingly." To give this court jurisdiction, it must appear, from the petition, that the decision complained of practically settles the case, and it must also be so stated. The court will not grant the writ, on such application, merely upon the statement of the fact; but the facts stated must sustain the statement. It will not grant the writ without the distinct statement by the attorney in the petition, because the object of the legislature in requiring that statement to be made was that the applicant should thereby signify his consent for this court to enter final judgment in the event it sustained the court of civil appeals. The language, "practically settles the case," as used in the law, means that the probable effect of the decision of the court of civil appeals will be to cause a judgment to be rendered upon another trial in the district court against the applicant for the writ. This effect could only result from a decision upon a question of law, because the conclusions of the court of civil appeals upon matters of fact are not binding upon the trial court or jury at a second trial. The propositions of law laid down by the appellate court are binding upon and must be followed by the trial court, and it is from the enunciation of legal conclusions adverse to the asserted rights of the applicant that the decision has the effect to settle his case, and furnish a ground for applying for a writ of error under the law quoted. So long as the decision leaves the matter in shape that the question

at issue may be properly submitted to the jury, the case is not settled; for, upon every issue submitted, the jury have the right to draw their own conclusions, although differing from those of the court. If this is not permitted under the condition of the evidence, the issue need not be submitted, but the judge should instruct a verdict upon that issue. It is not intended to say that a jury is entirely beyond the control of the court as to the facts, for this is not true; but that control can be exercised only in setting aside a verdict by the trial court or court of civil appeals. In arriving at their verdict, the jury acts independently of the court, so far as the weight of the evidence is concerned. This court has no power to try questions of fact, but must take the conclusions of the court of civil appeals as conclusive, when there is any evidence to support them. Consequently, upon every application, the conclusions of fact will be treated as correct, when it is not asserted that they are without any evidence to support them, or if it be found that there is such evidence; and, when this court has jurisdiction of a case under this law, if the law, applied to the facts as found by the court of civil appeals, sustains its decision, judgment will be here rendered against the applicant. To illustrate our views upon this subject, we will state this case as presenting a question of fact. Suppose the court of civil appeals had held, as it might have done, that the verdict of the jury in this case upon the issue of contributory negligence was against the preponderance of the evidence, and for that reason had reversed the judgment,—that is, if they had held that the jury ought to have found that the deceased was guilty of contributory negligence, notwithstanding there was evidence which would permit them to find otherwise; this, being a finding of fact, would not be binding upon the jury, or the judge of the trial court, at a second trial, and could not practically settle the case. Hence this court would not have jurisdiction. But, the court having held that the circumstances in evidence constituted contributory negligence on the part of the deceased, as a matter of law, the trial court could not, upon the same evidence, again submit that question to the jury, because it, being a question of law, must be decided by the judge, who, upon the same facts, in obedience to the decision of the court of civil appeals, must have instructed a verdict for the defendant. This practically settled the case, which gives this court jurisdiction. We cannot reverse the judgment of the court of civil appeals, for, although error was committed in announcing the legal conclusion upon the evidence, that court had the power to reverse for the reason that the verdict was against the weight of the evidence. It is true that the statute says that, when the decision of the court of civil appeals is sustained, this court must enter judgment accordingly; but that

means that in such case the court must enter judgment against the applicant if the facts found justify it. The case will be remanded to the district court for trial in accordance herewith.

FOSTER v. JOHNSON.

(Supreme Court of Texas. June 4, 1896.)

ESTOPPEL BY DEED—AFTER-ACQUIRED TAX TITLE—ADVERSE POSSESSION—TENANTS IN COMMON—PARTITION—SUFFICIENCY OF EVIDENCE—JUDGMENT—EFFECT.

1. A grantor in a warranty deed may acquire a tax title to the land conveyed under a sale for taxes accruing after he conveys. 34 S. W. 821, reversed.

2. In an action by an executor of a deceased wife, who devised all her property to her son, against the surviving husband, to determine the rights of the estate in a certain lot, it was adjudged that it was community property, but, as it was occupied by the husband as a homestead, plaintiff was not entitled to recover it so long as it was so occupied. *Held*, that the husband's possession after the judgment was not under the judgment, but was as co-tenant of the son, and inured to the son's benefit, so as to ripen title in him under the statute of limitations, under Const. art. 18, § 52, providing that, on the death of a spouse, the homestead shall descend and vest as other real estate of deceased, but shall not be partitioned during the surviving spouse's life, or so long as the survivor may elect to occupy the same as a homestead. 34 S. W. 821, reversed.

3. In partition, plaintiff showed title by devise from his deceased mother, who, with her husband, was at her death, and for a long time prior thereto, in peaceable possession of the land as a homestead; and it appeared that the husband continued in possession after her death under the same title. *Held*, that a prima facie right to recover the mother's interest was thereby established, and, unless defendant's proof should connect him with the sovereignty of the soil, he was not entitled to recover.

4. In trespass to try title against a husband and wife to recover a lot occupied by defendants as a homestead, and which was community property, it appeared that they acquired it from plaintiff's grantor, who obtained a tax title to it after he conveyed to plaintiff; that, pending the action, the wife died testate, and the lot was sold on execution against plaintiff to H., who quitclaimed three-eighths interest to J.; that H. and J. intervened, and H. deeded to J. an additional one-eighth of the lot; that the wife's devisee or heirs were not made parties; and that defendants obtained judgment that plaintiff and interveners take nothing, that defendants recover the lot, and that all right, title, and interest of plaintiff and interveners be divested out of them, and each of them, and vested in defendants. *Held*, that if H. and J. had title superior to defendant and the wife's devisee, prior to such judgment, the latter extinguished such title, and a subsequent conveyance by defendant to J. passed no title as against the devisee.

Error to court of civil appeals of second supreme judicial district.

Action by George Foster against Robert G. Johnson. There was a judgment of the court of civil appeals (34 S. W. 821) reversing a judgment in favor of plaintiff, and plaintiff brings error. Reversed.

Hogsett & Orrick, for plaintiff in error. Ross & Chapman, for defendant in error.

BROWN, J. George Foster sued Robert G. Johnson in the district court of Tarrant county for partition, and to establish his title to an undivided half interest in the lot of land described in the petition; also, to recover of Johnson a part of the rents derived from the property. The defendant, Johnson, pleaded not guilty to the action. The facts necessary to be stated are as follows: The survey in which the lot in question is included was patented in 1868 to the heirs of John Childress, deceased. E. M. Daggett, by warranty deed, conveyed the lot to Edward W. Brown, October 28, 1872. On April 1, 1878, Brown conveyed the lot by warranty deed to H. B. Stone. On May 10, 1878, the lot was sold for the state and county taxes for the year 1877; and on April 6th of the same year it was sold for the city taxes of the city of Ft. Worth, at each of which sales E. M. Daggett became the purchaser. November 5, 1881, Daggett executed a quitclaim deed to Fannie W. House, conveying to her whatever interest he had purchased at the tax sale as aforesaid. Fannie W. House was at the time the wife of J. W. House, and the mother of George W. Foster who was the child of a former marriage. This last deed was recorded March 6, 1882. Upon getting the deed from Daggett, Fannie W. and J. W. House moved upon the lot, and improved and occupied it as a homestead, and were living there when Fannie W. died, October 27, 1882; and, after her death, J. W. House continued to live upon the lot as his homestead, until he sold to Robert G. Johnson, as hereafter stated. Fannie W. House made a will, by which she devised all of her property to her son, George Foster, which will was duly probated; H. C. Powell being appointed executor of the will, who duly qualified according to law, and brought suit against J. W. House for the lot and buildings thereon. On May 3, 1883, final judgment was rendered in that suit, which recited the fact that the lot in question was community property of Fannie W. House and J. W. House, and that the fund, amounting to \$800, which went into the construction of the building, was community property, except \$140, which was the separate property of Fannie W. House. The judgment further recites that it appears that Fannie W. House and J. W. House were husband and wife, and occupied the whole of the property as a homestead at the time of her death; that J. W. House has since occupied the house as a homestead; and it was decreed that, so long as he so occupied it, the plaintiff should not recover possession. George Foster was a minor at the time, and did not live with his stepfather, but left the state soon after the death of his mother, returning occasionally on a visit to Texas. In April, 1882, H. B. Stone brought suit against Fannie W. House and J. W. House in trespass to try title to recover the lot in question, in which suit judgment was

rendered for the plaintiff September 4, 1882, from which judgment the defendants appealed to the supreme court. December 15, 1885, the judgment of the district court in that case was reversed, and the cause remanded; the court holding that the tax title obtained at the sale at which Daggett bought was invalid, but that there was error committed by the trial court upon issue of improvements and good faith. 64 Tex. 678. The cost of the appeal was adjudged against H. B. Stone, and an execution issued from that court, and was levied upon the lot as the property of Stone, October 4, 1886, under which levy the lot was sold by the sheriff in November, 1886. Wallace Hendricks purchased it for the sum of \$121, the sheriff making a deed to Hendricks. November 10, 1886, Hendricks conveyed by warranty deed to Robert G. Johnson three-eighths of the lot in controversy, and on the 11th of May, 1887, conveyed an additional one-eighth of the same lot to the said Johnson, which deeds were duly recorded. On January 2, 1891, Hendricks conveyed to Johnson, by quitclaim deed, the entire lot. Hendricks and Johnson, prior to the last sale made by Hendricks to Johnson, intervened in the case of Stone against House. Fannie House being then dead, they sought to make her heirs parties to the suit, but this was never done; and on the 27th day of January, 1890, the suit was dismissed as to the heirs of Fannie W. House, deceased. The case was then tried before a jury, and a verdict and judgment rendered in favor of the defendant J. W. House, by which it was decreed "that the plaintiff and the interveners take nothing of the defendant by reason hereof, and that the defendant J. W. House do have and recover of and from the said plaintiff, H. B. Stone, and said interveners, R. G. Johnson and Wallace Hendricks, the lands and premises in controversy herein described (describing it), and that all the right, title, and interest of the said H. B. Stone and said interveners, R. G. Johnson and Wallace Hendricks, of, in, and to the above-described premises, be, and the same is hereby, divested out of them, each of them, and vested in the defendant J. W. House, for which he may have his writ of restitution." This judgment was, upon appeal to the supreme court, affirmed. 14 S. W. 570. On December 22, 1890, J. W. House and his second wife, E. J. House, who were still occupying the lot as a homestead, sold and conveyed it to Robert G. Johnson, defendant in this suit, by deed containing a clause of general warranty, which deed conveyed to Robert G. Johnson all the right, title, and interest of the grantors in the lot in question. The deed was duly acknowledged and accompanied with a memorandum in writing reciting that the deed and two notes given for a part of the consideration thereof should be deposited with James C. Scott in Ft. Worth, to be held for both sides until

House should get rid of a suit pending on the docket of the district court of Tarrant county, Tex., of L. Dana v. J. W. House, wherein the title to the lot was called in question. If House prevailed in the suit, the two notes were to be delivered to him, and the deed to Johnson. It is not shown what became of the suit of Dana v. House, but House and his wife continued to occupy the lot as a homestead under the agreement stated, until August 1, 1892, when the deed was delivered and possession given by House to Johnson. The defendant Johnson had notice of the suit of Powell, Executor, v. J. W. House, and of the judgment therein, at the time he purchased from House; and he was informed by the latter that he (House) would not undertake to sell any interest owned by George Foster. Johnson, however, did not recognize that Foster had any interest in the property. He bought intending to acquire possession of the property, and to assert his title under Stone and Hendricks against any claim of Foster. The case was tried before the court, without a jury, which rendered judgment against Johnson for one-half of the land and improvements, and decreed partition thereof, and also for \$128.75, as rents due from Johnson to Foster. Johnson carried the case to the court of civil appeals by writ of error, which last-named court reversed the judgment of the district court, and rendered judgment in favor of Robert G. Johnson.

The court of civil appeals held in this case that the purchase by Daggett at the tax sales inured to the benefit of his vendee under a warranty deed, one Brown, and through the warranty of Brown to the benefit of Stone, as well as to the benefit also of Hendricks and Johnson, who claimed under the sheriff's sale by virtue of execution against Stone. The tax sales at which Daggett bought were made for taxes accruing upon the land after he sold to Brown; and the purchase made by Daggett at such sale did not inure to the benefit of either Brown or Stone, for the reason that his warranty was not broken by the fact that the land was incumbered for such taxes. It is not necessary for us to elaborate this point, but it is sufficient to say that we do not approve of the opinion of the court upon that question. If the decision of the court of civil appeals upon that point were correct, it would be unnecessary to proceed any further in the investigation of this case; but we hold that the title of Johnson cannot be sustained upon that view of the case, and will inquire as to whether or not the judgment of the court of civil appeals can be sustained upon other grounds which have been suggested by the defendant in error in this court.

J. W. House and his wife, Fannie House, were in the actual possession of the land in controversy, claiming it as community property; and after the death of Fannie House,

in a suit by her executor against J. W. House, the judgment of the district court established the fact that the property was the community property of Fannie House and J. W. House, from which it results that one-half interest in the lot vested in Foster by virtue of the will of Fannie House. Upon the death of Fannie House, J. W. House and George Foster became tenants in common of the lot in controversy. *Akin v. Jefferson*, 65 Tex. 142. Article 16, § 52, of the constitution of this state, provides as follows: "On the death of the husband or wife, or both, the homestead shall descend and vest in like manner as other real estate of the deceased, and shall be governed by the same laws of descent and distribution, but it shall not be partitioned among the heirs of the deceased during the lifetime of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having jurisdiction, to use and occupy the same." Under this provision of the constitution, J. W. House, as the surviving husband of Fannie House, had the right to occupy and use the premises as a homestead, and Foster could not claim partition of it so long as J. W. House continued to occupy and use it for such purposes; but this did not affect the character of the title under which House held the property. His occupancy and possession of the property was as tenant in common with Foster, and inured to the benefit of Foster as well as himself. *Knolls v. Barnhart*, 71 N. Y. 474. In the case cited the widow of the former owner of the property occupied the premises under her right as dowress, and as the "guardian in socage" of the minor children, which the court held to be in her the possession of a tenant in common with all of the heirs. Under the constitution, the right of possession of the property in controversy as a homestead might be exclusive in House, or it might be that Foster, then a minor, would have had a right of joint possession under certain circumstances; but whether the right of possession was, under the existing circumstances, exclusive or not, it was, nevertheless, the possession of a tenant in common. The homestead right under the constitution was not an estate in the land, but simply a right to use and occupy it for a specified purpose, upon the contingency that it would cease whenever it was not occupied and used for that purpose. It follows, then, that the rights of Foster in the lot as a tenant in common were not affected by the exclusive possession of House, but that whatever rights existed in his favor as a tenant in common, notwithstanding that possession, would be enforced against House by the court.

Foster's suit was based upon the prior possession of his mother and her husband, J.

W. House, during the lifetime of the mother and the continued possession by J. W. House after her death as tenant in common with the plaintiff. The defendant Johnson introduced in evidence the tax deeds to Daggett, a deed from Daggett to Fannie W. House, as well as the chain of title from Daggett to Stone, the evidence showing a sale by the sheriff to Hendricks, and from Hendricks to Johnson; also, a judgment rendered by the district court of Tarrant county in the suit of *Stone v. House*, in which Hendricks and Johnson had intervened, by which judgment the title of the plaintiff, Stone, and the interveners, was divested out of them, and vested in House; also, a deed from J. W. House and his second wife to Johnson, for the lot in controversy. It is unnecessary for us to determine whether, upon the findings of the court of civil appeals, the deed from J. W. House and his second wife to Johnson conveyed the entire lot, or only J. W. House's interest in it, because it is not disputed that Johnson knew of Foster's right and claim in the lot, and, this being true, House could not have conveyed to Johnson a greater interest than he had, if he had undertaken to do so, and the result must be the same whether he so undertook or not.

It having been shown that the mother of Foster, by virtue of whose will he claimed, and J. W. House, were in the actual peaceable possession of the lot at the time of the mother's death, and that House continued in the possession of the same under and by virtue of the same title and claim, the right of Foster to recover his mother's interest in the land was established *prima facie*, which devolved the burden upon the defendant, Johnson, to show that the title which the law presumed to be in Foster was not a good and sufficient title upon which he could recover. *House v. Reavis* (decided at this term) 35 S. W. 1063, and authorities there cited; *Duren v. Strong*, 53 Tex. 379. In the case of *Duren v. Strong*, cited above, Mrs. Strong had possession of the land by a tenant. Duren, claiming title to the land, succeeded in getting the tenant of Mrs. Strong to attorn to him. Mrs. Strong sued Duren and the tenant for the land, when Duren undertook to establish title to the land in himself, but failed to connect with the sovereignty of the soil, and the supreme court held that the plaintiff was entitled to recover upon her prior possession. Judge Gould, delivering the opinion of the court, said: "In our opinion, the judgment rendered may be supported on the ground of the prior possession of the appellee, whether that possession was under a deed duly registered, within the meaning of the statute of limitations of five years, or not. The efforts of defendants to show color of title in themselves failed, by reason of the failure to identify the land conveyed in the title bond from Thomas Morrow to J. R. Melton to the land in controversy. Plaintiff having clearly es-

established a prior peaceable possession never abandoned, the defendants having failed to show any right to disturb that possession, the judgment in favor of the plaintiff should stand."

It is claimed by Johnson that he had, as against Foster, a superior title before his purchase from House, and that his purchase from House, the co-tenant of Foster, did not charge him as trustee for Foster's benefit, so far as his pre-existing title was concerned. We think that this is correct, but the question recurs, did he show such superior title by the evidence introduced? If Johnson, Hendricks, and Stone had a superior title to that of House and Foster, the effect of the judgment rendered in the case of Stone against House (Hendricks and Johnson being interveners) was to divest all title out of the plaintiff and the interveners, and to vest it in J. W. House. The court must presume that the judgment giving this affirmative relief to House was based upon a cross bill justifying such judgment, and we think that the natural presumption would be that in that suit House established the superiority of the title under which he claimed, and by reason of that fact procured the judgment rendered in that cause. The result would be that the judgment would operate in favor of Foster. Even if a new title were acquired by that judgment, it would vest in House, as a tenant in common of Foster, and inure to the benefit of Foster as well as House. *Knolls v. Barnhart*, supra; *Roberts v. Thorn*, 25 Tex. 735; *Walker v. Read*, 59 Tex. 190. In other words, after the judgment was rendered, House was still the tenant in common of Foster as to the title that he then had, with the right to call upon Foster for contribution to discharge any costs of that title to him. But this right of House against Foster for contribution could not affect the question of title as between Foster and Johnson. If, therefore, it be conceded that Johnson and Hendricks had the title superior to that of House and Foster before the judgment was rendered in that cause, that title was extinguished in them by the judgment, and vested in House and Foster, and by the conveyance from House to Johnson no greater interest could pass than House had in himself. He could not convey Foster's interest in the property in any event. But, if we disregard the judgment rendered in the case of Stone v. House, the evidence introduced by Johnson does not establish a title in him superior to that of Foster in this case. As before stated, the law presumes that Fannie W. House and J. W. House, being in the actual peaceable and continuous possession of the land, owned the same in fee simple, and that presumption prevailed also in favor of Foster, claiming under Mrs. House. *Caplen v. Drew*, 54 Tex. 496. In the case last cited, the plaintiff claimed under one Hollis, and the evidence showed that Hollis had been

in the prior possession of the land. A judgment was rendered against Hollis; the land sold, and a party purchased it, under whom the plaintiff claimed. The court said: "If, as a matter of fact, Hollis was in possession of the lot at the rendition of that judgment, then the lien attached to that possession, and the rights attending the same and resulting therefrom passed, by the operation of the lien, to and vested in the purchaser at the marshal's sale. Such possession would be evidence of title in Hollis and as the purchaser connects himself directly with that possession by showing a judgment against Hollis, an execution, return, and marshal's deed, this would constitute sufficient title in the purchaser, in the absence of other evidence, to entitle him to recover." Johnson's evidence failed to connect him with the sovereignty of the soil, and for that reason failed to show that he had a superior title to that of Foster. If we view the evidence in the light of showing an outstanding title to defeat the right of Foster, it falls short of the requirements of the law, because it does not show that any other person has a subsisting title under the patent to the heirs of Childress. The proof made that a patent had been issued to the heirs of Childress was not sufficient to establish that Foster and House did not have that title. *House v. Reavis* (decided at this term) 35 S. W. 1063; *Rice v. Railway Co.*, 87 Tex. 90, 26 S. W. 1047. We have discussed this question so thoroughly in the case of *House v. Reavis*, before cited, that we deem it unnecessary to repeat either the reasoning or the authorities used in that case. Foster had a perfect right, under the evidence as against House, to have a partition. Johnson, by his purchase, was placed simply in the shoes of House, and against him Foster had the same right. Johnson having failed either to establish a superior title in himself or an outstanding title in another, waiving the question as to whether he would have been permitted to do so as against his tenant in common, the plaintiff in this case showed a right to recover of Johnson, and establish his right to the land as well as to a partition thereof.

It was contended upon the hearing before this court by counsel for Foster that the petition in this case constituted simply and purely a suit for partition; while Johnson claimed that it was an action of trespass to try title, and that the plea of not guilty was a sufficient answer thereto. In the view that we have taken of the case, we have treated it as if it were an action of trespass to try title, being the most favorable view to the defendant in error. We do not, however, find it necessary to decide upon the question presented, as the result would in either case be that the plaintiff is entitled to recover one-half of the property in question.

The court of civil appeals erred in revers-

ing the judgment of the district court, and rendering a judgment in favor of Johnson for the property in controversy, for which error the judgment of the said court of civil appeals is reversed, and the judgment of the district court is affirmed; and it is ordered that the plaintiff in error, Foster, recover of the defendant in error, Johnson, all costs of this court and of the court of civil appeals.

**WELCH et al. v. PHELPS & BIGELOW
WINDMILL CO.**

(Supreme Court of Texas. June 8, 1896.)

**CONTRACTS—COMBINATION IN RESTRAINT OF TRADE
—CONTRACT OF AGENCY.**

A contract by which a manufacturer of windmills granted exclusive territory for their sale to a firm, the windmills, after shipment, to remain the property of the maker until sold by the consignees, then to be paid for at a fixed price, was one of agency, and did not create a trust or conspiracy against trade, as defined and prohibited by Act March 30, 1889, p. 141, though it fixed the prices at which the windmills were to be sold, and bound the consignees to handle no other kind; the statute having no application to contracts between principal and agent.

Certified question from court of civil appeals of Second supreme judicial district.

Holland & Holland, for appellants. J. A. Lucky, for appellee.

DENMAN, J. The Phelps & Bigelow Windmill Company, of Kansas City, Mo., party of the first part, on the 22d day of May, 1890, entered into a contract with Welch and others, partners under the style of the Claude Lumber Company, of Claude, Tex., parties of the second part, wherein first party agreed: (1) To give to the second party the exclusive right to sell, during the year 1890, a certain patent of windmill manufactured by first party in certain named counties, but in no other. (2) "To ship to party of second part, from time to time, such windmills as it may deem necessary for the proper conduct of the business herein undertaken by parties of second part." And second party agreed: (1) To thoroughly and fairly canvass said territory; to make all sales for cash, or so that the cash would at least be paid when the windmill was erected; to make weekly returns, by mail, to party of first part, of all sales, with names and addresses of purchasers, together with prices,—no sale to be made below the price list attached to the contract, marked "net price," nor above the price list attached, marked "selling price"; settlements to be made between the parties and "remittances made to party of first part, as called for by said settlements, at least once per month, the basis of such settlements to be that party of first part is to receive for all goods sold the net price above mentioned, and all moneys beyond such amount, and not in excess of the selling price, are to belong to party of

second part." (2) At their own cost to do all necessary work in erecting windmills sold, to do the same in a workmanlike manner, and make all needed repairs, in order to create public satisfaction and demand for such goods, and not to directly or indirectly be engaged in the sale of or keep in stock any other windmill goods during the existence of the contract. (3) To save party of first part harmless from all losses by way of suits and litigation of any kind emanating from their trade and business, and also as to freight charges on goods both ways between Kansas City, Mo., and Claude, Tex., including expenses that may be incurred to party of first part in looking up and gathering in its property that may be shipped to the parties of the second part under the contract, in the event of the termination of the contract and their neglect to properly perform said work; and that they will, at their own expense, reship to party of first part all windmill goods that may be on hand unsold at the termination of the contract, in good order as received, or remit cash therefor according to the net price above mentioned. It was further stipulated in said contract that "the title and ownership of the windmill goods so to be shipped to the parties of second part shall still remain vested in the party of first part after such shipments, regardless of change of possession thereof, up to the time that same shall be sold to bona fide purchasers for purposes of erection upon their property within said territory, and that party of first part had the right to terminate and revoke the contract at any time upon failure of the parties of the second part to faithfully comply with its terms or any one of them. The above is, in brief, we believe, a substantial statement of the long contract included in the certificate. The question certified by the court of civil appeals is whether said contract was "in violation of the act of March 30, 1889, defining trusts and conspiracies against trade."

Under the authority of *Manufacturing Co. v. Peak* (Tex. Sup.) 34 S. W. 102, said contract was one of consignment, and not one of sale,—did not pass title to the windmills to the second party, but created the relation of principal and agent between the parties thereto. In order to hold a contract as creating a "trust," within the terms of Act 1889, p. 141, there must have been formed thereby "a combination of capital, skill, or acts by two or more persons," etc. The purpose of the statute was to prohibit "two or more persons," etc., from uniting or associating their otherwise independent, separate, and possibly competing "capital, skill, or acts" for one or more of the five purposes therein specified. Therefore, in *Houck v. Association*, 88 Tex. 184, 27 S. W. 696, it was held a violation of the statute for independent dealers in beer to combine to control the market; and in *Coal Co. v. Lawson* (Tex. Sup.) 34 S. W. 919, it was held a violation of the statute for a coal company and an individual to enter into an agree-

ment binding each to a series of acts intended to coerce the people, especially the miners of Thurber, to spend their earnings for liquor at a certain saloon, and preclude anyone else selling liquor to them. It was not the purpose of the statute, however, to interpose any obstacle to a principal's contracting with his agent with reference either to the terms or the subject-matter of the agency. In the case before us it was entirely within the discretion of the principal, before as well as after the contract was signed, as to how many of its windmills it would send into the named territory, as well as to decline to sell for less than the net price, or permit its agent to sell for others. It controlled them all, and therefore there was no union or association of otherwise independent, separate, and possibly competing "capital, skill, or acts," and hence no combination. We therefore answer the question certified in the negative. If the title to the windmills had passed by the contract and shipment, thus establishing the relation of vendor and vendee, instead of principal and agent, between the parties thereto, a different result might have been reached, as intimated in reference to the contract between plaintiff and defendant in *Houck v. Association*, 88 Tex. 190, 27 S. W. 696.

POWELL v. TEXAS & N. O. R. CO.

(Supreme Court of Texas. June 8, 1896.)

SUPREME COURT—JURISDICTION—FINAL JUDGMENT.

Plaintiff brought action against a railway company for wrongful ejection from a train; alleging that she tendered a ticket, which was refused, and, further, that she tendered cash fare to a point beyond where she was ejected, and that her fare was refused. Upon judgment for plaintiff, defendant appealed to the court of civil appeals, which considered only the right of plaintiff to ride upon her ticket, and reversed the judgment of the trial court upon the ground that by its terms the ticket had expired before tender for passage. *Held* not a judgment practically settling the case, which would give the supreme court jurisdiction to review it on writ of error, the question of plaintiff's right to ride under the tender of cash fare being left undecided.

Error to court of civil appeals of First supreme judicial district.

Action by Eliza D. Powell against the Texas & New Orleans Railroad Company for wrongful ejection from a train. There was a judgment for plaintiff, which was reversed by the court of civil appeals (35 S. W. 841), and plaintiff applies for writ of error. Application dismissed.

J. F. Lanier, C. B. Martin, and Douglas & Jackson, for plaintiff in error. Baker, Botts, Baker & Lovett and S. R. Perryman, for defendant in error.

DENMAN, J. Plaintiff in error sued defendant in error, alleging in her petition that on the 24th day of May, 1894, she purchased a ticket over defendant's road, whereby it

agreed to transport her from Houston to New Orleans; that on the 18th day of July, 1894, having boarded defendant's train at Houston for the purpose of going to New Orleans, she tendered to the conductor such ticket, for the purpose of securing her said passage on said train, whereupon said conductor refused to receive same, and thereupon "she offered to the conductor in charge of said train, whose duty it was to receive fare from said passengers, and take up the tickets, the sum of \$3.85, in payment of her passage into the state of Louisiana, being the regular rate of fare on line of defendant's railroad and the connecting lines to said point"; "that defendant company, knowingly, willfully, and wantonly, acting by and through said servants and agents as before alleged, refused to take the ticket in payment of the fare to New Orleans, or any other point on defendant's railroad or any connecting line therewith, and refused to receive or take said money offered in payment of her fare as hereinbefore alleged, and refused, willfully, wantonly, and knowingly, to permit plaintiff to ride on its cars," but, in the nighttime, willfully, wantonly, maliciously, and knowingly, forcibly ejected her from the train, in the town of Liberty, wherefor she was greatly damaged, for which she prayed for judgment and general relief. Defendant, among other things, pleaded that the ticket which plaintiff tendered the conductor was only good if used on a continuous trip beginning on the day of purchase, and that it was so understood between the defendant and plaintiff, the language of the ticket being set out in such answer. On exceptions made by plaintiff to the answer alleging that the ticket was limited to use beginning on the day of purchase, the trial court, construing the ticket, held that it was unlimited, and sustained the exception to said portion of the answer. On the trial before a jury the plaintiff recovered judgment, from which the defendant appealed to the court of civil appeals, which court, construing the language of said ticket, held it was limited to one continuous passage, beginning on the day of its purchase, and that it did not authorize plaintiff to ride upon the train of defendant at the time she was ejected, and reversed and remanded the cause without passing upon any other questions in the case. 35 S. W. 841. From this judgment of the court of civil appeals the plaintiff in error has brought the case to this court by writ of error seeking to have this court revise the ruling of the court of civil appeals in reversing and remanding the cause.

Plaintiff in error seeks to give this court jurisdiction by alleging "that the judgment and decision of the court of civil appeals for the First supreme judicial district of Texas in this cause, wherein and whereby the judgment of the district court of Liberty county, Texas, is reversed, practically settles the case." One of the instances in which this court has jurisdiction of a reversed and remanded cause is "when the judgment of the

court of civil appeals reversing a judgment practically settles the case, and this fact is shown in petition for writ of error, and the attorneys for petitioners shall state that the decision of the court of civil appeals practically settles the case." It will be observed that the portion of the statute above quoted prescribes two conditions as essential to the jurisdiction of this court, to wit: (1) That the petition for writ of error must show that the judgment of the court of civil appeals practically settles the case; and (2) that the attorneys for petitioners shall so state. Under the express terms of the statute, one of these conditions is just as essential as the other. The present application shows the existence of the second condition, but not the first; for it is clear that the ruling of the court of civil appeals as to the validity of the ticket at the time it was attempted to be used did not finally dispose of that part of plaintiff's petition which alleged that, being upon the train, and before she was ejected, she tendered to the conductor the regular fare to the state line. The most that can be said of the finality of the decision of the court of civil appeals is that it disposes of the ticket as evidence of plaintiff's right to continue upon the car, and leaves the case upon her allegation of being wrongfully ejected after having tendered the lawful fare to a point beyond the point of ejection. If this theory of plaintiff's case be true, and there is evidence in the record tending to support it, we do not see that the ruling of the court of civil appeals would at all affect her right to recover, unless it would deprive her of the right to recover for the value of the ticket from the place of ejection to New Orleans. We do not express any opinion upon the correctness of the ruling of the court of civil appeals, nor upon any other question in this case, except to hold that the decision of the court of civil appeals does not practically settle the entire case, and therefore this court has no jurisdiction, for which reason the application for writ of error will be dismissed. *Powers v. Schmidt*, 87 Tex. 385, 28 S. W. 1055.

SULLIVAN v. HARTFORD FIRE INS. CO.

(Supreme Court of Texas. June 8, 1896.)

FIRE INSURANCE—CONSTRUCTION OF CONTRACT—SEPARABLE POLICY—FALSE AFFIDAVIT OF LOSS—JURISDICTION OF SUPREME COURT—EFFECT OF DECISIONS.

1. Under Rev. St. 1895, art. 3089, providing that a fire insurance policy, in case of total loss, shall be deemed to be a liquidated demand for the full amount of the policy, but that this shall not apply in the case of personal property, a policy insuring plaintiff's dwelling house and household furniture in separate amounts is divisible; and a false affidavit, made by the plaintiff, as to the value of the personal property destroyed, will not avoid the entire policy, under a clause providing that the policy shall

be void in the case of false swearing by the insured touching the subject of insurance, either before or after loss, but only such portion of the policy as relates to the personal property.

2. The supreme court will not entertain jurisdiction on writ of error on the ground of conflict between the case sought to be reviewed and a prior decision of the court of civil appeals, where the adjudicated case has been subsequently overruled.

Error to court of civil appeals of Fifth supreme judicial district.

Action by A. A. Sullivan against the Hartford Fire Insurance Company on a fire policy. There was a judgment for defendant, which was reversed by the court of civil appeals (34 S. W. 999), and the defendant brings error. Writ dismissed.

Morgan & Thompson, for plaintiff in error. John Vesey and Wm. H. Allen, for defendant in error.

BROWN, J. The Hartford Fire Insurance Company issued to Sullivan a policy on his dwelling house and household and kitchen furniture in the sum of \$1,400, \$900 being placed on the house and \$500 on the furniture. The following are the findings of fact in the court of civil appeals pertinent to the issues presented in this court: "The policy provides that the entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof, or if the interest of the insured in the property be not fully stated herein, or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss. "A fire occurred, destroying the property, and proofs of loss were prepared under the terms of the policy, as required therein, and were presented to the insurance company. The proofs of loss prepared by plaintiff and presented to the company, sworn to before H. K. Hart, notary public, claimed the value of the house to be \$1,761.65, value of the personal property, \$529.85, the loss or damage to the personal property, \$378.00." After the jury had retired to consider their verdict under the instructions of the court, they came into court, and propounded the following question in writing: "If the jury believes that the plaintiff's loss on household furniture and kitchen goods is less than reported by him, and if they further believe that said representation was made for the purpose of fraud, are they instructed to find the entire policy void or not?" to which the court replied in writing as follows: "Gentlemen of the Jury: In answer to the question propounded to the court, the jury are instructed, if they believe from the evidence that the plaintiff knowingly and falsely and fraudulently claimed a greater amount than was due him for the destruction and damage to the household and kitchen furniture in his statement to the defendant of the loss sustained by him, and that he made oath

to the same, then in law the policy of insurance would become void, and the jury should find for the defendant as to all the insurance." The jury returned a verdict for the defendant, upon which verdict the district court entered judgment in accordance therewith, and upon appeal the court of civil appeals reversed the judgment of the district court, and remanded the case (34 S. W. 999), upon the ground that the policy of insurance was divisible, and that, although there may have been fraud and false swearing on the part of the insured as to the value of the household goods, this would not affect the right of recovery as to the dwelling house. The application for writ of error is based on the alleged conflict between this ruling of the court of civil appeals and the cases of *Insurance Co. v. Ward* (Tex. Civ. App.) 26 S. W. 764; *Insurance Co. v. Smith* (Tex. Civ. App.) 29 S. W. 264; and *Bills v. Insurance Co.*, 87 Tex. 547, 29 S. W. 1063. If a conflict exists, this court has jurisdiction, and the only question for our consideration is, was the policy under its terms divisible upon the facts stated by the court of civil appeals? There is no conflict between this case and that of *Insurance Co. v. Ward*, but we think there is a direct conflict between the case of *Insurance Co. v. Smith* and the case now before the court. *Insurance Co. v. Smith* was decided by the court of the Third supreme judicial district January 30, 1895, and the case of *Bills v. Insurance Co.* was decided by this court February 25, 1895. The two cases are in direct conflict with each other, hence the effect of the case of *Bills v. Insurance Co.* was to overrule that of *Insurance Co. v. Smith*, and this court will not entertain jurisdiction upon a conflict between the case sought to be reviewed and one which has been overruled, either by the court which decided it or by a subsequent decision of this court. Therefore the question of jurisdiction depends upon whether or not that case now presented is in conflict with that of *Bills v. Insurance Co.*, which we will proceed to examine. There is an apparent conflict between the two cases in this: that a clause of the policy in each, containing practically the same language, is differently construed in the two cases. In this case it is held to be divisible, and in the case of *Bills v. Insurance Co.* it was held to be entire. In order to determine whether or not there is a conflict between the two cases, we must determine whether they are subject to the same rules of construction under the accompanying circumstances. Article 3089, Rev. St. 1895, reads thus: "A fire insurance policy, in case of total loss by fire of property insured, shall be held and considered to be a liquidated demand against the company for the full amount of such policy; provided, that the provisions of this article shall not apply to personal property." The house insured in the policy under investigation was totally destroyed, hence the policy for the amount placed upon the house became a liquidated demand

against the insurer, and, so far as the amount to be paid was concerned, the value of the property destroyed could not be made an issue in the trial of the case, nor a question in the investigation of the loss by the insurer. In so far as the value of the house bore upon the question of fraud in obtaining the policy of insurance, the insurance company had no right to call upon the insured after the loss to make an ex parte affidavit with regard thereto. It follows that, in our opinion, if the policy had been upon the house alone, an affidavit made by the insured after the loss occurred, which falsely stated the value of the property, would be upon an immaterial matter, and could not work a forfeiture of the policy, which had become a liquidated demand under the statute. Such a clause of forfeiture, so far as applicable to a house which was totally destroyed, would be in conflict with the provision of the statute, in that it would prescribe terms of forfeiture based upon a matter which could not be made material under the statute, and which could not in any way affect the rights and interests of the insured or insurer. It being true that the insurance company could not have made such condition in a policy insuring the house alone without any personal property being embraced therein, we think that it necessarily follows that such a clause in a policy, which embraces both the house and personal property, cannot be construed to be applicable to the house, because a forfeiture would be thus produced by indirect means which could not have been effected by the same condition directly applied to the house. The most liberal construction for the insurer that could be placed upon such a policy would be to hold it divisible, and that the terms of forfeiture embraced in the policy should apply to the personal property when the false affidavit or false statement has been made as to it at a time subsequent to the fire. If the policy be entire, and the condition be void in part, it would be void in toto. We therefore conclude that the court of civil appeals did not err in holding that false swearing with reference to the value of the personal property subsequent to the fire did not work a forfeiture of the liquidated demand in favor of the insured for the amount placed upon the house. We held in *Bills v. Insurance Co.* that the policy was entire, but that conclusion was reached by the application of the rule that the condition of forfeiture must be construed against the insurer, and so as to prevent a forfeiture if the language used would admit of such a construction. Applying the same rule of construction in this case, it must be held that the condition of forfeiture embraced in this policy, which could not have been made to work a forfeiture of the liquidated demand for the house if it had been expressly so stated, must at least be limited in its effect to the unliquidated claim for the personal property to which it could have been made to apply by the use of language so

limiting its effect. There is no conflict between the decision of the court of civil appeals in this case and the decision of this court in the case of *Billis v. Insurance Co.*, and this court has no jurisdiction of this cause. The case will be dismissed for want of jurisdiction in this court, the plaintiff in error to pay the cost of this proceeding.

RACKLEY v. FOWLKES.

(Court of Civil Appeals of Texas. Feb. 26, 1896.)

RES JUDICATA—APPEAL—REVIEW—INSTRUCTIONS.

1. Though, in trespass to try title, the complaint demanded judgment for rents and profits, yet, where no evidence was introduced in support of such demand, a judgment for plaintiff for the land, no reference being made therein to the issue of rent, is not *res judicata* in a subsequent action for the rents.

2. Defendant cannot attack on appeal a judgment rendered on a verdict, in the absence of a motion for judgment non obstante veredicto, on the ground that a claim specifically included in the verdict was barred by limitations, which was pleaded.

3. The failure of the court to charge on limitations cannot be assigned as error where no special charge covering such omission was asked.

Appeal from district court, Tom Green county; J. W. Timmins, Judge.

Action by J. S. Fowlkes against J. J. Rackley to recover rents for land which had been recovered by plaintiff from defendant in a former suit of trespass to try title. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Ward & James, for appellant. D. D. Wallace and Cochran & Hill, for appellee.

KEY, J. The nature of this suit and the material facts proved are correctly stated in the briefs of the parties, appellee's statements being supplemental to appellant's; and we adopt the two statements.

We announce our conclusions of law as follows:

1. Although the pleadings in the former suit raised the issue of rent, the evidence of Mr. Wallace shows that no testimony was heard on that issue, and the judgment of the court is for the plaintiff for the land, no reference being made to the issue of rent. It is manifest, therefore, from the judgment itself, that the question of rent was not adjudicated; and, such being the case, the doctrine of *res adjudicata* does not apply. *Horton v. Hamilton*, 20 Tex. 606; *Bledsoe v. White*, 42 Tex. 180; *Cook v. Burnley*, 45 Tex. 97; *Roberts v. Johnson*, 48 Tex. 133; *Teal v. Terrell*, Id. 491; *Phillipowski v. Spencer*, 63 Tex. 604; *Pishaway v. Runnels*, 71 Tex. 352, 9 S. W. 260. This case is distinguishable from *Freeman v. McAninch*, 87 Tex. 132, 27 S. W. 97. In that case the former judgment showed on its face that it adjudicated the question which one of the

parties was attempting to relitigate; while the judgment here pleaded in bar shows that the question of rent, which is the subject-matter of this suit, was not adjudicated. It may be that it was not a final judgment, because it did not dispose of all the issues involved; but that question we are not called upon to decide. In this case it is sufficient to say that it did not adjudicate any question of rent, and therefore it is no bar to appellee's suit. There are expressions in some cases to the effect that a judgment "is not only final as to the matters actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided" (*Foster v. Wells*, 4 Tex. 104); but, in view of the doctrine announced in the cases above cited, this expression is too broad. As applied to questions of title, or the right to recover on a particular debt, or on account of a particular tort, a judgment adjudicating such a question will be final, not only as to the facts then before the court, but whenever it is attempted to litigate the same questions upon facts not adduced upon the former trial; and in this sense the judgment is final, not only as to the matters (that is, the facts) that were litigated, but also as to those that might have been put in evidence. So, if the judgment pleaded in bar in this case had adjudged that the plaintiff take nothing on his claim for rent, or had otherwise shown that the question of rent had been adjudicated, we would feel constrained to hold that appellee was barred for the rent accruing anterior to the date of that judgment; but, as the judgment shows just the reverse, we cannot so hold.

2. Appellant's third and fourth assignments assert that "the court erred in rendering judgment against appellant for the rent of the year 1889, because appellant's original answer filed herein pleads in proper form the two-years statute of limitations, and the evidence, as shown by the statement of facts herein filed, shows that the appellee's claim for rents for the year 1889 was barred by the two-years statute of limitations"; and, fourth, that "the court erred in failing to submit to the jury the question of limitations, as raised by the defendant's pleadings, and as supported by the evidence in this case, for the year 1889." Appellee contends that appellant obligated himself in writing to pay the rent by the supersedeas bond in the former suit, and certain stipulations in the deed from Hollingsworth to him, whereby he agreed to indemnify Hollingsworth as to the rent, and also that the statute of limitations was suspended, as in *Fields v. Austin* (Tex. Civ. App.) 30 S. W. 386, until the judgment in the former case was affirmed. We deem it unnecessary to decide these questions. There being a jury in the case, it was proper to submit the case to them, and obtain a verdict as the basis upon which to

render a judgment; and as appellant did not, by motion, ask the court to render judgment for him non obstante veredicto, he cannot be heard to complain that the court rendered judgment on the verdict, as he does in the third assignment. If there had been a nonjury trial, the third assignment would raise the question of limitation. The general rule is that, when the court fails to charge on an issue raised by the pleadings and evidence, in order to have the question considered on appeal a special charge covering the omission must be asked and refused. For collation of decisions on this subject see 1 Buckler, Dig. p. 314. In this case the court did not charge on limitation, and no charge was requested on that subject. We therefore overrule the fourth assignment of error.

3. The fifth and last assignment of error in appellant's brief reads thus: "The court erred in overruling defendant's motion for a new trial, and rendering judgment against defendant for the rent of the land in question for the year 1889, because the contradicted evidence in the case shows that J. A. Hollingsworth was in possession of the land all of said year 1889, and that defendant was not; neither was he asserting title or claim thereto,—all of which error of court and jury was submitted to the court in subdivision No. 4 of defendant's motion for a new trial, and was overruled." Subdivision 4 of appellant's motion for a new trial is as follows: "Because the court erred in his charge to the jury in submitting to them the rents for the year 1889, the same being *res adjudicata*, barred by the statute of limitations, and because the controverted evidence in the case showed that J. A. Hollingsworth was in the possession of said lands all of said year, and this defendant was not in possession of the same, nor did the evidence show that this defendant was asserting any claim to said land in 1889. We do not understand appellant to contend that the court's charge embodies any erroneous proposition of law on the subject under consideration, but the objection is that the court ought not to have submitted to the jury any issue at all concerning rent for 1889. We think the evidence raised the issue of appellant's liability for rent for the year 1889, and that it was proper for the court to submit that issue to the jury. The charge given may not have stated the law correctly; but it is not complained of on that account, but merely as being inapplicable to the facts.

No reversible error has been pointed out, and the judgment will be affirmed.

FISHER, C. J., did not sit in this case.

On Rehearing.

(April 15, 1896.)

It is earnestly insisted in appellant's motion for a rehearing that this court com-

mitted error in not sustaining his assignments predicated upon the proposition that the testimony shows that appellee's claim for rent for the year 1889 was barred by the statute of limitation; and especially that we erred in holding that, as the appellant asked no charge on the subject of limitation, he was not in a position to complain, because the trial court did not charge the law applicable to his plea of limitation. The contention is that the general rule stated in our former opinion only applies when the court has undertaken to charge on a given phase of the case, and the charge on that subject is incomplete, or not as full and definite as it might properly have been; and that the rule does not apply when the court fails entirely to charge on an issue raised by the pleadings and evidence. We fail to discover any basis for this alleged distinction, unless it is to be presumed that, because a judge fails to charge on such an issue, he would refuse any charge that might be asked in reference thereto; and as judges, like other people, sometimes fall through inadvertence to do that which, but for the oversight, they would have done, we do not think such presumption exists. The law encourages diligence and discourages negligence in the litigant; and it is upon this principle that the rule in question rests.

It is inconsistent with proper and orderly dispatch of public business, as well as unjust to the adverse party, to permit a litigant to take the chances of success on certain issues submitted in the court's charge, and, if he loses, obtain a new trial because another issue, which he did not by special charge ask to have submitted, might with propriety have been submitted to the jury. The litigant and his counsel know as well, and often better, when the court's charge entirely omits an issue in the case, as they do when it is merely wanting in fullness on such issue; and, if the exercise of proper diligence requires a special charge to cure the latter omission, we can see no reason why such a charge should not be required as to the former. Nor do we agree with appellant's counsel that the alleged distinction is supported by Texas decisions. The cases cited by them—*Stell v. Paschal*, 41 Tex. 645, and *Murchison v. Warren*, 50 Tex. 34—merely show that the general rule referred to is not inflexible, and that cases may arise which should be treated as exceptions to it. In each of those cases the verdict was for a sum much greater than, under the facts, the defendant was or ever had been liable for; and therefore the verdict was inequitable and unjust. It is not claimed in this case that appellant has paid the rent which he contends was barred, and we do not think that he can base an equity upon the fact that he has not obtained the benefit of the statute of limitation. Statutes of limitation secure legal, but not equitable, rights; and, to obtain their benefit, the litigant is re-

quired to be diligent. Limitation must be pleaded, even in trespass to try title, in which other defenses may be proved under a plea of not guilty. That the rule requiring a party to ask a special charge to supply an omission in the general charge applies when the omission embraces an entire phase of the case, see *Hawkins v. Cramer*, 63 Tex. 102; *O'Neil v. Bank*, 67 Tex. 39, 2 S. W. 754; *State v. Bender*, 68 Tex. 677, 5 S. W. 674; and *Hocker v. Day*, 80 Tex. 529, 16 S. W. 322. The latter case is very similar to the case at bar, and there the court said: "Appellant's first assignment of error is that the court erred in charging the jury that defendant had pleaded the statute of limitations in bar of plaintiff's cause of action, among other defenses, and did not in any part of its charge instruct the jury upon the law of limitation applicable to this cause. If the plaintiff was dissatisfied with the charge on account of such omission, his remedy was to call the attention of the court to it, by requesting the charge that he now urges should have been given. It is not at all clear to us that the jury would not have been required, in response to such a charge, to find for the defendant upon her plea of the statute of limitations of two years." The only difference between that case and this is that in one the charge told the jury that the defendant had pleaded the statute of limitations, while in the other the charge did not refer to the plea. But stating the issues presented by the pleadings is not attempting to charge the law applicable to the issues. So, in the case last cited, it seems that the court did not attempt to submit to the jury the issue of limitations, nor to explain to them the law on that subject; and yet it was held that as no special charge covering the omission was asked, though the evidence tended to support the plea of limitation, there was no reversible error.

On the other questions we do not desire to add anything to our former opinion. We have carefully considered the motion for a rehearing, and conclude that it should be overruled.

RACKLEY v. FOWLKES.

(Supreme Court of Texas. May 28, 1896.)

RES JUDICATA—QUESTIONS IN ISSUE.

Where, in trespass to try title, the pleadings put in issue the question of rents and profits, the fact that no evidence in support of the claim for rents was offered, until after the trial, when it was rejected on the ground that it came too late, does not show that the court refused to pass upon such claim, or that it was abandoned, so as to prevent the judgment, which merely awarded possession to plaintiff, and was silent as to the claim for rents, from being res judicata as to the claim for rents.

Error to court of civil appeals of Third supreme judicial district.

Action by J. J. Rackley against J. S. Fowlkes. There was a judgment of the

court of civil appeals (36 S. W. 75) affirming a judgment for plaintiff, and defendant brings error. Reversed.

Ward & James, for plaintiff in error. D. D. Wallace and Cochran & Hill for defendant in error.

DENMAN, J. J. S. Fowlkes sued J. J. Rackley in the district court of Tom Green county for rent for 75 acres of land for the years 1889, 1890, 1891, and 1892, which he alleged said Rackley wrongfully dispossessed him of on the 1st of January, 1889, and held possession thereof during said series of years, converting to his own use the rents, fruits, and revenues thereof. Rackley, among other things, pleaded: (1) That on 29th day of March, 1889, Fowlkes filed in the district court of Tom Green county a suit against him (Rackley) and others, in trespass to try title, to recover said tract of land and rents thereof for the year 1889. (2) That in said suit Rackley and other defendants joined issue with Fowlkes upon his said claim for rent by filing an answer denying all and singular the allegations of plaintiff's petition. (3) That on the 28th day of April, 1890, said entire cause, together with said issue as to rents, being submitted to the court, it rendered judgment for plaintiff, Fowlkes, against all the defendants, including said Rackley, for the title and possession of said land, but failed and refused to give plaintiff, Fowlkes, any judgment for rents. Wherefore he claimed that Fowlkes' right, if any he ever had, to recover against him (Rackley) rents for the year 1889 was adjudicated and barred by said judgment, which he pleaded as an estoppel. On the trial of this cause plaintiff, Fowlkes, introduced in evidence the petition, answer, and judgment in the cause formerly brought by him against defendant, Rackley, and others, referred to in said plea of res adjudicata, which record shows that the pleadings put in issue plaintiff's right to recover rents for said land for the year 1889, as stated in said plea of res adjudicata, and that on the date stated in said plea the court in said cause rendered a judgment "that plaintiff, J. S. Fowlkes, do have and recover of and from defendants J. A. Hollingsworth, John R. Nasworthy, and J. J. Rackley the title and possession to the following tracts or parcels of land, to wit [here giving field notes of land for which rent is sought to be recovered in the suit now before us], and all costs of this suit, for which he may have a writ of possession and execution." After introducing said record from said original cause, plaintiff introduced as a witness D. D. Wallace, his attorney therein, who was allowed to testify, in reference thereto, without objection, that "no evidence was introduced concerning rents of the land sued for on that trial. The question of rents was not put in issue. After the evidence was over and after the argument was closed, I

offered to prove the value of the rent. The testimony was objected to by H. C. Fisher, counsel for the defense, on the ground that it came too late, and the objection was sustained." This was all the evidence with reference to said plea of *res adjudicata*. The trial court charged the jury as follows: "You will find in plaintiff's favor for the value of the rent for the years sued for, provided you further find that J. A. Hollingsworth, or said Hollingsworth and defendant, had possession of said land during the year 1889, and up to May 12, 1890; and in any event you will find in plaintiff's favor for the value of the rent from May 12, 1890, to the end of the year 1892,"—and also directed them to estimate rent for each year separately. Whereupon the jury returned a verdict "for the rent for the year 1889, \$539.58," and then gave the amount of rent separately for the years 1890, 1891, and 1892, upon which verdict the court rendered judgment in favor of plaintiff, Fowlkes, against defendant, Rackley, for the sum of \$1,534.20, being the total amount of the rents specified in the verdict of the jury for the years 1889, 1890, 1891, and 1892. From this judgment Rackley appealed, giving superseas bond, to the court of civil appeals, assigning as error that the court below erred (1) in rendering judgment against him for the rents for the year 1889, and (2) in submitting the question of rents for the year 1889 to the jury, which said assignments the court of civil appeals held not well taken, and affirmed the judgment of the court below, and rendered judgment that "the appellee, J. S. Fowlkes, do have and recover of and from the appellant, J. J. Rackley, principal, and his sureties, H. B. Gerhart and W. M. Killgore, the amount adjudged by the court below, and all costs in this behalf expended." Plaintiff in error, Rackley, assigns as error in this court that the court of civil appeals erred in refusing to sustain his assignments aforesaid. In overruling said assignments, the court of civil appeals say: "Although the pleadings in the former suit raised the issue of rent, the evidence of Mr. Wallace shows that no testimony was heard on that issue, and the judgment of the court is for the plaintiff for the land, no reference being made to the issue of rent. It is manifest, therefore, from the judgment itself, that the question of rent was not adjudicated; and, such being the case, the doctrine of *res adjudicata* does not apply. *Horton v. Hamilton*, 20 Tex. 606; *Bledsoe v. White*, 42 Tex. 130; *Cook v. Burnley*, 45 Tex. 97; *Roberts v. Johnson*, 48 Tex. 133; *Teal v. Terrell*, Id. 491; *Phillipowski v. Spencer*, 63 Tex. 604; *Pish-away v. Runnels*, 71 Tex. 352, 9 S. W. 260."

The first question for us to determine is, what is the *prima facie* legal effect of the petition, answer, and judgment in the original cause, herein pleaded by defendant, Rackley, and introduced in evidence by plaintiff, Fowlkes, as aforesaid, upon the latter's claim for rent for the year 1889? The proposition seems to be sound in principle and well supported by authority that where the pleadings and

judgment in evidence show that the pleadings upon which the trial was had put in issue plaintiff's right to recover upon two causes of action, and the judgment awards him a recovery upon one, but is silent as to the other, such judgment is *prima facie* an adjudication that he was not entitled to recover upon such other cause. *Thompson v. McKay*, 41 Cal. 221; *Spencer v. Banister*, 12 La. Ann. 766; *Rice v. Garrett*, Id. 755; *Schmidt v. Zahensdorf*, 30 Iowa, 498; *Johnson v. Murphy's Admrs*, 17 Tex. 217. This liberal construction of the judgment against the party who sought to recover therein is supported by the presumption that the court performed the duty devolved upon it upon the submission of the cause by disposing of every issue presented by the pleadings so as to render its judgment final and conclusive of the litigation, and by the further fact that the policy of the law favors the speedy settlement of litigation and opposes the harassing of the defendant with two suits for the same cause. The issue of plaintiff's right to recover rent for 1889 having been clearly presented by the pleadings, plaintiff cannot escape this construction of the judgment, except by showing that, before its rendition, he withdrew such issue, or that the court refused to decide it.

This brings us to the question as to the effect of the testimony of Wallace on the question of withdrawal or refusal of the court to decide such issue. It does not tend to show a withdrawal, but to show that plaintiff was insisting upon rents by offering evidence even after the argument closed. The simple fact that no evidence was introduced at the proper time, or allowed when offered in support of the claim, could not justify a court or jury in finding that the issue was withdrawn by plaintiff, or that the court refused to pass thereon in proceeding to render judgment. On the contrary, the legal presumption, from the entire record before us, is that plaintiff did not, when the evidence was rejected, avail himself of his right to dismiss his claim for rent, and that the court performed its plain duty by deciding such claim against him for want of evidence. Suppose plaintiff had taken an exception to the ruling of the court rejecting the evidence offered, under the circumstances stated in the testimony of Wallace; could an appellate court have declined to consider it, on the ground that plaintiff had withdrawn his claim for rent, or that the court had not adjudicated same? Clearly not. So much of this testimony as states that "the question of rents was not put in issue" we understand to be a mere expression of opinion of the witness as to the legal effect of his not having introduced any evidence as to rents. If it means that the issue of plaintiff's right to recover rents was not raised by the pleadings, it is at variance with the record of that cause, introduced by plaintiff himself, and such contemporaneous verbal testimony, though admitted without objection, is no more competent to contradict that record than is such testimony, so admit-

ted, to contradict the terms of a written contract. Such testimony, in the face of such pleadings, was not sufficient, in law, to raise an issue for the decision of the jury as to whether the plaintiff's right to recover rents was put in issue, nor do we understand that such effect is claimed for it here. We are of the opinion that the record in the first suit shows an adjudication of plaintiff's right to recover rent for 1889, and that the testimony of Wallace does not tend to show either that plaintiff withdrew, or that the court did not decide such issue, and therefore that the trial court, in the case before us, erred in submitting to the jury the question of plaintiff's right to recover rents for 1889, and in rendering judgment therefor on the verdict, and that the court of civil appeals erred in not sustaining plaintiff in error's assignments based thereon. We therefore reverse the judgments of both of said courts, and here render judgment that defendant in error take nothing as to his claim for rent for 1889, but that he recover against plaintiff in error the other rents allowed by the verdict, together with all costs in the court below, defendant in error to pay all costs incurred in the court of civil appeals and this court; but no judgment will be rendered in favor of defendant in error against the sureties on said supersedeas bond, as plaintiff in error has prosecuted his appeals with effect by relieving himself from a portion of the judgment rendered against him by the trial court.

BRYANT v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

CRIMINAL LAW—STATEMENT OF FACTS—DELAY IN FILING—DILIGENCE OF COUNSEL.

A statement of facts not only not filed within 10 days after adjournment of court, but not even taken to the judge till 15 days after the adjournment of court, cannot be considered on appeal, notwithstanding the general statement of counsel that he was diligent in preparing it; the notes, when transcribed, amounting only to 150 pages of typewritten matter, and the statement of facts to 107 pages.

On rehearing. Denied.

For former report, see 33 S. W. 978.

HURT, P. J. This case was decided at the Dallas term, 1896, of this court, and the judgment then affirmed, the statement of facts being stricken out. Appellant now applies for a rehearing in said case, and his motion involves the action of this court in striking out the statement of facts. In the decision of this case the court ignored and disregarded what purported to be a statement of facts, found in the record, on the ground that no file mark appeared on said statement of facts. Appellant, in his motion for rehearing, presents the affidavit of the clerk to the effect that said statement of facts was filed within 10 days after adjournment of the term of court, the court having granted 10 days after

the adjournment of court in which to file said statement of facts. Said affidavit is as follows:

"J. R. Wilson, clerk of the district court of Bowie county, Texas, being sworn, says that the statement of facts, as it appears in the transcript in the above styled and numbered cause appealed from Bowie county, was sent to him by Hon. Jno. L. Sheppard, district judge presiding upon the trial of appellant in the district court of said county, with instructions to properly and in due time file the same, and that he did immediately place his file mark, as district clerk of said Bowie county, upon said statement of facts, and that the omission of a copy of the file mark in the transcript of said cause was an oversight of the clerk making the transcript; and he further says that while he does not remember the day upon which he filed said statement of facts, the file mark thereon shows that it was filed within ten days after the adjournment of the term of the court during which appellant was tried. [Signed] J. R. Wilson, Dist. Clerk, Bowie County, Texas."

"Subscribed and sworn to before me this February 3rd, 1896. Jno. K. King, Co. Judge. Bowie County, Texas."

It will be noticed that the affidavit of said clerk states that his omission to put the file mark on the statement of facts in the transcript of said case was an oversight, and that, while he does not remember the day upon which he filed said statement of facts, the file mark thereon shows that it was filed within 10 days after the adjournment of the term of court at which appellant was tried. This affidavit is clearly evasive, and is intended to convey the idea that said statement of facts was filed within 10 days after the adjournment of court. The clerk knew at the time that such was not the case. Other affidavits and letters in the case indicate that although the court adjourned on the 23d of October, 1894, the statement of facts in this case was not filed, in fact, until in the year 1895. And this same clerk makes the following subsequent affidavit:

"Now comes J. R. Wilson, and in obedience to a writ of attachment issued out of the court of criminal appeals of the state of Texas, and directed to the sheriff of Bowie county, commanding him to summon the said J. R. Wilson before the court of criminal appeals on the 4th day of March, 1896, then and there to testify in the case of the state of Texas vs. G. L. Bryant, and also show cause why he should not be fined for contempt of court, respectfully answers as follows: The statement of facts in said case was forwarded from Jefferson to the district clerk of Bowie county on the first day of February, 1895, by John L. Sheppard, judge of the Fifth judicial district, accompanied by a letter (a copy of which is hereto attached, marked 'Exhibit A,' and made a part of this answer) directing the said J. R. Wilson, as clerk, to file the said statement of facts within the ten

days from the adjournment of the term of court, which he did, believing the district judge had the right to make said order. Wherefore said J. R. Wilson respectfully asks that he be relieved from any further liability herein. [Signed] J. R. Wilson.

"Subscribed and sworn to by J. R. Wilson before me on this the 4th day of March, A. D. 1896. W. A. Hudson, Clerk Court of Crim. App. at Dallas."

To this affidavit is appended a copy of the letter of the Honorable John L. Sheppard, district judge, authorizing said Wilson to file the statement of facts back within the 10 days. Said letter is as follows:

"Linden, Texas, 2-7, 1896. Mr. J. R. Wilson, Boston, Texas—Dear Sir: File the statement of facts in the Bryant case within ten days from the adjournment of court. Very truly yours, [Signed] John L. Sheppard."

Unquestionably, the first contention of the appellant, to the effect that said statement of facts was filed within the 10 days after the adjournment of the court, is not true. Nor can the contention of the appellant that this court cannot go behind the file mark appearing on the statement of facts be maintained. The contrary was held in *Spencer v. State* (Tex. Cr. App.) 32 S. W. 690. Appellant contends, however, that, although it may be true that the statement of facts was not actually filed within the 10 days after the adjournment of the court, yet it was owing to no want of diligence on his part, and that, consequently, the same must be considered as a part of the record in this case. If it be true that appellant was diligent in endeavoring to procure and have filed a statement of facts within the 10 days after the adjournment of court, and by no fault of his the same was not procured and filed, then the statement of facts will be considered. See *Spencer v. State*, 25 Tex. App. 585, 8 S. W. 648; *George v. State*, 25 Tex. App. 229, 8 S. W. 25; *Farris v. State*, 26 Tex. App. 105, 9 S. W. 487; *Kutch v. State*, 32 Tex. Cr. R. 184, 22 S. W. 594; *Bell v. State*, 31 Tex. Cr. R. 521, 21 S. W. 259; *Prieto v. State* (Tex. Cr. App.) 31 S. W. 665. In testing this question of diligence, it will be tried by what appellant did with reference to preparing a statement of facts, and presenting the same to the district attorney, and then to the district judge, within the 10 days after the adjournment of the court. This question of diligence within the 10 days is presented to us, pro and con, by affidavits and exhibits. The affidavits of Estes and Mayher show that Mayher acted as stenographer during the trial of the case, and that he took the testimony in shorthand; that court adjourned on the 23d of October, and that Estes, acting as the attorney of appellant, and Mayher, as stenographer, at once set about the preparation of a statement of facts, and that they used all diligence to transcribe the stenographer's notes and get them in shape, and worked each day of the intervening time, except Sundays; that great difficulty was en-

countered in the transcription of said stenographer's notes, there being a good deal of expert medical testimony in the case; that the same was finished as soon as the said Estes and the stenographer could complete it, and said Estes immediately took it to Daingerfield, in Morris county, where the district court was in session, and submitted the same to Hon. Hiram Glass and Hon. John L. Sheppard, who were, respectively, the district attorney and district judge who prosecuted and presided, respectively, during the trial of the appellant's case; that the said district attorney declined to agree to said statement of facts, after which affiant (Estes) took the same to the district judge, informing him of his inability to agree with the district attorney upon the statement, and requested him to approve the same as furnished by the affiant, and forward as soon as possible to the clerk of the district court of Bowie county, Tex. The district judge declined to approve said statement or accept the same, and instructed the affiant to take the same back to the district attorney, and that as soon as each furnished him a statement from the two he would make up a statement of facts, and forward the same to the district clerk. Affiant then took his statement back to the district attorney, and left the same with him, requesting at the same time that as much speed as possible be used in preparing said statement to be furnished to the district judge for inspection. Appellant also appends to his motion a letter or certificate of the district judge, which is as follows: "Linden, Texas, Feb'y 10, 1896. This is to certify that I tried the case of the state of Texas against George L. Bryant, in the district court of Bowie county, Texas, and that, after ten days had elapsed after the adjournment of the district court in said county, Mr. Lee Estes, one of the defendant's attorneys, came to Daingerfield, Morris county, Texas, and told me that he had his statement of facts in said case, and I asked him, had the district attorney agreed to his statement, and he said that they had not agreed in the statement; and I suggested to him to take his statement to the district attorney, and, if they failed to agree, that they could present their respective statements to me, and then I would prepare a statement of facts. I never saw the statement of facts prepared by either the district attorney or the defendant's counsel until in January, 1895, which was about seventy-five or eighty days after the trial of the said George L. Bryant. It was about fifteen days after the adjournment of the court in Bowie county when I saw Mr. Lee Estes, in Daingerfield, and had the conversation with him above referred to. [Signed] John L. Sheppard, Judge 5th Judicial District." This exhibit shows that it was 15 days after the adjournment of the court before counsel for appellant spoke to the judge with reference to the statement of facts, and then he did not present the same to him for approval. As we have stated before,

there is a good deal in the record to show an endeavor, after the expiration of the 10 days, on the part of the appellant's counsel, to get the district attorney to agree to a statement of facts; but, as stated, with this we have nothing to do. The question is as to the diligence exercised within the 10 days after the adjournment of the court. Appellant says that the statement of facts contained some 150 pages, when transcribed from the stenographer's notes. This may have included questions and answers, as the questions do not appear in the record. But, as the statement of facts appears in the record, there is only 111 pages of typewritten matter, and this includes 4 pages of letters, which would leave only 107 pages of typewritten matter to be prepared within the 10 days. An ordinary typewriter would transcribe 50 pages a day. This would take only 3 days to complete the transcription of the stenographer's notes. While this was being done the counsel in the case could be employed in preparing from these questions and answers a statement of facts, so that he need not be delayed until the stenographer had finished the transcription of his notes. We take it as reasonable, without imposing upon him any extra labor, and without requiring him to work at night, that he could have at least prepared 20 pages of manuscript of the statement of facts each day, and within 6 days, by the use of ordinary diligence, he could have had his statement of facts prepared, and ready to be presented to the district attorney for his agreement. If the district attorney failed to agree to the same, it was his duty then to obtain his disagreement, and then present the statement of facts to the judge. He had 4 days after he could, by the use of ordinary diligence, have prepared his statement of facts, within which to have seen the district attorney and the district judge, and present his statement of facts to them. When the statement of facts reached the district judge within the 10 days, his duty was performed, and the judge's duty with reference to the statement began. But, as we have seen, the statement of facts was not presented to the judge even on the fifteenth day after the trial. It was merely stated by appellant's counsel to the judge that he had his statement. The affidavit of the attorney, before alluded to, is couched in the most general terms. He merely states that he used diligence, but the acts he did are not stated; and we are asked, on this bare statement that he used diligence, to take it for granted that it was impossible, in the nature of things, for the attorney in this case to have prepared the statement of facts, of 107 pages, within the limited time of 10 days. This proposition is unreasonable, and we cannot concede it. Should we do so, it would be equivalent to enlarging the limitation authorized by the statute, in almost every case. In every case where the evidence was at all voluminous we would be confronted with the general affidavit that the party

had used reasonable diligence to prepare his statement of facts, but found it impossible to do so. There may be such cases where the record is so voluminous that we might feel constrained to enlarge the time, but in such case it must clearly appear that appellant used due diligence to have prepared the statement of facts within the 10 days authorized by law, and that his failure to procure a statement of facts was the result of causes beyond his control. Nor would we feel at liberty to exclude the intervening Sundays from the limitation of time. Certainly a case could rarely occur in which the parties were only engaged in the trial 4 days, including the impanelment of the jury and argument of counsel, in which it could be said that by the use of reasonable diligence the party was not able to prepare a statement of the facts adduced on the trial within the 10 days. In our opinion, the diligence shown was not sufficient, and we cannot consider the statement of facts. What the judge may have said or done, or the district attorney may have said or done, with reference to filing the statement of facts back within the 10 days, cannot avail the appellant, in order to exonerate him from the use of diligence before the 10 days allowed by law expired. This being the only question in the case, the motion for rehearing is overruled.

Ex parte LAMBERT.

(Court of Criminal Appeals of Texas. May 28, 1896.)

COURT OF CRIMINAL APPEALS — HABEAS CORPUS.

The court of criminal appeals, except in extraordinary cases, will not grant original writs of habeas corpus.

Application on the part of John Lambert for a writ of habeas corpus. Refused.

Albert Stevenson, for applicant. Mann Trice, for the State.

HENDERSON, J. The applicant is charged by information with a violation of the local option law in Palo Pinto county, and has applied to this court for a writ of habeas corpus. As a part of his application, he has a statement from the county judge suggesting that he believes he is recused to try said case on habeas corpus, because a mandamus suit is pending against him and others, involving the validity of the local option election in Palo Pinto county. From the statement made, we do not understand the county judge to be disqualified to entertain said writ. We are also of the opinion that this is a matter over which the district judges are authorized to entertain jurisdiction and grant the writ of habeas corpus. While the constitution and the statute on this subject give this court jurisdiction to issue writs of habeas corpus, yet we do not believe it was the intention of the lawmakers to constitute this tribunal a *nisi prius* court for the purpose of

issuing and trying indiscriminately all cases of habeas corpus. The constitution and the laws of this state authorize us to review such cases on appeal, and we now lay down the rule that, except in extraordinary cases, we will not entertain jurisdiction as a court to grant original writs of habeas corpus. The application in this case is refused.

HARDIN v. STATE.

(Court of Criminal Appeals of Texas. June 2, 1896.)

CRIMINAL LAW—APPEAL—DEATH OF APPELLANT—ABATEMENT.

On a satisfactory showing that appellant, who was convicted of a crime, has died pending the appeal, the appeal will abate.

Appeal from El Paso county court; F. E. Hunter, Judge.

John W. Hardin was convicted of a crime, and appeals. Heard on motion to abate appeal. Appeal abated.

Mann Trice, for the State.

DAVIDSON, J. This is an appeal from a conviction for unlawfully carrying on and about his person a pistol. Since the consummation of the appeal, the appellant has died. A motion is made to abate said appeal in this court. The evidence before us satisfactorily shows that the appellant has died pending this appeal, and the judgment is therefore abated.

PURDY v. STATE.

(Court of Criminal Appeals of Texas. June 3, 1896.)

CRIMINAL LAW—APPEAL—REVIEW.

Refusal of a motion for a continuance on account of the absence of witnesses cannot be reviewed unless the motion is contained in the record.

Appeal from district court, Bexar county; Robert B. Green, Judge.

Ed Purdy was convicted of a crime, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of burglary, and given two years in the penitentiary, and prosecutes this appeal.

The appellant's only bill of exceptions recites that he made a motion to continue the cause for the want of the testimony of several absent witnesses, which motion was overruled by the court. The record does not contain the application for continuance; hence we cannot review this supposed erroneous ruling of the trial court.

2. There are several grounds set out in appellant's motion for a new trial in the court below. These all go to the supposed unfairness of the appellant's trial before the jury. We have carefully examined the state-

ment of facts, and do not think any of them are well taken. The testimony is clear and conclusive that appellant entered the house in the daytime, by opening the door, and took from the house the vest of a minor son of the owner of said house, which vest contained a watch, valued in excess of \$100. Almost immediately after he was seen to emerge from the house, he was followed, the vest and watch taken from under his coat, where he had it secreted, and he himself arrested, and incarcerated in jail. How a jury, under this state of case, could have done otherwise than convict, we cannot comprehend. He reserved no exceptions to any ruling of the court with reference to the admission of testimony; and, as before stated, the only exception reserved was with reference to the action of the court in overruling his application for a continuance. We find no error in the record, and the judgment is affirmed.

HURT, P. J., absent.

CAFFEY v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

FORGERY—INDICTMENT—SUFFICIENCY.

Under Sayles' Civ. St. art. 3776 (Rev. St. 1895, art. 3962), which provides that the amount contracted by trustees to be paid a teacher shall be paid on a check drawn by the majority of the trustees on the county treasurer, in all instances be accompanied by the affidavit of the teacher that he is entitled to the amount specified in the check, an indictment for forging such a check is fatally defective where it fails to allege that the affidavit of the teacher accompanied the check. Davidson, J., dissenting.

Appeal from district court, Comanche county; T. H. Conner, Judge.

A. J. Caffey was convicted of forgery, and appeals. Reversed.

Lindsey & Goodson, for appellant. Mann Trice, for the State.

HURT, P. J. Appellant was convicted of forging the following instrument of writing, commonly called a "school voucher," to wit:

"No. 5. \$36.00.

"Blanket Creek School District No. 51, Comanche County, Texas, May 20th, 1890. Pay to Linda C. Switzer, or order, the sum of thirty-six dollars out of the public school fund apportioned to the Blanket Creek School District No. 51, for services as teacher in the public free school of said district for the month ending the — day of May 20, 1890.

"J. B. Gates,

"R. W. Switzer,

"Trustees of School District No. 51 in Comanche County, Texas.

"To A. J. Caffey, County Treasurer, Comanche County, Texas."

"Approved, Chas. E. Williamson, County Superintendent, Comanche County."

Appellant moved to quash the indictment, because, under the law of this state, the instrument set forth in the indictment was not the subject of forgery, nor could it be made the subject of forgery by any allegations. Our statute on the subject of the payment of amounts due school teachers reads as follows: "The amount contracted by trustees to be paid a teacher shall be paid on a check drawn by the majority of the trustees on the county treasurer, and approved by the county superintendent. The check shall in all instances be accompanied by the affidavit of the teacher that he is entitled to the amount specified in the check as compensation under his contract as a teacher." See Acts 1884; Sayles' Civ. St. art. 3776; Rev. St. 1895, art. 3962. The indictment shows that two of the school trustees signed the check. It also shows that it was approved by the county superintendent of said county. It fails to allege that the affidavit of the teacher accompanied the check. The contention of the appellant is that this check is absolutely void, as it neither created, increased, diminished, discharged, nor defeated any pecuniary obligation, or would have transferred or in any manner have affected any property whatever. The question for our decision is this: In the absence of the affidavit of the teacher, which must accompany the check, is it such an instrument as is the subject of forgery? If the treasurer had paid the check, in the absence of the affidavit, he would have done so without authority, and against the law, and the check would have been no voucher to him in his settlement of accounts with the commissioners' court. This is not the case of the irregular or bungling execution of an instrument which is the subject of forgery, but it is a case of forging an instrument which, standing alone, is not such a completed instrument as to be the subject of forgery. Now, we are not to be understood as holding that this check is not the subject of forgery; but, to constitute it the subject of forgery, there must be the affidavit of the teacher accompanying it, for, in order to give it any force or effect, it requires both the check, properly signed and approved, and the affidavit of the teacher. Without the affidavit of the teacher, standing alone, it is not the subject of forgery. Why? Because the statute says "the check shall in all instances be accompanied by the affidavit of the teacher." The instrument by which a teacher, under the laws of the state of Texas, is authorized to demand and receive pay for his services, is a creature of the law. The terms of such an instrument are defined by the law, and, before he himself has such an obligation as he can make a legal demand for his services, he must have the instrument provided by the law. He cannot go with the check simply signed by a majority of the trustees, or by all of the trustees, and demand his salary. To have the completed

instrument, and in order to make a legal demand, he must also have the approval of the superintendent and the affidavit provided by law. Then he has a complete instrument, and has a legal demand for his services. We cite the following cases as being in point, and having a direct bearing upon this subject: *Roode v. State*, 5 Neb. 174; *Cunningham v. People*, 4 Hun, 455; *People v. Harrison*, 8 Barb. 560; *State v. Smith*, 8 Yerg. 150; *People v. Heed*, 1 Idaho, 531.

We are not aware that the exact question here presented has ever been decided by our courts, but analogous questions have been decided in the courts of other states. In the case of *Roode v. State*, 5 Neb. 174, supra, it was held that a married woman's deed, without an acknowledgment, which, under the laws of the state where it was executed, made it void, was such an instrument as was not the subject of forgery. This case refers to *Mr. Bishop*, and quotes from him as follows: "An instrument, to be the subject of forgery, must, on the face of it, be good and valid for the purpose for which it was created." 2 Bish. Cr. Law, 506. In the case of *Cunningham v. People*, supra, the prisoner caused to be engraved and printed what purported to be warrants drawn by the auditor of public accounts on the state treasurer of Mississippi, and had a seal made. He filled in the blanks of two warrants, but made no impression with the seal upon them. The warrants, by the law of Mississippi, were invalid without a seal; and it was held that the instruments, being invalid on their face, were not the subject of forgery, and it was further held that, if the statute authorizes an instrument not known to the common law, and so prescribes this form as to render any other form void, forgery cannot be committed by making an instrument in a form not provided by the statute, even though it is so like the genuine as to be likely to deceive most persons. In *People v. Harrison*, supra, it was held that an indictment would not lie for forgery of a certificate of acknowledgment of a deed, which certificate did not state that the grantor acknowledged the execution of the conveyance. It was stated that, in order to be the subject of forgery, a written instrument must be valid, and, if genuine, for the purpose intended. If void or invalid on its face, it cannot be made good by averment. The crime of forgery cannot be predicated upon it. In *Smith's Case*, supra, it is said that an instrument void in law upon its face is not the subject of forgery, because the genuine and the counterfeit would be equally useless, imposing no duty or conferring no right; as the forgery of a will for lands, having only two witnesses, when three were required, where the court held the instrument void on its face and no forgery.—referring to *Wall's Case*, 2 East, P. C. 953.

These authorities support the view we

take of the question involved in this case, and the judgment of the lower court is accordingly reversed, and the cause dismissed.

HENDERSON, J., concurs.

DAVIDSON, J. (dissenting). Appellant's contention, which is sustained by the majority of the court, that the check declared upon is illegal and void "upon its face," because the indictment does not allege that the affidavit of the teacher accompanied said check, is, in my opinion, not sound, as I understand the law with reference to the question of forgery. The basis of the opinion of the majority is that the affidavit must not only accompany the check given by the trustees, but it must accompany it when presented to the county treasurer for payment. I cannot concur in this view of the law. The affidavit alluded to, required in all instances to accompany the check given by the trustees to the teacher, is intended for the inspection of the county superintendent, in case there be such an officer, or, in the absence of such officer in the county, to the county judge as *ex officio* superintendent.

By the terms of section 25 of the act of 1893, teachers are furnished with necessary blanks and forms for making out their monthly reports to the superintendent of the county. These blanks are furnished by the state superintendent, who is clothed with authority to require from school teachers and officers reports regarding all such school affairs as he may deem proper. Section 72 requires the teachers to keep a daily register, in which the names, ages, studies of the pupils, and their attendance shall be recorded, and such other matters as may be prescribed by the state superintendent. Section 72a provides that all teachers shall make monthly reports of such subjects as may be designated by the state superintendent or the county superintendent, to be approved by the majority of the trustees of the district, and shall file the same with the county superintendent when they present their vouchers for their monthly salary. Section 72b requires that all monthly and term reports of teachers shall be made under oath, and county superintendents are empowered to administer such oaths for such purposes. Section 57 enacts that the amount contracted by the trustees to be paid a teacher shall be paid on a check drawn by the majority of the trustees on the county treasurer and approved by the county superintendent. The check shall in all instances be accompanied by the affidavit of the teacher that he is entitled to the amount specified in the check as compensation under his contract as a teacher. These provisions are in substance the same as when this offense occurred. My construction of these various provisions of the act of 1893 is that these reports are made out by the teacher, and are presented,

along with the check drawn by the trustees, to the county superintendent; that, when the voucher or check, thus accompanied, is presented to the county superintendent, he shall approve the check drawn by said trustees, and said report and said affidavit are to be lodged with the county superintendent, and not the county treasurer; and the superintendent's approval is not placed upon the check until these matters have been complied with, and when this has been done, he retains said reports and affidavit, delivering to the teacher the check approved by himself. This check is then presented to the county treasurer, who is authorized and required to pay it. Such I understand to be the legitimate and proper construction of these various provisions of the law. And this check, signed by a majority of the trustees, and approved by the county superintendent, is a complete and valid instrument "upon the face of it." But, even if these matters have not been complied with, yet the check is a completed instrument "upon the face of it," whether approved by the county judge or accompanied by the affidavit, or not. It is a completed instrument, so far as the trustees can make it, whether the affidavit is made or not, and the absence of said affidavit could not possibly affect the terms of the check as shown "upon the face of it." Mr. Bishop says that "an instrument, to be the subject of forgery, must on the face of it be good and valid for the purpose for which it was created." 2 Bish. Cr. Law, 506. Such is the well-settled law in Texas, under all of the decisions where the question has ever been discussed. See *Hendricks v. State*, 26 Tex. App. 176, 9 S. W. 555, 557, and *King v. State*, 27 Tex. App. 567, 11 S. W. 525.

I do not question the authorities relied upon by the majority of the court as enunciating correct principles of law; and, if this instrument came within the contemplation of the rule laid down by said authorities, I would readily concur in the opinion of the majority. I think, however, a careful examination of each case cited will demonstrate the fact that in each instance the court rendering the opinion was discussing only that character of instrument which was of no legal effect or efficacy "upon the face of the instrument itself"; and if this instrument was of that character, then the indictment would be vicious. But this check was, "on the face of it," good and valid for the purpose for which it was created. It was given for a specified sum of money, payable to the proper school teacher, signed by the requisite number of school trustees, and approved by the county judge, as *ex officio* superintendent. A simple glance at the face of the instrument declared upon verifies this statement. There was no other act of the trustees to be performed, and no act of the teacher or the superintendent or the treasurer could add to or detract from the terms

on the face of that instrument; and, if the teacher or the superintendent had changed the terms of the instrument after its execution by the trustees, they might themselves have been guilty of altering the check. The act of the teacher in making the affidavit could not affect the terms of the check as given by the trustees, in so far as the face of the instrument itself is concerned. His act was an independent one, forming no part of the terms of the check, and could not increase or diminish its efficacy as the act of the trustees. It was the independent act of the payee of the check. It was an extraneous matter, and was not a prerequisite to the execution or making of the check. The statute does not require that this affidavit shall be made before the execution of the check, but only requires that it shall accompany the check; and, under the various provisions of the law, its object is to show that the teacher is entitled to the amount specified in the check as compensation for his services as teacher. This compensation is based upon the number of the pupils taught by him, and is covered in the monthly report. So far as the act of the teacher was concerned, the check was as complete "on the face of it," and for the purpose for which it was created, without the affidavit as it was with it; and, this being so, it was capable of being used to consummate a fraud, and therefore was and is the subject of forgery under our statute. *Kennedy v. State*, 33 Tex. Cr. App. 183, 26 S. W. 78; *Hendricks v. State*, 26 Tex. App. 176, 9 S. W. 555, 557; *King v. State*, 27 Tex. App. 567, 11 S. W. 525; *Lassiter v. State* (Tex. Cr. App.) 34 S. W. 751; *People v. Bibby*, 81 Cal. 470, 27 Pac. 781; *Com. v. Costello*, 120 Mass. 367.

In *Bibby's Case*, *supra*, the appellant was convicted of forging the order of the school trustees on the county superintendent of public schools of Fresno county, for the sum of \$120, for material and work furnished the Pleasant Valley school district. This order was not accompanied by the required bill of items mentioned in the statute of that state, which provided that "no requisition shall be drawn, unless the money is in the fund to pay it, and no requisition shall be drawn upon the order of the board of trustees against the fund of any district, except for teachers' salaries, unless such order is accompanied by an itemized bill, showing the separate items and the price of each, in payment for which the order is drawn." The contention was made in that case that the order was illegal upon its face, because it did not appear that said order was accompanied by said bill of items, and it was further urged that this "order was worthless paper, save for the purpose of forming a foundation upon which to issue a requisition to the auditor for the county warrant, and that no requisition could issue in the case because the order was not accompanied by a bill of

items." In overruling this contention, the court said: "The order is a valid order upon its face. It fulfills every requirement of the law, and, if genuine, would have a well-defined value. A bill of items is no part of the order, and is only required to accompany the order when a requisition is required from the county superintendent. At that time, and only at that time, is the bill of items of any value." So, in this case, it was not necessary that the affidavit should have been made in order to constitute the check of the trustees a valid obligation. The check was as complete without the affidavit, "upon the face of it," as it would or could have been had the affidavit accompanied the same. If it were necessary to go into the question further, it might be said, correctly, that it is not necessary that the check should have a completed legal efficacy. It would be sufficient if its legal efficacy be apparent, and not actual or real. As was said by the Indiana supreme court: "It is true that the forged instrument must, on its face, appear to be one of sufficient legal efficacy; but it is sufficient if the legal validity be apparent, and not actual. It is only where the instrument appears as a matter of law to be void, that the accused can escape; and Mr. Bishop thus states the law: 'Since men are not legally presumed to know facts, an instrument which is good on its face may be legally capable of effecting a fraud, though inquiry into extrinsic facts should show it to be invalid, even if it were genuine.'" *Rudicel v. State*, 111 Ind. 595, 13 N. E. 114, and cited authorities.

The check, then, being complete on its face, and the affidavit a separate and independent document, not necessary to the execution of the check, it is an extrinsic, independent fact; and, even if not made, could not affect the completeness of the check, in so far as the "face of it" is concerned. This check was of at least apparent legal efficacy. It was drawn by the proper trustees, in favor of the proper teacher for a definite sum. And this was all, under the law, that the trustees could do, or were required to do. And their act gave the check legal efficacy, and served as the foundation of a legal claim and demand, and it could be used as legal proof. There was no defect in regard to the terms of the check, as shown by the "face of it." There was nothing that rendered it doubtful upon the "face of it," so as to require inuendo averments in declaring upon it. It was then a completed instrument for the purpose for which it was created, and, tested by Mr. Bishop's rule, "it is good and valid, on the face of it, for the purpose for which it was created." Now, what was that purpose? Simply to order the payment to the teacher of the amount of money specified on the face of it, out of a certain school fund, belonging to Blanket School District No. 51, for services as teacher of said district for the month ending May

20, 1890. It certainly was good for this purpose, and, if the teacher failed to make the required affidavit, that failure could not affect the terms of the instrument. If the check was void without the affidavit, as held by the majority, then there was no act save the oath of the teacher that could render it valid; and, in case of his death before making said affidavit, it could not form the basis of a claim by his estate that could be enforced against the school fund. If void during the life of the teacher, the fact of his death would not operate to make the check valid, or give it any legal standing. I do not apprehend that this position would be contended for as being correct, for, in case of the death of the teacher before the affidavit is made, the check certainly would constitute the basis of a claim in favor of his estate for the services rendered by him as such teacher. If this be true, the instrument was not a void one; and, if it had been genuine, it certainly could be made the basis of a legitimate and valid claim for the sum specified upon its face. But it is not necessary that the instrument be actionable in order to constitute it the subject of forgery. It is sufficient if the instrument affects property and is one which could be used as evidence, either for or against a person whose act it purports to be, or against any other person. See *State v. Boasso*, 38 La. Ann. 202; *State v. Johnson*, 26 Iowa, 407; *State v. Dunn*, 23 Or. 562, 32 Pac. 621; *People v. Munroe*, 100 Cal. 664, 35 Pac. 326; and 24 Lawy. Rep. Ann. p. 33 et seq., and notes, for collated authorities on questions discussed.

I therefore feel constrained to dissent from the opinion of my brethren,—from the position upon which they have predicated their opinion that the instrument is void without the teacher's accompanying affidavit. I think the judgment in this case should be affirmed.

MARSHALL v. STATE.

(Court of Criminal Appeals of Texas. June 3, 1896.)

CRIMINAL LAW—SUFFICIENCY OF INSTRUCTION.

Where the evidence was largely circumstantial, and defendant attempted to show an alibi, instructions covering the law of circumstantial evidence and the question of alibi will be deemed sufficient, in the absence of exception to the charge or a request for further instructions.

Appeal from district court, Navarro county; Rufus Hardy, Judge.

John Marshall was convicted of burglary, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of burglary, and prosecutes this appeal. There are only two questions raised for our consideration,—the insufficiency of the evi-

dence to support the conviction, and the error of the court in not fully presenting the law applicable to the theory of appellant's defense.

With reference to the first, we are of opinion that the evidence is amply sufficient to support the conviction. We do not propose to enter into a discussion of the testimony. The theory of the appellant on the trial was that at the time of the burglary, and the burning of the burglarized house, he was at a different place, and asleep, and the goods found in his possession, and shown to have been taken from the burglarized house, he purchased at different places in the city of Corsicana. The names of the parties from whom he claimed to have purchased the different articles were given by himself in his testimony, and several of said parties were introduced, and testified in rebuttal, to the effect that his statements in this respect were untrue. With reference to this phase of the case, the court charged the jury that they must believe beyond a reasonable doubt that the defendant entered the house as charged in the indictment, with intent to commit the crime of theft, before they could convict him. He also charged very directly and pertinently the law applicable to alibi. He further charged them on the law with reference to circumstantial evidence. If other charges were desired by the appellant, he should have requested them. In the absence of exceptions to the charge, and the appellant's failure to ask special instructions if he deemed the court's charge insufficient, we are of opinion that the charge as given is sufficient. The judgment is affirmed.

HURT, P. J., absent.

PHILLIPS v. STATE.¹

(Court of Criminal Appeals of Texas. June 3, 1896.)

HOMICIDE—ASSAULT WITH INTENT TO KILL—INSTRUCTIONS.

On an indictment for assault with intent to kill, it appeared that defendant had gone to the prosecutor's house, and raised a difficulty, and the prosecutor had, after some fighting, put him out of the house. The next day, defendant took his gun, and demanded an apology of the prosecutor, which was refused. Defendant shot at him, whereupon prosecutor drew a knife, and cut defendant. Defendant shot a third time, the shot taking effect. Defendant claimed that he did not shoot at all until after prosecutor had cut him. Held that, under the evidence, the shooting was either an assault with intent to kill, or was justified as being in self-defense, and it was not error to refuse to charge as to aggravated assault.

Appeal from district court, Hays county; H. Teichmueller, Judge.

Anderson Phillips was convicted of an assault with intent to kill, and appeals. Affirmed.

¹ For opinion on rehearing, see 36 S. W. 441.

Will G. Barber and Ed. R. Kone, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to murder, and his punishment assessed at two years in the penitentiary, and he prosecutes this appeal. The court gave a charge upon assault with intent to murder and self-defense, but did not give a charge upon aggravated assault. The defendant excepted to the refusal of the court to charge upon said theory, and this refusal of the court is assigned as error. In our view, the record presents but two theories. It appears that, the night before the difficulty, the appellant went to the house of the witness Lenox Anderson, and raised a difficulty. Anderson tried to put him out, and the defendant started to strike him with a gun, and Anderson then knocked him down, and beat him severely, and put him out of the house. According to the theory advanced by the state, on the next day the defendant armed himself with a pistol, and, having declared his purpose to kill a negro, sought the prosecutor, Anderson, and demanded of him an apology. The prosecutor refused to apologize. Appellant thereupon pulled his pistol, and began to shoot at him. After he pulled his pistol and had shot at the prosecutor, the prosecutor cut him with his knife. After he was cut, he succeeded in hitting the prosecutor with his third shot. The defendant's theory was that he went to see the prosecutor, Anderson, on a peaceful mission, to get him to explain and apologize for the way he had beaten him the night before, and that the prosecutor refused to apologize, and assaulted and cut him with his knife; and he thereupon drew his pistol, and began shooting at him, and hit him with the third shot. This testimony for the state and the appellant, in our opinion, presents two clear cut issues,—assault with intent to murder on the one hand, and self-defense on the other. The court gave a full and clear charge, presenting both phases of the case, and especially carefully guarding all of the rights of the appellant. The jury believed the theory presented by the state, and that theory, in our opinion, is amply supported by the evidence in this case, and we see no reason to disturb it. The judgment is affirmed.

HURT, P. J., absent.

TURNER v. STATE.

(Court of Criminal Appeals of Texas. June 3, 1896.)

CRIMINAL LAW — NEW TRIAL — CUMULATIVE EVIDENCE — VERDICT.

1. Evidence which, if introduced, would have been cumulative, affords no ground for a new trial as newly-discovered testimony.

2. Where there is a very decided conflict in the evidence, the verdict will not be disturbed.

Appeal from district court, Travis county; F. G. Morris, Judge.

Jim Turner was convicted of an assault with intent to murder, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of an assault with intent to murder.

1. The failure of the court to charge the jury in relation to the law governing aggravated assault is assigned as error. We do not think the testimony in the case called for a charge upon aggravated assault. If the testimony for the state is true, appellant made an unprovoked and an unnecessary assault with a pistol upon Hillard Brown. If the testimony for the defense is to be credited, Hillard Brown made an assault upon appellant with his knife, under such circumstances as indicated that he intended to use it with serious effect, and that in repelling this assault appellant drew his pistol. The testimony clearly presents the issue upon one side of an assault with intent to murder, and upon the other of justification or self-defense.

2. Appellant contends that the court should have granted his motion for a new trial upon newly-discovered testimony. The witnesses by whom this testimony was to be shown were Jane Maxwell and Phil Field. By the witness Maxwell he proposed to prove that shortly after the difficulty between Brown and himself, she bound up the finger of one Johnson Billingsley, and that Billingsley told her that Hillard Brown cut him while he was holding Brown to keep him from cutting appellant. The witness stated that she did not know that this was material, and never said anything about it until after the appellant was convicted. What Billingsley told this witness was not original evidence, and could not be introduced as such. As to the witness Field, his proposed testimony shows that he saw Brown draw his knife, and cut at appellant, before appellant drew his pistol; and that Brown would have cut appellant if he had not been prevented by Johnson Billingsley; and, further, that Johnson Billingsley got his finger cut while he was holding Brown. Had this witness been present at the trial, this testimony would have been cumulative, and, being cumulative, it affords no ground for granting a new trial as newly-discovered testimony. See Willson's Cr. St. § 2540, for collated authorities.

3. In regard to the testimony there is a very decided conflict. The issue was sharply drawn by the evidence as stated above. If the testimony for the state be true, this conviction should be sustained; if that for the defendant be true, he should have been acquitted. The jury had the witnesses before them, heard them testify, saw their manner of testifying, and they decided ad-

versely to the appellant. We see no reason for disturbing their verdict, and the judgment is affirmed.

HURT, P. J., absent.

HARRIS v. STATE.

(Court of Criminal Appeals of Texas. June 3, 1896.)

HOMICIDE—BILLS OF EXCEPTIONS—INDICTMENT—MEANS OF DEATH UNKNOWN—INSTRUCTIONS.

1. In a criminal case, to make available on appeal an objection that witnesses were permitted to read testimony taken on the examining trial of others, tried for the same offense, the bill of exceptions should show that the witnesses did not request the use of the examining trial testimony, and should set out the questions and answers that were then elicited.

2. Where error is predicated on an alleged improper examination of a witness by the court, the bill of exceptions must show what testimony was elicited by him.

3. Ordinarily it is discretionary with the trial court to permit leading questions; and, where such permission is objected to, the bill of exceptions must show the attending circumstances under which the questions were propounded.

4. An indictment which alleges that "the said defendant did then and there, with malice aforethought, kill [deceased] by some means to the grand jury unknown," is sufficient, where the circumstances do not permit the means of death to be described with certainty.

5. Where the evidence in a murder case indicates only in a vague and general way what means caused the death of the deceased, proof need not be offered that the means of death was, as alleged in the indictment, unknown to the grand jury.

6. Where the court had charged that before the jury could convict defendant they must find beyond a reasonable doubt that she was a principal, a failure to charge that, if she were an accomplice or an accessory, they must acquit her, was without prejudice where the evidence shows that, if guilty at all, she was guilty as a principal.

7. A statement made by a witness on the trial of one accused of homicide is admissible as original evidence, as a statement or confession with regard to the homicide and her connection therewith, on a subsequent trial of the witness for the same offense.

Appeal from district court, Live Oak county; M. F. Lowe, Judge.

Bessie Harris was convicted of murder, and appeals. Affirmed.

F. G. Chambers, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of murder in the second degree, and given five years in the penitentiary, and prosecutes this appeal.

1. Appellant, in her first bill of exceptions, claims that she was prejudiced by the action of the court in permitting the witnesses John Davis and Dollie Harris to read certain testimony taken on the examining trial of Hogan and Goodwin, tried for the same offense; and also complains that the court erred in using said testimony in examining said witnesses. The ground of objection urged is

that the said written testimony was not certified to by the justice, and that the trial was in a case against other defendants, charged with the same offense, and that the appellant in this case was not a party in said preliminary examination. The court, in his explanation to said bill, shows that when he used said examining testimony it was only for the purpose of refreshing the memory of the witnesses named, and that at that time the jury had retired. Said explanation, however, still leaves that part of the bill with reference to the course pursued in the examination of the witnesses by counsel in connection with the examining testimony intact. The bill does not show how said examining testimony came before the court and jury. If it was at the request of the witnesses themselves, in order to see what they had testified to on a former trial, involving the same facts, it was competent for them to have recourse to said examining testimony, if they should say it would refresh their mind, regardless of whether it was certified to by the justice or not. In order to have availed the appellant, the bill should have shown that said witnesses did not request the use of said examining trial testimony, and that they did not identify and recognize the same as the testimony given by them before the justice on the trial of Hogan and Goodwin. And, moreover, in order for this court to determine whether or not any injury resulted to the appellant from the use of said testimony, the questions and answers—that is, the testimony itself that was then elicited—should have been contained in the bill. This was not done.

2. Appellant has a bill of exceptions to the refusal of the court to admit the testimony of one T. J. Anderson. The court, however, in his explanation to the bill, shows that the said Anderson knew nothing of the matter inquired about of his own knowledge, and that his testimony upon the point was merely hearsay. The court did not err in refusing to admit such testimony.

3. Appellant also excepted to the action of the court with reference to the witness Davis, introduced by the state. She complains that the court permitted leading questions to be propounded to said witness, and the court undertook the examination of the said witness, and, among other things, during said examination, said to the witness that he would give him a chance to put himself right before he left the stand, and he wanted him to tell the truth about this matter, and that he stated to said witness "that you will be handled for perjury if you do not tell the truth in this case." The court, in his explanation to said bill, says that all that transpired between him and said witness after the jury had been retired, and that it was then that he insisted on the witness telling the truth about the matter, and that he would be handled for perjury, etc., if he did not tell the truth. How this examination

by the court came up is not explained; nor is it shown what answers, if any, the court elicited from the witness. In the absence of such showing, we are not in a position to determine whether the action of the court was prejudicial to the appellant or not. We would here observe that the examination of witnesses on the part of the state, as a rule, is confided to the prosecuting attorney, and the court should interfere in such examinations with great caution. He should certainly refrain from any attempt to coerce testimony, much less to menace or bulldoze the witness; and if it had been shown in this case that by the action of the court in threatening the witness with the punishment for perjury, testimony material to the state against the appellant had been elicited, this court would not hesitate to reverse the case. The bill, however, is fatally defective in failing to show that any testimony at all was elicited; and the court explains that what he did in the case with reference to the witness was after the jury had retired; and even it is not shown that any material testimony was elicited from said witness by the action of the court. As far as the course pursued by the court in permitting leading questions to be propounded by the district attorney to the witness Davis, as has been repeatedly held by this court, that is a matter largely in the discretion of the trial judge. If the witness being examined is an unwilling or reluctant witness, this being made manifest, the privilege of propounding leading questions to a witness called by the state is not improper. The bill in this respect is defective, in that it does not advise us as to the attending conditions when the court permitted leading questions to be propounded by the district attorney to the state's witness.

4. The indictment, in alleging the means of death, uses the following language: "That the said defendant did then and there, with malice aforethought, kill A. S. Blackman, by some means to the grand jurors unknown." Appellant insists that this indictment is defective, because the means or weapon with which the homicide was committed is not stated. With reference to a homicide committed where the weapon or instrument is not known, Mr. Wharton says: "If the instrument by which the homicide was committed be not known, it is enough for the indictment to aver such fact; and under the circumstances the want of specification will be excused on the same principles as allow the nonsetting out of a stolen or forged paper, when such paper is lost or in the prisoner's possession. Thus, where the fourth count of the indictment averred that the defendant, 'in and upon the said G. P., feloniously, willfully, and of his malice aforethought did make an assault, and him, the said G. P., in some way or manner, and by some means, instruments, and weapons to the jurors unknown, did then and there felo-

nously, willfully, and of malice aforethought deprive of life, so that he, the said G. P., then and there died,' this was sustained by the supreme court of Massachusetts. 'The rules of law,' said Chief Justice Shaw, when charging the jury, 'require the grand jury to state their charge with as much certainty as the circumstances of the case will permit; and if the circumstances will not permit of a fuller and more precise statement of the mode in which the death is occasioned, this count conforms to the rules of the law.'" See Whart. Hom. § 818. The pleader in this case appears to have followed the rule here stated. Appellant also contends that some proof should have been offered that the means of death was not known to the grand jury which presented the bill of indictment, insisting that a matter of this sort is within the rule laid down by this court with reference to the allegation in thefts as to the unknown owner of property alleged to have been stolen. We know of no particular case which would require us to adopt the same rule with reference to indictment for murder in alleging the means of death as in indictments for theft. We have held, in the character of cases referred to by counsel, that where the proof on the trial made no suggestion that the owner of stolen property, by the use of diligence, might have been ascertained, the state would be still compelled to show that reasonable diligence was used by the grand jury to ascertain the name of the owner. Applying the same rule here, the evidence on the trial indicates only in a vague and general way what means did cause the death of the deceased. We are inclined to the opinion that the homicide was committed by strangulation, caused by the use of a rope; or it may have been done by a blow back of the ear with some instrument. In a case like the present, where it is doubtful how death was caused, it is allowable to charge that it was done by some means unknown to the grand jury.

5. Appellant complains that the court should have given the appellant the benefit of a charge on the theory that she may have been an accomplice or an accessory, and that the jury should have been instructed to acquit her if they believed that she was either an accomplice or an accessory. The court instructed the jury that before they could convict appellant they must find beyond a reasonable doubt that she was a principal, and the evidence, to our view, indicates that, if there was on her part any guilty participation in the alleged homicide, it was neither as an accomplice nor an accessory, but as a principal.

6. Appellant complains that the court did not instruct the jury as to the purpose for which Steadman's testimony as to the statement made by the appellant on the trial of Hogan and Goodwin was admitted in evidence, and she insists that the purpose of such testimony should have been restricted

by the court to the purpose of impeaching her testimony. She was not a witness in the case, and for the court to have instructed the jury as insisted by appellant would have been error. Moreover, this testimony was admitted as original evidence, as her statements or confessions with regard to the homicide, and her connection therewith.

7. Appellant contends that the evidence is insufficient to sustain the verdict. We have examined the record carefully, and in our opinion it does sustain the finding of the jury. It is a most peculiar case, but we cannot account for the acts, conduct, and statements of the appellant on any other reasonable hypothesis than that she was a guilty participant in the murder of the deceased. There being no errors in the record, the judgment is affirmed.

HURT, P. J., absent.

LAWRENCE v. STATE.

(Court of Criminal Appeals of Texas. June 3, 1896.)

MURDER—PREMEDITATION—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—SELF-DEFENSE.

1. It is not necessary that any length of time intervene between the formation of the intent to kill and the act of killing, to render the killing murder in the first degree.

2. A charge on manslaughter, that if the jury find that all the facts in the case were sufficient to excite passion in defendant's mind of such a character as to render him for the time being incapable of cool reflection, and that he killed deceased under such circumstances, to find him guilty of manslaughter, is sufficient, without stating the particular facts on which such a charge was predicated.

3. A motion for further time to answer contradictory affidavits, filed by the state, on motion by defendant for a new trial for newly-discovered evidence, is properly denied, where it was not made until after the parties had gone into a discussion of the motion for a new trial.

4. It is not error to refuse a new trial for newly-discovered evidence, where the contradictory affidavits filed by the state show that the evidence is probably untrue.

5. Where defendant was the aggressor, the fact that the deceased, as defendant advanced upon him, started to draw his pistol, whereupon defendant shot him, does not make a case of self-defense.

Appeal from district court, Dallas county; Charles F. Clint, Judge.

Sherman Lawrence was convicted of murder in the first degree, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at a life term in the penitentiary, and he prosecutes this appeal.

1. Appellant contends that the charge of the court ought not to have submitted murder in the first degree at all, as all of the evidence showed that the killing was upon a sudden impulse, produced by some cause

unknown. It is true that the testimony showed a killing based upon a very slight pretext. The very fact, however, that the evidence shows that there was occasion for the killing, indicates that the killing was malicious. It is not necessary, as has been repeatedly held, that any length of time intervene between the formation of the intent to kill and the killing, and no length of time is required to form the intent to kill upon express malice. The very fact that the killing was done without cause indicates that the motive or intent was in a heart devoid of social duty, and one fatally bent on mischief.

2. Appellant claims that the charge of the court on manslaughter did not state the particular facts upon which such a charge was predicated. The charge was a comprehensive one upon this subject, and did not restrict the jury to the statutory causes, but authorized them, in determining the adequacy of the provocation, if any, to consider all the facts and circumstances in evidence in the case, and if they found said facts and circumstances were sufficient to excite passion in the defendant's mind of such a character as to render him for the time being incapable of cool reflection, and that he killed the deceased under such circumstances, to find him guilty of manslaughter. We think this a sufficient charge.

3. Appellant complains that he should have been allowed further time to answer the controverting affidavits filed by the state to his application for a new trial, on the ground of newly-discovered evidence. From the court's explanation to appellant's bill, it appears that the defendant did not ask further time to file counter affidavits until he had gone into a discussion of the motion. He should have craved further time before the argument of said motion.

4. Appellant filed a motion for a new trial, because of the newly-discovered evidence of Mrs. K. Nitzschmann, Mary Ventura, and D. B. Frank. The state proved by Cabell and others that they got to the scene of the homicide soon after it occurred, and the body was apparently undisturbed, and that the defendant's vest was buttoned close up all the way; that on unbuttoning the same, on the inside vest pocket, a small pistol was found. The affidavit of D. B. Franks states that he thinks he reached the body of the deceased first; that he struck a match, and held it to his face; and that he noticed his vest was unbuttoned; and that he had not mentioned the matter until after the trial, when he told the appellant's attorney, R. B. Seay. On the trial of the case, the state proved by the witness Black (who was with the deceased at the time he was shot) that the deceased's vest was buttoned all of the way down, and close up under his neck; that he saw the pistol taken from his inside vest pocket, after he was killed; and that Sheriff Cabell arrived about 20 minutes after he

was killed, and found the vest in that same condition. So that the witness Frank seems to have mysteriously found the body, and said nothing about the fact until after the trial; and if it is true, as he states, that the vest was unbuttoned, he must have seen it after he was killed, and afterwards one had unbuttoned the deceased's vest. If, however, Cabell and Black were both mistaken about his vest being buttoned up, we cannot regard his testimony as material. The homicide was committed at night. The witnesses say that it was a dark night. The parties, the deceased, who was with one Black, were walking in a path parallel with the appellant and some three or four others. There were high weeds between the two paths. None of the witnesses pretend to have been able to see anything that either of the parties did immediately prior to the killing, except one witness, Murray, who testified for the appellant that the deceased, as appellant ran across to the path where he was, threw his hand to his bosom. He could have done this as well with his vest buttoned as unbuttoned, and the demonstration would serve the same purpose in either event; so we cannot regard his testimony as material, even if it were not confronted in such manner as to render it altogether improbable.

The affidavits of Mrs. Nitzschmann and Mary Ventura show that they lived not far from where the homicide was committed; that on the night of the homicide, and shortly before it occurred, the deceased and one William Black came to the house where said parties lived; that the deceased came for the purpose of buying a wagon; that, while there, the deceased, Mason Miller, drew a pistol from his pocket, and began waving it about, and stated, "I've got this [meaning the pistol], and I am not afraid of anybody;" that, on request, deceased put up the pistol, and they left, going towards one Houseman's place, about 400 yards distant. After a few minutes, they heard a pistol fired in the direction they had gone. Mrs. Nitzschmann immediately went down there, and found one hand of the deceased down by his side, and there was a large pistol by it, the same pistol that she had seen him with at her house a short time before. The way she came to see it, she was examining the body, and stepped on it. Miller (deceased) was then dead. It appears that this witness and Mary Ventura were summoned as witnesses by the state, and were present at the trial, but were not examined. R. B. Seay, attorney for appellant, and appellant, both made affidavits that they knew nothing of their testimony, and had no reason to suspect that they knew the facts to which they swore in their affidavits. The state controverted these affidavits by Ben Cabell, the sheriff, and R.

P. Sanderson, a mounted policeman; and they both state in their affidavits that, immediately after going to the body of the deceased, they went to the house where Mrs. Nitzschmann and Mary Ventura lived, and talked with said witnesses, and they informed them about the killing of Miller, and that neither of said witnesses knew that he had been killed, and they so stated, and furthermore stated that it had been but a short time since he left their house, and that while there he behaved very nicely, and were surprised to hear that he had been killed. In the face of the controverting affidavits, in our opinion, the court correctly held that the newly-discovered evidence was not probably true.

5. The court gave a charge on self-defense, though this is scarcely raised by the testimony. If the deceased had a pistol, the appellant could not have seen his pistol in the path in which he was traveling, and he could only have seen it when he sprang across the path, and confronted him with his own pistol. The parties evidently did not know each other. The witnesses did not seem to apprehend anything until the defendant jumped from the path in which he was traveling, over the weeds, into the path where Miller was, and confronted him, saying, "You move, —you white-livered son of a bitch, and I'll kill you." He held the pistol in Miller's face. Miller said, "You have got me, ain't you?" The defendant then fired, and the appellant immediately started off, saying, "That is my record." This is the testimony of the witness Black, who was in the path with the deceased at the time of the killing. The witness Frank Murray, who testified for the appellant, stated that, as he walked along, he heard a conversation start up between the two men in the other path and the appellant, who was with his party. The defendant made the remark, "It is a damned lie; you will not do what you say you will do." The defendant then started for the man in the other path. Deceased threw his right hand up to his breast, and appellant fired, and killed him. This latter is the most favorable testimony for the appellant. We do not see how it can be re-enforced by the newly-discovered evidence, so as to make for the appellant a case of self-defense. By his own testimony, the appellant was the aggressor; and if the deceased had a pistol, and was about to draw it as the appellant advanced upon him, it would not make a case of self-defense for the appellant. So, in our opinion, there was no error in the court overruling the motion for a new trial on the ground of newly-discovered evidence. The judgment is affirmed.

HURT, P. J., absent.

Ex parte CRAWFORD.

(Court of Criminal Appeals of Texas. June 3, 1896.)

CRIMINAL LAW—SENTENCE—CUMULATIVE PUNISHMENTS—HABEAS CORPUS.

Code Cr. Proc. 1895, art. 840, provides that, when a defendant has been convicted in two or more cases, and the punishment in each is confinement in the penitentiary, the judgment and sentence "shall be rendered and pronounced in each case in the same manner as if there had been but one conviction," except that the "judgment" in the second and subsequent convictions "shall be" that the punishment shall begin when the judgment and sentence in the preceding conviction shall have ceased, and the sentence and execution shall be accordingly. *Held* that, where the subsequent sentences were made cumulative in the sentences only, and not in the judgments proper, the sentences were not void, so as to entitle defendant to his release, on habeas corpus, after expiration of the first sentence.

Original application on the part of Ross Crawford for a writ of habeas corpus. Refused.

W. F. Robertson, for applicant. Mann Trice, for the State.

HENDERSON, J. This is an original application to this court for a writ of habeas corpus; the alleged ground being that, the applicant having been convicted in the district court of Williamson county in three cases of felony, the sentences were not made cumulative in the judgment proper, and, although they were made cumulative in the final sentences, that this is not in conformity with the statute on the subject, and the sentences cannot thus be made cumulative. The applicant shows that he served his first sentence, and claims that he ought to be enlarged as to the punishment for the other offenses, which is made cumulative only in the sentences. By article 840, Code Cr. Proc. 1895 (which is a re-enactment of the act of 1883), it is provided: "When the same defendant has been convicted in two or more cases, and the punishment assessed in each case is confinement in the penitentiary, or the county jail for a term of imprisonment, the judgment and sentence shall be rendered and pronounced in each case in the same manner as if there had been but one conviction, except that the judgment in the second and subsequent convictions shall be that the punishment shall begin when the judgment and sentence in the preceding conviction shall have ceased to operate and the sentence and execution thereof shall be accordingly."

It is contended that, inasmuch as the article in question uses the term "judgment," and says "that the 'judgment' in the second and subsequent conviction shall be," etc., it is mandatory, before the sentences can be held cumulative, that the judgment shall recite the cumulations. In this connection applicant cites article 831, Code Cr. Proc. 1895, defining a judgment in a felony case, and

also article 832, defining a sentence. Now, it will be observed that, in the trial of a case, the jury has nothing whatever to do with the record of the preceding trial in regard to cumulative penalties. This is a matter exclusively for the court, who, it is presumed, inspects the record of such former convictions, and imposes the penalty accordingly. By reference to article 831, it will be seen that cumulative penalties are not provided for in the recitations of the judgment. As to the punishment, the jury prescribes that in each case; and subdivision 10 of said last-mentioned article provides that "the defendant be punished as has been determined by the jury in cases where they have the right to determine the amount or the duration and place of punishment, in accordance with the nature and terms of the punishment prescribed in the verdict." Article 832 provides: "A sentence is the order of the court made in the presence of the defendant and entered of record, pronouncing the judgment and ordering the same to be carried into execution in the manner prescribed by law." Here we have the terms, "pronouncing the judgment," "ordering the same to be carried into execution," etc. "Pronouncing" means "to utter formally, officially or solemnly; to declare or affirm,"—that is, to utter formally and solemnly the judgment of the court, and order the same to be carried into execution. And it has been repeatedly held by this court that the sentence is the final judgment in the case, only after which will the jurisdiction of this court attach. So, we take it that, when article 840, with reference to cumulative punishments, uses the term, "Judgment and sentence shall be rendered and pronounced in each case in the same manner as if there had been but one conviction, except that the judgment in the second and subsequent convictions, shall be that the punishment shall begin when the judgment in the preceding conviction has ceased to operate," etc., it has reference to the final judgment and sentence. There is, as stated, no provision for the entry of these cumulative sentences in the original first judgment. There is no particular occasion why it should go into said entry. When the final judgment and sentence comes to be rendered, the court inspects all the preceding judgments of conviction that may have been rendered against a defendant, and, with all of them before him, cumulates the punishments, and renders the final judgment accordingly. Of course, it would do no harm if the cumulative punishments go into the entry of each formal judgment; but there appears to us no necessity why this should be so, and we do not understand the statute to require it. Concede, however, that article 840 bears the construction for which the applicant contends. Then he is equally without relief, so far as this court is concerned. If he was dissatisfied with the entry as made in the sentence cumulating his punishment,

he had his right of appeal in order to have the same corrected. The entry of cumulative punishments in the final judgment and sentence certainly cannot be treated as void, and, not being void, he cannot avail himself of the remedy by habeas corpus. See *Church, Hab. Corp.* §§ 365, 365a, 365b; *Ex parte Dickerson*, 30 Tex. App. 448, 17 S. W. 1076; *Ex parte Wilson*, 114 U. S. 417, 5 Sup. Ct. 935.

The application for writ of habeas corpus is refused.

HURT, P. J., absent.

CROW v. STATE.

(Court of Criminal Appeals of Texas. June 3, 1896.)

CRIMINAL LAW—APPEAL.

In all felony convictions of a less grade than capital, sentence is a prerequisite to appeal.

Appeal from district court, Milam county; W. G. Tallafarro, Judge.

Jim Bob Crow was convicted of murder, and appeals. Dismissed.

Mann Trice, for the State.

DAVIDSON, J. This appeal is prosecuted from a conviction of murder in the first degree, the punishment being assessed at a life term in the penitentiary. The assistant attorney general moves the dismissal of the appeal, because the record fails to show that appellant was sentenced in the court below. From an inspection of the record we find this motion well taken, and it must be sustained. In all felony convictions of less grade than capital the sentence of the convicted party is a prerequisite to an appeal to this court. The motion to dismiss the appeal is sustained, and the appeal is dismissed.

HURT, P. J., absent.

LORANCE v. STATE.

(Court of Criminal Appeals of Texas. June 3, 1896.)

CRIMINAL LAW—TESTIMONY AFTER RETIREMENT OF JURY.

After retirement of a jury to consider their verdict, they cannot hear testimony other than that which has already been placed before them, and recalling a witness and allowing him to testify to another fact is error.

Appeal from Bosque county court; W. B. Thompson, Judge.

Ed. Lorange appeals from a conviction. Reversed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of disturbing religious worship, and fined \$25; hence this appeal. The defendant's

fourth bill of exceptions recites that, "after the jury had retired to consider of their verdict, they returned into open court, and the court propounded the following question to both the state's witnesses Romine and Whitely, to wit: 'Did the disturbance continue after the minister reproved the boys the first time?' To which question the witness Romine answered that it did, and continued until the boys went out of the church. The witness Whitely answered that he did not remember, and could not say. To which counsel for the defendant objected because the word 'disturbance' was used in place of 'talking, laughing, and whispering,' as used in the indictment, and because the question did not ask the witnesses to state what he testified while on the stand, but the witnesses were to answer the above question." Error is assigned upon this ruling of the court. We think the error is well assigned. After a jury has retired to consider of their verdict, they cannot hear testimony other than that which has already been placed before them; and, in the event any witness is recalled, he can only be so recalled for the purpose of restating the testimony already given by him. He cannot be interrogated with reference to any other fact. This is a plain statutory provision. See *Willson's Cr. St.* §§ 2384, 2385; *Williams v. State* (Tex. Cr. App.) 32 S. W. 893. The other questions suggested for reversal we deem without merit. The judgment is reversed, and the cause remanded.

HURT, P. J., absent.

FILES v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

THEFT FROM THE PERSON—WHAT CONSTITUTES—INDICTMENT—EVIDENCE—INSTRUCTION.

1. Under an indictment for theft, alleging that the property was privately taken from the person of W., if defendant privately, without W.'s knowledge, slipped his hand in W.'s pocket, and secured in his hand the pocketbook containing the money, there could be a conviction, notwithstanding W. subsequently discovered the fact before the pocketbook had been withdrawn; though there could be none if W. knew that defendant was attempting to privately slip his hand in his pocket before he had secured the pocketbook, and submitted to the same without resistance.

2. A charge that: "If you believe W. knew when defendant put his hand in W.'s pocket, and took W.'s pocketbook in his hand, you will acquit him. If defendant had the pocketbook in his hand before W. knew it, W.'s subsequent discovery of the fact would make no difference, and defendant could nevertheless be guilty; but unless you should find that defendant did have the pocketbook in his hand before W. knew it, you should acquit" him,—is not a charge on the weight of evidence, and does not assume as a fact that defendant put his hand in W.'s pocket without W.'s knowledge, and that he subsequently discovered it.

Appeal from district court, Hill county; J. M. Hall, Judge.

Oscar Files appeals from a conviction. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of theft of property from the person, and given two years in the penitentiary, and prosecutes this appeal.

1. The substantial facts as to the act of taking are stated by the state's witness W. R. Ward, who testified as follows: "That witness, defendant, and a number of others had been drinking together in the city of Hillsboro; that about eight o'clock at night he started to go home. Defendant took hold of one of his arms, and put the other around his waist, and said to him, 'Here, you don't know where you are going,' and led him out of the back lot, where they were, into an alley; and when they were about sixteen steps down the alley the defendant put his hands into his pocket, and took his pocketbook, which contained two \$5 bills, and two one cent copper pieces. These bills were United States currency money. It was my money. I did not know when the defendant put his hand in my pocket, but I felt him as he was pulling my pocketbook out of my pocket, and said to the defendant, 'Never mind about that; I can attend to that.' I made no resistance, because I saw other negroes around, and was afraid to say anything," etc. On this state of facts, upon this point the court charged the jury as follows: "If you believe from the evidence said Ward knew when he (defendant) put his hand in his (Ward's) pocket, and took said Ward's pocketbook into his (defendant's) hand, then you will acquit him. If the defendant had the pocketbook in his hand before Ward knew it, the subsequent discovery of the fact by Ward would make no difference; and the defendant could nevertheless be guilty; but unless you should find from the evidence beyond a reasonable doubt that the defendant did have said pocketbook in his hand before Ward knew it, you should acquit the defendant." Appellant excepted to this charge of the court on the ground that it was a charge upon the weight of evidence, and assumed as a fact that the defendant put his hand in Ward's pocket without Ward's knowledge, and that Ward subsequently discovered it. We have examined the charge in question, and it occurs to us that it pertinently presents the issue in the case upon the very point of taking. The allegation in the indictment is that the property was privately taken from the person of said Ward. To sustain this allegation it was necessary for the state to prove that the defendant privately, without the knowledge of the prosecutor, slipped his hand into his pocket, and secured in his hand the pocketbook containing his money. Further asportation was not necessary. If, however, the prosecutor knew that the defendant was attempting to privately slip his hand in his

pocket, before he had secured the purse, and he submitted to the same without resistance, then it would not have been theft, under the allegations of the indictment. Both phases of the case upon this point were presented to the jury in a clear and succinct manner, and the charge of the court is not obnoxious to the criticism made by the appellant as being upon the weight of the evidence. See *McLin v. State*, 29 Tex. App. 171, 15 S. W. 600; *Green v. State*, 28 Tex. App. 493, 13 S. W. 784; *Flynn v. State*, 42 Tex. 301.

2. Appellant also excepted to the remarks of counsel for the state when addressing the jury. As soon as the court's attention was called to this, he reprimanded counsel, and instructed the jury to disregard the same. In this there was no error. The judgment is affirmed.

SCHROEDER v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

REMARK OF PROSECUTING ATTORNEY.

A reversal cannot be had because the district attorney, in his argument, called defendant a "hyena"; it not appearing that defendant was prejudiced thereby, and the court having promptly stopped the attorney, and instructed the jury to disregard the remark.

Appeal from district court, Washington county; Ed. R. Sinks, Judge.

Julius Schroeder appeals from a conviction. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to rape, and given 15 years in the penitentiary, and prosecutes this appeal.

1. There is only one bill of exceptions in the record. Appellant excepted to the remarks of the district attorney in his concluding argument to the jury, in which he characterized the defendant as a "hyena" three times. The court approved said bill, with the explanation that as soon as the defendant objected to said expressions he stopped the district attorney, and then and there withdrew said expressions from the jury, and instructed them not to consider the same. It is always improper to travel out of the record, and denounce a defendant by applying to him epithets, and the court should restrain this practice without even being appealed to. The epithet applied in this case was exceedingly improper, but it is not shown that it prejudiced the appellant and it is shown that as soon as the court's attention was called thereto he promptly stopped the district attorney, and verbally instructed the jury to disregard the same. If the appellant desired any further instructions to the jury in that regard, it was his duty to prepare and present the same in writing to the court, for submission to the jury.

2. Appellant, in his motion for a new trial, urged that the court committed an error in the following portion of the charge: "If you believe from the evidence that the defendant committed an assault upon the said Emma Kess, and that when he did so (if he did) he did not have the intent by force (as that term is defined in paragraph two of this charge) to have carnal knowledge of said Emma Kess without her consent, or that he had the intent to have carnal knowledge of the said Emma Kess with her consent, then, and in either case, you will acquit the defendant of assault with intent to rape." This charge was advantageous to the appellant, and presented the theory of the defense, to wit, that the defendant never did have the specific intent to commit a rape by force. This charge covered both phases of the defense relied on by appellant,—that is, in the first place, if the defendant, although he committed an assault upon said Emma Kess, did not have at the time the ulterior intent to have carnal knowledge of her without her consent, and by force, they would acquit the defendant; and, in the second place, although he may have committed an assault on said Emma Kess, and intended to have carnal knowledge of her, but that he did not intend to do so by force, but intended to gain her consent,—otherwise to desist,—in such case they would acquit. We fail to see how the appellant can complain of this charge.

3. The appellant's contention that the evidence does not support the verdict in this case is also groundless. We have carefully examined the record, and the jury were fully warranted in finding the verdict they did. The prosecutrix identified her assailant, and his proximity was shown by other testimony. He assaulted the prosecutrix in the dark, threw her down, choked and beat her; she repeatedly screamed, and he proceeded in his purpose until parties came to her relief, and the appellant fled. There is no question as to his guilt, and the judgment is affirmed.

SIMMONS v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

CRIMINAL LAW—APPEAL—INSUFFICIENCY OF RECORD.

An appeal in a criminal action will be dismissed where the record contains neither the sentence of the court nor the notice of appeal.

Appeal from district court, Runnells county; J. O. Woodward, Judge.

Will Simmons was convicted of murder in the second degree, and appeals. Dismissed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of murder in the second degree, and given 50 years in the penitentiary. The record does not contain notice of appeal or sentence, each

of which is necessary in order to attach the jurisdiction of this court. Even if we could entertain the appeal, the statement of facts was filed after the adjournment of the term of court, and there is no order of court authorizing such filing in vacation. Because the record does not contain a sentence and notice of appeal, the appeal herein is dismissed.

PIERCE v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

THEFT OF HORSE — IDENTIFICATION OF PROPERTY.

Under an indictment for stealing a sorrel mare, which was described as being thin, and having no particular marks or brands, testimony showing that defendant had been seen coming from the direction of the alleged owner's stable, riding a sorrel mare, thin in order, having no particular marks or brands; that he was seen afterwards by several persons with such an animal in his possession; and that neither defendant nor any of his family were known to have owned a sorrel mare,—was sufficient to identify the animal in the possession of defendant as the stolen mare.

Appeal from district court, Lamar county; E. D. McClellan, Judge.

Will Pierce was convicted of stealing a horse, and appeals. Affirmed.

Allen & Allen, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of horse theft. The only question presented by the appellant for a reversal is the alleged insufficiency of the evidence to support the conviction. The main point of contention is that the evidence does not sufficiently identify the animal seen in the possession of the appellant on Sunday morning after the horse was stolen during the previous night as the sorrel mare lost by the alleged owner. The evidence shows that the sorrel mare was taken from the stable during Saturday night, and she is described as being a sorrel mare, with no peculiar marks or brands on her, and thin in order. Appellant knew the mare well, had worked for her owner, and was acquainted with the premises from where she was stolen. Early Sunday morning he was seen by one Mary Ellis, some eight or ten miles from the place of the theft, riding a sorrel mare, with no peculiar marks or brands, and thin in order. This witness did not notice whether the animal was a mare or a horse; that the defendant rode the horse to the witness' house from the direction of where Mr. Latimer, the owner of the animal, lived. At this point appellant claimed, when asked why he had ridden the animal so hard, that she was young, and that he was breaking her for a white man. Defendant ate breakfast at this place, and rode the animal off in the direction of Julia Petty's residence. During that week Minor Latimer, the father of Lan Latimer, was at the house of the wit-

ness, looking for the mare. Appellant rode the animal from the residence of Mary Ellis to that of Julia Petty on the same morning. Julia Petty lived in the city of Paris. It was about 8 o'clock in the morning when he reached the residence of the witness Petty. He hitched the mare there, and asked permission to leave her there until he could go up town. He went off in the direction of town, and did not return until night. The mare stood hitched at the gate all day, and when the defendant came back from town that night witness said to him, "Will, you ought to be ashamed to treat your father's mare so badly." Defendant said, "It is not my father's mare; it is mine." Defendant went away that night, and witness saw no more either of the defendant or the mare. The mare had been ridden very hard, and had no peculiar marks or brands on her, and was a sorrel mare, thin in order. The defendant's father testified that during the time the mare was gone he did not know where the defendant was; that he did not own a sorrel mare or horse in January, 1895 (the mare being stolen in that month). He further testified that the defendant did not own a sorrel mare at that time, and he never saw the defendant with a sorrel mare. He gave defendant a bay horse, and afterwards, hearing of this alleged theft, he said to his son, that "they are accusing you of stealing Latimer's mare," and defendant said nothing in reply. He had never heard of the defendant breaking a sorrel mare for any white man. The alleged owner recovered the mare a few days after she had been stolen, from what the witnesses term "a stalk field"; that they did not know how the mare came in the field, but they had to let down the fence in order to get her out of the field. The mare had been used very badly, and ridden very hard, and was nearly dead when recovered, and did die soon after the recovery. We believe, under the facts in this case, that the animal is sufficiently identified as that of the alleged owner. The judgment is affirmed.

WOODS v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

CRIMINAL LAW—THREAT TO TAKE LIFE OF ANOTHER—EVIDENCE—HEARSAY—REPUTATION.

1. On a prosecution for threatening the life of another, testimony that witness heard others say that defendant had threatened the life of such other was inadmissible, being hearsay.

2. On a prosecution for threatening the life of another, it was error to allow a witness, who had stated that he did not know defendant's general reputation in the county in which he lived for carrying out his threats, to testify that defendant was a dangerous man.

Appeal from McLennan county court; W. H. Jenkins, Judge.

Lee Woods was convicted of threatening to take the life of another, and appeals. Reversed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of seriously threatening the life of Andy Walters, and fined \$100, and he prosecutes this appeal.

1. Appellant's first bill of exceptions recites that the state's witness Frank McCune testified that he had never heard any threat, but that he had heard other people say that the defendant had threatened the life of Andy Walters. Appellant objected to this testimony, upon the ground that it was purely hearsay, and because rumors of that character were calculated to prejudice the minds of the jury against the appellant. The court admitted the testimony. This testimony was clearly inadmissible, upon the grounds stated in the bill of exceptions. This testimony had a pertinent bearing upon the vital issue in the case, and evidently must have had a very serious bearing upon the minds of the jury.

2. Appellant's second bill of exceptions was reserved to the action of the court in permitting the witness Martin to testify that the appellant was a dangerous man, by giving his opinion in regard to this matter; the witness having already stated that he did not know the general reputation of the appellant, in the community in which he lived, as to whether he was or was not a man calculated to carry out any threat that he might make. Appellant objected to the introduction of this witness' testimony, because the reputation of the defendant could not be thus proved, and because the testimony was calculated to prejudice the minds of the jurors against the appellant. The court qualified this bill in the following language, to wit: "The witness testified that he was well acquainted with the defendant, but did not know his general reputation. The court then allowed him to answer as to his belief, from his personal knowledge of the man, as to whether he was likely to carry out any threat he might make." The reason given by the court for permitting this evidence to be introduced offers to our minds the very reason why it should have been excluded. The witness having stated that he was unacquainted with the general reputation of the defendant, he certainly would not then be permitted to give his own opinion. There is no statement of facts in the record. We are not aware whether appellant put his reputation in issue. If he did not, the state could not put this reputation in issue. Bearing upon the issue that the threats were seriously made, all the attendant circumstances could be looked to. Motive or a reason for desiring to kill the prosecutor could be looked to, also. The judgment is reversed, and the cause remanded.

ANDERSON v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

CRIMINAL LAW — APPEAL — RECOGNIZANCE — NEW TRIAL — NEWLY-DISCOVERED EVIDENCE.

1. A recognizance "to abide the judgment of the court of criminal appeals" is sufficient, though it omits the expression "of the state of Texas."

2. A motion for new trial on the ground of newly-discovered evidence was properly denied where it appeared that the matters set forth in the affidavit were known to defendant before the trial.

Appeal from Milam county court; Sam Streetman, Judge.

Bill Anderson was convicted of carrying a pistol on and about his person, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of carrying a pistol on and about his person, and appeals.

1. The assistant attorney general moves to dismiss the appeal, because of an insufficient recognizance. The defect in the recognizance consists in the omission of the expression "of the state of Texas," following the expression "to abide the judgment of the court of criminal appeals." Our statute has prescribed a form for recognizances in appeal misdemeanor cases, and the subsequent statute requires a substantial compliance with this form, in order that the jurisdiction of this court may attach on appeal. We are of opinion that the recognizance as found in the record is a substantial compliance with the statute, although it omits the expression "of the state of Texas." The motion to dismiss is overruled.

2. Appellant moved for a new trial on the ground of newly-discovered testimony, and files therewith the affidavit of one Ella McCullough. In her affidavit, she states that she was present when the appellant undressed and changed his clothes, and, if he had had a pistol, she would have seen it. She further narrates some matters that occurred in the presence of the appellant and one Belt Harland, and some remarks made by both of these parties, in connection with some trouble that had occurred, and was about to occur, between them, looking towards a personal conflict. These matters, from her statement in the affidavit, were known to the appellant before the trial, and were therefore not newly-discovered testimony. As presented to us by the record, the testimony was clearly not newly discovered, and the appellant should have used diligence in seeking to have the witness McCullough present at the trial.

With respect to that ground of the motion for a new trial which asserts that the verdict of the jury is contrary to the law and the evidence, we would say that two witnesses, one for the state and one for the ap-

pellant, testified positively and unequivocally to the fact that appellant had the pistol, and exhibited it. It is true that the defendant introduced other witnesses who testified that they were present and did not see the pistol. The credibility of these witnesses, and the weight to be attached to their testimony, were submitted fairly by the judge to the jury, and they decided adversely to the appellant. We see no reason why this judgment should be reversed, and it is therefore affirmed.

LEAKE et al. v. CITY OF CLEBURNE.¹

(Court of Civil Appeals of Texas. May 20, 1896.)

MUNICIPAL CORPORATIONS — CONTRACTS — LIMITATIONS — ESTOPPEL.

1. A city employed two attorneys to defend its interests in certain suits. They were to receive a certain per cent., contingent on a successful defense to the suits. Plaintiff was employed by the city as associate counsel in one suit in the United States circuit court, and it was agreed in writing that the compensation should be the same as was to be paid to each of the other attorneys, and on the same contingency. The suit was successfully defended. The other suits, in which plaintiff did not appear, were finally disposed of, and settlement was made with the original attorneys. *Held*, that plaintiff's right of action for compensation did not accrue till the entire litigation was ended.

2. Having paid the other attorneys, the city was estopped from denying the validity of plaintiff's claim.

Appeal from district court, Johnson county; J. M. Hall, Judge.

Action by Leake & Henry, co-partners, against the city of Cleburne, to recover an alleged fee for legal services. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

Henry, Patton & Brown for appellants. A. T. Plummer, W. D. McKoy, J. N. English, and W. J. Ewing, for appellee.

NEILL, J. Messrs. Leake & Henry, a law firm, on August 16, 1893, sued the appellee to recover a fee of \$5,000, which they claimed was due them for legal services performed under a contract with the city in successfully defending a suit brought by W. N. Cole against it in the United States circuit court of the Northern district of Texas, at Dallas, upon certain coupons, and to test the validity of certain bonds of the face value aggregating \$51,000, purporting to have been issued by appellee to procure a system of waterworks for the city. They alleged that, anterior to their retainer, the appellee had engaged in the defense of said suit the services of two other firms of attorneys; that the city contracted to pay appellants a retaining fee of \$250, and, for the further and contingent compensation for their services to be rendered in said court and cause, promised

¹ Rehearing denied.

to pay them such contingent fee as it had then engaged to pay each of the other firms, to mature and be payable when the contingent fee promised to be paid the other firms would, by the terms of their contract, become due and payable, which did not occur until in December, 1892; that, while the terms and conditions of their contract and the manner of its payment were made to depend upon the contract of the other attorneys, appellants contracted only to represent the city in said circuit court in said cause therein pending; that the contingent compensation contracted to be paid said firms of attorneys by the city was 10 per cent. on the amount of the principal of said bonds, one-half to each of said firms; and that the contingent fee of appellants was therefore 5 per cent. on the principal on said bonds. The performance of the services contracted for by appellants, and the successful termination of the suit in appellee's favor, were also averred. The appellee's answer consisted of general and special exception, general denial, pleas of two and four years statutes of limitations, and, for special answer, that, at and since the time of making said contract, there was in full force a valid ordinance of said city by the terms of which appropriations and payments of money and contracts to appropriate and pay money by appellee, to the amount of \$500 or more, were expressly forbidden and prohibited unless done by an order, resolution, or ordinance first passed by the city council by the concurrent vote of the council, etc.; that no such ordinance or resolution authorizing the making of said contract was ever passed, etc. Appellants filed supplemental petition, consisting of general and special exceptions and general denial. The cause was tried before a jury, and a verdict returned in favor of appellee, upon which the judgment appealed from was entered. After the suit was instituted in the federal court against the appellee by Coler, the mayor of Cleburne authorized Col. B. J. Chambers to go to Dallas to see J. L. Henry, and find out from him what his firm would represent the city in the case for. Upon such authority, Col. Chambers went to Dallas, saw Judge Henry, told him about the case, and that Brown, Ramsey & Crane and Bledsoe & Fisher had been employed in the case by the city, and, in response to his inquiry as to what his firm would represent the city for in the case, received the following written proposition: "Dallas, June 5, 1886. Col. Chambers: Answering your questions as to the terms on which we will assist the attorneys of Cleburne in defense of suit upon its waterworks coupons, now pending in the United States circuit court at Dallas, we will say that, if entirely agreeable with the attorneys now defending the case, we will assist in said court for a retainer fee of two hundred and fifty dollars, and a contingent fee equal to the one to be paid the leading attorneys for defendant. This, provided the

case is not tried at present time. Leake & Henry, per Henry. We mean, to make contingent fee equal to that of any one lawyer or firm of lawyers, not equal to all of them. L. & H." This communication was presented to the city council, a resolution adopted employing the firm to defend the suit, and the communication, together with the resolution, spread upon its minutes. Under their employment, Leake & Henry defended the city, and obtained a judgment in its favor, which was afterwards affirmed on appeal by the United States supreme court, and the \$250 retainer paid by the appellee. It is admitted by counsel in their argument, what we do not think can be controverted, that a written contract was thus entered into and acted upon by the parties. As, by the terms of this contract, the contingent fee to be received by appellants was to be "equal to the one to be paid to the leading attorneys for defendant," it is necessary to ascertain from their contract what contingent fee was to be paid such leading attorneys.

The contract of Brown, Ramsey & Crane and Bledsoe & Fisher with the city in the case of Coler v. The City of Cleburne was that they should attend to all matters in the federal and state courts relating to its city waterworks bonds, and, in addition to a specified fee, certain, were to have 10 per cent. of what was finally saved to the city at the end of litigation over the waterworks bonds. In other words, they were to give their personal services in defending the case pending in the circuit court in Dallas, and in all cases which might arise in the state courts growing out of the city's liabilities on waterworks bonds or its waterworks obligation, and were to have a contingent fee of 10 per cent.,—that is, each firm 5 per cent. upon all that might be saved to the city after the litigation was closed; such contingent fee to be reckoned or based upon \$51,000 of the city's bonds or obligations. Incorporating what one of these firms was to receive into the proposition of appellants which was accepted by the resolution of the city council, we have what the city was to pay them under the contract. It is 5 per cent. of all that might be saved to the city on its waterworks bonds after all litigation was closed, not 5 per cent. on the city's obligations upon the successful termination of the suit in which appellees were retained, unless the litigation was closed by the termination of that suit. Though appellants had done all required of them under their contract, they could not have successfully maintained their action against the city for their contingent fee when the judgment in that case was affirmed by the supreme court, because another suit had been instituted, and was pending in the state courts, on the city's waterworks bonds. Had they, preliminary to a suit, presented a claim to the city council for allowance of their contingent fee, they would have been met with the same reply that was made to

Brown, Ramsey & Crane and Bledsoe & Fisher when they presented theirs: "Your fee is not yet due, nor can the council determine what it will be, for another suit is pending involving the validity of the bonds; and, under your contract, you are only to receive a contingent fee equal to that to be paid our leading attorneys, which is 5 per cent. of all that may be saved to the city on its waterworks bonds after all litigation is closed. We cannot anticipate that the city will be saved from all liability on these bonds, or that it will not finally have them all to pay. Wait until after all litigation is closed." Just here we will remark that the evidence that was offered to show that the council, when it refused to allow the claim of the other attorneys upon the ground it was not due, considered appellants' claim in the same category, is, under our view of the contract, unimportant, for it appears from the contract itself, taken in connection with the pendency of the other suit, that appellants' claim was in exactly the same condition as that of the other attorneys, and it is a matter of no moment how the council regarded it. It was the duty of the court to construe the contract, and, upon the undisputed facts, to instruct the jury that appellants' cause of action did not accrue until in December, 1892, if then, when the other suit was decided by the court of civil appeals at Ft. Worth. If, after that, as the testimony seems to indicate, the appellee determined that the contingent fee of the other attorneys was due, and settled with them on such determination, we think, under the terms of appellants' contract, the city ought not to be heard to say that they are not entitled to their compensation. The verdict being manifestly contrary to the law and evidence, the court erred in not granting appellants a new trial, for which reason the judgment of the district court is reversed, and the cause remanded.

REED v. BREWER.

(Court of Civil Appeals of Texas. April 22, 1896.)

NEGOTIABLE INSTRUMENTS — ILLEGAL CONSIDERATION — IMMORAL PURPOSE — ASSIGNMENT — KNOWLEDGE OF INDORSEMENT — PARTNERSHIP.

1. Plaintiff, with full knowledge of the facts, sold furniture for use in a house of prostitution, under a contract providing for monthly payments, and that the purchaser should use the furniture in her house: title to remain in the vendor until the price was paid. *Held*, that the contract, and notes given in accordance therewith, were void, being based upon an illegal consideration.

2. Action having been brought upon notes based on an illegal consideration, the plaintiff agreed to dismiss upon the execution of an agreement by the defendant promising, in consideration of the dismissal, to pay a certain sum weekly until the notes were paid. *Held*, that the illegal consideration in the original notes extended to the new contract, rendering it void.

3. Where notes given to a firm for an illegal consideration are indorsed in blank, and transferred to a member of the firm, the transferee is charged with notice of the illegal character of the notes, and is not an innocent holder.

4. The fact that the use of the furniture was not regulated by the contract does not relieve the notes of the illegal consideration; the defendant being bound to keep and use the furniture only in her house, which was known to plaintiff to be a house of prostitution.

5. Within 11 months after the execution of notes to a named payee, plaintiff and her partner made an assignment, reciting that they were then, and theretofore had been, doing business in the firm name and style of such named payee. *Held*, that this was sufficient to show that the partnership existed when the notes were executed.

Appeal from district court, Bexar county; S. G. Newton, Judge.

Action brought by A. Reed against Sarah Brewer to recover \$1,800 due on promissory notes. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Otto Staffel, for appellant. Cox & Haltom, for appellee.

FLY, J. The appellant here was plaintiff in the district court, and sued appellee on a debt of \$1,800, together with interest from March 14, 1885. Appellee answered by general demurrer, plea of limitation, general denial, and that the consideration for which the debt was made was furniture furnished by the firm of Erastus Reed, which was composed of Erastus Reed and appellant, for furnishing a house of prostitution, and was to be paid for, as said firm well knew, out of the profits arising from the business of keeping a brothel in the city of San Antonio, and that said debt was therefore founded upon an illegal consideration, contrary to public policy and good morals, and rendered the contract void. Judgment was rendered for appellee. The proof shows that Sarah Brewer, commonly known as Sallie Brewer, in 1883, desiring to furnish a house for purposes of prostitution,—her former house for that purpose having been destroyed by fire,—applied to the firm of Erastus Reed, furniture dealers, for the necessary furniture. Erastus Reed, being fully cognizant of the use to which the furniture was to be put, and knowing and expecting that his pay was to be realized out of the profits arising from the crime of prostitution, sold to appellee furniture valued at \$18,096. In 1885 this account was closed by the execution of 57 notes, 6 for \$100 each, and 51 for \$200 each; \$412.88 being left out of the notes, as Reed said, as a margin for the interest, and a payment of \$5,296. At the same time the notes were given a contract was entered into between Reed and appellee in which it was agreed that Reed sold the furniture, mattresses, bolsters, blankets, towel racks, etc., to appellee, and for which appellee agreed to pay the sum of \$16,096 as purchase price for same,—\$5,296 to be paid in cash, and \$200 upon the 1st day of each month, until

all the notes were paid,—and that until the amounts due were fully paid the property should belong to Reed. A portion of the notes given in 1885 were those sued on in this case. Appellee has been using the furniture, since she bought it, in the business of keeping a bawdyhouse, which was known to the firm of Erastus Reed. Erastus Reed and appellant constituted the firm of Erastus Reed at the time of the execution of the notes, as well as when the furniture was sold to appellee. All the notes were indorsed "Erastus Reed," without date. On March 27, 1894, Ed. Howard, acting for appellant, instituted suit in his name against appellee, on the notes sued on in this case. Afterwards the following instrument was executed by appellee: "In consideration that cause No. 6,530, styled 'Edward Howard vs. Sarah Brewer,' pending in the district court, 37th judicial district, in and for Bexar county, Texas, be dismissed without prejudice to plaintiff's rights, I do hereby agree to pay the costs of court, and to pay the promissory notes sued upon in this cause, the same being due and still unpaid; and I agree to pay on said notes, unto the holder thereof, at least \$20 every week, until said notes are fully paid." Under the above agreement the cause was dismissed, but appellee made no payment on the notes. The suit was brought in the name of Howard, because appellant did not desire to figure in a suit against a woman with the reputation of appellee, who knew that the suit was brought for appellant.

The original contract, as evidenced by the notes and the written instrument accompanying their execution, was based upon an illegal and immoral consideration, and that it was thereby rendered null and void is well settled in this state. *Norvell v. Oury*, 13 Tex. 31; *Conner v. Mackey*, 20 Tex. 748; *Monroe v. Smelly*, 25 Tex. 587; *Seeligson v. Lewis*, 65 Tex. 215; *Wegner v. Blering*, Id. 506; *Hunstock v. Palmer*, 4 Tex. Civ. App. 459, 23 S. W. 294. There is other authority sustaining the same proposition. *Greenh. Pub. Pol.* p. 202, footnote 8; *Hanauer v. Doane*, 12 Wall. 342; *Bish. Cont.* § 496; *Smith, Cont.* 195, 196. The proposition that the original contract was vitiated and rendered null and void by reason of the furniture having been sold knowing that it was to be used by appellee for purposes of prostitution, and that the pay for the same was to come out of the profits of that vicious vocation, is not controverted by appellant, but it is contended—First, that, the notes being indorsed in blank to appellant, the presumption would prevail that she acquired the same before maturity, and was a bona fide holder for value, and as against such holder the illegality of the consideration would be no defense to the notes in the absence of any statute so declaring; second, that the dismissal of a pending suit is in itself a valid consideration for an executory contract made there-

on, and a plea of illegality of the original consideration would not avail against the second contract.

Appellant was a partner in the firm of Erastus Reed, that sold the property to appellee, and she was affected with notice of the immoral purposes for which it was to be used. The property was sold with the knowledge, on the part of the firm, not only that it was to be used in a house of ill fame, but with the expectation that the pay for it should come out of the proceeds of the business of prostitution. If the defense of innocent purchaser for value before maturity could ever be successfully urged in a case where the notes were given for an illegal consideration, certainly a member of a partnership which was cognizant of its legality cannot pose as an innocent purchaser.

Did the contract made to pay the amount of the notes in consideration of the suit that had been brought by Howard for Mrs. Reed so change and purify the whole transaction as to relieve it of its vice and illegality? We are of the opinion that it did not. The debt was the same, the real consideration was the same, and the transaction practically between the same parties. That the dismissal of a suit, when based on a well-founded claim, constitutes a sufficient consideration to support a contract, is admitted, but a suit based on an illegal and immoral consideration cannot be said to be well founded. *Von Brandenstein v. Ebensberger*, 71 Tex. 267, 9 S. W. 153. "A contract executed in consideration of a previous illegal one, or in compromise of differences growing out of it, is, like that whereon it rests, illegal and incapable of being enforced." *Bish. Cont.* 488. It is said by the supreme court of Texas: "If a note is tainted by the consideration of the demand for which it is given, there can be no good reason for drawing the line at the first note. If the first is taken up, and a new one given in its stead, to obtain an extension of time, to embrace in it additional demands, or for other purposes, the illegal consideration is as distinctly traced in the second note as in the first. The new considerations dilute, but do not neutralize or extinguish, the poison. If the second note is enforced, the money promised for an illegal consideration collected by one of the guilty parties, the other guilty party is forced by the law to do what he is commanded by the law not to do." *Wegner v. Blering*, 65 Tex. 507. In the case of *Clay v. Ray*, 17 C. B. (N. S.) 188, cited in the *Wegner-Blering* Case, a judgment was recovered on the prohibited demand, and in consideration of a stay of execution a third party guaranteed payment; and the guaranty was held void. There is some conflict on the point in question, but we are of the opinion that the Texas doctrine is supported by reason and sound public policy. The distinction is drawn between contracts that are collateral to the illegal transaction and those which carry out the original scheme, as also between the class last stated and those

which have for their basis the realized proceeds of an illegal enterprise. *De Leon v. Trevino*, 49 Tex. 89; *Pfeuffer v. Maltby*, 54 Tex. 451; *Armstrong v. Toler*, 11 Wheat. 274. The new consideration, the dismissal of the suit, was vitiated and rendered void by its "vitality resting" on the execution of the original unlawful contract. It could not vitalize a contract that was dead by reason of its being founded on an immoral consideration. The mask with which the so-called new contract has attempted to conceal its features is transparent, and behind it is seen the vicious consideration, tainting and corrupting the whole transaction. The law discountenances contracts the consideration for which must come out of a vocation not only degrading and opposed to public policy, decency, and morals, but one upon which the statutes of the state have placed the stamp of disapproval, and branded as a crime against society. If such contracts are knowingly made, the parties thereto need not expect the cooperation of the courts in enforcing them. The judgment will be affirmed.

JAMES, C. J., did not sit in this cause.

On Rehearing.

(June 10, 1896.)

The notes were dated on March 14, 1885, and on February 2, 1886, less than 11 months thereafter, appellant and Erastus Reed executed a deed of assignment in which they recited that they then and theretofore had been doing business in the city of San Antonio, Tex., under the firm name and style of Erastus Reed. We are of the opinion that this was sufficient to show that a partnership existed when the furniture was sold, and when the notes were executed. Why the notes which appellant claims were transferred to her, on their date, were not turned over to the assignee, or, if so placed in his possession, how they got back into the possession of appellant, does not appear in the record. Appellant did not deny the partnership, or introduce any evidence to show that "theretofore," used in the deed of assignment, did not mean as far back, at least, as the time when the furniture was sold, or the notes executed. *Bates, Partn.* § 1159. The argument that the taking of the notes, and mortgage on the furniture, indicates that there was no intention or desire to obtain pay for the furniture out of the proceeds of the immoral vocation of appellee, loses its point, in view of the fact that one or two years had elapsed from the time of the sale before the notes or mortgage were executed. In the mortgage it was stipulated that until the purchase money was paid the title to said furniture should be and remain solely in said Reed, and that appellee should have the possession of the same, and should use the same with care, and should not remove the same from her house, or sell the same,

and only in event of full payment of the notes should a bill of sale be made to the property. The contract provided for the payment of \$200 per month. How was this sum to be raised? Appellee was the proprietress of a bagnio, which was furnished by the firm of Erastus Reed. This was known to the firm, and it follows that it must have been known out of what business the money was to be realized. The contract could have been no more vicious if the furniture had been rented to appellee for purposes of prostitution. The same feature was perpetuated in the new contract made with appellant. We have not gone to the extent of holding that the selling of goods with the knowledge that the buyer will make an illegal use of them is sufficient to deprive the vendor of the right of enforcing payment, although there is high authority for that doctrine. *Hanauer v. Doane*, 12 Wall. 342. Without going to that extent, we do hold that when the vendor is a sharer in the illegal transaction, and knowingly obtains the profits arising from it, he cannot recover. The case of *Michael v. Bacon*, 49 Mo. 474, cited by appellant in her motion, is not in conflict with the decision of this court. The Missouri court says, "If the merchant is not to be paid out of the illicit gains of a gambler, and is not connected by contract with the object the gambler has in view, his knowledge of the purpose does not vitiate the sale." It is insisted by appellant that, while the firm of Erastus Reed may have known the base purposes for which the furniture was to be used, yet the manner of the use was not regulated by contract. It would seem that the use was regulated when appellee was bound by the contract to keep \$16,000 worth of furniture in a bagnio, and use it there, and not sell or dispose of it. "Any contract encouraging prostitution, or auxiliary to the keeping of a bawdyhouse, is void." *Bish. Cont.* § 496; *Smith, Cont.* 195, 196. We also call attention to 1 *Daniel, Neg. Inst.* (4th Ed.) § 200, and notes. Under our view of the case, the motion for rehearing must be overruled.

GULF, C. & S. F. RY. CO. v. WEST.¹

(Court of Civil Appeals of Texas. April 29, 1896.)

RAILROADS — ACCIDENTS AT CROSSINGS — NEGLIGENCE — RULE ON WITNESS — DENIAL — REVERSAL — OPINION EVIDENCE.

1. Where employes of a railroad company suddenly ran an engine against cars standing near a crossing which they knew was used by children going to and from school, so as to drive them upon the crossing and cause them to run over a child who was with due care attempting to cross, the company was liable.

2. Where the court inquired, when the witnesses were all within the bar, if counsel wished to place them under rule, and, receiving no response, directed them to retire, a refusal to

¹ Rehearing denied.

grant a request, made while they were retiring, to put certain witnesses under rule, was within the discretion of the court.

3. In an action against a railroad for injuries to a child at a crossing, testimony that a brakeman stood near, and knew, as a fact, that the plaintiff and children with him were attempting to cross, is not objectionable, as being the opinion of the witness.

Appeal from district court, Johnson county; J. M. Hall, Judge.

Action by Samuel West, by next friend, against the Gulf, Colorado & Santa Fé Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. W. Terry, for appellant. Poindexter & Padelford, for appellee.

NEILL, J. Samuel West, a minor, by his next friend, sued appellant for damages for personal injuries inflicted by the negligent acts of its servants, and recovered a judgment for \$6,550, from which we have this appeal.

The appellee, a boy seven years old, while going to school in the town of Joshua, in attempting to cross appellant's road at a place then generally used, and which had been for years, as a crossing, by the school children, in going to and from school, was, without negligence on his part, knocked down by the negligence of appellant's servants in suddenly pushing an engine against several detached cars, which were standing, when the child tried to cross, near the crossing, with such force that they ran over him, mangling his body, and inflicting serious and permanent physical injuries, to his damage in the sum of \$6,550. These findings of fact dispose of the assignment which asserts the insufficiency of the evidence to support the verdict.

The failure of appellant's servants, in moving its cars at a time and place when and where they knew children were wont to cross its track on their way to school, to use ordinary care to prevent their injury, was a breach of duty the company owed the public; and, as its failure to discharge such duty was the proximate cause of appellee's injury, the appellant is liable to him for its consequences. *Railway Co. v. Crosnoe*, 72 Tex. 79, 10 S. W. 342. This disposes of the assignments wherein it is urged that the appellant owed no such duty.

After the witnesses in the case had been brought within the bar of the court room and sworn, the trial judge inquired of counsel for the parties if they desired the witnesses placed under the rule, and, after waiting long enough for an answer, he told the witnesses to take their seats outside the bar. After some of the witnesses had left the bar, and had taken their seats, though all were in the room, counsel for appellant then demanded, without giving a reason therefor, or stating why he had not made the request in response to the question of the judge, that they be placed under the rule, and his demand was then re-

fused. To this action of the court an exception was reserved, and it is here urged in an assignment as an error requiring the reversal of its judgment. The right of parties litigant to have witnesses placed under the rule is "subject to such judicious regulations, confided to the judge's discretion, as right and justice exact." *Watts v. Holland*, 56 Tex. 60. We cannot say that the inquiry by the judge of counsel, when all the witnesses were within the bar, if they wished them placed under the rule, was not in pursuance of a "judicious regulation," nor that his refusal to place them under rule, on the request of counsel, after his failure to respond to the inquiry of the court, in the absence of anything in the record tending to show that appellant was prejudiced thereby, was an abuse of the "discretion" confided to the judge requiring a reversal of the judgment.

A witness for the appellant testified, in response to a cross-interrogatory propounded by appellee, that a brakeman of defendant company was standing near by and knew of their (the school children) crossing or attempting to cross the track where the accident occurred; that is, that this brakeman certainly knew that, as a fact, plaintiff and the other children who were with him were crossing or attempting to cross at the place where plaintiff was hurt. The objection assigned to this testimony is: "It is apparent, from the evidence of the witness, that he did not know, of his own knowledge, whether the brakeman knew that Sam West was crossing or attempting to cross, and that such statement of the witness was his mere supposition, inference, or conclusion." We do not think the objection well taken, for the testimony is not to a supposition, inference, or conclusion, but to a fact occurring within the presence and observation of the witness.

In our opinion, there is no error assigned requiring a reversal of the judgment, and it is affirmed.

ALAMO FIRE INS. CO. v. HILL.¹
(Court of Civil Appeals of Texas. May 13, 1896.)

REVIEW—SUFFICIENCY OF EVIDENCE.

The finding of a court that an insured house was not vacant for 10 days before the fire will not be disturbed, there being some evidence to support it.

Appeal from Hill county court; W. P. Cunningham, Judge.

Action by J. R. Hill against the Alamo Fire Insurance Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Derden & Melson, for appellant. Bounds & Bounds, for appellee.

NEILL, J. This is a suit by appellee against appellant on a fire insurance policy issued by

¹ Rehearing denied.

the latter on a dwelling house for \$300. The policy provided that it should be void if the building became vacant or unused for any or either of the purposes indicated therein, and so remained for 10 days, without immediate notice to the company and its consent indorsed thereon. The appellant pleaded as a defense that the house was vacant when destroyed, and had been so continuously for 10 days immediately prior to its destruction, and that, by reason of such fact, the policy, under the provision referred to, became void. The case was tried by the court without a jury, and it found, as its conclusions of fact: (1) The issuance of the policy sued on; (2) the destruction of the building by fire within the time insured; and (3) the evidence fails to show that the house was vacant or unused for the purposes of a dwelling 10 days prior to the fire. The assignments of error are directed to the court's failure to find, from the evidence, that the house was vacant or unused for the purpose of a dwelling for 10 days previous to the fire. As the appellant pleaded a forfeiture, the burden was on it to prove it. Whether the evidence established the facts necessary under the policy to constitute a forfeiture was for the determination of the trial court, and its finding on such issue of fact will not be revised by this court, even though we might have reached a different conclusion from the evidence. **Affirmed.**

COLEMAN et al. v. DAVIS et al.

(Court of Civil Appeals of Texas. April 24, 1896.)

JUDGMENT — RES JUDICATA — PRIVIES IN ESTATE.

A privy in estate, so as to be bound by a judgment affecting real estate to which he was not a party, is one whose title must be derived from a party bound by the judgment. A claimant of land under the homestead donation laws is not concluded by judgments against prior claimants, holding the land to be owned by a private person under a former grant; the state, through whom such settler claims, not being bound by the judgment.

Appeal from district court, Jack county; J. W. Patterson, Judge.

Actions of trespass to try title by C. C. Davis and E. A. McDonald against W. M. Coleman and others to recover two tracts of land. The actions were consolidated, and judgment rendered for plaintiffs, from which defendants appeal. **Affirmed on rehearing.**

R. F. Arnold, for appellants. F. E. Dycus, for appellees.

STEPHENS, J. Appellants, contending that this is not a boundary case, within the meaning of the constitution, making the jurisdiction of this court final in that class of cases, request us to file our conclusions of law and fact upon the question raised in the first ground of their motion for a rehearing. We are of opinion, however, that the case

is one of boundary, and that the jurisdiction of this court is final; but as the facts are set out in that ground of the motion with substantial accuracy, so as to save us the trouble of a re-examination of the record, we have concluded, contrary to precedent, to comply with this request. We therefore adopt the statement of facts therein contained as the basis of the contention that the issue of boundary in this case was no longer an open question, because of the defense of *res adjudicata* interposed; that is to say, in previous suits between appellants and parties other than appellees, who undertook to acquire title to the land in controversy, under the homestead donation laws of Texas, final judgments were rendered in favor of appellants, who claimed the land as a part of the Brazos county school land survey, against the contention of the other parties that it was vacant public domain. Appellees, who were in no sense parties to said suits, subsequent to the judgments therein, ejecting other parties therefrom, attempted also to acquire title to said land under the homestead donation laws, and, having complied with the statute in that respect, brought this suit against appellants. The suits were separately brought, but were afterwards consolidated.

Our conclusion of law upon this state of case is that appellees were not bound by the judgments in said prior suits, either as parties or privies. A privy in estate is correctly defined to be any person who must necessarily derive his title to the property in question from a party bound by a judgment. *Dickinson v. Lovell*, 35 N. H. 1, and cases there cited; also, *Hunt v. Haven*, 52 N. H. 162. Whatever right or title appellees had was not derived from any of the parties to said former suits, but proceeded solely from the state of Texas, which was clearly not bound by the judgments therein.

The other grounds of the motion for a rehearing complain of our action in sustaining the verdict upon the facts, but, as it rests upon conflicting evidence, we adhere to the former conclusion, and overrule the motion.

HUNTER, J., disqualified, and not sitting.

ATWELL v. WATKINS.

(Court of Civil Appeals of Texas. May 20, 1896.)

TRESPASS TO TRY TITLE—EVIDENCE—BURDEN OF PROOF—INSTRUCTIONS—GIFT—DEEDS—PRESUMPTIONS.

1. In trespass to try title, plaintiff claimed title under a deed to himself which showed that part of the consideration was paid in cash, and the balance by his brother's note; and defendant claimed under a trust deed from the brother given to secure a loan to him, made on his sworn application, reciting that he was the owner of the premises. On the trial the brother testified that plaintiff was the owner. The sole issue was whether plaintiff, as grantee of

land for which his brother paid the consideration, was merely a trustee of the naked legal title. *Held* that it was prejudicial error to allow the application in evidence without restricting its effect to discrediting the brother's testimony.

2. When one claims title to land as purchaser at a sale under a trust deed, the deed of trust, the deed made by the trustee after the sale, and a judgment in favor of the purchaser, based thereon, by which he recovered possession of the premises from the grantor in the deed of trust, are admissible in evidence.

3. When one who pays the consideration for land has the land deeded to his brother, no presumption arises from the relationship of the parties that the conveyance was a gift.

4. Where one claims title under a deed to himself which recites payment of the consideration by another, the burden is on him, as against one claiming title through such other, to show that he acquired by the deed the equitable as well as the legal title to the land.

5. Where a deed recited that the consideration was partly cash, and in part the note of another than the grantee, the fact that the cash was handed to the grantor by the maker of the note was insufficient to overcome the presumption arising from the deed that it was paid by the grantee where the evidence showed that the money belonged to him, and that the maker acted only as his agent in paying it.

6. In trespass to try title, where plaintiff claimed under a deed to himself reciting that the consideration was paid partly in cash, and partly by the note of another, and defendant claimed title under a subsequent mortgage or the land given by the maker of the note, on the ground that a trust resulted in favor of the maker, and that plaintiff held a mere naked legal title to the premises, it was error to exclude the issue, on which there was evidence, whether the note was executed for the reason that plaintiff was a minor, and with the intention that the equitable as well as the legal title should vest in plaintiff.

7. One induced by fraud to furnish money to another, which is used by the latter in payment of part of the price of land, title to which was taken in the name of a third person, is not entitled to a proportionate interest in the land, on the theory of a resulting trust, regardless of whether the holder of the title was chargeable with knowledge of the fraud, or of whether he had compensated the borrower for the money paid out by the latter for him.

Appeal from district court, Kaufman county; J. E. Dillard, Judge.

Trespass to try title by J. D. Atwell against J. B. Watkins. From a judgment for defendant, plaintiff appeals. Reversed.

Huffmaster & Huffmaster, for appellant. W. L. Williams, for appellee.

NEILL, J. The appellant, J. D. Atwell (plaintiff below), on the 26th of November, 1893, sued the appellee, J. B. Watkins, in trespass to try title, to recover possession of 120 acres of the J. H. Price survey, particularly described in his petition; and the appellant having on the 2d of September, 1893, instituted in the same court, against the same party, the same kind of suit, to recover 261 acres, a part of the Levi Pruett survey, described by metes and bounds, the pleadings being the same in both suits, they were, upon agreement of both parties, by an order of the court, consolidated and tried as one suit. Appellee (defendant below) pleaded

in answer, specially: First. A plea of purchase in good faith, in which he alleged that on the 1st of February, 1889, J. B. Atwell, an elder brother of appellant, borrowed \$400 from him, and executed to him a deed of trust to secure its payment; that in order to procure said loan J. B. Atwell furnished appellee an application in writing, sworn to by him, in which he stated that the lands in controversy belonged to him, and also presented to appellee's agents, who were acting for him, an abstract of title made from the records of Kaufman county, and an unrecorded deed showing the title in the premises to be in him, the said J. B. Atwell; that said deed of trust was duly recorded on the 25th day of the same month; that on December 8, 1891, the said J. B. Atwell having defaulted in the payment of the indebtedness, the land was sold under the power conferred upon the trustee in the trust deed, and the appellee became the purchaser thereof, in good faith, for value, without knowledge, actual or constructive, of appellant's claim; that appellant then resided in Kaufman county, and had full knowledge of the loan and deed of trust; and that appellant combined with his brother, J. B., for the purpose of defrauding appellee, allowing his brother to occupy, rent, and control said lands in his own name, withholding his deeds from record, and setting up no claim to the property. Second. A plea in estoppel, in which he alleged that appellant allowed his brother, J. B. Atwell, to hold and occupy the lands in controversy, and to keep and control his deed, if he had any; that he knew his brother had procured the loan; that he acquiesced in all that J. B. was doing, and consented to his fraudulent acts; that said acts induced and influenced appellee to advance money on said land; that appellee, relying upon the showing made by J. B. Atwell, and the records of Kaufman county, made said loan and purchase, without knowledge of appellant's claim; that appellant, having full knowledge of the fraudulent intent of J. B. Atwell to cheat and defraud appellee, and fraudulently acting with him, by acquiescing in and consenting to said acts, and concealing the same from appellee, and silently standing by, knowing said intent, became a party to said fraud, and should be estopped from setting up title in himself. Third. A cross bill, in which he alleged that the purchase of the lands in controversy was made by J. B. Atwell from the Heffingtons on December 8, 1886, and that appellant and appellee claim title through them as a common source; that if appellant has any title he acquired it through the management of J. B. Atwell, without his knowledge or consent, and totally without consideration from him; that J. B. Atwell made the purchase, paid the cash consideration, and gave his note for the deferred payment, which he subsequently paid out of money borrowed from appellee; that,

by reason of said purchase and payment of the consideration, J. B. Atwell was the real owner, and held an equity superior to appellee's naked legal title; that appellant was a naked trustee only; that J. B. Atwell took possession of said lands, held, occupied, and used the same as his own, and rendered them for taxes in his own name, from the date of the purchase in 1886 till he was dispossessed by a decree of the circuit court of the United States on February 28, 1893; that appellee is the owner of all the right, title, and interest that J. B. Atwell had when said deed of trust was made. Wherefore he prayed that the legal title be divested from appellant, and vested in him. For the purposes of the trial, appellee filed his written admission "that plaintiff [appellant] has a good cause of action as set forth in his petition, except so far as it may be admitted in whole or in part by the facts in the answer constituting a good defense, which may be established on the trial." The cause was tried before a jury, and a verdict returned and judgment rendered thereon in favor of appellee.

Upon the trial of the cause the appellee offered in evidence an application for a loan made by J. B. Atwell to the J. B. Watkins Land-Mortgage Company, in which he represented the land in controversy to belong to him, and to be of the value of \$5,715, exclusive of improvements, etc., to which appellant objected upon the grounds that he was not a party to such application, that he was a minor at the time the application was made, had no knowledge thereof, and was in no manner connected therewith, and that it was irrelevant, and would tend to prejudice his case in the minds of the jury. These objections were overruled, and the application was read as evidence to the jury. In explanation of the bill of exceptions reserved by the appellant to this action of the court, the trial judge states that "the defendant had set up in his answer an estoppel, and this evidence was allowed in support of said plea, to show the manner in which J. B. Atwell was dealing with said property, and the inception of defendant's title, and also to impeach J. B. Atwell as a witness." Had a predicate been laid for the introduction of this application, by showing that it was made with the knowledge of the appellant, for the purpose of deceiving appellee's agents, and inducing them to believe the property described therein belonged to the applicant, and thereby enable him by such deception to procure a loan of appellee's money upon such land as security, upon the faith that it belonged to J. B. Atwell, the application would have been admissible as evidence tending to prove appellee's plea of estoppel. But no such predicate was laid, nor was there any evidence introduced at any stage of the trial from which the inference could be legitimately drawn that appellant had any knowledge whatsoever of

the fact that his brother had made such statement, or that he had applied, or even had ever contemplated applying, to the appellee or his agent to borrow money upon the land in controversy, as security. The trial court recognized the total failure of appellee's proof on his plea of estoppel, by its failure to submit such issue to the jury. Except as evidence on the plea of estoppel and purchaser in good faith, the "inception" of appellee's title was unimportant; and, as there was no evidence tending to establish either, the application of J. B. Atwell was irrelevant, and should not have been allowed to go to the jury as evidence. It can readily be seen that the application, and the representations made in connection with it, were such as would be calculated to prejudice the jury against the appellant's case, when considered in connection with his relationship to J. B. Atwell, and the evidence bearing upon the issue on which the case was tried. When we look to the only issue submitted, and the only one on which appellee adduced any evidence, the statement made by J. B. Atwell in the application cannot but be regarded as hearsay of the most dangerous character. The error in admitting it is not obviated by showing that it contained the sworn statement of J. B. Atwell directly contrary to what he swore upon the stand as a witness, when the record shows that the jury were not restricted, in their consideration of it, to evidence as only intended to discredit the witness. It is advanced as evidence by appellee's counsel, in their brief, to show that J. B. Atwell was the real owner of the land, and the appellee merely a naked trustee, and before us it is argued that "J. B. had either sworn falsely when he applied for the loan, or his testimony before the jury was false"; and such, after the application was admitted as evidence, must have been the argument to the jury. The appellant is not responsible for, and should not be prejudiced by, what his brother swore in the application, for he was not present when the affidavit was made, and was ignorant of it, and it should not have been admitted as evidence from which to argue that his brother was the owner of the land when he made such application.

The only ground of defense upon which there was any evidence tending to defeat the appellant's admitted cause of action was the third or cross bill set out in our statement of the case, and this was the only one submitted to the jury. "Where property is purchased, and the conveyance of the legal title is taken in the name of one person, while the purchase price is paid by another, a trust results in favor of the party who pays the price, and the holder of the legal title becomes a trustee for him. In order to produce this effect, it is indispensable that the payment should be actually made by the beneficiary, or that an absolute obligation to pay should be incurred by him,

as a part of the original transaction of purchase, at or before the time of conveyance. No subsequent and entirely independent contract, intervention, or payment on his part would raise any resulting trust. A trust results in favor of one who pays a part of the price. So, when two or more persons together advance the price, and take title in the name of one of them, a trust will result in favor of the other with respect to an undivided share of the property, proportioned to his share of the price." 2 Pom. Eq. Jur. (2d Ed.) §§ 1037, 1038. "When a deed recites that the payment was made by the grantee thereon, the real fact may always be established by parol evidence; and it may be shown by such evidence that the purchase price was wholly or partly paid by another person, and thus a trust may be shown to result in his favor. When the trust does not appear in the face of the deed, the burden is upon him who asserts it against the vendee named therein to establish by a preponderance of evidence the facts from which the trust results. As the whole doctrine of a resulting trust depends upon an equitable presumption of an intention, this presumption may be overcome by parol evidence of an actual intention on the part of the one paying the price that the transaction was to be a gift." 2 Pom. Eq. Jur. § 1040. In the light of these principles, we will examine the questions presented by the assignments of error made to the action of the court upon the trial of the only issue made by the evidence in the case, which is whether J. B. Atwell was the equitable owner of the land, or any part thereof, when he gave the deed of trust to secure the money loaned him, and endeavor to apply the principles to and determine the questions by them.

The deed under which appellant claims the land in controversy was made to him by John, Henry, and Mattie Heffington on December 8, 1886, was duly acknowledged by the grantors on the same day, and recorded January 2, 1893. It recites a consideration of \$500 cash, but does not state by whom paid, and the further consideration of a promissory note for \$612.50 executed by J. B. Atwell. The purchase of the land was effected through Nestor Morrow, the agent of the Heffingtons, who testified upon the trial that in December, 1886, J. B. Atwell came to him, and purchased the land upon the terms recited in the deed; that he wrote the deed, and sent it to the vendors to sign and acknowledge; that when the deed was returned to him, properly signed and acknowledged, he delivered it to J. B. Atwell, and that Muckleroy & Martin took up the \$602.50 note by advancing the cash upon it, and the money was sent the vendors; that he furnished Muckleroy & Martin an abstract of title to the land, showing the title to be in J. D. Atwell, before they advanced the money on the note; and that it was his understanding at the time the trade for the

land was made that the \$500 paid in cash belonged to the appellant, J. D. Atwell, and the land was to be his, but, as he was a young boy, witness said that some one else would have to sign the note, who was not a minor, whereupon it was signed by J. B. Atwell, who was making the trade. The substance of the appellant's (J. D. Atwell's) testimony on this issue is that he was born February 12, 1872; that his father died in 1882, leaving a place occupied by his family as a homestead, and used as a farm; he also left some stock, consisting of horses and cattle, and several hundred head of sheep; that the personal property mentioned was sold, and the money received therefor divided among the children; that with the money received in this way, together with what he had saved from the proceeds of crops which he made on the farm, he had accumulated, and owned in his own right, the sum of \$500 in cash; that desiring to purchase some land which was for sale near him, but learning that the Heffington land was in the hands of Mr. Morrow for sale, and could be bought cheaper than the other, and concluding to buy it, he got his brother, J. B. Atwell, to make the purchase for him, and to that end turned over to his brother the \$500 in cash, and his brother brought back to him a deed dated December 8, 1886, for the land, from the Heffingtons to himself; that he took the deed and read it, showed it to the family, and then placed it with the other deeds to the homestead; and that he arranged to satisfy his brother for the note he had signed in part payment for the land by letting him have two horses and the land purchased, free of rent, for three years; and that in this way J. B. took charge of the land, and used it for that period. The testimony of J. B. Atwell fully corroborates that of appellant and Morrow. It was shown by the tax rolls that J. B. Atwell rendered the land for taxes, as well as the Atwell homestead, in his own name, up to and until the year 1892; but he and appellant testified that, when the time came to pay the taxes, each furnished his part of the necessary amount.

We have thus stated substantially all the evidence on the issue of a resulting trust which is asserted to defeat appellant's legal title. On the theory of the existence of such trust, constituting J. B. Atwell the equitable owner of either the whole or a part of the land in controversy, it was incumbent upon the appellee to show that he had acquired such equitable estate; and, as he claimed it through a sale under the power conferred in the deed of trust from J. B. Atwell to M. J. Dart as trustee, such deed of trust, and the deed made by the trustee to appellee in pursuance of the power, and the judgment based thereon, by which appellee recovered possession of the land from J. B., were admissible in evidence for the purpose of showing, if J. B. ever had such

equity, that appellee had acquired it, and was holding possession thereunder; and the court did not err in so holding. If the land was purchased and paid for with money belonging to J. B. Atwell, no presumption could arise from the fact of his having the deed made to the appellant that he intended it as a gift, the relationship between the parties not being such as to authorize it. *Baylor v. Hopf*, 81 Tex. 642, 17 S. W. 230. And upon the authority of the case just cited, as well as upon principle, the recital in the deed that J. B. had obligated himself alone, by his promissory note, to pay over one-half of the purchase money, an equitable interest in the premises, to the extent of such obligation, would be presumed; and the burden would rest upon the appellant to rebut such presumption by establishing by a preponderance of testimony that it was the real intention in the transaction to vest the equitable as well as the legal title in him. When the recital in a deed of the payment of the purchase money does not show by whom it was made, the presumption, in the absence of evidence to the contrary, is that it was paid by the grantee. This presumption can only obtain as to the cash payment of \$500. As to it, the extraneous evidence shows that it was handed the agent of the grantors by J. B. Atwell; but as such evidence also showed that it was appellant's money, and that his brother only acted as his agent in paying it, we do not think the mere fact that it was handed by J. B. to the grantor's agent is sufficient to overcome the presumption that the cash payment was made by appellant. It was said by Mr. Justice Gaines in *Howard v. Zimpelman* (Tex. Sup.) 14 S. W. 59, "It is against the policy of the law that a written instrument should be shown by parol testimony to have an effect different from that which its terms impart, except upon very strong proof," and that "in a case like the present it would be proper to instruct the jury as to the legal effect of the conveyance, and that the parties to it are presumed, in the first place, to have intended that it should have that effect, but that they should find that a trust was intended, provided the other evidence be sufficient to overcome that presumption, and to reasonably satisfy them that such was in fact the intention." *Baylor v. Hopf*, supra. As to such interest in the land as is represented by the \$500 recited as a cash payment, we do not believe the evidence is sufficient to overcome the legal import of the conveyance, and to reasonably satisfy any one that, as to that much of it, a trust resulted in favor of J. B. Atwell, under whom appellee claims title; and for that reason we think the court erred in not granting a new trial.

The part of the charge complained of in the ninth assignment of error is an enunciation of the elementary principle stated in the first sentence in our quotation from sec-

tion 1037, Pom. Eq. Jur., and, as an abstract proposition, cannot be questioned. In the next paragraph of the charge, which is covered by the tenth assignment, the court, in endeavoring to apply the principle to the evidence in this case, tells the jury that if they believe from it that J. B. Atwell purchased the land from the Heffingtons, and paid \$500 in cash out of his own money, and gave his note for the balance of the purchase money, and afterwards paid the note out of the money borrowed from appellee, it would be their duty to find for the defendant; and, in the succeeding paragraph, that if they believed J. B. purchased the property for appellant, took the deed in his name, paid \$500 in cash with money furnished by J. D. Atwell, gave his note in payment for the balance of the purchase money, and if in A. D. 1889 J. B. fraudulently procured a loan of \$2,000 from appellee by representing to his agents that he was the owner of the land, and, out of the money thus procured, paid the purchase-money note, the appellant would be entitled to recover only so much of the land as the money paid by him bore to the entire consideration paid, and appellee would be entitled to such portion of the land as the purchase money furnished by him bore to the whole of the purchase money. We do not believe the evidence was sufficient to submit the issue as to whether the \$500 cash payment expressed in the deed was paid with appellee's money, the presumption from the deed being that it was his, and all the parol evidence being to the same effect. The other part of the charge quoted eliminated entirely the question raised by the evidence, as to whether or not the note for the deferred payment was made by J. B. because his brother was a minor, without the intention of the maker's having any beneficial interest in the premises, and with the intention that the title to the equitable as well as the legal estate should vest in the grantee. J. B. did not owe the appellee anything at the time, and, if he wished to contract to pay a part of the purchase money on land intended for the appellant, it was no business of, and did not concern, the appellee. Besides, there is testimony, which is uncontradicted, tending to show that J. B. was paid by the appellant the value of the note in pursuance of an agreement between them. This is not the only defect in the charge. Regardless of the facts that the note may have been made with the intention that the land should belong to the appellant, and the maker may have been fully compensated by the grantee for its payment, a question of fraud is injected, without evidence tending to connect appellant with, or show he had knowledge of, it; and the jury are told that if money was fraudulently procured by J. B. from appellee, with which the note was paid, the appellee would ipso facto be entitled to such interest in the land as was represented by

the money paid in settlement of the note. This cannot be the law. It was not contended that appellee paid and took up the note, and thereby became subrogated to the rights of the payees, and, being in possession of land upon which he had a vendor's lien, could not be ousted of it until the lien was discharged by appellant. Without passing upon such question, we will say that we doubt whether the facts before us are such as to show that appellee is subrogated to the rights of the payees of the note made by J. B. Atwell.

It is unnecessary to protract the discussion of the questions in the case. The errors indicated require a reversal of the judgment. Reversed and remanded.

MAYS et ux. v. SANDERS et al. (KEARBY et al., Interveners).

(Court of Civil Appeals of Texas. May 20, 1896.)

VENDOR AND PURCHASER—LIEN—SUBSEQUENT GRANTEE—RESCISSION BY GRANTOR—RELEASE—TRANSFER OF NOTES.

1. Where a grantor holds his grantee's notes for the purchase price of lands, secured by a vendor's lien, and a subsequent grantee assumes the payment of the notes, the taking of possession by the original grantor, after an election to rescind the contract and make the premises a homestead, is a release of the grantee's obligations on the notes.

2. A grantor took purchase-money notes, secured by a vendor's lien. The premises were in turn conveyed to a subsequent grantee who assumed the payment of the notes as part of the consideration. The payee transferred the notes, but received an inadequate consideration. He employed attorneys to recover the notes, and agreed that they should receive, as compensation, one-half the difference between the value of the notes and the consideration which he had received for their transfer. The notes were recovered, and the subsequent grantee, with knowledge of the attorneys' interest in the notes, quitclaimed the premises back to the original grantor in consideration of a release from all liability on the notes. *Held* that, to the extent of their interest, the attorneys were entitled to judgment against the maker of the notes and his grantee, and to enforce its payment by a foreclosure of the vendor's lien on the premises.

3. In estimating the value of the notes, it was proper to include the attorneys' fee, which attached, by the terms of the notes, when suit was brought to collect them.

4. The release of the subsequent grantee from liability on the notes also released the maker, who stood in the relation of surety.

Appeal from district court, Dallas county; R. E. Burke, Judge.

Action by W. A. Mays and wife against J. W. Sanders and D. W. Bowser on promissory notes. Kearby & McCoy, partners, intervened. From a judgment in favor of interveners, plaintiffs Mays appeal. *Affirmed*.

Field, Brown & Camp and T. T. Vander Hoeven, for appellants. J. C. Muse and Harris & Knight, for appellees.

NEILL, J. This suit was instituted by the appellant, W. A. Mays, against the appellees, J. W. Sanders and D. W. Bowser, to recover on the notes described in our first conclusion of fact. Mays, in his petition, declared the last note due under the terms of the contract by reason of the default in payment of the first. Sanders & Bowser pleaded a release from their obligation on the note by reason of the facts found in our third conclusion, and also that Mays had elected to rescind the contract for the sale of the land, for which the notes were given, by taking possession of the premises as his homestead before the institution of the suit. W. A. Mays (and his wife, who joined him in the plea) pleaded in replication the mental incapacity of the former to make such release, and that it was procured by fraud and misrepresentations, and denied any intention of rescinding the sale, but averred that he only took possession of the premises for the purpose of preserving them. Kearby & McCoy, a law firm composed of J. C. Kearby and J. M. McCoy, intervened, claiming, by virtue of their contract set out in our fourth conclusion of fact, an interest in the notes sued on, and asked judgment thereon against Sanders and Bowser, and, as against Mays and wife, a foreclosure of the vendor's lien on the land for which they were executed. Bowser answered, admitting interveners' interest in the notes, and acknowledging his liability to them to the extent of such interest. Sanders failed to answer the petition of intervention. W. A. Mays, in answer to interveners' claim, pleaded the contract under which it was asserted as inequitable, and the claim disproportionate in amount to the value of the services rendered, and that Mays was, when the contract was entered into, of such weak mind as to incapacitate him from entering into such contract; and, further, that by the terms of the contract interveners were entitled to recover only one-half of the difference between the value of the Peak property and the value of the notes at the time the contract was made; that the value of the Peak property was then \$11,300, and of the notes sued on \$11,760,—the difference in the value being \$460, and that the interest of interveners, if any they have, in the notes, is only one-half of the sum last stated; that he (Mays) has the right to collect the notes, and that the attorney's fees are a legitimate expense attached to their collection, in which fees the interveners have no interest. Such facts as were not admitted, in the pleadings of the respective parties against whom they were averred, were in separate issues submitted to and found by the jury, as shown in our conclusions of fact. Upon the admitted facts and those found by the verdict, the court adjudged that interveners were entitled to a four-fifteenths interest in the notes used on, including the 10 per cent. attorney's fee stipulated, which interest was computed to be \$5,792.50, for which amount a

judgment was entered in their favor against J. W. Sanders and D. W. Bowser, with a foreclosure of the vendor's lien on an undivided four-fifteenths interest in the property for which the notes were given against Sanders, Bowser, and Mays and wife. The court also adjudged that Sanders and Bowser were released from said notes, by reason of the facts stated in our third conclusion, to the extent of Mays' interest in them, and, as to such interest, decreed them canceled. The court further adjudged that W. A. Mays acquired title to an undivided eleven-fifteenths of the land for which the notes were given, in consideration of his release of said notes, and that he was not entitled to recover anything in this suit against any of the parties, and that he pay all costs of suit. From this judgment, Mays has appealed to this court.

Conclusions of Fact.

The following facts were admitted in the pleadings of the respective parties, and are uncontroverted:

(1) On December 18, 1890, J. W. Sanders executed to W. A. Mays his two promissory notes, one for \$760, and the other for \$14,000, payable, respectively, one and four years after date, with interest from the 27th of August, 1890, at the rate of 8 per cent. per annum. These notes were, and recite that they were, for a part of the purchase money of a certain tract of land, sold, on the day of their date, by the payee of the notes to the payor, and expressly reserve a vendor's lien to secure their payment. Contemporaneous with the execution of the notes, Sanders executed to J. P. Murphy, as trustee, a deed of trust, as further security for their payment, in which it was provided that, in default of the payment of the first note upon its maturity, the other, at the option of the legal holder, should become due, and also, in event the notes were placed in the hands of an attorney for collection, the maker should pay 10 per cent. additional on the amount owing as attorney's fees.

(2) On the 15th day of May, 1891, J. W. Sanders and wife, by their deed of that date, sold the land for which the notes were given to D. W. Bowser, which deed recites a consideration of \$26,000,—\$11,240 cash, and the assumption by the grantee of the payment of the notes sued on. It also recites the retention of a vendor's lien to secure the payment of the purchase money.

(3) On the 9th day of November, 1893, D. W. Bowser executed to W. A. Mays a deed, whereby, in consideration of the written covenant of that date, executed by Mays, releasing Bowser from all liability on the two notes he had assumed to pay, and agreeing to cancel, surrender, and discharge said notes, and to hold Bowser harmless against any further liability thereon, he quitclaimed to Mays the land for which the notes were given.

(4) In July, 1891, Worth Peak, in some sort of trade with W. A. Mays, obtained from him

the two Sanders notes, and Mays, conceiving himself overreached in the trade, retained Kearby & McCoy, interveners, to institute legal proceedings for the recovery of the notes, and with them entered into and signed the following contract: "This agreement, between W. A. Mays and his wife, T. C. Mays, and Kearby & McCoy, is that Mays and wife have employed said Kearby & McCoy to bring and prosecute to final judgment suit No. 9,154, W. A. Mays et al. vs. Worth Peak et al., in the Fourteenth judicial district court. In consideration of the services of Kearby & McCoy in said suit, W. A. Mays and wife hereby transfer to them one-half of any and all sums, notes, and property recovered by said suit, over and above the property received by us from said Peak. That is to say, said property, received by us from said Peak, is of the supposed value of from five to seven thousand dollars. This suit is brought to recover fourteen thousand seven hundred and sixty dollars, on a note signed by J. W. Sanders. If we recover in said suit said note, then we hereby transfer to Kearby & McCoy one-half of said note in excess of the value of said land, to wit, from five to seven thousand dollars. And if the said Kearby & McCoy fail to recover said note, or any sum in excess of said land received by said W. A. Mays from said Peak, then it is understood that said Kearby & McCoy are to receive nothing for their said services. But, if they do recover in said suit, then they are to have one-half of all recovered, in excess of said land by Peak to Mays, or its value." Under this contract, of which D. W. Bowser had notice before and when he obtained Mays' release, the possession of the notes was recovered by legal proceedings instituted by the interveners against Peak.

The following facts were found by the jury, upon special issues submitted by the court, and are warranted by the evidence, viz.:

(5) When the contracts were made between Mays and interveners, set out in our fourth conclusion, and between Mays and Bowser, set out in our third, he (Mays) was mentally capable of making such contracts, and they were not obtained from him by fraud.

(6) The reasonable value of the property received by Mays from Peak, referred to in the contract between Mays and Kearby & McCoy, was, at the date of the contract, \$7,000.

(7) Mays took possession of the land for which the notes were given, before the execution of the release to Bowser, without his consent, with the intention of making it his homestead; and he is not in a condition to restore Bowser the consideration received from him for the release. Bowser was, when the release was executed, insolvent.

Conclusions of Law.

1. After Bowser's assumption or the payment of the vendor's lien notes made by Sanders to the appellant for the purchase

money, the relation of Bowser and Sanders as to the notes was that of principal and surety, and the effect of the reconveyance of the land for which they were given, and upon which a lien was reserved to secure their payment, and the release of Bowser from his assumed obligation, was to release Sanders. And we understand that the proposition that such was the legal effect of the transaction is not controverted by the appellant, but that his contention is that the release and discharge of Bowser was procured by him through false and fraudulent representations, and the mental imbecility of W. A. Mays. This was a question of fact, and was settled adversely to him by the jury, as appears from our conclusions.

2. The ouster of Bowser's tenant by the appellant, and taking possession, without his consent, of the land for which the notes were given, after their maturity, with the intention of making it his homestead, as found by the jury, was an election to rescind the contract of sale; and its effect, as to his interest in the notes, was to release Sanders and Bowser from their obligation upon them, for appellant could not, after having acted upon his election, enforce a contract of sale he had himself rescinded.

3. Nor is the proposition controverted by appellant, which is admitted by the original defendants, that the effect of the contract with interveners, and the successful performance of their undertaking under it, was to vest in them an interest in the notes sued on, and by virtue thereof a lien on the land to the extent of their interest in the notes. The controversy goes only to the extent of such interest,—the contention being interveners' interest should, under the contract, be measured by the value of the notes when the contract was made; that, as Sanders and Bowser were then insolvent, the value of the notes depended solely upon that of the land for which they were given, and on which they were a lien; that the notes were worth only \$11,760, and the value of the Peak property was \$11,300, and half of the difference (\$230) between such values was the extent of interveners' interest in the notes, for which, only, they had a lien on the land. And complaint is made at the court's not presenting this contention as an issue to the jury for their determination. There is no ambiguity in the terms of the contract, and it is not claimed that it does not express the agreement actually made by the parties. It was, then, the duty of the court to instruct the jury in accordance with its obvious meaning; and to have submitted the contention of appellant as an issue would have been a departure from such duty. The contract with Kearby & McCoy

transferred them one-half of said notes in excess of the value of the property received by appellant from Worth Peak; and, the services of the interveners having been performed which entitled them to the fruits of their contract, and the jury having found that the contract was fairly made, they were the owners of a half interest in the notes after deducting from the amount due on them the value of the property received by appellant from Peak, and, to the extent of their interest in the notes, they also had a lien on the land for which they were given; and, as Bowser had knowledge of their interest when he procured his release from appellant, interveners were entitled to recover from him and Sanders their interest in the notes, with a foreclosure of their lien on the premises.

4. The attorney's fee specified was a part of the note, and, as an incident to interveners' interest, they had the right to recover their part of such fee when it attached by the notes being placed in the hands of an attorney for collection.

5. The appellant complains of the court's foreclosing the lien as to an undivided four-fifteenths interest in the land for which the notes were given. We think this is an error, but one of which appellant has no right to complain. If Bowser, Sanders, and interveners are silent as to it, certainly appellant ought to be. The vendor's lien, to the extent of interveners' interest in the note, having been created prior to the time appellant took possession of the premises as a homestead, extended to and covered all the property for which they were given, and could not be limited to an undivided interest in it, proportioned to interveners' interest in the notes. As appellant's homestead interest was subordinate to this lien, he is not injured by being adjudged an eleven-fifteenths interest in the land, discharged and freed from such lien.

6. There was no error in rendering judgment in favor of Sanders against appellant, for the record does not bear appellant out in his statement that "Sanders neither appeared in person nor by attorney during the trial of the cause, nor was his plea presented to the court or jury." On the contrary, it shows that he pleaded his discharge by reason of the release of Bowser; that appellant interposed thereto a general denial; that the judgment recites that plaintiffs, defendants, and interveners appeared in person and by attorneys; and that the jury found Mays had released Bowser, from which it follows, as a matter of law, that Sanders was also released.

There is no error assigned requiring a reversal of the judgment, and it is affirmed.

GALVESTON, H. & S. A. RY. CO. v. STATE
 ex rel. CULBERSON, Attorney General.¹

(Court of Civil Appeals of Texas. April 29, 1896.)

REMOVAL OF CAUSES—LAND CERTIFICATES—TRESPASS TO TRY TITLE—NECESSARY PARTIES—ESTOPPEL.

1. A cause cannot be removed from a state to a federal court simply because during the litigation a construction of the federal constitution becomes necessary.

2. Mortgagees are not necessary parties to actions of trespass to try title brought against mortgagors.

3. Illegal acts of land commissioners in granting land certificates will not estop the state from recovering the land located under the certificates.

Appeal from district court, Brewster county; Walter Gillis, Judge.

Action of trespass to try title on relation of C. A. Culberson, attorney general, against the Galveston, Harrisburg & San Antonio Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

T. D. Cobbs and J. P. Blair, for appellant. C. A. Culberson and R. L. Batts, for appellee.

Conclusions of Fact.

FLY, J. It is agreed that the defendant company received from the state and located the certificates described in plaintiff's petition, and that said petition contained a true statement of the number of certificates issued, the number of each certificate, the number of acres, the date when certificates were issued, the counties in which located, the section of road for which said certificates issued, as well as the number of miles of main track and sidings in each section, and whether the same has been patented, and the date of the patents. It is further agreed that the defendant railway company began the construction of the first section of its road—that part of its road for which certificates in this suit were issued—at the point of junction with the old line of the Buffalo Bayou, Brazos & Colorado Railroad, at a distance of 493 feet west of the west approach to the bridge over the Colorado river, and ending at the west end of west approach over the West Navidad river, subsequent to July 27, 1870, and completed the same December 19, 1873; that the second section of defendant company's road, from the "western side of the western approach to the bridge over the West Navidad river, and ending at the center of a red sandstone culvert, the first one east of Buck's branch," was constructed and completed between July 27, 1870, and June 25, 1874; that the third section of defendant company's road, from a "red sandstone culvert, the first one east of Buck's branch, and ending at the turntable at Luling, was constructed and completed between July 27, 1870, and January

16, 1875; that the fourth section of defendant company's road, between "the station house at Luling and ending at the west end of the siding at Kingsbury," was constructed and completed between July 27, 1870, and July 12, 1875; that the fifth section of defendant company's road, between "the east pier of the Guadalupe bridge, thence eastward, ending at a point opposite the depot door at Kingsbury, or the west end of the siding where the last inspection terminated," was constructed and completed between July 27, 1870, and October 27, 1876; that that portion of the road of defendant company between the Colorado river and San Antonio was completed to San Antonio February 13, 1877; that said railroad was thereafter constructed and put in running order, and operated from said beginning, at the bridge over the Guadalupe river, to El Paso, in El Paso county, being a distance of — miles. It is further agreed that the charters and special laws relating to defendant's company and relating to grants of laws to railroad companies may be used on the trial in evidence and considered, without the necessity of incorporating the same in the statement of facts; as well as all special laws incorporating railroads, and other laws, general and special, granting lands and land certificates for works of national improvements. Any other pertinent fact may be introduced by either party on trial.

There are now remaining and belonging to the state of Texas — acres of public domain, reserved since 1879 from location by certificates. Defendant paid taxes on the lands sued for continuously since they were located up to the present time, which were received by the state of Texas, and by it used as other taxes are used by the state. Defendant paid all fees for locating and surveying the said lands sued for, as well as the same number of alternate sections known as the "even-numbered" for the public free-school fund, and has paid all surveying fees and all fees to the commissioner of the general land office in respect hereto, and all sums of money necessary for its protection and in the way of betterments for the preservation of the same, etc. The said certificates for land described in plaintiff's petition were issued to it after the said railway company had completed and after the governor had appointed an engineer to examine the same and report, which engineer did examine the same, and report to the governor the condition of said road, and thereupon the governor approved the report, and thereupon the land commissioner issued certificates to said railway company, signed by the commissioners of the general land office, calling for main line and sidings, not separating the sidings from the main line. At the time the act of January 30, 1854, became a law E. M. Pease was governor of the state of Texas. It was by his approval as such governor that the bill passed the legislature and became a

¹ Rehearing denied.

law. The first certificates that were issued under the act of January 30, 1854, were authorized and directed to be made by the said E. M. Pease, whose term of office had not then expired. These certificates were issued upon a report made by Tipton Walker, engineer, appointed by Gov. Pease in pursuance of the provisions of said act, which report bears date of March 24, 1856, and is now on file in the proper department of the state in the capitol at Austin. In this report said Tipton Walker specially states that the railway company to whom said certificates were issued had completed of its main line a certain number of miles, and also states the length of sidings that had been constructed. Upon receiving this report the said E. M. Pease, as governor, as aforesaid, in a letter addressed to Hon. Stephen Crosby, commissioner of the general land office, under date of March 31, 1856, advised said Crosby, as such commissioner, that the president of the railway company making application for said certificates had notified him (the governor) that said railway company had completed and put in running order a section of 25 miles and more of its road; that, there being no state engineer, he had appointed, under the act of January 30, 1854, Tipton Walker, engineer, to examine said section of road; and that he then inclosed a copy of said report under oath, with the affidavit accompanying the same, from the said engineer; that said engineer reported that said section, containing (with the necessary turnouts) 32.12 miles, is constructed in accordance with the provisions of its charter and the general laws of the state in force regulating railroads. The various engineers appointed by the different governors to inspect railways as the same were constructed, in their respective reports of inspection to the respective governors, stated the number of miles and feet of main track, the number of miles or feet of bridges, culverts, and trestles, the number of depots, cars, engines, weight of iron, and width and character of track and grade. The action of the respective governors (except Gov. Roberts) in said reports were usually in the following words, "Reports examined and approved," upon which reports and action of the respective governors the commissioner of the general land office issued to the respective companies the certificates for main track and sidings. During the administration of Gov. Roberts the reports of the engineers were in substance and form of those made to other governors, but he approved for only the number of miles of main track stated in the reports. In one instance during the administration of Gov. Davis he approved one report for sidings exclusively, for which certificates were issued in the usual amount per mile. This was also done in one instance by Gov. Hubbard, for which certificates issued. On March 13, 1877, Gov. Hubbard made the following indorsement on

one of the reports: "This report of Inspector Gray examined, and approved for thirty miles of main track and sidings, as being made, graded, and in all respects complying with the law." In many cases patents were issued on said certificates for both main line and turnouts, and in some cases did not separate the quantity of land for main line from the quantity of land for sidings.

The said railway company had expended large sums of money, as aforesaid, in the work of surveying such lands, locating and correcting the same; also in preserving said railway company, and enabling it to perform the duties incumbent upon it as a common carrier; and has paid large sums of money, by way of taxes, to the state of Texas. Said lands have been surveyed in all respects as the law requires lands to be surveyed for railway companies, by virtue of the donations of grants of land, into tracts of 640 acres, where the same could be done, surveying an equal amount for the benefit of the school fund, the field notes of which were recorded, and are now in the proper surveyor's office. That maps, plats, and sketches thereof were duly made, which, with the field notes and certificates, have been duly returned to the general land office of the state of Texas within the time required by law, and have remained on file in the land office ever since. That the same were duly platted upon the maps of the general land office of the state of Texas, and suitably marked as the lands of the railway company. The maps of the same are in use of the land office of the state of Texas now. The odd sections are recognized as said railway company's lands, and maps thereof have been furnished to the county surveyors in all the counties where the said lands are situated, and are now in their possession and control, showing said lands platted thereon, which are recognized by the state of Texas, through its officers, as the lands granted to said defendant railway company. The following commissioners have issued land certificates for sidings as well as for main line, to wit, Stevens, Crosby, White, Kuechler, and Groos. During the administration of the following governors land certificates were issued for sidings and main line to the railway companies named as follows: Gov. E. M. Pease, to the Buffalo Bayou, Brazos & Colorado Railroad; Gov. H. Runnels, to the Southern Pacific Railroad Company, to the San Antonio & Mexican Railroad Company; Gov. Sam Houston, to the Southern Pacific Railroad Company; Gov. Edward Clark, to the Washington County Railroad Company, to the Buffalo Bayou, Brazos & Colorado Railroad Company; Gov. J. W. Throckmorton, to the Texas & New Orleans Railroad Company, to the Washington County Railroad Company; Gov. E. J. Davis, to the Galveston, Harrisburg & San Antonio Railroad Company, to the Galveston, Houston &

Henderson Railroad Company, to the Indianola Railroad Company, to the Texas Pacific Railroad Company, to the Houston & Great Northern Railroad Company, to the Houston & Texas Central Railway Company, to the Waco & Northwestern Railway Company; Gov. Richard Coke, to the Texas & Pacific Railroad Company, to the Houston & Great Northern Railroad Company, to the Gulf, Colorado & Santa Fé Railway Company, to the Galveston, Harrisburg & Santa Fé Railroad Company; Gov. R. B. Hubbard, to the Texas Pacific Railroad Company, to the Houston & Great Northern Railway, to the Gulf, Colorado & Santa Fé Railway Company, to the Denison & Southeastern, to the East Line & Red River Railroad, to the Tyler Tap Railroad, to the Houston East & West Texas Railroad, to the Georgetown, to the Dallas & Wichita, to the Galveston, Harrisburg & San Antonio Railroad, to the Texas Western.

The lands were surveyed and located and certificates issued as shown by the statement in plaintiff's petition. The defendant company completed its line of railway from San Antonio to El Paso and to Rio Grande river, in El Paso county, beginning on the — day of —, a distance of 623.14 miles, and ending on the — day of —, 18—, for which it never received any certificates for land. H. B. Adams, as vice president of the Galveston, Harrisburg & San Antonio Railway Company, made application to his excellency, O. M. Roberts, governor of the state of Texas, to appoint a civil engineer to examine and inspect said portion of completed line, which application was refused by Gov. Roberts. The act legalizing the organization of the Buffalo Bayou, Brazos & Colorado Railroad Company was approved September 4, 1850. The Southern Pacific Railroad Company was chartered August 16, 1856. The San Antonio & Mexican Gulf Railway Company was chartered September 5, 1850. The Washington County Railroad Company was incorporated February 2, 1856. The Texas & New Orleans Railroad Company was incorporated prior to February 7, 1861. The Galveston, Houston & Henderson Railroad Company was incorporated February 7, 1853. The Indianola Railway Company was incorporated January 21, 1858. The Texas & Pacific Railway Company was not chartered by the state of Texas. The Houston & Texas Central Railway Company was incorporated September 1, 1856. The Waco Tap Railroad Company was incorporated in 1866. By act of May 24, 1873, the Waco & Northwestern Railroad Company was merged with the Houston & Texas Central Railway Company. The Gulf, Colorado & Santa Fé Railroad Company was incorporated May 28, 1873. The Denison & Southeastern Railroad Company was chartered July 27, 1877. The East Line & Red River Railroad Company was incorporated by an act of March 22, 1871. The Tyler Tap Railroad Company was incorporated by act of

December 1, 1871. The Houston, East & West Texas Railway Company was incorporated by act of March 11, 1875. The Georgetown Railroad Company was chartered May 31, 1878. The Dallas & Wichita Railroad Company was incorporated December 2, 1871. The Texas Western Railroad Company was incorporated February 16, 1852. The Columbus Tap Railroad Company was incorporated February 2, 1860. The Gulf, Western Texas & Pacific Railroad Company consolidated with the Indianola & San Antonio Railroad Company August 4, 1870. The Galveston, Brazos, Colorado, N. G. Railroad was incorporated February 2, 1875.

The defendant company located the land sued for by virtue of 315 certificates out of 415 issued on the first section of that portion of its road from the Colorado river to the Guadalupe bridge, the 407 certificates of the 433 issued on the second section of its road, the 308 certificates issued on the third section of its road, 91 certificates of the 192 issued on the fourth section of its road, and the 262 certificates issued on the fifth section of its road; said sections of road being as heretofore referred to in this agreement. That the railroad company, long prior to the institution of this suit, executed mortgages for large amounts of money to secure issue of bonds. The mortgages were secured upon the following property: The line of road and its franchise, and on all the lands, locations, surveys, land scrip, and rights to lands that have been or may be hereafter acquired by said company for the construction of its railroad from Harrisburg to San Antonio by virtue of any general or special acts of the legislature of the state of Texas making donations of lands. Some of said mortgages are each for the sum of \$20,000 per mile of the road. One of said mortgages is the mortgage mentioned in defendant's plea, in which George F. Stone is the sole surviving trustee; and it shall not be necessary to further describe the said mortgages. The said mortgages and bonds which they secure were issued and floated on the money market, and money obtained for the purpose of building and constructing the railroad of defendant company, and were duly recorded in the counties where lands are situated. The Railway company treated and understood, and also the holders of said mortgages so understood, that the lands sued for were embraced in and secured by said mortgages; but this point is not conceded by plaintiff. The state refused to issue and grant any certificates to the defendant company for any part of the road constructed west from San Antonio to El Paso, which is a distance of 623.14 miles. The construction of that part of the railroad began west at Columbus in March, 1873, and was completed to the West Navidad about January 1, 1874. The road was opened for business on the following dates: Welmar, November 16, 1873; Schul-

enburg, December 1, 1873; Flatonia, April 16, 1874; Waelder, July 1, 1874; Luling, September 1, 1874; Kingsbury, July 23, 1875; Seguin, August 10, 1875; Guadalupe River, August 10, 1876. Construction west of San Antonio began in May, 1881. The first grading at Rio Grande river, near El Paso, was done on March 28, 1881. The construction of the road was finished from El Paso eastward December 27, 1882. The road was opened for business west from San Antonio and El Paso at La Coste, 25 miles, October, 1881; at Hondo, 50 miles, 1881; at Sabin, 71 miles, October 24, 1881; at Uvalde, 93 miles, November 21, 1881; at Eagle Pass Junction, 132 miles, March 6, 1882; at Del Rio, 170 miles, June 23, 1882. Construction west from San Antonio and east from El Paso met in January, 1883. W. P. Harde- man inspected the road west from San Antonio under appointment of Gov. Roberts first, and afterwards under contract with Mr. Pierce, who was then the president of the railway company. The first inspection was made on June 27 and 28, 1881, for 11 miles; balance made not long after the repeal of the law. The work west of San Antonio began June 4, 1881. From Leona river to a short distance west of Del Rio the road was completed before April 22, 1882, a distance of 163.6 miles. Inspected the road under contract with Pierce from Rio Grande above El Paso, 265 miles, to a point near Marathon, pointed out by Chief Engineer Mr. Linburg as the point to which the road was completed April 22, 1882. Inspected all that was completed to April 22, 1882. Do not know the exact date; but what he did inspect he found complete, and in running order, and in other respects according to law. The unappropriated public domain was as follows at the dates given: August 31, 1872, 88,842,704.5; August 31, 1873, 84,565,367.91; January 24, 1874, 83,783,750.91; August 3, 1874, 79,227,793.1. At the following named dates the unappropriated public domain, according to the then commissioner of the general land office, had ceased to exist, and the state's land liabilities exceeded its land assets, to wit: August 31, 1882, deficiency 6,136,615 acres; August 31, 1884, deficiency 6,745,723 acres. At date of land commissioner's report, August 31, 1892, excess of public domain over liabilities was estimated at 745,666 acres. Change from liability in 1883 to excess in 1892 was caused by the return of certificates within the constitutional limitation of five years from date of issuance, or by their location on reserved lands, which rendered them void unless floated as provided by law. An approximate estimate of the unappropriated public domain reserved from location by certificate and sale, made January 12, 1893, make the number of acres of such land 4,393,835. Reservation was first made by the act of July 14, 1879, which took effect October 9, 1879. The number of acres of the unappropriated

public domain was at that time approximately 31,025,298, as per report of the commissioner of this office.

Opinion.

This suit was instituted on the 5th day of January, 1893, by C. A. Culberson, attorney general of the state of Texas, in behalf of the state, to recover 1,383 tracts of land, containing, in the aggregate, 879,070 acres of land situated in the counties of Jeff Davis, Presidio, Brewster, Kimble, San Saba, Val Verde, Crockett, McCulloch, Pecos, Buchel, Reeves, Schleicher, Sutton, and Zavalla, and to cancel patents issued to appellant for said land. After setting out the land sued for, and the locating of certificates on it by appellant, it was alleged that the Buffalo Bayou, Brazos & Colorado Railroad Company was chartered by a special act of the legislature of date February 11, 1850; that by that special act said company, and appellant as its successor, was authorized only to build an extension of its railroad to the city of Austin, and to a line extending north from Austin to connect with some road running north of Austin to the Pacific Ocean; that said railroad companies were not entitled to receive any lands for the construction of any road from Columbus to San Antonio and westward for which appellant has received land certificates; that by the special act of the legislature of the state of Texas approved July 27, 1870, the name of the Buffalo Bayou, Brazos & Colorado Railroad Company was changed to the Galveston, Harrisburg & San Antonio Railway Company, and by its provisions appellant was for the first time given authority to extend its road from Columbus to San Antonio, for which the land certificates in question were issued, and that at the time of their issuance the constitution of 1869-70 forbade the legislature to grant lands to railway companies for the construction of their roads; that there were issued to appellant, at different times, 1,610 certificates, by the commissioner of the general land office of Texas, for a line of road from Columbus to the east pier of the bridge across the Guadalupe river, all of which road was constructed between July 27, 1870, and October 27, 1876; "that at no time during said period was there any law in existence in this state authorizing the issuance of land certificates to the defendant company for main track or sidings, and especially does the plaintiff aver and represent that at no time during said period was there any law in existence authorizing the issuance of certificates to said company for the construction of its line of road between Columbus and the Guadalupe bridge." It was therefore charged that the certificates were unlawfully issued, and were null and void. On the 6th day of March, 1893, appellant filed a petition for removal of the cause to the circuit court of the United States, which was overruled. On March 13, 1893, appellant filed its answer, setting up that it

lad, in 1880, mortgaged the land in controversy to Andrew Pierce and George Stone; that Pierce was dead, and Stone was the sole surviving trustee, and that Stone was a necessary party to the suit. Appellant also pleaded general denial, and specially pleaded all its charters, and all laws, general and special, of the state of Texas, by which it became entitled to the lands claimed by it. Defendant further answered, among other things, that it was provided in section 11 of the charter granted in 1870 that said new company shall be entitled to the same or similar rights and relief (except state aid in bonds or indorsement of guaranty of interest on bonds) granted to or provided for any other railroad company by the legislature, and upon the same or similar terms and conditions, as far as such rights and relief are in their character applicable to said new company or its line or lines of railroad. Defendant pleaded specially, as aforesaid, its title at length, and, further, the amendment of the constitution in 1873; and pleaded further, that upon the adoption of the said amendment to the constitution the legislature of Texas proceeded to grant to and provide for a large number of railroads rights to 16 sections of land to the mile of completed road; and defendant thereupon proceeded to construct its road from Columbus to the Guadalupe river; and defendant constructed the same relying in good faith upon the promise, agreement, and undertaking of the state, as fully set forth in said section 11 of its charter of 1870; and defendant, from time to time, received the lands sued for as said construction proceeded. On the 16th day of August, 1876, the legislature passed a general law granting 16 sections of land per mile to railroads; and on the 22d day of April, 1882, the legislature repealed all laws granting lands to railroads. Defendant also claimed that it was entitled to the lands for the following reasons, to wit: First. By reason of the legislation, charters, and amendments thereto, and the general laws applicable to railroad companies passed prior to the constitution of 1869, which secured its rights to the land, and which could not be impaired by any subsequent legislation, without violating the provisions of the constitution of the United States. Second. Because it was entitled to the land by virtue of the act of the legislature passed July 22, 1870, and by virtue of the amendment to section 6, art. 10, of the constitution of 1869. Third. It is entitled to said land by virtue of the provisions of section 11 of said act of 1870 supplementary to its charter; and by reason of the fact that, subsequent to the amendment to the constitution made in 1873, the legislature proceeded to and did make numerous and specific grants of 16 sections of land per mile of completed road to other roads in this state; and defendant, relying upon the provisions of its charter, commenced and continued the construction of its road in good faith, and in reliance up-

on the recognition and performance by the plaintiff of its obligation to accord to defendant equal rights with other roads, in favor of which special land grants of 16 sections of land to the mile of completed road had been made. Fourth. Because, if it was not otherwise entitled thereto, it was entitled to have lands by force and virtue of the act passed August 15, 1876, and by reason of the fact, on the faith and in reliance upon the provision of said act, the defendant constructed that portion of its road between San Antonio and El Paso, amounting to 623.14 miles, which entitled it to receive from the state 16 sections of land for each mile, amounting in the aggregate to 6,380,953.6 acres of land, which was constructed subsequent to August 15, 1876. Defendant further averred that by reason of the action of the executive officers of the state in construing the law; appointing engineers to inspect the road; the report of such engineers; the action of the governor thereon; the issuance of certificates; the survey and location of the land; maps and plats thereof filed in the office of the commissioner of the general land office, and also in the surveyor's office, and the state officers fully recognize them to be the lands of the Galveston, Harrisburg & San Antonio Railway Company for a period of many years; the decisions of the highest court in the land, establishing the rule of property; the payment of large sums of money by defendant in surveying and locating the lands; the payment of taxes, patents, and betterments, which the state has made no provision to pay or to return to defendant; and during a period of more than 10 years the state of Texas and her officials have stood by and allowed the assertion of title to said lands by the railway company, permitting the lands to be mortgaged and money obtained in the money markets of the world,—the state is estopped from the recovery of the lands in this cause, and that the same is a stale demand. Defendant also prayed for affirmative relief, and, if within the power of the court, for judgment for the said land certificates which have not been issued, requiring the same to be issued to defendants, and praying the court for such affirmative relief in the premises as it was entitled to. The cause was tried on September 13, 1893, and judgment was rendered in favor of the state of Texas for all the lands sued for.

Finding that the statement of facts is as much condensed as we could make it in justice to the parties, we have, with a few emendations, adopted it as our conclusions of fact. The first and second assignments, presenting the error in the refusal to remove this cause from the state to the federal court, cannot be sustained. The points therein presented have been decided by the supreme court of the United States adversely to the contention of appellant. *State of Tennessee v. Bank of Commerce*, 152 U. S.

454, 14 Sup. Ct. 654. In that case it was held that "a cause cannot be removed from a state court simply because, in the progress of the litigation, it may become necessary to give a construction to the constitution or laws of the United States." The trustee in the mortgage, George F. Stone, was not a necessary party to this suit. Mortgagees are not necessary parties to actions of trespass to try title brought against mortgagors. If the state was willing to run the risk of another lawsuit with the mortgagee, it does not concern appellant. Its title was not strengthened or weakened by the existence of the mortgage. We are of the opinion that the illegal acts of the land commissioner in granting the land certificates, and of the governor in granting patents to the land, do not estop the state of Texas from recovering the lands sued for. "The state cannot be estopped by the acts of any of its officers, done in the exercise of a power not conferred upon them, any more than it can be bound by contracts made by its officers which they were not empowered to make. The powers of all officers are defined and conferred by law, and of these all persons who deal with them must take notice. Acts done in excess of the powers conferred are not official acts." *Day Land & Cattle Co. v. State*, 68 Tex. 528, 4 S. W. 865.

The questions raised by the remaining assignments of error have been certified by this court to the supreme court, and have been answered adversely to appellant. *Galveston, H. & S. A. Ry. Co. v. State* (opinion delivered March 19, 1896), 34 S. W. 746. In that opinion it was held that appellant did not succeed to the rights that would have accrued to the Buffalo Bayou, Brazos & Colorado Railroad had it been extended, as provided by its charter, to Austin, and that it was no defense to the action for the recovery of the lands involved in this suit that the company may have been entitled to certificates for the 163 miles of railroad constructed west of San Antonio under the law of 1876. The judgment is affirmed.

LAING et al. v. HANSON.¹

(Court of Civil Appeals of Texas. May 6, 1896.)

ASSUMPSIT—COMPLAINT—INDEMNITY—EVIDENCE OF DAMAGE—ASSIGNMENT OF ERRORS.

1. That part of a petition in an action to recover divers sums on account of the construction of a railroad, reciting: "At the special instance and request of defendants, plaintiff did work on said line of railway on the * * * dates set out in Exhibit C, which is filed herewith and made a part hereof, which said work consisted in building and repairing bridges, packing up track, loading and unloading pile timber, hauling iron, and repairing cars, as fully set out in said exhibit, in the aggregate to \$135.67; that defendants thereafter received and accepted said work, and became liable to the plain-

tiff for the reasonable value thereof, to wit, the sum of \$135.67,"—is sufficiently certain in its allegations to present a good cause of action without any reference to the exhibit.

2. When a contractor liable to another for damages caused in the performance of his contract by his subcontractor, which the latter has agreed to indemnify him against, being sued for the damages, compromises the suit, without the knowledge or consent of the subcontractor, after the latter has neglected the opportunity offered him to defend, the amount compromised for is no evidence against the subcontractor of the amount of damages for which he is liable, but merely fixes a limit beyond which damages cannot be shown against him.

3. Failure to submit a charge will not be held error, where the assignment or statement thereunder does not indicate that there was any evidence to warrant it.

4. An assignment that the court erred in overruling a motion for new trial on account of the grounds therein stated is too general.

Appeal from Dallas county court; T. F. Nash, Judge.

Action by H. Hanson against Laing & Smoot. Judgment for plaintiff, defendants appeal. Affirmed.

Dickson & Moroney, for appellants. McCoy & Hudson, for appellee.

NEILL, J. Suit by appellee (plaintiff below) against Laing & Smoot, a firm composed of Jos. Laing and E. K. Smoot, to recover divers sums of money on transactions growing out of, and connected with, a contract of the former with the latter parties to do certain work for them in the construction of a railroad. There was a verdict and judgment for the plaintiff for \$617.96, from which we have this appeal. As it would serve no useful purpose to make a full statement of this case, only such matters as are related to the assignments will be stated in connection with them.

The first assignment is, "The court erred in overruling the fifth exception contained in defendants' third amended original answer to so much of plaintiff's third amended original petition as sought to recover upon a claim for \$135.67." The part of the petition to which the exception referred to in the assignment was directed is as follows: "At the special instance and request of defendants, plaintiff did and performed a large amount of work on said line of railway on the days and dates set out in Exhibit C, which is filed herewith and made a part hereof, which said work consisted in building and repairing bridges, packing up track, loading and unloading pile timber, hauling iron, and repairing cars, as fully set out in said exhibit, in the aggregate to \$135.67; that defendants thereafter received and accepted said work, and became liable to the plaintiff for the reasonable value thereof, to wit, the sum of \$135.67, but the same to pay, or any part thereof, they have, though often requested so to do, failed and refused, to plaintiff's damage in said amount." Exhibit C shows the several kinds and character of work, the time it was done, the sums charged

¹ Rehearing denied.

for the different items, etc., corresponding to the allegations in the petition. The exception overruled is as follows: "Defendants specially except to plaintiff's claim for \$135.67 shown in his Exhibit C, because the plaintiff, by referring to one exhibit in this manner, cannot evade the necessity for making proper allegations as to work which he claims to have done, and because the same is so uncertain in its allegations as not to properly notify these defendants of what case they would be expected to meet." We do not think the petition is obnoxious to these exceptions. Independent of the exhibit, it contains a statement of the kind of work done by plaintiff at the special instance of defendants, its value, and, by proper allegations, avers their liability to pay for it. The exhibit supplies no omission necessary to present a good cause of action, but only serves to aid and explain specific allegations in the pleading.

The second assignment of error is, "The court erred in sustaining the exceptions contained in plaintiff's second supplemental petition to so much of defendants' third amended original answer as set up a claim for \$35 paid to B. G. Bidwell for defending the Baumgartner suit, and to the sum of \$277.25 paid Abe Baumgartner in settlement of his said claim, and in refusing, on the trial of said cause, to allow these defendants to show the amount they had paid to Abe Baumgartner in settlement of his claim." The answer of defendants alleged that, under the terms of their written contract with plaintiff, he agreed to pay all damages to the fences, the crops, and other damages of any kind which he might cause, in and along said railroad, for which defendants might in any way be liable; that on the 30th of November, 1890, the force employed by plaintiff in and about the business of building bridges left down the fences of the farm of Abe Baumgartner, near Garner, in Parker county, Tex., on the line of said road; that defendants were general contractors with the railroad company for the construction of the road, and as such were liable for injuries that Baumgartner might recover by virtue of his fences being left down, but that under the contract plaintiff was liable over to defendants for such damages; that Baumgartner instituted suit in Parker county against defendants, claiming \$600 damages caused by cattle and stock getting into his farm on account of his fences having been left down; that as a matter of fact, on account of said fences being left down by plaintiff, cattle and stock got in Baumgartner's farm, and damaged his crops to the extent of \$600; that defendants, on being sued therefor, thereupon notified plaintiff to appear in the cause and defend the same, but that he refused to do so, whereupon defendants were compelled to and did employ B. G. Bidwell, an attorney at law, to defend said suit; that they notified plaintiff to attend the trial of the cause, which

he failed to do; and that defendants, having no defense to the action, on March 1, 1891, paid Baumgartner, in settlement of the suit, the sum of \$277.25, and to said B. G. Bidwell, for defending the same, \$35, the reasonable value of his services, making a total of \$312.25, which was a reasonable sum to pay in settlement of the alleged claim, which defendants claim and plead in offset of plaintiff's demand. This part of the answer plaintiff excepted to on the ground (1) that it did not show any legal liability on the part of defendants for such damages to Baumgartner, or what, if any, property of Baumgartner was destroyed or injured, or the kind or extent of such damages, if any; (2) that it does not show that plaintiff was in any way a party to said suit, or was ever legally cited to appear and answer therein; and (3) it fails to show that plaintiff ever authorized or agreed to the compromise of said claim, or ever knew of the same, or in any way authorized or empowered the defendants to compromise the same. The ruling of the court upon these exceptions was that they were well taken, except as to the allegations of Baumgartner's damage, and it was ordered that the allegations with reference to the payment of \$35 to B. G. Bidwell, and \$277.25 to Abe Baumgartner, be stricken from the answer; and in explanation, we suppose, of its ruling, the court "further ordered, adjudged, and decreed that upon the trial of the cause the defendants may, if they can, show the amount of damages to the crops of Abe Baumgartner done by the forces of plaintiff, but they cannot show the amount claimed to have been paid by them to B. G. Bidwell for defending the Baumgartner suit against them, nor the amount paid to Baumgartner in settlement of said suit." After the defendants' witness Field testified that he thought Baumgartner's crops had been damaged about \$200 or \$250 by stock; that suit had been brought by him against defendants for the damages; that plaintiff had been notified by him, as defendants' agent, to appear and defend it, and of his refusal to do so; and that then the suit was compromised,—the witness was asked what amount had been paid to Baumgartner in compromise, and upon objection by counsel for plaintiff the court refused to allow the witness to answer. We will here observe that the bill of exceptions taken to the action of the court fails to show, or even intimate, what would have been the answer of the witness to the question. When a party, as principal contractor, is held to another for damages caused in the performance of his contract by his subcontractor, which the latter has agreed to indemnify him against, and is sued for such damages, he may make the subcontractor a party to the suit, and, on proper pleadings, recover over against him such judgment as he himself may be condemned to pay. But,

should the contractor fail to make his indemnator a party, he must, in order to bind him by the judgment, tender him a full, fair, and previous opportunity to meet the controversy. Upon principle, no one can be held to make answer without an opportunity to defend; and, to bind one by a judgment to which he is not a party, he should be allowed all means of defense open to him had he been a party. *Freem. Judgm. § 181.* Conceding that the answer to which this assignment relates shows ample notice to appellee of the Baumgartner suit against appellants, and that they were given every opportunity to defend it, it appears that the suit was not prosecuted to judgment, but that the matters involved were compromised without the knowledge or consent of the appellee. Such compromise cannot have the force to bind appellee that a judgment rendered upon a trial of the controversy would have had. It simply limits the amount to a sum beyond which the appellants could not recover against the appellee, but does not establish their right to recover anything against him, but left the whole matter, save such limitation, as between appellants and appellee, open to adjustment. And we apprehend that this is the effect of the ruling of the trial court upon the exception to the answer. In other words, the court held that the appellants could offset appellee's demand by any damage they might show they had sustained by reason of injuries caused to Baumgartner's crop by the employés of the appellee, but that the amount paid on the compromise would be no evidence of such damages, which ruling, as applicable to the facts, if not strictly correct, was not prejudicial to appellants; for the estimate of the injuries to Baumgartner's crop was shown by appellants' own witness to be less than the sum which the answer alleges to have been paid on the compromise. This disposes of the assignment, in so far as it questions the ruling of the court on the exceptions. As it does not appear from appellants' bill of exceptions what would have been the answer of the witness Field, had the court allowed him to answer the question, we cannot say that the appellants were prejudiced by the court's ruling in not admitting the answer, even if we should hold its exclusion erroneous.

The third assignment, which is asserted as a proposition, is as follows: "The court erred in charging the jury that, 'If you find any damage for defendants on account of delay in the completion of the work which plaintiff had to do, the measure of the damages would be six per cent. per annum on the amount that was withheld from defendants by the railroad company, for the time it was so withheld.'" This is the statement made under the assignments: "The defendants allege that they had been damaged on account of being deprived of the use of \$15,000 for two weeks; and (2) \$200, the

amount of wages they had paid during this delay to employes who were employed by the month, and were idle during the delay caused by plaintiff." It will be observed that the assignment does not point out any error in the charge. In its relation to the damages claimed for being deprived of the use of money, if there was any evidence to support it, it is correct. If there was no evidence to warrant such charge, it was error to give it, but the error is in appellants' favor. The statement does not indicate that there was any evidence that would have justified the court in charging on the amount of wages appellants had to pay their hands as damages for appellee's alleged delay, and, in the absence of such statement in their brief, we are not required to search the record for such evidence. If we should, from investigation, find such evidence, and conclude that there was error in not submitting a charge upon it, we would not on that account be authorized to reverse the judgment, because the assignment indicates no such error. The statement under the fourth assignment of error is likewise defective. The assignment complains of the court's refusal to give a special charge asked by appellants. The statement does not embody the charge asked, nor show its purport, or even indicate where it is to be found in the record. The rules require that to each proposition there shall be subjoined a brief statement, in substance, of such proceedings, or part thereof, contained in the record, as will be necessary and sufficient to explain and support the proposition, with reference to the pages of the record. *Rule 31; 20 S. W. viii.* The seventh assignment is, "The court erred in giving the special charge asked by plaintiff." This assignment points out no error in the charge, and will therefore not be considered. The fifth assignment of error, which is, "This court erred in overruling defendants' motion for a new trial on account of the grounds therein stated," is also too general to be considered; and the seventh has neither a proposition nor statement under it. There is no error in the record brought before this court in such a way as to authorize a reversal of the judgment, and it is affirmed.

GULF, C. & S. F. RY. CO. v. WARNER.
(Court of Civil Appeals of Texas. May 20, 1896.)

MASTER AND SERVANT—APPLIANCES—NEGLIGENCE OF FELLOW SERVANT—MASTER CONCURRING—INSTRUCTION—ASSIGNMENT OF ERROR—REQUISITES.

1. Where an action against a railroad company by an employe for injuries is based on negligence of an engineer and defective appliances, and the undisputed evidence shows that the engineer is a fellow servant of plaintiff, the submission to the jury of the issue of negligence, based on the acts of the engineer, will necessitate a reversal.

2. A master is not bound to furnish the newest and safest appliances for his employes, but must exercise ordinary care in furnishing those which have been found safe and are ordinarily used by others in the same business.

3. Concurring negligence of a fellow servant with the negligence of the master will not relieve the master of liability.

4. An assignment of error must specify the ground of objection.

Appeal from district court, Johnson county; J. M. Hall, Judge.

Action by Charles C. Warner against the Gulf, Colorado & Santa Fé Railway Company for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed.

J. W. Terry, for appellant. Poindexter & Padelford, for appellee.

FLY, J. This appeal is from a judgment for \$15,000, rendered in the district court of Johnson county, in favor of Charles C. Warner and against the Gulf, Colorado & Santa Fé Railway Company. The suit was for damages arising from personal injuries received by appellee while in the employ of appellant as a switchman. The negligence charged against the railroad company was the failure to block its guard rails, by reason of which appellee's foot was caught, and he was unable to extricate it, and his leg was run over and crushed by a car that was being propelled along the track; and also that the spaces between the ties were left unfilled and unguarded, which condition contributed to the injury of appellee. Negligence was also charged upon the engineer who was in charge of the switch engine. Appellant answered, setting up contributory negligence on the part of appellee.

In the brief of appellant the 18th, 19th, 20th and 22d assignments of error are grouped. The 19th and 20th are in open violation of the rules in regard to assignments of error, and are too general for consideration. They come directly within the class mentioned in rule 26, that are not to be considered by the court. The 22d assignment of error is meaningless. It is a mere narration of what was proved, or supposed to have been proved, without setting out any error. The only one of the batch of assignments, grouped as above referred to, that can be considered is the 18th, which is not a model in any respect, but in an imperfect way can be held to raise the question of the sufficiency of the evidence as to the negligence of the company in regard to defective appliances, and the question of the engineer being a fellow servant to appellee. The testimony, barring the opinions of witnesses as to grade and departments of service, which should not be considered, showed, without contradiction, that appellee and the switch engineer were fellow servants, under the construction placed upon the fellow servants' act by the supreme court in answer to a certified question in this case. *Railway Co. v. Warner*

(opinion delivered April 27, 1896) 35 S. W. 304. In that opinion there is an able analysis of the law in question, and, applying it to the facts of this case, we are of the opinion that, unless there was negligence on the part of appellant in the construction of the switch where appellee was injured, he cannot recover. The question of fellow servants should not, under the facts, have gone to the jury, but should have been eliminated by the charge of the court. The jury may have found against appellant under the construction they may have placed on the facts as to fellow servants, or they may have found under the issue of negligence in regard to the guard rail and the opening between the rails. If they found against appellant on the ground of negligence of the engineer, the verdict cannot stand, because the testimony shows he was a fellow servant of appellee; and, not knowing upon what issue the verdict was rendered, a reversal must follow. The question, under the undisputed facts, was one purely of law, and the court should have withheld the issue of negligence, so far as it arose from the acts of the fellow servant, from the jury.

A discussion of the evidence in regard to the defects in the track and guard rail on the spot where the injury was inflicted will be unnecessary; but it may be well, in view of a reversal, to call attention to rules of law applicable to the facts. Masters are not bound to supply the best and safest or newest appliances for the purpose of securing the safety of their employes, but they are bound to use reasonable care and prudence for the safety of employes, by providing appliances reasonably safe and suitable for the use of such employes. While masters are not bound to adopt every new invention or supposed improvement, yet we think that the rule is a good one that they should be held to use such appliances as have been found safe, and that are ordinarily used by persons in the same business. As said by the supreme court of Alabama: "It is the duty of railroads to keep themselves reasonably abreast with improved methods, so as to lessen the danger attendant upon the service; and, while they are not required to adopt every new invention, it is their duty to adopt such as are in ordinary use by prudently conducted roads engaged in like business and surrounded by like circumstances. There have been such advancements in science for the control of steam, and improvements in machinery and appliances used by railroads for the better security of life, limb, and property, that it would be inexcusable to continue to the use of old methods, machinery, and appliances, known to be attended with more or less danger, when the danger could be reasonably avoided by the adoption of the newer, which are in general use by well-regulated railroads. Not that it is required of them to adopt every new invention useful in the business, al-

though it may serve to lessen danger; but it is their duty to discontinue old methods, which are insecure, and to adopt such improvements and advancements as are in ordinary use by prudently conducted roads engaged in like business, and surrounded by like circumstances." *Railroad Co. v. Jones*, 92 Ala. 218, 9 South. 276. It is said by the supreme court of Vermont: "A man in any situation or business is always bound to conform to the rules and usages which prudent and careful men have established in the conduct of similar business under similar circumstances, and it is negligence to make any important departure from such course when it proves more injurious to others than the usual course. The rule by which he is bound to govern the use of his own is that which is established by the concurrent use of careful and prudent men in that particular business." *Vinton v. Schwab*, 32 Vt. 614. It is held in Michigan: "Every one has a right to expect that railroads will be managed according to the custom; and railroad companies have a right, in their turn, to expect conformity to this." *Railroad Co. v. Coleman*, 28 Mich. 449. In Pennsylvania it is said: "The general rule requires of the master that he provide materials and implements, for the use of his servant, such as are ordinarily used by persons in the same business." *Manufacturing Co. v. McCormick*, 118 Pa. St. 519, 12 Atl. 273.

There seems to be some conflict of opinion as to effect that should be given to proof of an appliance being in general use in a certain class of business. In New York it would seem that proof that an appliance is constructed in the ordinary way should be conclusive that there was no negligence. *Laffin v. Railroad Co.*, 106 N. Y. 136, 12 N. E. 599; *Burke v. Witherbee*, 98 N. Y. 562. There are other cases which do not extend the rule so far, but qualify it by stating that evidence of customary use is entitled to weight, but is not conclusive upon the subject of the exercise of proper care. *Railway Co. v. McDaniels*, 107 U. S. 454, 2 Sup. Ct. 932; *Myers v. Iron Co.*, 150 Mass. 136, 22 N. E. 631; *Martin v. Railway Co. (Cal.)* 29 Pac. 645. The latter rule seems to be the rule followed in Texas. *Railway Co. v. Gormley* (Tex. Civ. App.) 27 S. W. 1051. After all, the test is ordinary care; and there could be no better rule by which to ascertain the existence or absence of such care than to compare the conduct of the party charged with negligence with the conduct of ordinarily prudent men under like circumstances. *Bailey, Mast. Liab.* p. 30; *Titus v. Railroad Co.*, 136 Pa. St. 618, 20 Atl. 517.

Concurring negligence of a fellow servant with the negligence of the master will not relieve the master of liability. *Railway Co. v. McClain*, 80 Tex. 85, 15 S. W. 789; *Railway Co. v. Johnson*, 83 Tex. 629, 19 S. W. 151; *Lutz v. Railway Co. (N. M.)* 30 Pac. 912, where the authorities on the subject are

fully collated. Whether appellee had knowledge of the defect in the track, and whether he was guilty of contributory negligence, were questions of fact which were properly presented to the jury.

It is not a compliance with the requirements as to assignments of error to say a charge is erroneous, and copy it, without pointing out the error. A number of the assignments of error in this case are so framed, and will not be considered. We will not discuss the question of excess in the verdict raised by appellant. For the error pointed out herein, the judgment is reversed, and the cause remanded.

CENTRAL TEXAS & N. W. RY. CO. v. DOUGLASS.¹

(Court of Civil Appeals of Texas. May 6, 1896.)

RAILROAD COMPANIES—INJURIES TO CHILD ON TRACK—NEGLIGENCE—SUFFICIENCY OF EVIDENCE—INSTRUCTIONS.

1. In an action for injuries to a child not two years old, the evidence showed that defendant's gravel train stopped for about 15 minutes in front of the house where the child stayed, which was 50 feet from the track; that, when the train stopped, the trainmen saw the child and its brother, a year older, on the porch of the house; that the ground was level, and the track was on a level with the surface; and that, when the train started, such child was injured by a car about the center of the train. *Held*, that there was no evidence of defendant's negligence to submit to the jury.

2. If the evidence warranted a charge on negligence, it was error to refuse to charge that, if the trainmen did not see the child approaching the train, nor closer to it than the doorway or yard of the house, it was for the jury to determine whether the trainmen should, as reasonably prudent men, have kept watch on the child to see whether it would stray from its home and go under the train, and that, if not, the fact that the child was injured by defendant's train was not alone sufficient to authorize a verdict for plaintiff.

Appeal from district court, Ellis county; J. E. Dillard, Judge.

Action by Jesse Douglass against the Central Texas & Northwestern Railway Company for personal injuries caused by defendant's negligence. From a judgment for plaintiff, defendant appeals. Reversed.

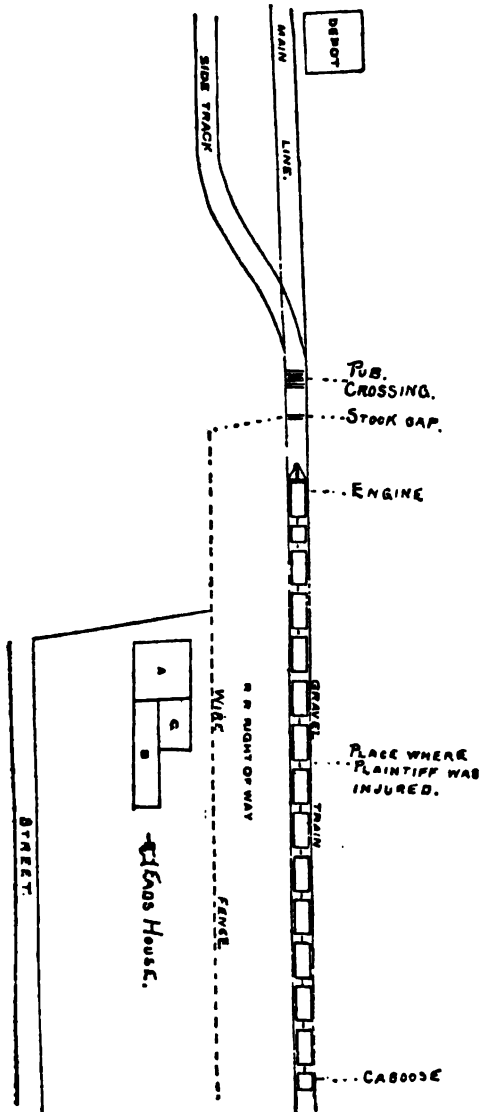
Frost, Neblett & Blanding, for appellant. A. A. Kemble and E. P. Kemble, for appellee.

NEILL, J. Suit by the appellee for personal injuries inflicted on him by the alleged negligence of appellant, and the judgment appealed from is \$4,000.

This case was before the court of civil appeals of the Fifth district on an appeal from a judgment in favor of the present appellant sustaining a demurrer to the plaintiff's petition. On that appeal the court held the petition stated a cause of action, and reversed the judgment. 26 S. W. 892. The allega-

¹ Rehearing denied.

tions in the petition are fully stated in the report of the case, and need not be repeated. The facts in the case are briefly as follows: On the 10th of June, 1892, the appellee, Jesse Douglass, a child not then two years old, and his brother, one year older, during the illness of their mother, were in the care of their aunt, Mrs. Eads, who lived at Jeffries Station, on appellant's road. On the morning of that day, about 11 o'clock, the gravel train of defendant, consisting of 20 flat cars, a caboose, tender, and engine, came up and stopped at the east switch, opposite Mrs. Eads' house. At the time the train was drawn up and stopped, the appellee and his brother were out on the platform of the house, facing the train. The train remained stationary about 15 or 20 minutes. Its crew consisted of a conductor, a rear and front brakeman, engineer, and fireman. The locality is indicated by the following diagram:



The house is about 50 feet from the railroad track, and there is a wire fence between it and the house. There is a conflict in the testimony as to whether the child was seen by any of the trainmen prior to his injury. If, however, he was, the testimony shows it was just about the time the train stopped, when he was on the porch or platform, C. The ground between the house and track was nearly level, and the track nearly on a level with the ground. There was a wire fence between the house and track, the lower wire of which was loose, and hitched up to a post at such height that appellee could easily walk under it. After the train had remained some 15 or 20 minutes, it was signaled to move forward, and, when it began to move slowly, the rear brakeman, at his proper place on the caboose, heard a scream, and, looking, saw a woman running from the house to the train, the center of the train being opposite to the house, and, supposing something "was the matter," signaled for "down brakes." The train was stopped, having moved about two car lengths. When it stopped Mrs. Eads was seen pulling the child from under the train. While the train was standing, its aunt being busy in the house preparing dinner, the child strayed from the house, and got under the train. She heard it scream at the starting of the train, and ran to its rescue. The child was injured so that it became necessary to amputate the little finger and the two middle ones of the left hand, and the big toe of the left foot, and from the bottom of the left foot the flesh to the bones.

The court, on the issue of negligence, instructed the jury as follows: "It is the duty of the agents and servants of a railway company, while engaged in operating its trains, to keep a reasonable lookout, and to use ordinary care to prevent or avoid injury to persons who may come upon its track. 'Reasonable care,' as used in this charge, means such care as a person of ordinary care and prudence would exercise under like circumstances to prevent injury to another. 'Negligence' is the failure of a person to exercise such care and prudence as a person of ordinary care would have exercised under like circumstances to prevent injury to another." The jury were then told, if they believed, from the evidence, the plaintiff's injuries were caused from the negligence of defendant's agents and servants in operating its cars, the plaintiff would be entitled to recover; but, on the other hand, to find for the defendant if the injuries were not caused by the negligence of its servants. The defendant's counsel requested the court to give the jury the following special charge: "If the employes and operatives of defendant's train by which the plaintiff was injured did not see the child approaching the train, nor in closer proximity to the train than the doorway or yard of Mrs. Eads, the aunt of plaintiff, in whose care it is shown he was at the time, then it is for the jury to determine whether the persons in

charge of the train should, as reasonably prudent men, have kept a watch on the child, to see whether it would stray from its home, and go on defendant's track, under the train. That is, would ordinarily prudent persons, in conducting their own affairs, have, under such circumstances, kept supervision of the child, for the purpose of shielding it from injury, if it had been seen in the doorway or yard of its own house? If not, then the fact of the child having been injured by defendant's train is, alone, not sufficient to authorize a verdict for plaintiff."

If there was any evidence in the case warranting a charge upon negligence, the refusal of this charge was error. The main charge was abstractly correct, but it nowhere directed the attention of the jury to or required them to consider the only evidence in the case from which the slightest inference, if any, of negligence could be drawn. This defect would have and should have been cured by giving the instruction requested. But we do not believe the evidence in this case was sufficient to authorize the court in submitting the issue of negligence to the jury at all. Resolving the only conflict in the testimony in plaintiff's favor, and conceding that the evidence establishes that the trainmen saw the child on the porch when the cars moved up and stopped in front of the house, we do not believe that the slightest inference of negligence can be legitimately deduced from the evidence. Unless a duty is imposed, there can be no negligence. While in this state it is the duty of servants of a railway company, operating its trains, to use reasonable diligence to discover a child which, by reason of its tender years, is unable to apprehend and protect itself from danger, and, therefore, incapable of negligence, if on or near its track, to prevent its injury, it has never been supposed to be the duty of such servants, when they see a child in a position of safety, and where it may be protected from danger by those upon whom the laws of nature have imposed such duty, to keep a watch on it, and see that it does not get under standing cars, or to look under the cars, before placing them in motion, to see that those whose duty it is to take care of it have not allowed it to stray from its place of safety, and place itself in one of most imminent peril. Had the appellee and his little brother been seen alone at a place near the track where it might have been reasonably supposed by the train crew that no one was looking to their safety and that, from their tender years, they might place themselves in danger of being injured by the cars when set in motion, then it might have been a question whether the employes, as reasonably prudent men, should have kept a watch on the children for the purpose of keeping them out of such supposed danger. But, when they were seen at the house, where the employes of defendant had every reason to believe they would receive the care of its inmates, whose duty it was to guard them

from danger, and were not seen afterwards until the injury was inflicted, we do not believe, under these circumstances, that the law imposed any duty upon appellant's servants to watch the child for the purpose of keeping it out of danger.

The insufficiency of the evidence to support the verdict, urged as a ground for a new trial, and the refusal of the court to grant it thereon, is assigned as error. The motion should have been granted on that ground. Believing as we do that there was no evidence of negligence adduced on the trial, the judgment of the court below is reversed, and the cause remanded, with instructions to the district court to direct a verdict for the defendant, should the evidence on the issue of negligence, upon another trial, remain unchanged.

HENRY et al. v. SANSOM et al.¹

(Court of Civil Appeals of Texas. May 13. 1896.)

ACTION ON NOTE—FAILURE OF CONSIDERATION—EVIDENCE—RELEASE—RES JUDICATA—VOLUNTARY PAYMENT—VERDICT—ERRONEOUS COMPUTATION.

1. Though defendant, pending an action on a note, paid the same, he was entitled, in a subsequent action on another note executed at the same time, as part of one transaction, to the benefit of any credit or deduction to which he was entitled against both notes, and was not confined to a credit for the proportion applicable to the note sued on, though there were different sureties on each note.

2. In an action on a note, it may be shown in defense that said note, which was in excess of two other notes, was intended as a substitute for said other notes, and was to be given for the amount represented by said notes, whether the excess consisted in a mistake as to the amount due on the prior notes, or an arbitrary addition of a bonus, in the form of compound interest.

3. In connection with such plea of partial failure of consideration, evidence that the payee, in his lifetime, stated that no more than the amount represented by said substituted notes should be collected from defendant, was admissible.

4. Where, in an action on a note, defendant alleged that said note was given as a substitute for two other notes, but by reason of a mutual mistake the amount thereof was in excess of said notes, and plaintiffs asserted that said note also included another indebtedness to the payee, which was in fact released at the time of the execution of the note in suit, it was proper to inquire whether the payee, in consideration for said note, released defendant from his liability on the substituted notes as well as for said indebtedness.

5. Where the defense in an action on a note was that said note was included in another note afterwards executed by defendant, the determination of that issue against defendant did not preclude him, in an action on said last-mentioned note, from claiming a deduction on the ground that said note was given as a substitute for two other notes, but by mistake was made out for more than the amount due on said other notes,—particularly as the sureties were not parties to the former action.

6. Nor did the voluntary payment of a note executed contemporaneously with the note

¹ Rehearing denied.

in suit operate as an estoppel to claim such deduction in this action, though payment of said note was made pending an action thereon.

7. A verdict for a less amount than plaintiff was entitled to will be reversed.

Appeal from district court, Johnson county; J. M. Hall, Judge.

Action by J. F. Henry and others, executors of the estate of F. M. Sansom, deceased, against D. F. Sansom and others, on a note. From the judgment rendered, plaintiffs appeal. Reversed.

W. Poindexter, for appellants. M. M. Crane and W. F. Ramsey, for appellees.

JAMES, C. J. It appears that F. M. Sansom, whose executors are the appellants, held two notes of D. F. Sansom, one dated March 1, 1885, for \$8,778, and the other for \$150, dated January 1, 1886, both bearing interest from their dates at the rate of 12 per cent. per annum; that on or about August 23, 1886, F. M. Sansom being ill, and the above notes not being before them, he and D. F. Sansom had a settlement, wherein the latter gave the former two notes for \$6,347.43 and \$6,391.02, with sureties, due, respectively, one and two years after that date, bearing 12 per cent. interest per annum from date. The former had been sued upon, and was paid off, with interest, and this suit was brought to recover the amount of the latter note of \$6,391.02. The answer stated that D. F. Sansom was the nephew of F. M. Sansom, and that their relations were close and confidential; alleged the existence of the two notes of \$8,778 and \$150, which, with interest, amounted on August 23, 1886, the day the new notes were given, to \$10,476.13; that the \$8,778 note was a lien on certain horses and lands, and said F. M. Sansom being at that time in precarious health, and not expected to live, appellee desired to relieve his property from incumbrances before F. M. Sansom died; that he approached him concerning it, and was informed by him that the notes, with his will, were sealed up and deposited in the bank; that therefore neither knew the amount of same on that date, and the new notes were then given, with the intention and for the purpose of covering and including the actual sum then due on said notes, as estimated, which new notes were, under a mutual mistake, given for largely more than he was in fact indebted to F. M. Sansom; that instead of owing him \$12,738.45, the aggregate of the two new notes, he actually owed him on that date \$10,476.13, and no more; that in making the new notes there was added to the sum estimated, with interest, certain other interest, to wit, 6 per cent. for one year on one half the sum, and for two years on the other half; that at the time the new notes were given, and the computation of the 6 per cent. extra was made known to F. M. Sansom, he declared it to be wrong, and stated that when the new notes came

to be paid and settled he desired them to be collected only in reference to and in accordance with the notes that were in bank, and that appellee should only be charged with 12 per cent. interest per annum on what was actually due at the time, as shown by the two notes in the bank; and that relying on this assurance from F. M. Sansom, who was very ill, he signed the new notes. Defendant further pleaded that he had paid on this indebtedness \$7,000 on November 12, 1887, and \$350 on December 10, 1887. The answer was under oath. It will be seen that the answer raised the following issues: That the consideration of the new notes consisted of the two former notes, and being given as a substitute for them, and intended to cover the same amount they represented, that in so far as they were for a greater amount there was no consideration for them; also that, as to the addition of the 6 per cent., the contemporaneous parol agreement not to collect it when the notes came to be paid was valid, and could be proved by parol and enforced; that accordingly defendants should be held only for what was due on the basis of two old notes, less the payments that had been since made. Other issues were raised by supplemental petition, which will be indicated as we proceed.

Assignments 2, 11, 12, and 20 show no error. We are of opinion that defendants had the right in this suit to the benefit of any proper deduction or credit they were entitled to against the notes, although one of them had been sued on and paid in full. The giving of the two notes constituted, between the parties thereto, a single transaction. By the answer it was claimed that they were designed to represent the total of what was due on the notes of \$8,778 and \$150. The failure or defect of consideration did not apply to either note particularly, but to both the notes; and the amount of the excess, being obviously less than either, might be set up in a suit in which both or either of them were sought to be enforced. One might be voluntarily paid without impairing the maker's right to claim the full deduction in a suit on the other. During the progress of the suit on the first note, defendants paid \$7,000 thereon, and a judgment, by agreement, was entered for \$337, which was paid. The court in that proceeding tried no issues, and the payment of the note was as if it had been done voluntarily. There was no error in not confining the deduction to the proportion applicable to the note sued on. Nor was there any reason for this, arising out of the fact that there was a difference in the sureties on the notes, for these were entitled to the benefit of any defense which their principal could make.

The defense made in this case was practically that of partial failure of consideration. On the theory that the notes were intended as a substitute for the two other notes, and

to be given for the amount they represented, then for any excess contained in them they were without consideration, whether the excess consisted of a mistaken amount of principal and interest due on the old notes, or an arbitrary addition of a bonus in the form of interest, compounded or otherwise. If the real purpose and agreement in giving the new notes was to have notes to cover the amount of the old notes, this could be shown under the plea of failure of consideration, and in connection with this plea it was proper to hear evidence of the deceased's statements that no more than that amount should be collected, notwithstanding the notes called for a greater amount. This testimony was corroborative of the fact that the notes were intended to be for the amount of the old notes, and no more, and was not subject to the objection of varying the writing by parol testimony. If a person gives another a note for an existing debt, he may knowingly give it in excess of what he owes, and yet not be deprived of the right, under a plea of want of consideration, to have the proper amount ascertained. There was, however, conflicting testimony in reference to the notes being given to embrace, not only the two old notes mentioned, but another indebtedness of \$3,400. This, of course, if credited by the jury, would have defeated defendants. This issue was submitted to the jury by a proper charge, and the finding was evidently against it. The person who acted for F. M. Sansom in the matter of preparing the notes testified that the new notes were made with reference to the \$8,778 and the \$3,400 claims; that a mistake was made in calculating the former note at \$7,778 instead of \$8,778. And it seems, when the calculation is made of principal and interest in this manner, the amount about corresponds with the amount for which the new notes were given. More than this, on the same day the new notes were given D. F. Sansom took a release from F. M. Sansom, reciting that, in consideration of the giving of these new notes, he (F. M. Sansom) released D. F. Sansom from all demands upon, or by reason of, two certain notes, viz. one for \$7,778, dated March, 1885, and the other claim for about \$3,400, dated about March, 1886, both secured by mortgage liens, and reciting that the two notes were executed upon the date of the instrument, "in full payment and satisfaction of all pre-existing debts, dues or demands, mortgages or other liens, that I may have heretofore had against the said D. F. Sansom." The above evidence must be conceded to be very persuasive that the new notes were based on the \$8,778 and \$3,400 claims. The release was undoubtedly a part or parcel of the transaction, and if there had been a statement in the release, or in the notes, that they were intended to be in the amount of what was due on the \$8,778 and \$3,400 claims, the case would have been different.

As it is, it purported to be a general release of all claims, specifying said two debts, that he (F. M. Sansom) held against D. F. Sansom.

Under these circumstances, we think it was competent to inquire into the real consideration of the notes. D. F. Sansom may have been indebted to F. M. Sansom in a much larger sum than the amount of the new notes, yet he may have been willing, in consideration of these new notes, secured as they were, to release the former from all his indebtedness as it existed. It is true, the evidence is quite convincing that D. F. Sansom at that time still owed the \$3,400, which, with the two other notes, made him indebted at that time in a greater sum than the new notes called for; but nevertheless F. M. Sansom may have meant to accept the new notes for the aggregate of the \$8,778 and \$150 notes, with personal security, and discharge D. F. Sansom from all his indebtedness. In such case the consideration would be what the two old notes amounted to, and whether or not this was the actual consideration would be a matter open to inquiry.

It appears, also, from the testimony, that the \$150 note above mentioned had been sued on, and judgment obtained against the maker thereof, D. F. Sansom. In respect to this it is contended that the very defenses herein set up were presented in that case, and determined against him; hence, that the disposition made of these issues in that case is conclusive of the same question in this suit. Apart from the fact that the sureties in the present suit were not before the court on that occasion, and therefore ought not to be concluded by what was decided against D. F. Sansom alone, we construe the judgment in that case as not determining the issues raised here. The defense there was that the \$150 note had become merged in the two notes given on August 23, 1886.

It is also insisted that in the suit on the first of these two notes the same defenses were made as are now made, and the judgment entered therein is an estoppel against their being made again. The answer in that case is not in the present record. The judgment, however, shows that \$7,000 was paid during the pendency of the suit, and a judgment entered for the balance, \$337, by agreement. Hence the issues, if raised there, were not determined at all. The jury having found against the theory that other debts figured in the new notes than the \$8,778 and \$150 notes, the verdict must have been arrived at on the issue of partial failure of consideration. This is demonstrated by the amount found, which can only be explained by the jury having taken the amount of the two old notes, and computed the interest, and made the credits in the manner indicated by the court in its charge on this phase of the case. When we examine the testimony, we find that the evidence, on this view of the case, would require a greater verdict for plaintiffs than the one rendered.

The amount due (principal and interest) on the \$8,778 and \$150 notes on August 23, 1886, was \$10,496.28; and computing 12 per cent. interest on this to November 11, 1887, when the \$7,000 was paid, makes it \$12,028.73, and deducting the \$7,000 leaves \$5,028.73. Computing same interest on this to December 6, 1888, when the \$337.09 was paid, makes \$5,674.08, and, deducting the payment of \$337.09, we have \$5,336.99. These figures, taken from appellants' brief, are approximately correct. This, by calculation, was all that could have been due, on defendants' theory, on December 6, 1888. Now, if to this be added interest to the date of the judgment, the amount would be over \$8,000,—much more than the verdict. The finding for a less amount (\$6,268.67) must be referred to the fact of a tender having been made "in the winter of 1889—1890, upon the motion for new trial being overruled on the previous trial of the case," from which it will be inferred that it occurred a year after December 6, 1888. This is as near as the record shows the date of the alleged original tender. From the published report of the former appeal (21 S. W. 70), we see that the judgment was rendered on December 28, 1889. Therefore we must add 12 per cent. interest for at least one year on said sum of \$5,336.99, which would make it over \$5,900 when the tender of \$5,700 was first claimed to have been made. The proof was that this sum was tendered in satisfaction of the claim, and, as it was for less than what was due, its rejection could not have the effect of stopping interest, and it is unnecessary to discuss the question of whether the tender was made in the proper manner to be binding on the creditor. This error alone necessitates reversal of the judgment. If, upon another trial, the jury should determine that the notes were not intended to be in the amount due on the \$8,778 and \$150 notes, as claimed by defendants, it seems that they must find that they were given with reference to the \$8,778 and \$3,400 claims, which would lead to a recovery according to the full amount of the note. If defendants' theory is taken, the two old notes, with interest, would be the measure of their liability. If plaintiffs' theory is accepted, the notes were not drawn in too great an amount. Reversed and remanded.

GERMAN INS. CO. v. EVERETT.

(Court of Civil Appeals of Texas. May 27, 1896.)

INSURANCE—ACTION ON POLICY—PLEADING—ALLEGATION AS TO OWNERSHIP—VALUE OF PROPERTY—MEASURE OF DAMAGES.

1. A complaint in an action on a policy which alleges that plaintiff was the owner of the goods destroyed at the date of the issuance of the policy and prior thereto, but which fails to allege that she was the owner thereof at the date of the fire, is demurrable.

2. Where a policy provides that the loss shall be estimated according to the value of the property at the time of the fire, evidence as to the value of the property, fixed by the agent at the time of the issuance of the policy, and as to the value as stated in the policy, was inadmissible, in the absence of evidence that such values and the cash value at the date of the sale were the same.

3. Where a policy provides that the loss shall be estimated according to the cash value of the property at the time of the fire, the measure of damages is the amount which it would cost the insured in cash to purchase property of like kind and quality.

4. The knowledge of an insurance broker, who acted as soliciting agent for a company in obtaining the policy in suit, that there was an incumbrance on the property at the date the policy was issued, binds the company.

Appeal from district court, Dallas county; R. E. Burke, Judge.

Action by Mrs. M. J. Everett against the German Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

Oeland & Smith, for appellant. G. G. Wright, for appellee.

NEILL, J. The appellee brought this suit against appellant on three fire insurance policies, alleged to have been issued to her by the German Insurance Company. One of the policies was on her dwelling house, and was issued on the 6th day of January, 1894, insuring her in the sum of \$900 against loss on it for the period of one year from date of its issuance. The other two were upon her household furniture and property situated in the insured dwelling. One of them was issued on the 6th day of March, 1894, for \$800, and the other on the 15th day of June, 1893, for \$500, and ran for 12 months from their respective dates. In her petition the appellee alleged: That she was on the several dates of the policies, and had been for some time prior thereto, the owner of the property covered by them. That the personal property was about the value of \$2,200; and that while situated in the insured building, on the 26th day of March, 1894, a part of it, amounting in value to \$1,536.95, was destroyed by fire. That a part of the property was saved, but was damaged to the amount of \$120.50, which was the agreed damage. Itemized lists of the property destroyed, with the value of each item set opposite, and of the damaged property, showing the damages assessed, were attached as exhibits to the petition. That the house insured was destroyed by fire when the personal property in it was, and that it was of the value of \$1,600. That the loss under the several policies was not caused, directly or indirectly, by any of the causes excluded by them, nor by the fault of the appellee. That soon after the fire appellee gave notice and furnished proofs of loss as required in the several policies, and that she was the legal owner and holder of the policies of insurance. That the amount of said policies had long since been due and unpaid. Judgment was prayed for the several sums mentioned in the policies.

aggregating \$2,200. The three policies were attached as exhibits to and made a part of the petition. The appellant answered by a general demurrer, general denial, and specially: (1) That each policy contains the following condition or stipulation: "If the interest in the property insured be a leasehold, rental, mortgagee's or undivided partnership interest, or a building standing on leased ground, or not the absolute, sole, and unconditional ownership, or if the property above described is incumbered in any manner, it must be so represented to this company, and expressed in this policy, in writing; otherwise this insurance contract shall be void and of no effect." That appellant was not the sole absolute and unconditional owner of the property at the time the policy was issued, and that it was incumbered when the policy was issued. (2) That each policy contains this stipulation: "This policy shall not be binding upon this company until the premium is actually paid, nor unless such payment is made before fire occurs." That the premium and consideration for the policies, nor either of them, has ever been paid, nor any part thereof, by reason of which each policy is rendered void. The appellant, by her supplemental petition, denied the matter set up in the answer, and averred that, if there was any mortgage or incumbrance upon said property, appellant and its agents knew all about it at the time and before the execution of the policy of insurance sued on; that she notified appellant of the existence of whatever mortgage there was, and the policy was issued with full knowledge of all incumbrances of every character and description on the property. The general demurrer to the petition was overruled, the cause tried before a jury, and a verdict returned for \$2,050, with interest from the 26th day of May, 1894, upon which the judgment appealed from was entered.

The first assignment of error complains of the court's overruling the general demurrer to appellee's petition, because it did not allege any interest or ownership in the property destroyed by fire at the time of the fire. It will be observed from our statement of the allegations that there is an omission in the petition of such allegation. The appellee insists that as, in testing the sufficiency of a petition on a general demurrer, the court considers everything properly alleged which, by reasonable construction, is embraced within the allegations, the court did not err in its ruling. Indulging every reasonable intendment in favor of the petition, we are unable, upon the most favorable construction that can reasonably be given, to find anything in the allegations which would warrant us in concluding that the appellee even intended to allege that she owned the property, or had an interest in it, when destroyed by fire. To entitle the insured to recover on an insurance policy, he must have an insurable interest in the property both at the time of the insurance and at the time of loss. The loss is purely a

contract of indemnity, and, unless an interest exists in the property at the time of its destruction or damage, the assured is not injured. *Howard v. Insurance Co.*, 3 Denio, 301; *Bevin v. Insurance Co.*, 23 Conn., 244. When wager policies were not regarded illegal, the rule seems to have been different in cases where the loss was absolutely and finally total. *Buchanan v. Insurance Co.*, 6 Cow., 329. The appellee's interest in the property covered by the policies at the time of the fire being one of the essential facts upon which her right to recover depends, it should have been alleged in the petition, and, in the absence of the specific averment of such fact, it cannot be supplied by reasonable intendment. *Chrisman v. Insurance Co.*, 16 Or. 283, 18 Pac. 469; *Quarrier v. Insurance Co.*, 10 W. Va., 507; *Freeman v. Insurance Co.*, 38 Barb. 247; *Murdock v. Insurance Co.*, 2 N. Y. 210; *Tillou v. Insurance Co.*, 5 N. Y. 405. From this it follows that the court erred in overruling the demurrer.

The second assignment of error is directed against three separate and distinct rulings of the court on the admission of testimony. As to one ruling on a bill of exceptions appears in the record; as to the other, separate bills of exceptions were reserved, which are too meager in their statement of the testimony offered in connection with that complained of to enable us to intelligibly pass upon the rulings. Besides, no specific error is assigned to the admission of the evidence. Were it not for the fact that the case will be reversed and remanded for another trial because of other errors, we would not further notice this assignment. But, as it is, we deem it best to notice the proposition under it, which is that "neither the values fixed by the agent at the time of the issuance of the policy nor the amount stated in the policy can be introduced as evidence of the market value of the property at the time of its destruction." As by the policies the loss is left open to be determined by the value of the property actually destroyed or injured, the statement in them of the amount of insurance is no evidence of the value of the property, either at the time the insurance was effected or the loss occurred. But if it can be shown aliunde the policies that the amount of insurance was the value of the property when the policies issued, and if it should then be proven that such values have remained unchanged from the time the policies were issued up to the time of the fire, or, if changed, the relation of values at the time of the loss to the values at the time the insurance was effected should be shown, then we think that the amount of insurance could be introduced in evidence, in connection with such other testimony, as a circumstance to show the value of the property at the time the loss was sustained. Appellant, in its argument, under this assignment seems to proceed under the assumption that the

policy provides that the loss shall be ascertained from the market value of the property at the time it was destroyed; whereas the stipulation in the policies is that the loss or damage shall be estimated according to the cash value of the property at the time of the fire. Household furniture and goods in use such as were covered by these policies are not generally on the market, and consequently may have no market value, unless they should be classed as second-hand goods. Such classification would be very unjust to the assured, for the very fact that goods are so classified often reduces their market value below what they are actually worth. What it would cost the appellee in cash, after the loss, to purchase property of like kind and quality as that destroyed would be a reasonable and equitable test of the damages sustained, as well as the cash value of the property lost. The contract of insurance is for indemnity against loss, and its purpose is well understood by insurance companies when it can be invoked in their favor; and they should not be allowed to forget it where indemnity is justly demanded of them under their contracts. The insurance on the building was solicited and effected by one Lee Lacy, who, the testimony tends to show, was informed and knew of certain incumbrances on the property when he procured its insurance; and the court charged the jury "that if, from the evidence, they should believe that Lee Lacy, at the time he procured the insurance to be written, knew of such incumbrances, to return a verdict for the full amount of the policy." This charge is assigned as error upon the ground that it assumes Lee Lacy was the agent of the company, and the evidence shows that he was a mere insurance broker, and his knowledge could not and did not bind the insurance company. Lacy may have been technically merely an insurance broker, yet the fact that he solicited the insurance on behalf of appellant company requires him to be held its agent. Rev. St. 1895, art. 3093. What we have said in regard to the second assignment of error renders it unnecessary to say anything further in relation to the sixth.

The undisputed evidence shows that the premium on the \$800 policy was never paid. On this the court instructed the jury as follows: "You are told that under the evidence before you the fact that Mrs. Everett did not pay the premium on the \$800 policy issued on March 6, 1894, would not, under the law, prevent a recovery by her under the same." This is assigned as error, for the reason the policy provides "that it should not be binding on the company until the premium was actually paid, nor unless the premium was paid before the fire occurred." It will be seen from our statement of the case that the policy does contain this provision. The uncontradicted evidence shows that this was a renewal policy,

and that the agent of the company delivered it by placing it under the door of appellee's dwelling house; that she gave her son the money to pay the premium, and while on his way to the office of appellant's agent to make the payment an accident befell him, which rendered his return home necessary, and the money was never paid, but was returned by him to appellee after the fire; and that appellee was ready and willing to pay the premium at any time the bill should be presented. Under these facts we do not think the court erred in giving the charge quoted, nor in refusing to charge the jury, at appellant's request, that, as the proof showed the premium had not been paid, they should find for appellant. It is well settled that a delivery of the policy without payment of the premium waives its prepayment as a requisite of the contract's taking effect, though such a condition is contained in the policy. *May, Ins. §§ 360a, 360b; Wood, Ins. § 862; Insurance Co. v. Mims, 1 White & W. Civ. Cas. Ct. App. § 1323; Ball v. Insurance Co., 20 Fed. 232; Insurance Co. v. Miller, 12 Wall. 285; Boehen v. Insurance Co., 35 N. Y. 132; Trustees of First Baptist Church v. Brooklyn Fire Ins. Co., 19 N. Y. 307; Insurance Co. v. Booker, 9 Heisk. 606.*

It is deemed unnecessary to notice the other assignments. For the reasons of the error indicated, the judgment is reversed, and the cause remanded.

XIMENES v. WILSON COUNTY.

(Court of Civil Appeals of Texas. May 27, 1896.)

RELEASE—MISTAKE—IGNORANCE OF THE LAW.

A sheriff who, though complaining that he was under the statute entitled to a certain amount per day for keeping prisoners, in deference to the opinion of the attorney general and county judge to the contrary, and the refusal of the county to pay such sum, presents his bill to the county for a less sum, and is paid the same, cannot afterwards recover of the county the difference.

Appeal from district court, Wilson county; T. H. Spooner, Judge.

Action by M. J. Ximenes against the county of Wilson. Judgment for defendant. Plaintiff appeals. Affirmed.

Polley & McCracken, for appellant. W. H. Blanton and Lawhon & Camp, for appellee.

NEIL, J. This suit was brought by the appellant to recover from Wilson county the sum of \$615.60, which he alleged was due him for feeding prisoners while he was sheriff of said county. After averring his election to the office of sheriff on the 20th of November, 1890, his re-election on the 22d of November, 1892, his qualification after said election, and the continuous discharge of the duties of said office from the date of his election until the qualification of

his successor, on the 22d day of November, 1894, he alleged that during the time he was in office he fed all the prisoners confined in the county jail of Wilson county, as required by the law prescribing his duties; that he was entitled to receive from appellee, for feeding the prisoners, 45 cents per day for each and every prisoner when the number did not exceed four, and, when the prisoners exceeded that number, he was entitled to receive 45 cents per day for four prisoners each, and 30 cents per day for each prisoner in excess of four, but that he was only allowed by and only received from the county commissioners' court 45 cents for each prisoner when the number did not exceed four, and, when the number exceeded four, only 30 cents for each prisoner; that the compensation so allowed him was in consonance with the construction placed upon the statute fixing the compensation by the attorney general when appellant's predecessor was in office, and such, under the construction, as was allowed by the commissioners' court to his predecessor, for whom appellant served as a deputy; that knowing of such ruling of the attorney general, and being dissatisfied with it, appellant went to the commissioners, and complained of the allowance, and, being assured that no greater allowance would be made under said construction, he then went to the county judge of Wilson county for his advice in the premises, who advised him in accordance with the attorney general's opinion; and that then, in order to prevent any controversy or trouble concerning his compensation, he made out his accounts therefor for the amounts and in the manner as shown upon their faces. He states that he makes reference to said accounts as a part of his petition, but the accounts referred to do not appear in the record. We may safely assume, however, from the allegations in the petition, the ruling of the court, and statements in briefs of either party, that they were made out in accordance with the ruling referred to of the attorney general. The appellant alleged further that he continually complained to the commissioners that he was not receiving enough to pay his expenses in furnishing food for the prisoners, and continually complained of and protested against any allowance less than that to which he was justly and legally entitled; that acting in good faith, upon the ruling of the attorney general, the advice of the county judge, and on the representations and advice of the commissioners, he was deceived and misled as to his rights, and as to what the law really is and was at the time; his accounts were made out and presented in accordance with the ruling of the attorney general; that, during the four years appellant was sheriff, there were 1,026 days on which he had more than four prisoners, for which he only received 30 cents per day for each prisoner, whereas he was entitled to receive 45 cents per day on each, making 15

cents per day on each prisoner, aggregating \$615.60 in excess of what he was allowed and received, as shown by an itemized account attached to his petition. The items set out in the exhibit commence with February, 1891, and run down to and include November, 1894. The appellee filed certain special exceptions to the petition, of which two were sustained. They are as follows: "The petition alleges plaintiff's ignorance of law as a reason why he never demanded but thirty cents a day for feeding each prisoner when the number of prisoners exceeded four." "It appears from the account sued on that each and every item mentioned from February, 1891, to May, 1893, is barred by the statute of limitations of two years." Upon sustaining these exceptions, the court entered judgment dismissing the suit, and from such judgment this appeal is prosecuted.

"For the safe keeping, support and maintenance of prisoners confined in jail or under guard, the sheriff shall be allowed the following charges: (1) For any number of prisoners not exceeding four he shall be paid for each prisoner, for each day, not exceeding forty-five cents. (2) For any number of prisoners exceeding four, for each prisoner for each day, not exceeding thirty cents." Code Cr. Proc. 1895, art. 1097. It seems that it was conceded on the trial that the proper construction of this statute is as contended by appellant in his petition, and no question as to its construction is presented to us on this appeal. Therefore, without construing it, but assuming for the purpose of this appeal that the construction conceded and acted upon in the trial court is correct, we will consider the assignments of error, which question the ruling of the court on the exceptions quoted.

It is well settled that ignorance or mistake of law, pure and simple, not induced by fraud, and unmixed with fact, will not relieve one from a settlement made in such ignorance or under such mistake. In this case the facts were well known and understood by appellant to be just as he alleged them in his petition. He knew the number of prisoners in his official custody for safe-keeping each day during the entire tenure of his office. He was equally cognizant of the fact that he made out his account against the county for feeding them, and presented it to the commissioners' court for allowance for 30 cents for each prisoner for each day they were confined in jail; and he knew the accounts as made out were passed upon and allowed by the court. He cannot escape these facts, for he has alleged them, and depends upon them for a cause of action. His ignorance of the law was not induced by any fraudulent act of the appellee or its representatives. He voluntarily sought the opinion of the county judge upon the law, and found that he concurred in the ruling of the attorney general, and, with an inkling

all the time that the opinion of these officials was erroneous, adopted it as his, and now says it was through ignorance. If it was, it is such ignorance as entitles him to no relief after having made out his account, and received all the compensation he claimed from the county. He was required at each regular term of the commissioners' court to present his account to such court for the safe-keeping, support, and maintenance of prisoners, and to state the name of each prisoner, and the date of each item, and verify it by his affidavit (Code Cr. Proc. 1895, art. 1104); and the commissioners' court to examine the account, and allow the same, or so much thereof as might be reasonable and in accordance with law, and order a draft to be issued to the sheriff for the amount so allowed, upon the treasurer of the county, and the account was required to be filed and safely kept in the office of the clerk of such court. Code Cr. Proc. 1895, art. 1104. After such an account has been made out, and acted upon in accordance with these provisions, and paid, it should not again be opened up, upon the ground of ignorance or misconception of the law. As we are of the opinion that the first exception quoted was properly sustained, it is unnecessary to inquire into the ruling of the court on the other. The judgment is affirmed.

**GALVESTON, H. & S. A. RY. CO. v.
HERRING.**

(Court of Civil Appeals of Texas. May 27,
1896.)

**CARRIERS — INTERSTATE SHIPMENT — CONTRACT —
LIMITATIONS — DAMAGES — EVIDENCE —
PLEADING AND PROOF.**

1. Act March 4, 1891, invalidating contracts which limit to less than two years the period in which suit may be brought on them, applies to an interstate shipment of live stock.

2. Where negligence in connection with a switch has been specially pleaded, evidence to show negligence of an entirely different character is inadmissible.

3. It is error to submit an issue not raised by the pleadings or proof.

4. A carrier is responsible for damages to a shipment of horses resulting from a negligent delay on a switch, though the inherent propensities of the horses may have contributed to the result.

5. Where a carrier had negligently loaded a log on a flat car, so that the end of it protruded over the end of the car in such manner as to come in contact with a car in which horses were being shipped, the carrier was responsible for damages resulting to the horses, though the injury did not occur till the cars had passed onto a connecting line.

Appeal from district court, Medina county; Eugene Archer, Judge.

Action by R. C. Herring against the Galveston, Harrisburg & San Antonio Railway Company for damages to a shipment of horses. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Baker, Botts, Baker & Lovett and Clark, Summerlin & Fuller, for appellant.

v.3(s.w.no.1—9

FLY, J. Appellee sued appellant, the Galveston, Harrisburg & San Antonio Railway Company, to recover damages in the sum of \$600 alleged to have accrued through injuries inflicted upon 30 head of horses, mares, and colts, while being transported from Hondo, Tex., to New Orleans, La. The case was tried with a jury, and a verdict was returned in favor of appellee for \$450.

The first assignment of error complains of the action of the court in holding that the requirement in the contract that suit should be instituted within 40 days after the cause of action accrued was invalid, because the law declaring any such agreement unlawful does not apply to an interstate shipment. We can see no reason why it should not. It is not an attempt by the state to regulate or interfere with interstate commerce in any manner or form, but it simply seeks to regulate its own statutes of limitation. The same reasoning, we think, applies to the requirement in regard to notice. The law of 1891 on the subject of notice of damages seems to have been entirely ignored in the case of *Railway Co. v. Davis*, 88 Tex. 593, 32 S. W. 510, and the question is treated as though, in a case of interstate commerce, under our statutes, the question of notice of damages was one that depended for its validity upon its reasonableness alone. We are not informed, however, in that case, when the contract was made, and we will presume that it was prior to the passage of the act of 1891. This court has heretofore held that the act of March 4, 1891,¹ was not in conflict with the commerce article of the constitution, and does not attempt to regulate interstate commerce. *Armstrong v. Railway Co.* (Tex. Civ. App.) 29 S. W. 1117; *Railway Co. v. Johnson* (Tex. Civ. App.) 29 S. W. 428. We have had no reason presented for receding from that position. The following authorities support the same doctrine: *Railway Co. v. Eddins*, 7 Tex. Civ. App. 116, 26 S. W. 161; *Railway Co. v. Gann*, 8 Tex. Civ. App. 620, 28 S. W. 349; *Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 97, 9 Sup. Ct. 28; *Connell v. Telegraph Co.* (Mo. Sup.) 18 S. W. 883; *Butner v. Telegraph Co.* (Okla.) 37 Pac. 1067; *Solan v. Railway Co.* (Iowa) 63 N. W. 692; *Hennington v. State* (Ga.) 17 S. E. 1009; *Railway Co. v. Palmer* (Neb.) 56 N. W. 957. This court has not rendered any opinion, and permitted it to stand, that is in conflict with the position now held by the court. In the case of *Railway Co. v. Williams*, 25 S. W. 311, a contrary doctrine was announced, but it was withdrawn on rehearing. Id. 1019.

It was alleged, generally, that appellant was guilty of negligence in the carriage of the animals, and, in addition, special acts of negligence were alleged, in switching and

¹ Act March 4, 1891, provides, inter alia, that no contract limiting the period in which to sue to a shorter one than two years shall be valid.

jerking the car on which the horses were loaded upon the siding at Hondo, in failing to allow the stock to be fed and watered, and in carelessly loading a log upon a flat car, the end of which protruded, and injured the horses. Under the general allegation of negligence, proof of the delay on the siding at Hondo may possibly have been admissible; but, when the negligence in connection with the switch was specially pleaded, appellee should have been confined to proof of the allegation. The object of pleading is to put the opposite party upon notice of what he will be called upon to meet, and it must necessarily follow that only that which is alleged can be proved. *Railway Co. v. Hennessey*, 75 Tex. 157, 12 S. W. 608. In the case before us, the appellant was given notice by the pleading that it would be expected to answer a charge of negligence in jerking the car loaded with horses about on a switch for a long time, but the proof shows a case of negligence in allowing the car to remain perfectly still on the siding for a long time. The proof should not have been admitted. The same may be said of the testimony in regard to the broken slat in the car. Appellee should have been confined to the acts of negligence specially pleaded.

It was error to give the following charge, requested by appellee: "You are instructed by the court that you will not find any damages in favor of plaintiff, resulting from a defective car, if you should find the car was defective at the time of loading the stock; but you are further instructed that, if such car was in good condition at the time the stock was placed therein, and that the slat or slats were broken by reason of the restiveness of said stock, and that such restiveness was caused by reason of the defendant's delay in the commencement of the journey, and that such delay was unreasonable, then you can consider injuries, if any, resulting to such stock from the condition of such car as an element of damage." There was no testimony that indicated whether the slat was broken before the horses were loaded or afterwards, and the charge should have been confined to the issues made by the pleadings and proof. In this connection we will say that, if the injury to the horses while on the switch at Hondo resulted from the delay, even though the inherent propensities of the horses may have contributed to the result, the carrier will be held responsible for the damages. See authorities cited in *Whitt. Smith, Neg.* p. 353.

It was alleged in the petition that appellant had carelessly and negligently loaded a heavy piece of timber or log on a flat car, the end of which protruded over the end of the car, so as to strike the car in which the horses were loaded, and that the horses were thereby injured. There was no proof as to the manner in which the log was loaded on the car. This was essential to sustain

the allegation of injury from the log. If the injuries caused by the log arose from the negligent and careless manner in which it was placed on the car, appellant would be liable, no matter if the injury did not occur until after the car had passed onto another line.

We need not discuss the remaining assignments of error. The judgment is reversed, and the cause remanded.

MCCORMICK v. KAMPMANN.

(Court of Civil Appeals of Texas. May 27, 1896.)

CONTRACTS—ACTIONS ON—EVIDENCE—CONSIDERATION.

1. Where defendant, in an action on notes reciting that they were given in payment for certain property, claims that they were, instead, given for services to be rendered by plaintiff, which he failed to render, evidence of the amount of an offer by a third person to plaintiff for the property, made prior to the sale to defendant, is admissible to show the value of the property, and thus rebut defendant's claim.

2. When such testimony is admitted, it is error to exclude testimony of defendant as to the value of the property sold.

Appeal from district court, Bexar county; S. G. Newton, Judge.

Action by H. D. Kampmann against J. A. McCormick. There was a judgment for plaintiff, and defendant appeals. Reversed.

Webb & Finley, for appellant. Keller & Johnson, for appellee.

JAMES. C. J. Carter & Mullaly executed to appellant a bill of sale dated June 22, 1893, to property pertaining to an undertaker's business at 309 West Commerce street, in San Antonio, together with a hearse, funeral car, a white funeral car, and an undertaking wagon. This bill of sale recited that it was made in consideration of \$4,000 cash paid, and \$2,500 in notes of \$100 each, payable monthly. The notes recited that they were given in part payment for the hearse, two funeral cars, and undertaker's wagon. The suit is brought on eight of these notes. The defense was failure of consideration, in that the notes were not in fact given as any part of the consideration for the above-mentioned property, but (Carter & Mullaly being in the livery business) for taking care of, housing, and storing the hearses and funeral cars and furnishing the teams necessary for McCormick to conduct funerals, in connection with the undertaking business, for a period of 25 months, and that such service failed to be performed after the seventeenth note had been paid.

We think there is no error shown by the first and second assignments. The witness Wingfield was in the undertaking business, and was allowed to testify that he had in May or June, 1893, offered Carter & Mullaly for their business, including the dead

wagon, but not the hearses, the sum of \$3,100. It is observed that Mullaly testified that the notes were given for the consideration expressed in the bill of sale and notes, and that the plea set up by appellant was an invention. McCormick testified to the truth of his plea, and that the property was sold to him for \$4,000 cash, and the notes were given for livery services to be performed. The issue was sharply drawn in the testimony of the witnesses, appellant having the disadvantage of his bill of sale and notes contradicting him. Evidence of the value of the property sold him would be a circumstance going to sustain or defeat the plea. According to appellant's theory, he gave \$4,000 for all the property, the remainder, \$2,500, in notes, for the service promised. Mullaly testified that the hearses alone were worth \$3,500. The testimony referred to of Wingfield, therefore, tended to sustain the theory of appellee. It was admissible under the rule laid down in 1 *Suth. Dam. p. 800*; the circumstances being such as to indicate that the offer was fairly made in the course of trade.

The third assignment is that the court refused to allow McCormick to testify that, immediately after purchasing, he made an inventory of the merchandise in the establishment, and that the same did not exceed \$800 in value, and that the hearses, funeral cars, and dead wagon were not worth more than \$3,000. This testimony was material to appellant upon the issue made. Its tendency was to confirm his statement as to the purpose and consideration of the notes sued on; and, in view of the testimony of Wingfield and others touching the value of the property, it was error to exclude it. The judgment is therefore reversed, and the cause remanded.

**FARMERS' & MERCHANTS' NAT. BANK
v. WACO ELECTRIC RAILWAY &
LIGHT CO. et al.**

**METROPOLITAN TRUST CO. et al. v.
FARMERS' & MERCHANTS' NAT.
BANK et al.**

(Court of Civil Appeals of Texas. June 3,
1896.)

**EQUITY—PLEADING—CROSS BILL—CORPORATIONS—
BONDS—CONSIDERATION—RIGHTS OF PURCHASERS—
LIS PENDENS—RECEIVERS—SALE—ORDERS
OF COURT—PRIORITY OF CLAIMS—OPERATING
EXPENSES—ATTACHMENT AGAINST INSOLVENT
CORPORATION—EFFECT—TRAVERSE OF AFFIDAVIT.**

1. In consolidated actions against a corporation, in which its property was attached, a receiver was appointed, and a trustee sought to foreclose a mortgage to secure 200 bonds of defendant of \$2,000 each, and an intervenor set up an indebtedness, and alleged that it was the holder of 25 bonds, a bank by cross bill set up large judgments against defendant H. and others, and alleged defendant's insolvency, especially if the bonds were valid, and the insolvency of H. and others; that it was the holder of 11

of such bonds as collateral security; that part of the debt due the intervenor was paid, and the bonds held by it were not to be used until other security held by it was exhausted; that all the bonds except those held by the bank were issued without consideration, and were void, for reasons particularly stated; that all the holders except the bank took the bonds with notice of their invalidity: that the mortgage only authorized the trustee to sue on request of a majority of the bondholders, and its suit was against the protest of such majority; that the trustee had no interest in the bonds, and the bank never requested the trustee to act for it in the suit; that part of defendant's railroad, which was in the hands of a receiver, was not its property, but was H.'s; and that the bank's judgments were liens on it, and it should be subjected to their payment. The prayer was for the release of the property from the control of the receiver and for the foreclosure of its lien. *Held*, that the cross bill was not demurrable.

2. One claiming a lien on attached property, superior to the attachment plaintiff, cannot, in a cross bill, traverse the affidavit for attachment.

3. The holder of part of the bonds of an insolvent corporation is not estopped to set up the invalidity or want of consideration of other of the bonds not in the hands of innocent holders.

4. The promoters of a railroad corporation on their individual credit borrowed money of banks, which was used in constructing the road, and paid themselves by stock issued to them. They afterwards caused to be issued by the company 200 bonds of \$2,000 each, and turned over to such banks \$134,000 of the bonds in payment of the money borrowed, the banks having knowledge of the facts. *Held*, that the banks acquired such bonds without consideration.

5. The doctrine of *lis pendens* does not apply to a purchaser of negotiable bonds for value before maturity.

6. Though a court administering property through a receiver may resort to the statute requiring the sale of property by the sheriff under process of execution or order of sale, such statute is not exclusive, and the court may, in its discretion, order a sale by the receiver or commissioners.

7. In a contest among creditors of an insolvent corporation, whose property was in the hands of a receiver, some of whom intervened in an action to foreclose a mortgage given to secure its bonds, it appeared that none of the claims in dispute, except the claims of one E. and of intervenor G., and those intervenors who sued before a receiver was appointed, belonged to the classes specified in Rev. St. 1895, art. 1472, which gives a preference lien on all earnings from operation of the property by the receiver in favor of classes of claims therein mentioned; but the claims of E., and of a certain electric company, and all the intervenors were entitled to priority of payment over the mortgage debts under article 1480. *Held*, that in disposing of the earnings during the receivership, which had not been applied to prior claims mentioned in article 1472, the claims of E., G., and those who sued before the appointment of the receiver should be first paid, and the remaining earnings, if any, applied to claims of other intervenors and the electric company, in preference to the mortgage debts.

8. An attaching creditor of an insolvent corporation for which a receiver is appointed after the attachment, acquires no preference right or lien that will deprive the court of the power to equitably apportion the earnings of the property during the receivership to claims classed as operating expenses.

9. Where a bank advances money to an insolvent corporation for which a receiver is appointed, to pay its operating expenses, its claim

ranks with those of general creditors only, and not with those classed as operating expenses, in the absence of a transfer to it of the claims which arose for operating expenses, or of facts showing that either by contract or operation of law it became subrogated to the rights of such preferred creditors.

10. Where a railroad company is in the hands of a receiver, though at the instance of the holders of a mortgage, the court has no power to appropriate the corpus of the property to the payment of claims for operating expenses in preference to the prior mortgage debts, in the absence of a statute, at the time the mortgage was executed, giving such claims a prior lien on the corpus of the property.

11. An attaching creditor of an insolvent corporation acquires no right superior to other creditors.

Appeal from district court, McLennan county.

Two actions consolidated,—one by Eugene Early against the Waco Electric Railway & Light Company, W. J. Hobson, and A. Schuster on a debt and for the appointment of a receiver, in which an attachment and an injunction were issued, and W. W. Seeley was appointed receiver; and the other by the Metropolitan Trust Company against the Waco Electric Railway & Light Company to foreclose a mortgage given to secure 200 bonds of \$2,000 each, issued by defendant, and held by plaintiff as trustee. In the consolidated case the General Electric Company filed an answer and cross bill, setting up an indebtedness due it by defendant in the second action, and alleging that it was the holder of 25 of such bonds; and the Farmers' & Merchants' National Bank filed an answer and cross bill setting up five judgments against the Waco Electric Railway & Light Company, W. J. Hobson, C. W. Hobson, and A. Schuster, aggregating \$20,000, and alleging that it held 11 of such bonds as collateral security for its debts, etc. From a judgment sustaining demurrers to the answer and cross bill of the Farmers' & Merchants' National Bank, it appealed. Also an action by the Metropolitan Trust Company, Eugene Early, and the General Electric Company against the Waco Electric Railway & Light Company to foreclose a trust deed given by defendant to secure its bonds to the plaintiff trust company, and for the appointment of a receiver, in which the Farmers' & Merchants' National Bank and others intervened, claiming priority of payment out of the fund in the hands of the receiver. From a judgment in favor of the interveners, plaintiffs appealed. After appeal all the cases were consolidated by order of court. Reversed on both appeals.

Robertson & Davis, for Farmers' & Merchants' Nat. Bank. J. R. Downs and R. I. Munroe, for interveners. Clark & Bolinger, for Metropolitan Trust Co., General Electric Co., and Eugene Early.

FISHER, C. J. At a former day of this term the above causes were consolidated by

an order of this court. The first cause is here on appeal from a judgment of the court below sustaining demurrers to the answer and cross bill of the Farmers' & Merchants' National Bank. It appears from the record that on February 26, 1894, Eugene Early, in the district court of McLennan county, sued the Waco Electric Railway & Light Company, W. J. Hobson, and A. Schuster on a debt, and caused a writ of attachment to be sued out and levied upon the property of the railway and light company, and asked the court for the appointment of a receiver for the property of the Waco Electric Railway & Light Company, and on that day, to wit, the 26th of February, 1894, the court appointed W. W. Seeley receiver, who immediately took charge of the property of the railway and light company. The next day Early asked for a writ of injunction, which was granted March 29, 1894. The Metropolitan Trust Company brought its suit in the district court of McLennan county against the Waco Electric Railway & Light Company to foreclose a mortgage on all of the property of the railway and light company, which was given to secure 200 bonds issued by the railway and light company for \$1,000 each, held by the Metropolitan Trust Company as trustee. May 7, 1894, upon motion of the Metropolitan Trust Company, the court consolidated its case with that of Early, and extended the injunction and receivership of the property also for the benefit of the trust company. July 2, 1894, Seeley filed an answer, in which he alleged that the bonds sought to be foreclosed by the trust company were without consideration, and therefore not binding obligations upon the railway and light company; and the answer also set up the fact that the Farmers' & Merchants' National Bank holds 11 of said 200 bonds secured by the mortgage, and asks that the bank be made a party. July 16, 1894, the General Electric Company filed an answer and cross bill in the consolidated cases, in which it sets up an indebtedness due it by the railway and light company, and that it is the holder of 25 of the 200 \$1,000 bonds set out in the pleadings of the trust company. After this the appellant the Farmers' & Merchants' National Bank filed answers and cross bill, wherein it sets up five judgments against the railway and light company, W. J. Hobson, C. W. Hobson, and A. Schuster, recovered in June, aggregating the sum of about \$20,000, and all of said judgments recorded, so as to fix liens upon the property of said defendant, if under the law such liens could be created against the property of the defendant corporation; it being at the time confessedly insolvent. It alleges that at least \$5,000 of the debt evidenced by said judgments was created prior to 1st of June, 1892. It alleges that \$4,500 of its judgments was on a debt created by said railway and light company on December 23, 1891. It al-

leges that it holds 11 first mortgage bonds of said railway and light company as collateral security for its debt. It sues herein for collection of its judgments and enforcement of collection of its bonds without the assistance of the Metropolitan Trust Company, and says that it has never requested said trust company to act for it in this suit, and that said trust company has no interest in the \$200,000 bonds secured in the mortgage made by said railway and light company. It admits that the Metropolitan Trust Company is trustee in the mortgage executed by the Waco Electric Railway & Light Company on the 1st of September, 1891, for the purpose of securing the issue of 200 bonds of \$1,000 each, of same date of said trust deed, and that said trust company brought its suit in this cause over the protest of the majority of the holders of the bonds secured in said mortgage (the stipulations in said mortgage only authorizing it to sue on the request of a majority of the holders of bonds), and that said trust company is but a naked trustee and intruder in this cause. It alleges the right of the railway and light company to issue bonds to the extent of \$200,000, and its right to secure the same by mortgage, and that the same were issued, and mortgage executed, and makes the mortgage part of its answer and cross bill; but denies the authority of said trust company to institute suit on said bonds. In the second division of its answer and cross bill it pleads a failure of consideration as to \$134,000 of said bonds. In division 3 it alleges that \$25,000 of said bonds are held by the General Electric Company as collateral, not to be used by express contract until other security was exhausted. It also alleges that a large part of said debt claimed by the General Electric Company, and secured by said bonds, had been paid, and asked for an adjudication of this question; that said General Electric Company had disposed of said bonds to Henry C. Scott, of St. Louis, Mo., when it had no right to do so, said sale being since 1st of January, 1895, and that said Scott took no title to said bonds. In the fourth and fifth divisions of its answer and cross bill it alleges that the \$11,000 bonds held by it are the only legal bonds of the entire \$200,000 issue as against the bona fide creditors of said railway and light company, and prays for a foreclosure of said mortgage to pay said \$11,000 bonds held by it. In division 6 of its answer and cross bill it alleges failure of consideration in all said bonds except those held by it, and that the parties now claiming to hold the same took them with notice of their invalidity; that the same were originally placed by the officers of said railway and light company for a fictitious indebtedness, all of which was well known to the present holders of the same. In division 7 of its answer and cross bill it alleges that plaintiff Early acquired no lien by his attachment, because

it was collusive, and the grounds of attachment were untrue, which issue the court was asked to try. In division 8 of its answer it alleges insolvency of all its judgment debtors. In division 9 of its answer and cross bill it alleges that $4\frac{1}{2}$ miles of the track, right of way, and franchise of said railway and light company, as claimed by it, was not in fact the property of said railway and light company, but was the property of W. J. Hobson, one of its judgment debtors, and that its judgment attached to said property, but that the same was in the hands of the receiver, along with the other property of said railway and light company. It asked the court, having all the parties before it, to adjudicate the title to this property, so it could be sold, if belonging to the railway and light company, free from all clouds on its title; and, if belonging to Hobson, to allow it to have it sold under its execution. The effect of the averments of the answer and cross bill of appellant are that the railway and light company is insolvent if the bonds set up by the Metropolitan Trust Company and the General Electric Company are valid, and it is possible that the averments may be so construed to allege an insolvency even though the railway and light company may not be liable on the bonds. But, however this may be, it is apparent, if the averments are true, that the enforcement of the bonds and the indebtedness of the General Electric Company against the property of the railway and light company will materially affect the claim of the appellant, for, if such bonds and the debt of the General Electric Company are made a charge upon the property in the hands of the receiver, the property is not of sufficient value to pay these claims and those of appellant and of other creditors who may have a superior right to the appellant, and therefore the demand of appellant must be scaled and reduced in value in proportion to the existence of other valid charges against the property. Hence it follows that the appellant, with a lien on the property, either as owner of the bonds or the holder thereof as collateral to secure its debt, has such an interest in the administration of the property in the hands of the receiver as would authorize it to set up and urge the invalidity of other claims that are sought to be made a charge upon the property superior or equal to that set up by the appellant. The appellant contends that the claim of the General Electric Company has been paid in part, and that the bonds it holds are a security for the indebtedness due it by the railway and light company, and that such bonds were not to be used until other security held by the General Electric Company was first exhausted; and charges that the successive holders of the bonds acquired them from the General Electric Company with notice of these facts. The answer also alleges that the railway

and light company was constructed by the promoters of the corporate enterprise in part by private funds and by money borrowed from certain banks in the state of Missouri; that the money was borrowed on the individual credit of the promoters of the enterprise, and not upon the credit of the railway and light company; that these promoters reimbursed and paid themselves by stock issued by the corporation in a sum greater than the amount due by them to the Missouri banks, which the promoters received and accepted in satisfaction of the indebtedness due them for the money put into the construction and equipment of the railway and light plant. The averments then proceed to the effect that the promoters caused to be issued by the railway and light company the bonds sought to be foreclosed by the Metropolitan Trust Company; and that, while these bonds were legally issued, the railway and light company never legally floated them, or parted with possession thereof for a consideration deemed valuable in law, but, upon the contrary, \$134,000 of them were turned over to the Missouri banks by the promoters of the corporation in order to pay the individual debt due those banks by the promoters, as before stated; and that, as such debts were paid to the promoters by the issuance and acceptance of stock as aforesaid, they were satisfied and paid, so far as the railway and light company was concerned; and that the Missouri banks and the present owners of the bonds acquired them with notice of these facts. The answer also avers that a part of the railway, which was in the hands of the court through its receiver, is not the property of the railway and light company, but is the property of one Hobson, against whom the appellant has valid and unsatisfied judgments which are a lien upon his property, including the part of the railway owned by him, and asks the court to release and relieve this property from its control and custody through its receiver, to the end that appellant's liens may be foreclosed, and his judgments against Hobson collected.

In the three particulars noticed, we think the answer and cross bill set up matters which should have been passed upon by the court on the facts alleged, and to this extent there was error in sustaining the demurrers.

The attack upon the claim and lien of Eugene Early is not alleged with sufficient particularity so that we can determine upon the facts stated that it is not a valid and legal claim against the railway and light company. Besides, the appellant will not be permitted to traverse the affidavit for attachment. Therefore there was no error in sustaining the demurrer to this branch of the case.

The appellant, because it was a holder of a part of the bonds, was not estopped to set up the invalidity or want of consideration of other of the bonds. Its interest in the assets

of the insolvent corporation as a creditor of the concern, and its right to see that the property is appropriated only to the payment of claims for which it is legally liable (*Hamilton-Brown Shoe Co. v. Mayo*, 8 Tex. Civ. App. 169, 27 S. W. 781), is equal to the right of the maker of the paper to assert facts to show that it is not liable for it. It could not be contended, when it was sought to hold the maker of paper liable, that he would be estopped from showing a want or failure of consideration because he had executed and delivered the paper, unless in a case where the paper was negotiable, and in the hands of a holder for value without notice. And in the case cited this rule is made to apply to a subsequent lienholder.

In response to the proposition of appellee that the foreclosure of the bonds by the trustee was for the benefit of all the holders of bonds, including appellant, and therefore there was no reason for appellant to set up its rights, as it would be protected if it was entitled to protection, we need only say that the attempt of the trustee to foreclose upon bonds, and subject the property thereto, which were not valid debts against the railway and light company as pleaded in the answer, was clearly in hostility to the rights of appellant, as is manifest by what has been previously said upon this question; and in such a case the remedy by foreclosure is not exclusive in the trustee, but may be pursued by the holder beneficially interested in the bonds.

The appellee also contends that, as the money procured from the Missouri banks went into the construction of the railway and light plant, and as that concern, upon the maturity of the debt due the banks by the promoters for that sum, joined in a renewal thereof, the railway and light company became bound and liable for what was due the banks; and, as the bonds were transferred to settle that indebtedness, consequently the banks acquired them for a consideration. Unless there is some express agreement by a party who is authorized to so make a binding agreement that the lender will be subrogated, or that a claim he has, if any, that gives him a superior right will be transferred to the lender, the general rule is that an assignment of such claim will not result, nor will subrogation be created in the lender to the thing acquired with the money borrowed. In other words, if A. should borrow from B. a sum of money which A. uses to discharge a lien held by another or appropriates it to the payment of a debt due and owing by such other, or if A. should purchase property with the money borrowed, in neither case would B., the lender, in the absence of a contract or agreement between the parties, have any lien or interest in the debts or lien discharged or in the property purchased. The averments of the answer fall within this principle and illustration. The Missouri banks, because of the fact that the

money loaned the promoters of the railway and light company went into the construction of those plants, would not have, in law or equity, in the absence of a binding contract, any claim against the railway and light company for the sum loaned; and if the railway and light company paid the debt due by it to the promoters in stock, which they accepted, so the answer avers, in payment of the money they put into the concern, it satisfies and extinguishes that debt so far as the liability of the railway and light company is concerned; and the subsequent promise to pay that debt, made by the railway and light company through the promoters, who sought to hold the company, as the averments state, without the consent of the directors, will not create against the company a legal liability when the debts in fact were already paid. Nor does there exist any ratification under the statements contained in the answer that will create a liability against the railway and light company. If these averments are true, it shows that the Missouri banks obtained the bonds sought to be foreclosed in consideration of a debt for which the makers of the bonds—the railway and light company—were not liable. And as the answer charges that all of these facts were known to the present holders of the bonds and those under whom they successively hold, it legally results that the railway and light company and appellant and other creditors so situated may show these matters to defeat a foreclosure. On the question as to the notice of the present holder of the bonds, who seeks foreclosure through the Metropolitan Trust Company, and who acquired them pending the present litigation, and when the property was in the hands of the receiver, we might rest the decision on the allegations of the answer to the effect that he had actual notice of the want of consideration when he acquired his interest, if any, in the bonds. But, as the question will probably arise in another trial, we express the opinion that the bonds are negotiable in form, and, as to the amounts not due, the doctrine of lis pendens does not apply to a purchaser of the bonds for value. *Gannon v. Bank*, 83 Tex. 274, 18 S. W. 573; *Board v. Railway Co.*, 46 Tex. 328.

With these views we conclude that the judgment in cause No. 1,445 should be reversed and remanded, and it is so ordered. And in this connection we express the opinion that the effect of this ruling is to set aside the sale of the railway and light property, and that it should be again sold, if there is a necessity therefor, after the rights of the bondholders are determined, and after it is ascertained whether or not the railway and light company are liable on the bonds set up by the appellees, and for the entire debt of the General Electric Company, and after it is determined whether or not the railway and light company owns that part of the road the answer alleges is the property

of Hobson. There was no error in the court effecting a sale of the property through commissioners appointed for that purpose. The statutes that require the sale of property by the sheriff under process of execution or order of sale may be resorted to by the court administering the property through a receiver, but these provisions of the law are not exclusive in effecting sales in cases of this character, and the court may, in the exercise of its discretion, order a sale by the receiver or commissioners. The case of the Metropolitan Trust Company et al. v. Farmers' & Merchants' National Bank et al. is an appeal by the trust company, Eugene Early, and the General Electric Company from judgments in favor of the appellees, interveners, by which the claims of the interveners were established against the railway and light company, and were given priority of payment out of the funds in the hands of the receiver over the claims of the trust company, Eugene Early, and the General Electric Company. All of the claims of the interveners except that of the appellee Gaines arose within six months preceding the appointment of the receiver. Gaines' claim was for personal injuries received while the property was in the hands of the receiver. The mortgage bonds sought to be foreclosed, and all of the claims in controversy, arose after Laws 1887 and 1889 were in force, providing for the appointment of a receiver, and regulating the administration of the property and the classification of claims. Therefore the bonds and the several claims in controversy are subject to these provisions of the law. The Laws of 1887 and 1889 are carried into the present Revised Statutes, and are the same now as existing when the judgments below were rendered; hence in noticing the laws upon the subject reference will be made to the present Revised Statutes. It appears that some of the claims in controversy of the interveners were sued on before the appointment of a receiver, as was also the claim of Eugene Early. The court below classified the claims of the interveners, and allowed priority of payment in accord with article 1472, Rev. St. 1895, but the orders do not, in terms, restrict payment out of the earnings of the property when in the hands of the receiver, or out of the earnings of any that arose before the property went into the hands of the receiver. This article gives a preference lien on all the earnings arising from the operation of the property by the receiver in favor of the classes of claims therein mentioned. None of the claims in controversy fall within any of these classes except the claim of Eugene Early and that of intervener Gaines, and those interveners who sued before the appointment of a receiver. But when we turn to article 1490 we find that the claims of all of the interveners, as well as that of Eugene Early and the General Electric Company, are entitled to

priority of payment over the mortgage debts out of the earnings arising from the operation of the property while in the hands of the receiver. Hence, in disposing of the earnings of the property that arose during the receivership which has not been applied to prior claims mentioned in article 1472, the claims of intervenor Gaines, and those who sued before the appointment of a receiver, and that of Eugene Early, should be first paid, and remaining earnings, if any, applied to the claims of other interveners and the General Electric Company in preference to the mortgage debts. This disposition as to such earnings is in accordance with articles 1472, 1490, of the statute. It is a well-recognized principle of law that the earnings and revenues arising from the operation of property of the character in question are not a fund to be reached by the mortgage until the mortgagee takes possession, or takes steps to foreclose on the property. Hence it is held that such earnings as arose before the receiver was appointed, and before possession, or its equivalent, by the mortgagee, and which were applied to the partial extinguishment of the mortgage debt to the prejudice of the operating creditors, or which were invested in betterments or in the improvement of the mortgage security, or which were on hand when the receiver was appointed, may, in the discretion of the court, in administering the property through its receiver in the exercise of its equity jurisdiction, be applied to claims that arose for operating expenses, or that were necessary or proper to be incurred in order to preserve the property prior to the appointment of the receiver, so that it may continue in operation as a going concern, in preference to the mortgage debt or of the claims of general creditors who do not come within the classes named. And those claims of the interveners which may be classed as operating expenses are entitled to priority of payment over the mortgage debts, and the claims of other creditors out of the earnings that arose prior to the appointment of the receiver, which were on hand at the time, or which have been diverted in the manner stated. There is no equity existing in the claims of the other interveners which would entitle them to priority of payment over the mortgage debts and of the claims of appellees as to income that arose before the receiver was appointed; and as to such income as remains after paying such preferred claims the claims of appellees and the interveners who are not entitled to the preference stand upon an equal footing. In this connection we will say that, in our opinion, no additional right to that of a general creditor was gained by appellee Early by reason of the levy of his writ of attachment. As the defendant corporation was then insolvent, he could acquire no preference, right, or lien that would deprive the court of the power to equitably apportion

such income to the claims classed as operating expenses. And we also take this occasion to say that the claim of the Farmers' & Merchants' National Bank should take rank along with those of the general creditors. The bank, it is true, advanced money to the defendant corporation in order for it to pay its operating expenses, but the facts pleaded and shown by the master's report upon this claim do not show a state of facts which would create an assignment or transfer in favor of the bank superior to the claims of those which arose for operating expenses, nor is it made to appear that by either contract or operation of the law the bank became subrogated to the claims or rights of any such preferred creditors.

In this case the question also arises as to the power of the court to appropriate the corpus of the property of the defendant corporation to the payment of claims in preference to the prior mortgage debts. We are well aware of the line of cases which in some instances permit this to be done, with the principal reason upon which they are based, to the effect that a court, in placing the property in the hands of a receiver at the instance of the mortgage holders, may, as a condition to the exercise of its authority, require that certain claims shall be paid prior to the mortgage debts; and that as to corporations or enterprises which affect the general public, and in which the interest of the public is involved to the extent of a continuation of their operation, the interest of the public is superior to that of the individual, and for this reason the property may be appropriated to the payment of claims necessary to its operation. Such a disposition, we think, may be made of the income that arises from the operation of the property. And after a court has assumed, through its receiver, control of the property, in certain instances it would be within the power of the court to appropriate the corpus of the property to paying the cost and expenses that resulted from the litigation that arose during the time of its administration by the court, but beyond this we believe the court has no power to go, in the absence of some provision of law in existence when the mortgages were executed that gave the claims of the class described a prior lien upon the corpus of the property. A court administering the rights of litigants in accord with the principles of law and equity has no inherent right, simply by virtue of its judicial authority, to displace valid mortgage liens that are fixed upon the property, and which is subject to the liens, and require that such liens shall be postponed to claims which were not in existence at the time the mortgage liens were created, or are not based upon some contract or provision of the law which gives them a prior right over the mortgage liens. If the power is wanting in the court to appropriate the corpus of the property to the

payment of the claims to the prejudice of the prior mortgage debts, an order made by the court in appointing a receiver that such illegal diversion should result is no more valid and binding than if made at some subsequent stage of the case. It results from this that our conclusion upon this branch of the case is that the trial court did not have the authority to appropriate any of the corpus of the property to the claims of the interveners in preference to the mortgage liens.

It is unnecessary for us to decide whether article 3179a, Sayles' Civ. St., applies to street railways and property of the character in question, because none of the claims in controversy are of the class for which a lien is given as provided by that article.

The supreme court has recently decided that no preference over general creditors can be acquired by levy upon the property of an insolvent corporation, hence the claim of Eugene Early has no superior right, by reason of his attachment levy, over the claims of other creditors. If upon another trial it should be determined that the defendant corporation was not insolvent when Early's attachment was levied, then the attachment lien would be valid against the corpus of the property subject to the prior liens then existing.

We have not attempted to dispose of the claim of each intervener by name, but these general observations are sufficient to guide the lower court in another trial. Our conclusion is that both cases should be reversed and remanded, and it is so ordered.

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STEPHENSON v. SINCLAIR et al.

(Court of Civil Appeals of Texas. June 3, 1896.)

CONSTABLE'S BOND—LIABILITY OF SURETIES.

Where a prisoner charged with a misdemeanor attempts to escape from the custody of a constable, and the officer, in order to prevent his escape, fires on the prisoner, and kills a horse ridden by the latter, the sureties on the officer's bond are liable for the value of the horse, though the officer had no right to fire on the prisoner.

Appeal from Red River county court; George F. Burdett, Judge.

Action by W. T. Stephenson against J. T. Sinclair and others on the official bond of defendant Sinclair as constable. From a judgment in favor of plaintiff against defendant Sinclair only, and in favor of the other defendants, plaintiff appeals. Reversed and rendered.

Lennox & Lennox, for appellant.

FISHER, C. J. This action is by the appellant against the appellee Sinclair and others, as the sureties upon his bond as constable of precinct No. 4 of Red River county. The action is one of damages

against the defendant for the value of a horse shot by the constable, and for expenses incurred in seeking to effect a cure of the animal, and for the loss of his services. The court found the actual damages at \$153.60, and for this amount rendered judgment against the constable, but refused to give any judgment against the sureties. From this result the plaintiff appeals. At the time the horse was injured he was being ridden by a prisoner charged with a misdemeanor, and who was lawfully in the custody of the constable, by virtue of a warrant. The prisoner attempted to escape, and the constable fired upon him and wounded the horse. The constable, under the facts and the law that governs in such cases, had no authority to fire upon the prisoner, seeking to escape, with the purpose of wounding him or killing him, in order to prevent the escape, the prisoner then being held in custody under accusation of a misdemeanor. But it was the official duty of the constable, the prisoner being lawfully in his custody by warrant, to exercise proper care and diligence to retain custody of the prisoner and to prevent his escape; and, when he was engaged in efforts to prevent his escape, he was in the exercise of an official duty, for the abuse of which his sureties would be liable. The fact that the constable resorted to means not authorized by law in order to prevent the escape does not remove his effort to prevent the escape out of the realm of official duty. The duty to prevent the escape existed, and because the constable may have gone too far in the effort to perform this duty, and while still in its exercise the injury occurred which resulted in the damages, would not relieve the act of the obligation covered by the bond. With this view of the case, we reverse the judgment of the court below, and here render judgment against all of the appellees for the sum found by the trial court to be the actual damages sustained by the plaintiff.

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BURR et al. v. DAVIS et al.

(Court of Civil Appeals of Texas. June 10, 1896.)

PLEADING—PETITION—GENERAL DEMURRER.

A petition alleged that plaintiffs obtained a judgment against defendants' father May 26, 1890; that June 30, 1893, the father conveyed to one of his sons (defendants) a tract of land, receiving as consideration \$500 cash, and two notes for \$1,000 each, payable after one and two years, and secured by vendor's lien; that the father was insolvent when plaintiffs' judgment was rendered against him, and so remained until he died, leaving no property real or personal; that before his death, designing to defeat the collection of plaintiffs' judgment, he gave the two notes to his two sons (defendants), who took them without paying any consideration, and with knowledge of the fraudulent purpose of the donor. The prayer was for judgment against each of the defendants for the

amount of the note held by each, and for costs. Held, that the petition was bad on general demurrer.

Error from district court, Camp county; John L. Sheppard, Judge.

Action by Charles P. Burr & Co. against C. G. and N. A. Davis. From a judgment sustaining a general demurrer to the petition, plaintiffs bring error. Affirmed.

The court below sustained a general demurrer to plaintiffs' petition, and the case is before us by writ of error. The petition is as follows:

"Chas P. Burr & Co. v. C. G. Davis et al. In the District Court, Camp County, Texas. December Term, 1894. To the Hon. John L. Sheppard, Judge of said Court: Your petitioners, Charles P. Burr and Henry E. Corby, hereinafter styled plaintiffs, complaining of C. G. Davis and N. A. Davis, hereinafter called defendants, respectfully show to the court: That plaintiffs reside in the city of St. Louis, state of Missouri, and defendants in Camp county, Texas. That defendants are the children and heirs at law of L. G. Davis, deceased, against whom plaintiffs on May 26, 1890, in the district court of Camp county, Texas, recovered a judgment in words and figures as follows: 'Chas. P. Burr & Co. v. L. G. Davis. May 26, 1890. This day, this cause being called for trial, came the plaintiffs and defendants, each by their attorneys, and announced ready for trial, and, waiving a jury, submitted the matters of fact as well as of law to the court, who, after hearing the evidence, and argument of counsel, is of opinion that the plaintiffs ought to recover their debt; and, it being found to amount to (\$2,470⁸¹/₁₀₀) two thousand four hundred and seventy and ⁸¹/₁₀₀ dollars, it is therefore ordered, adjudged, and decreed by the court that Chas. P. Burr & Co., a firm composed of Chas. P. Burr and Henry E. Corby, plaintiffs, do have and recover of L. G. Davis, defendant, the sum of \$2,470.81, with interest thereupon from date hereof at the rate of 8 per cent. per annum, and all costs of suit, for which execution may issue,' which judgment, plaintiffs aver, is still subsisting, and unsatisfied either in whole or in part. Further complaining, plaintiffs say that on the 30th day of June, 1893, the aforesaid L. G. Davis executed to one of his sons, W. H. Davis, a warranty deed, in writing, in words and figures as follows:

"The State of Texas, County of Camp. Know all men by these presents, that, I, L. G. Davis, of Camp county, Texas, for and in consideration of the sum of twenty-five hundred dollars to me in hand paid by W. H. Davis as follows: Five hundred dollars cash in hand paid, the receipt of which is hereby acknowledged, and two notes for one thousand dollars each, due respectively December 1st, 1894, and December 1st, 1895, drawing interest at the rate of ten per cent. per annum from date,

and ten per cent. additional for attorney fees in case of legal proceedings to enforce collection, have granted, bargained, sold, and conveyed, and by these presents do grant, bargain, sell, and convey, unto the said W. H. Davis, of the county of Camp and state of Texas, all that certain tract or parcel of land lying and being situated in the county of Camp, and state aforesaid, a part of the Elbert Matthews headright, and more particularly described as follows: Beginning at a stake in the road 82 vrs. S., 70 W., from the corner of a survey of nine acres deeded to T. E. Gasaway by J. L. Russell, from which a post oak bears S., 70 W., 502 vrs., to the N. W. corner of the L. G. Davis original survey, a stake, from which pine bears north, 29 E., ¹⁸³/₁₀ vrs., a post oak brs. N., 70 E., ¹⁸⁶/₁₀ vrs., both marked thus, 'X'; thence S., 20 E., 969 vrs., a stake, from which a red oak brs. S., 10 W., 13 vrs., marked 'X'; thence N. 70 E., 1,800 vrs., to the E. B. line of the original survey, a stake; thence N., 20 W., 28 vrs., a stake in the road, from which a post oak bears N., ^{62 1/2}/₁₀ W., ¹⁰³/₁₀ vrs., marked 'X'; thence N., 70 W., with the road from Pittsburg and Daingerfield, 1,619 vrs., to the place of beginning,—containing 200 acres of land, and being my homestead. To have and to hold the above-described premises, together, with all and singular, the rights and appurtenances thereto in any wise belonging, unto the said W. H. Davis, his heirs and assigns forever, in fee simple. And I do hereby bind myself, my heirs, executors, and administrators, to warrant and forever defend, all and singular, the said premises unto the said W. H. Davis, his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof. But it is expressly agreed and stipulated that the vendor's lien is retained against the above-described property, premises, and improvements until the above-described notes, and all interest thereon, are fully paid according to their face, and tenor, effect, and reading, when this deed shall become absolute. But it is expressly agreed that I shall use and occupy said place and premises during my natural life. Witness my hand this the 30th day of June, A. D. 1893. L. G. Davis.

"The State of Texas, County of Camp. Before me, F. A. Lockhart, county judge in and for Camp county, Texas, on this day personally appeared L. G. Davis, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and considerations therein expressed. Given under by hand and seal of office this the 30th day of June, A. D. 1893. [Seal.] F. A. Lockhart, County Judge, Camp County, Texas.

"Filed for record July 1st, 1893, at 9 o'clock a. m. C. G. Davis, Clerk County Court, Camp Co.

"Recorded July 15th, 1893, at 7 o'clock a. m. C. G. Davis, Clerk County Court, Camp County, Texas, by Dick Smith, Deputy."

"Complaining further, plaintiffs say that at the date of the rendition of the aforesaid judgment in their favor against the aforesaid L. G. Davis, and at the date of the execution of the aforesaid deed to W. H. Davis, the said L. G. Davis was wholly insolvent, and so continued to be up to the — day of —, 189—, when he departed this life leaving no property whatever, either real or personal; that after the execution of said deed to W. H. Davis, and shortly before his death, the said L. G. Davis, being wholly insolvent,—a fact well known to defendants,—and designing to defeat plaintiffs in the collection of their aforesaid judgment, gave and delivered to each one of the defendants one of the notes hereinbefore described; and that the defendants, well knowing the aforesaid purpose of the said L. G. Davis, and without paying any consideration therefor, became by such fraudulent transfer the holders and owners of one of said notes, said notes being each of the value and worth of one thousand dollars. Wherefore plaintiffs sue, pray for citation to defendant to answer this petition for judgment against each of the defendants, C. G. Davis and N. A. Davis, for one thousand dollars, and interest thereon accrued according to the tenor of the note owned by each, for costs of suit, and for such other and further relief, both general and special, as to the court may seem proper. W. J. Singletary, Heath & Smith, Attorneys for Pliffs.

"Filed the 28th day of November, 1894. C. G. Davis, Clerk District Court, Camp County, Texas."

After the demurrer was sustained, plaintiffs declined to amend, and the suit was dismissed.

W. J. Singletary and Heath & Smith, for plaintiffs in error. E. A. King, for defendants in error.

COLLARD, J. (after stating the facts). The ruling of the lower court, sustaining the demurrer and dismissing the case, is correct, and the judgment is affirmed.

ARMSTRONG CO. v. ELBERT.

(Court of Civil Appeals of Texas. June 10, 1896.)

GARNISHMENT — EXTENT OF LIEN — FRAUDULENT CONVEYANCE—QUESTION OF FACT.

1. Where a garnishee has possession of property which he has obtained from the debtor by virtue of a sale which is a fraud upon creditors, the process of garnishment runs against such property, and plaintiff does not thereby affirm the sale, but may attack it as fraudulent, and, if successful, enforce the lien created on the property by the garnishment.

2. As a matter of law, a purchaser's knowl-

edge of his vendor's failing circumstances does not necessarily put him upon notice of an intent to defraud creditors.

Error from Denton county court; S. M. Bradley, Judge.

Garnishment by the Armstrong Company against G. W. Elbert. From a judgment in favor of the garnishee, plaintiff brings error. Reversed.

McCormick & Spence, for plaintiff in error.

FISHER, C. J. Plaintiff in error sued one W. W. McCormick on a debt due by McCormick, and at the same time applied for garnishment directed to the defendant in error as garnishee. The garnishee answered, denying any indebtedness to McCormick, and that he did not have possession of any property belonging to the said McCormick, nor did he know of any one being so indebted, or having property belonging to McCormick. It appears from the findings of the court that, before the writ of garnishment was issued, McCormick sold to the defendant a stock of goods, and that, at the time of sale, McCormick was practically insolvent, and that the defendant paid for the goods a check drawn by himself, payable to McCormick, on the Exchange National Bank of Denton, for \$880, which check was held by McCormick until the day after the writ of garnishment was served, and was then presented to the bank and paid. It also appears that the defendant Elbert was in possession of the goods when the writ of garnishment was served upon him. The court also finds that, at time of the purchase, Elbert knew that McCormick was indebted to other creditors, and from this fact the court concludes the sale by McCormick to defendant in error was in law fraudulent as to the creditors of McCormick, but denied the plaintiff relief, upon the ground that, as he pursued the remedy by garnishment, he affirmed the sale, and elected thereby to waive the right to attack the sale as fraudulent. This legal conclusion of the court presents the question for decision. The contention of the plaintiff in error is that the sale from McCormick to the defendant in error was in fraud of creditors, therefore the plaintiff in error could attack that sale, and subject the property to its claim. If the garnishment process was solely directed against the proceeds of the sale, the effect would be to affirm the sale, as the garnishing creditors would not be permitted to reach the proceeds of the sale, and in this way obtain its benefits, and then deny its validity, but the process also runs against the property of the debtor that may be in the hands of garnishee at the time of the service of the writ and answer, and such process creates a lien in favor of the creditors upon such property. *Focke v. Blum*, 82 Tex. 436, 17 S. W. 770; *Harrell v. Cattle Co.*, 73 Tex. 612, 11 S. W. 863.

If the garnishee has possession of property which he has obtained from the debtor by

virtue of a sale which is a fraud upon creditors, the sale, between the parties to it, is valid, but is illegal as to the creditors, and the right of the pretended purchaser in the property is inferior to the rights of the creditors, and his title will yield to the claims of the creditors. Consequently, the logic of this rule must be that, as between him and the creditors with a lien, the law will treat such property in his hands as belonging to the debtor. Therefore, we must hold that the court erred in not holding that the plaintiff could attack the sale as fraudulent, and, if successful, enforce the lien created on the property by the garnishment process. The court below found that the sale was in law in fraud of creditors, and reaches this conclusion solely upon the fact that the debtor was much indebted when he sold to defendant, and that the defendant knew this fact, or had knowledge of facts sufficient to put him upon inquiry. There is no finding of fact as to the intention of the parties to defraud creditors. If there had been, we could have reversed, and rendered in favor of plaintiff in error. The fact that the defendant may have purchased the property from the debtor when in failing circumstances, with a knowledge of his financial embarrassment, does not necessarily render the sale fraudulent and void as to creditors. *Hadock v. Hill*, 75 Tex. 195, 12 S. W. 974; *Cross v. McKinley*, 81 Tex. 333, 16 S. W. 1023. A sale by an insolvent debtor is not necessarily, by reason of that fact, a fraud upon creditors. This would depend upon his intention and good faith in the transaction; and, if his purpose and intent were to defraud, it does not necessarily follow, as a matter of law, that his failing circumstances, which were known to the purchaser, but who did not know of his intent and purpose to defraud, would put him upon notice of the illegal purpose. These are all questions of fact. Judgment reversed, and cause remanded.

R. F. SCOTT GROCER CO. et al. v. KELLY.

(Court of Civil Appeals of Texas, June 10, 1896.)

WRONGFUL ATTACHMENT—DAMAGES.

1. Where, in an action for wrongful attachment, it appears that plaintiff had conveyed his entire mercantile business to a trustee for the benefit of certain creditors, damages for injuries to his mercantile credit are not recoverable.

2. Damages may be recovered by a lessee for the wrongful attachment and sale of his leasehold interest, though the sale was invalid.

3. Where plaintiff, whose property was wrongfully attached, purchased the same at sheriff's sale, the fact of such purchase is admissible in evidence, on the question of damages.

4. In an action for malicious attachment, the fact that defendant acted on the advice of counsel, after laying before him all the facts, is to be considered in determining the question of malice.

Appeal from district court, Lamar county; E. D. McClellan, Judge.

Action by S. W. Kelly against the R. F. Scott Grocer Company and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

H. D. McDonald, for appellants; Hill & Birmingham and Hale & Hale, for appellee.

COLLARD, J. The judgment of the lower court, in our opinion, should be reversed. The suit is for damages, actual and exemplary, brought by S. W. Kelly, appellee, against the R. F. Scott Grocer Company, and J. R. Shelton, for the wrongful and malicious issuance and levy of attachment by defendant below, on certain property described in the petition. The trial resulted in a verdict and judgment for plaintiff for \$1,254.38 actual and \$600 exemplary damages, from which the appeal is taken. The petition shows that plaintiff had executed a deed of trust to J. R. Shelton, trustee, for the benefit of certain named creditors, including the R. F. Scott Grocer Company, whose debt was deferred to other named debts, and that possession of the goods and merchandise was delivered to Shelton for the purpose of selling the goods, as directed in the trust deed. Plaintiff's entire stock of goods in his mercantile business, the fixtures in the store where plaintiff had carried on his business, and the lease plaintiff had of the store, were conveyed to the trustee, and the petition shows that the trustee had taken possession of all the property, including the storehouse. The petition claimed special damages by reason of the attachment and levy for loss of credit as a merchant. Defendants specially excepted to this item of damage. The court overruled the exception, and appellants assign the ruling as erroneous.

1. Having mortgaged and delivered possession of all his stock of merchandise to the trustee, together with his lease on his storehouse, it must be held that plaintiff had voluntarily gone out of the mercantile business, and could not recover damages for injury to his credit as a merchant. That he may have intended at some future time to resume business ought not to change the rule. Such expectant resumption of business and injury to credit would be too remote as a basis for damages to commercial credit. *Hunt v. Kellum*, 59 Tex. 535. Plaintiff, it is true, alleged that he had other property not mortgaged amply sufficient to pay his debts, but this property was no part of the goods and merchandise of the business. The fact, if it had existed, that he was insolvent, would of itself be enough to prevent a recovery for injury to commercial credit. *Roby v. Meyer*, 84 Tex. 387, 19 S. W. 557. But insolvency is not a necessary prerequisite as a bar to such recovery. Other facts will have the same effect, though the debtor be solvent, as if he is not in commercial business at all, or has

abandoned it. If he be not a merchant, he cannot be injured in his credit as a merchant. The special exception to such damages should have been sustained.

2. The court did not err, as insisted by appellants, in overruling defendants' special exception to that part of the petition claiming damages for the levy upon and sale of defendants' lease of the storehouse and fixtures. The argument of appellants that the leasehold estate cannot be sold under execution or by the lessee without the consent of the landlord, and that, therefore, there would be no right to damages if it should be signed and sold under attachment, is not sound. The wrong would consist in the fact of the seizure and sale without legal right. The absence of legal authority to do the act would not excuse or justify it, but such want of authority would furnish the very reason, or one of the very reasons, of complaint. The injured lessee would be entitled to damages commensurate with the injury, the value of the use for the time he may have been dispossessed of his household estate.

3. The court erred in sustaining plaintiff's special exception to that part of the defendants' answer showing that plaintiff bought the goods at sheriff's sale. The goods were sold by order of the court, under the attachment proceeding, before judgment; and defendant alleged that plaintiff himself was the purchaser of his goods at the sale by the sheriff, or, if he was not, that he immediately thereafter again became the owner thereof at the price for which the sheriff sold the same, whereby he wholly mitigated and wholly saved himself from damages arising from the levy and sale. The amount plaintiff paid to regain possession of his property, with interest while out of his possession, is the measure of ordinary damages in such cases. *Field v. Munster* (Tex. Civ. App.) 32 S. W. 417. A different rule (that contended for by appellee) was announced in *Schoolher v. Hutchins*, 66 Tex. 324, 1 S. W. 266; but that case was overruled by this court in *Field v. Munster*, Justice Key delivering the opinion, which was sustained by the present supreme court on writ of error (*Munster v. Fields*, 33 S. W. 852), and the correct rule, upon principle and precedent, established as above declared. The alleged fact that plaintiff purchased the goods at the sheriff's sale, or had it done for his benefit, or regained possession soon after the sale, paying therefor less than value, was a pertinent issue, measuring the amount of rightful recovery by plaintiff, and it was error to refuse to try the same. *Sprague v. Brown*, 40 Wis. 620.

4. The court refused a charge asked by defendants, as follows: "If you believe from the evidence that, before suing out the attachment, J. R. Shelton, acting for defendant grocer company, in good faith sought legal advice in regard to the propriety of suing out the attachment, and fully laid all

the facts before counsel, and was advised by counsel that it had the right to sue out the attachment, and that the same was sued out in pursuance of such advice, then you may take such fact into consideration, in connection with all the other facts and evidence, in determining whether or not the same was sued out maliciously." There were facts in proof to which the charge applied, properly admitted by the court. It was not upon the weight of evidence. It was a proper charge to direct the jury to the issue upon which the testimony was admitted. *Griffin v. Chubb*, 7 Tex. 603.

There are several assignments of error which we need not discuss. It will suffice to say that we have examined them, and find that they should not be sustained. Because of the errors above pointed out, the judgment of the lower court is reversed, and the cause remanded. Reversed and remanded.

SCARBOROUGH v. BOWYER.

(Court of Civil Appeals of Texas. June 10, 1896.)

ACTION ON NOTE — SUFFICIENCY OF PETITION — EVIDENCE.

A petition on a note which states the amount of a credit thereon, though without giving the date, is sufficient, in the absence of special exception, to authorize proof of the date.

Error from district court, Jones county; C. P. Woodruff, Judge.

Action by W. Bowyer against George A. Scarborough. Judgment for plaintiff, and defendant brings error. Affirmed.

Cockrell & Cockrell, for plaintiff in error.
C. C. Ferrell, for defendant in error.

FISHER, C. J. The character of suit and question in issue is presented by the following statement, from brief of plaintiff in error: "Suit in district court of Jones county, on two promissory notes, executed by plaintiff in error. Judgment by default September 8, 1894. Brought to this court for review on the following: 'The court erred in rendering judgment against plaintiff in error for \$527.52 and interest, because such judgment is excessive, and not warranted by the pleadings, in this: The pleadings declared on two notes for \$175 and \$275, respectively, each bearing 12% interest per annum from date, and bearing date March 2nd, 1891, and on one of which there is a credit of \$125, as shown by the pleadings. The judgment was entered by default September 8, 1894, for \$527.52, when, under the pleadings, judgment could not have exceeded \$508.24; and the judgment is excessive in at least the sum of \$19.28, it being presumed that the credit is at the date of the note, in the absence of an allegation to the contrary, and the pleadings being construed most strongly against the pleader.'" The petition states that the note is credited with the

sum of \$125, but does not state when the credit was placed upon the note. The judgment shows that the note was in evidence, and was before the court, when the judgment was rendered; and the judgment states when the credit was placed on the note, and a calculation of the amount due upon the note as it is described in the judgment, together with the statement of the amount of credit, and, when placed on the note, shows that the judgment was proper, and not excessive. The petition was good on general demurrer, and it was not essential that the time the credit was placed upon the note should be stated. It stated the fact that a credit of \$125 was indorsed on the note. This was sufficient, in the absence of a special exception, to let in proof when the indorsement was made. The introduction of the note shows this fact, as is recited in the judgment. We find no error in the judgment, and it is affirmed.

LAING et al. v. CRAIG et al.

(Court of Civil Appeals of Texas. June 10, 1896.)

PLEADING—VARIANCE—PARTNERSHIP AS SURETY.

To authorize a judgment on a replevin bond against individuals, when the bond is signed by a partnership name, on proof that they were the members composing the firm, such fact must have been pleaded.

Error from district court, Wichita county; George E. Miller, Judge.

Action by Sarah F. Craig and others against Joseph Laing and others. Judgment for plaintiffs, and defendants bring error. Reversed.

Dickson & Moroney, for plaintiffs in error. Carrigan & Hughes, for defendants in error.

KEY, J. A judgment was rendered in the court below against the plaintiffs in error, Joseph Laing, F. O. Brown, and C. Vanordstrand, as sureties on a replevin bond. The bond was signed thus: "Brown & Laing, by J. Laing, N. J. McLeod, C. Vanordstrand." It showed on its face that N. J. McLeod was a principal, and the other signers sureties. There is no pleading in the record showing that F. O. Brown and Joseph Laing composed a firm called Brown & Laing, and that by such firm signature to the bond they became individually liable thereon; and, this being the case, there is no basis in the record for the judgment against them, and for this reason, and this alone, we reverse the judgment and remand the cause. It may be that, if the names F. O. Brown and Joseph Laing had been signed to the bond, that fact, without any averments in reference thereto, would have made them parties to the suit, and entitled Mrs. Craig to judgment against them on the bond. But as their names were not so signed, nor stated in the bond, the court could not assume, nor, in the absence of pleading alleging the fact, hear evidence to show, that F. O.

Brown and Joseph Laing composed a firm called Brown & Laing. Hence, if we assume (there being no statement of facts) that the existence of such a partnership was shown by proof, such assumption will not sustain the judgment. It being necessary to plead the existence of the partnership, proof of it, without such a plea, would not support the judgment. Reversed and remanded.

CAMERON et al. v. TERRELL et al.

(Court of Civil Appeals of Texas. June 10, 1896.)

SUBCONTRACTOR'S LIEN.

A subcontractor acquires no lien, unless he files a copy of his contract, or an itemized account of his claim, as provided by Sayles' Civ. St. art. 3165, and serves a notice on the owner of the property as provided by article 3176.

Appeal from district court, Wise county; J. W. Patterson, Judge.

Action by William Cameron & Co. against L. P. Terrell and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Bullock & Tankersley, for appellants. Seward & Martin, for appellees.

FISHER, C. J. This suit was brought by appellants against appellees, L. P. Terrell, M. T. Martin, and her husband, C. W. Martin, by petition filed in district court November 13, 1894, in which appellants alleged that they had sold and delivered to appellee L. P. Terrell lumber and material of the value of \$86.28, for the purpose of erecting a building upon the lot of appellee M. T. Martin; that the lumber and material were used by said Terrell, at the instance and direction of said Martins, in the erection of said building; that appellee Terrell was indebted to appellants in said sum of \$86.28; and that they had a lien on the said lot and building of appellee M. T. Martin for said sum. Appellants prayed for judgment against appellee Terrell for said \$86.28, and against all of appellees for the foreclosure of their lien on the lot and building. Attached to said statement is the sworn account of the demand due appellants, with the affidavit required by statute to fix their lien, and certificate of the county clerk of its recordation in the records of mechanics' liens in Wise county. Appellees C. W. and M. T. Martin (defendants below) filed their special demurrer and answer. The demurrer being overruled, the cause was tried before the court, a jury having been waived, on the 29th of January, 1895, and resulted in a judgment for defendants; the court finding that plaintiffs had no lien on the lot and building, that defendant Terrell was indebted to plaintiffs in the sum of \$86.28, but that the court had no jurisdiction of said amount. The court below found the following facts, which are copied from the record: "I find that in March, 1894, the defendant L. P.

Terrell entered into a contract with the defendant Mrs. M. T. Martin, then Miss M. T. Lang, in which defendant Terrell agreed to build for defendant Lang a stone business house on the lots described in the petition for the sum of \$2,295; that \$2,238.25 of the amount has been paid in cash to the said Terrell by the said Lang, and was so paid before any notice of any kind was given by the plaintiff of the fact that plaintiff had furnished the lumber and material with which a house was built, and before plaintiff filed his account for record in the office of county clerk of Wise county for record. I also find, at the time said defendant Martin made the cash payment of \$2,238.25, she was the legal owner and holder of a note given by defendant L. P. Terrell to Ford, Weakly & Johnston on the 5th of December, 1892, and that the same became due on the 3d day of March, 1893, and that there was at the time of such cash payment due on said note the sum of \$56.75, and that said note was then a legal demand against said L. P. Terrell, and that there was then due upon the same the sum of \$56.75, and that at the time of such payment the said note was tendered to the said Terrell as part payment on said building, and that said Terrell refused to accept the same. Second. I find that the plaintiffs are lumber dealers, and furnished the defendant Terrell the material set out in the account set out, and attached to the plaintiffs' petition as a part of the same, and that the materials were so furnished at the dates mentioned in said account, and that said material was used by the said Terrell in the construction of said building on said lot for said defendant M. T. Martin, and that there is now due on said account, by the said Terrell to the plaintiffs, the sum of \$86.28. Third. I find that on the 29th day of September, 1894, the account sued on, and attached to the plaintiffs' petition, and the affidavit attached thereto, was duly filed in the office of the county clerk of Wise county for record, and was duly recorded on said date. Fourth. I find that the defendant M. T. Martin is still the owner and holder of the said note hereinbefore referred to, and there was no evidence showing, or tending to show, when the defendant M. T. Martin obtained the title and possession of said note; that said note became due and payable on the 3d day of March, 1893. I also find that since the making of said building contract the said M. T. Lang has been married to defendant C. W. Martin."

The court, in the second section of its conclusions of law, states that "as the plaintiff failed to establish a lien on the real estate, and as the amount in controversy is under the jurisdiction of this court, cause has to be disposed of for want of jurisdiction of this court." The court also finds other conclusions of law, upon which it based its judgment. We do not say that the reasons

stated by the court in its conclusions of law are not correct, as we need not rest our disposition of the case upon those reasons, but prefer to put the affirmance of the judgment upon the proposition that the facts as stated by the trial court, when considered with allegations as to the time when appellants' debt matured, fail to show a compliance with the statute that prescribes the time and manner of fixing a lien of the class sought to be foreclosed. Sayles' Civ. St. arts. 3165, 3176. Judgment affirmed.

SPRINGFIELD FIRE & MARINE INS. CO. v. GREEN.

(Court of Civil Appeals of Texas. June 10, 1896.)

INSURANCE — APPLICATION — SOLE OWNERSHIP OF PROPERTY.

In an action on a fire policy covering a building and personal property therein, and providing that, if the interest of the insured be other than sole ownership, the policy should be void, where it appears that insured owned all of the building, but only part of the personalty, and the application stated that he was sole owner of both, it was error to render judgment for plaintiff for the value of the personal property, since the policy is divisible, and, as to such property, is void.

Appeal from district court, Hopkins county; E. W. Terhune, Judge.

Action by J. B. Green against the Springfield Fire & Marine Insurance Company. Judgment for plaintiff, and defendant appeals. Modified.

Morgan & Thompson, for appellant. Templeton & Crosby, for appellee.

FISHER, C. J. J. B. Green brought this suit against the Springfield Fire & Marine Insurance Company, declaring upon a policy of insurance issued to him, covering \$700, on his one-story frame, shingle-roofed building, and \$300 on his household and kitchen furniture, books, pictures, etc., contained therein. The amended petition, upon which trial was had, was filed October 30, A. D. 1894. Plaintiff alleged that a fire occurred, destroying the property (an itemized list of which was attached to the petition, so far as the personal property was concerned); that he gave notice and made proofs of loss as required by the terms of the policy. The defenses relied upon were that the personal property was grossly overvalued in the sworn proofs of loss; that plaintiff was not the sole and unconditional owner of the insured property, for his own use and benefit, as required by the policy; and that other persons owned interests in said property, whose names are set out in the answer. Trial was had before the court without a jury, resulting in a judgment in favor of the plaintiff for \$700 on the house and \$100 on the furniture and fixtures, to which judgment defendant excepted.

There is no dispute about the facts. We adopt those found by the court. The findings of the court and the conclusion reached upon the question of fraud or false swearing in making the claim or proof of loss are approved by this court. But we must disagree with the court upon the construction given the policy as relates to the personal property covered by it, and in applying the provision of the policy that requires, "If the interest of the insured in the property be other than the entire, unconditional, and sole ownership of the property, the policy shall be void." The facts show that the insured owned the building, but only owned a part of the personal property covered by the policy. The policy as to the real and personal property is divisible, and it may fail as to one and be sustained as to the other, but that that relating to the personal property as a subject of insurance is entire so far as that subject is concerned, and the same may be said as to the real estate. Therefore we are constrained to hold that the court erred in finding for the plaintiff any sum for the personal property, but was correct in its judgment for the value of the building destroyed. The judgment below will be reformed and affirmed for the value of the building, and will be in favor of plaintiff in error that defendant in error take nothing as to any recovery for the personal property. The costs of this appeal will be taxed against defendant in error.

DALLAS NAT. BANK v. DAVIS et al.
(Court of Civil Appeals of Texas. June 10, 1896.)

SALE—WHEN TITLE PASSES—BILL OF SALE—DELIVERY OF PROPERTY.

In an action by one claiming cattle under a bill of sale properly executed and recorded, as required by Rev. St. 1879, art. 4564, against an attaching creditor of the seller, to determine the right to the property, where the court had charged as to the necessity of the delivery of the cattle to the buyer before the levy of the writ, it was proper to refuse a charge that by the word "delivery" the court meant actual delivery of the cattle, and that, if anything remained to be done by the seller with reference thereto, the title did not pass, and plaintiff could not recover, it appearing that a contract between the buyer and seller which modified the bill of sale, and required the seller to perform certain duties before delivery, had been canceled prior to the levy of the attachment; since, in such case, the bill of sale passed title without delivery.

Appeal from district court, Olney county; George E. Miller, Judge.

Action by J. H. Davis & Bros. and others against the Dallas National Bank to determine the right to certain property attached by the bank in an action brought by it against J. L. Hull. Judgment for plaintiffs, and defendants appeal. Affirmed.

J. A. Templeton and L. C. Barrett, for appellants. J. T. Chesnutt, Davis & Garnett, and Harris & Knight, for appellees.

Conclusions of Fact.

KEY, J. This is the third appeal in this case. The nature of the case is disclosed by the former decisions. 78 Tex. 362, 14 S. W. 706, and 26 S. W. 222. Before the last trial, the two cases, *Dallas National Bank v. J. H. Davis & Bros.*, and *First National Bank of Decatur v. J. H. Davis & Bros.*, were consolidated. There is a mass of documentary evidence, which it is unnecessary to set out or state in our findings of facts, because written instruments speak for themselves. The rights of the appellees depend largely upon the two instruments considered and construed on the first appeal,—the bill of sale from J. L. Hull to appellees, and the gathering contract between the same parties, executed the same day. The court below, following the ruling on the last appeal, instructed the jury, among other things, as follows: "(7) If you fail to find for the plaintiffs under the second and third sections of the fifth subdivision of this charge, and you find and believe from the evidence that between the 5th June, 1885, A. D., and the 22d June, 1885, A. D., when plaintiffs' attachment was levied, J. L. Hull made an actual delivery of the cattle in controversy to J. H. Davis & Bros.; or if you find and believe from the evidence that the written contract signed by J. H. Davis for J. H. Davis & Bros., and by J. L. Hull, and dated the 5th June, 1885, A. D., was after that time, and before the levy of plaintiffs' attachment, by mutual consent and agreement of J. L. Hull and J. H. Davis & Bros., canceled and abandoned, then you will find for the defendants." The evidence will support a finding, and we therefore find that between the 5th and 22d of June, 1885, the contract referred to in said charge was, by mutual consent of the parties, canceled and abandoned. The evidence also supports a finding that prior to June 22, 1885, Davis & Bros. had obtained actual possession of about one-half of the cattle. On the issues of fraud submitted in the court's charge, especially on the question of knowledge on the part of appellees of Hull's intent to defraud, the finding of the jury in appellees' favor is sustained. The great preponderance of the testimony shows that the cattle in controversy were not at the time (June, 1885) worth any more than the debt in payment for which appellees claim they bought them.

Conclusions of Law.

Appellants have over 50 assignments of error, in which objections are urged to the trial court's rulings on exceptions to appellees' pleadings, to its rulings on the admissibility of evidence, and to its action in giving and refusing instructions. While, in consultation, these objections have been considered in detail, they will not, for satisfactory reasons, be so treated in these conclusions of law; and we content ourselves with

the announcement that, in our opinion, the law applicable thereto is announced on the former appeals.

There was no positive error in the court's definition of the term "delivery"; and, if it was wanting in fullness, appellants should have asked a correct charge supplying the omission. They requested the court to charge the jury as follows: "By the term 'delivery,' as used in the second paragraph of the general charge, is meant an actual delivery of the cattle in controversy; and you are instructed that if anything remained to be done by J. L. Hull with the cattle in order to pass them to J. H. Davis & Bros. at the time plaintiffs' writ was levied on them, then such delivery was not complete, and the title to said cattle did not pass to said Davis & Bros." This charge was properly refused, because it contained the unqualified declaration that, if there was no delivery of the cattle to appellees prior to the levy of appellants' attachments, then appellees acquired no title; whereas, under the ruling on the last appeal, if the written contract which modified the bill of sale was canceled prior to the levy of appellants' attachments, the bill of sale which was executed and recorded in substantial compliance with article 4564 of the Revised Statutes of 1879 vested title in appellees, though there may have been no delivery. We conclude that no reversible error has been pointed out, and therefore the judgment will be affirmed.

WATKINS et al. v. MARKHAM et ux.

(Court of Civil Appeals of Texas. June 10, 1896.)

HOMESTEAD — MORTGAGE TO SECURE LOAN — ESTOPPEL.

Plaintiffs, in the application for a loan, alleged upon oath that the land offered as security was not their homestead or the homestead of any other person. It appeared, however, that defendant's agent knew that plaintiffs had a homestead right in the property. *Held*, that plaintiffs were not estopped from maintaining an action to set aside the deed of trust given to secure the loan made in accordance with the application on the ground that the property was their homestead.

Appeal from district court, Hunt county; E. W. Terhune, Judge.

Action to set aside a deed of trust, brought by W. Markham and wife against J. B. Watkins and others. There was judgment for plaintiffs, and defendants appeal. Affirmed.

W. L. Williams and B. F. Looney, for appellants. Matthews & Neyland, for appellees.

FISHER, C. J. This suit was instituted by W. Markham and his wife, Elizabeth Markham, against the appellants, in the district court of Hunt county, Tex., on November 16, 1893, for the purpose of having annulled and canceled certain instruments claimed by plaintiffs to be void, and a cloud on their title

to the 47½ acres of land in controversy. The plaintiffs' allegations are voluminous, but the case, in brief, as pleaded by them, is that in June, 1888, plaintiffs made application to the J. B. Watkins Land Mortgage Company for a loan of \$500, and offered as security the 47½ acres of land involved herein; that the loan was made, and plaintiffs executed certain deeds of trust on the said 47½ acres to secure the same. One trust deed, in which J. B. Watkins was trustee, was given to secure Charles Swanell, the beneficiary in the payment of the principal sum and a portion of the interest. In the other trust deed M. J. Dart was trustee, and it was given to secure the payment to J. B. Watkins of a certain series of interest notes, being a part of the interest on the principal sum loaned. Plaintiffs alleged that on default in the payment of an interest note the land was, under the trust deed, advertised and sold, and that J. B. Watkins became the purchaser at said sale, and afterwards conveyed it to A. J. Jasper. They further allege that at the time of the loan, and ever since that time, the land was a part of their homestead, and that the instruments were, therefore, void, and they prayed their cancellations. Defendants pleaded the general denial, not guilty, and set up by way of estoppel that, in order to induce the loan, the appellees made a written application under oath, in which they stated that the 47½ acres of land were not their homestead, or any part thereof, or the homestead of any other person, but that their homestead, upon which they then resided, and to which their title was perfect, consisted of a house and lot in the town of Farmersville, Collin county, Tex.; and, further, that they then owned in Hunt county, Tex., 200 acres of land, excluding the 47½ acres, and their Farmersville homestead; that, relying upon these statements so made, the J. B. Watkins Land Mortgage Company made the loan of money in question, and accepted the said 47½ acres as security. Defendants alleged further that the said 47½ acres was no part of the homestead of plaintiffs, but that their homestead was in the town of Farmersville, upon which they resided. Defendant Jasper, in a cross bill, also set out his title, and prayed that plaintiffs' claim as a cloud on the title be removed, and that he have his writ of possession. The court tried the case without a jury, and gave judgment for plaintiffs. There is no statement of facts in the record, but there are conclusions of fact found by the trial court, which we adopt as the facts in the case. The conclusion of the court that the property in controversy was the homestead of appellees when the deeds of trust were executed is supported by the facts found on this branch of the case. The findings of fact clearly show that Nicholson was the agent of appellants when the deeds of trust were executed and the loan procured, and that he knew of the existence of the appellees' homestead rights in the property. The court correctly applied the law to

this state of facts, and properly held that the appellees were not estopped, and that the deed of trust could not be enforced upon the homestead. This is all we deem necessary to say in disposing of the case; therefore the judgment is affirmed.

HARTFORD FIRE INS. CO. v. MOORE.¹
(Court of Civil Appeals of Texas. May 13, 1896.)

INSURANCE — DESCRIPTION OF PROPERTY — AVOIDANCE.

1. A policy of fire insurance written on property described as the "Hotel Central, a two-story, metal-roof building," is not avoided by the fact that a part of it was only one story, where it appears that the property was insured as a whole, and that it was the building in the minds of the parties, and the one intended to be covered by the contract of insurance.

2. Where the insurance agent was acquainted with the premises insured, and could have made an accurate description from his knowledge of them, the company cannot, after receiving the premium with such knowledge, avoid its obligation by showing a misdescription of the property.

Appeal from district court, Bexar county; S. G. Newton, Judge.

Action by L. W. Moore against the Hartford Fire Insurance Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Leake, Henry, Reeves & Greer and Perry J. Lewis, for appellant. I. B. Henyan, for appellee.

NEILL, J. This is a suit by appellee against appellant on the insurance policy described in our first conclusion of fact. There was a judgment rendered upon the trial in favor of plaintiff for \$2,158.50, from which the defendant has appealed.

Conclusions of Fact.

(1) On the 22d of January, 1894, the Hartford Fire Insurance Company, by its policy of that date, insured the appellee, L. W. Moore, for the term of one year from the 22d day of January, 1894, at noon, to the 22d day of January, 1895, at noon, against all direct loss or damage by fire, except under certain provisions, not necessary to mention, to an amount not exceeding \$2,000, to the following described property while located and as described in the policy as follows, to wit: "\$1,500. On the two-story stone and iron-clad metal-roofed building occupied as hotel, as situated on the south side of Main Plaza N. 212, known as 'Hotel Central,' San Antonio, Texas. \$500.00 on hotel furniture, beds, beddings, carpets, mirrors, pictures, and crockery ware, cooking utensils, range, iron safe, office and other furniture and fixtures incidental to a hotel,—all while contained in the above-described building."

¹ Rehearing denied.

The policy contains this written statement: "It is understood that within building stands on leased ground," and the stipulation that it "shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein"; "or if the interest of the insured be other than unconditional and sole ownership." It also contains the following provisions: "In all matters relating to this insurance no person, unless duly authorized in writing, shall be deemed the agent of this company." "And no officer, agent, or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon, or added hereto; and as to such provision or condition no officer, agent, or representative shall have such power, or be deemed or held to have waived such provision or condition, unless such waiver, if any, shall be written upon or attached hereto; nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the assured unless so written and attached."

(2) The building insured and known as "Hotel Central" was of two stories, situated and fronting on Main Plaza, but a part of the building in the rear was only one story. Without this one-story part the building would not have been complete, for one room was partly of the two and one story parts of the structure, and some of the furniture insured was in the one-story part of the building when the policy was issued. The agent of the appellant who solicited and effected the insurance officed in the building, and was familiar with its structure.

(3) After the policy was issued, a part of one of the walls of the building was claimed by Mr. Garza. The appellee knew nothing of this claim when the insurance was effected, and, Mr. Garza having informed him that his vendor had paid him a dollar per month for the part of the wall so claimed, and asked him to pay a like rent, appellee went to appellant's agents who wrote the policy, informed them of Garza's claim, asked them if the proposed lease, which had been written, but not signed by him, would affect his insurance, and, being told by them it would not be affected by such lease, and to go ahead and sign it if he liked, he asked them to note on the policy about the lease, and was told that it was useless. He then signed the lease. The evidence does not show that Garza really owned the part of the wall claimed by him.

(4) At the date of the policy the interest of the appellee in the property insured was truly stated therein, he being the unconditional and sole owner of the building and hotel furniture thereby insured. This interest continued in appellant until the property

covered by the policy was destroyed by fire on the 14th of February, 1894.

(5) The actual cash value of the building insured which belonged to appellee at the time of the fire was \$3,000; and the actual cash value of the furniture insured and owned by appellee at that time was \$1,000.

Conclusions of Law.

The appellant asked the court to instruct the jury "That the insurance policy sued upon insures a two-story stone and metal-roof building, and does not insure a one-story shed or addition"; and assigns its refusal as error. The charge asked, in our opinion, submits no issue in the case. The evidence did not tend to show that the building destroyed and claimed to have been insured was "a one-story shed or addition." It was all to the effect that it was the Hotel Central, "a two-story, metal-roof building." True, a part of it, as shown in our conclusions of fact, was only one story; but it was insured, as is apparent from the evidence, as a whole; and, if the description is not strictly correct, the policy should not, on that account, be avoided, for it is the building in the minds of the parties when the contract of insurance was made, and intended to be covered by it. Besides, the agent of appellant who effected the insurance was acquainted with the premises, could have made an accurate description from his knowledge of them, and the company cannot now, after receiving the premium with such knowledge, avoid their obligation by showing a misdescription of the property. *Wood, Ins. (2d Ed.)* § 153, and authorities therein cited.

The only other assignment of error insisted on is, the court erred in not sustaining appellant's motion for a new trial, in that the uncontradicted evidence showed that plaintiff, at the time of the fire and during the life of the policy, was not the sole and unconditional owner of the property insured. Our fourth conclusion of fact, which we think is fully sustained by the evidence, disposes of this assignment adversely to appellant, and renders discussion of it unnecessary. The judgment of the district court is affirmed.

MAVERICK v. BOHEMIAN CLUB et al.¹

(Court of Civil Appeals of Texas. May 20, 1896.)

CHATTEL MORTGAGE—EFFECT OF FAILURE TO FILE FORTHWITH—SUBSEQUENT CREDITORS.

Under Rev. St. 1895, art. 3328, providing that a chattel mortgage not filed for record forthwith shall be void as to creditors of the mortgagor and subsequent purchasers and lienholders in good faith, such a mortgage, though not filed at once after its execution, is not void as to those who became creditors after its filing.

Appeal from district court, Bexar county;
Robert B. Green, Judge.

Action by W. H. Maverick, against the Bohemian Club and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Wm. S. Temple, for appellant. B. J. De-witt and C. T. McGill, for appellees.

FLY, J. Appellant sued the Bohemian Club for \$286, alleged to be due for the rent of certain rooms on Soledad street, city of San Antonio. It was sought to foreclose a landlord's lien on a certain Emerson upright piano and a piano stool, and Thomas Goggan & Bros. were made parties defendant as setting up a claim to the piano and stool. Other defendants were also joined as claiming the property. The case was tried by the court without a jury, and resulted in a judgment declaring the lien of Thomas Goggan & Bros. superior to all others, and foreclosing the same in their favor on the piano and stool. The Bohemian Club purchased a piano and stool and scarf from Thomas Goggan & Bros. on September 30, 1892, for which it agreed to pay \$360, and to secure the same gave a mortgage on the property. The mortgage was filed with the county clerk of Bexar county on November 21, 1892, nearly two months after its execution. On February 9, 1893, over two months after the mortgage had been filed, the Bohemian Club leased of appellant certain rooms in the city of San Antonio, agreeing to pay \$55 per month for the same. The club held the rooms until the end of November, 1893, and at that time owed a balance for rent of \$286. It is claimed by appellant that the failure to file the mortgage forthwith with the county clerk rendered it "absolutely void as to all lien creditors of its maker without any distinction as to whether such creditors acquired their lien on the mortgaged property previously or subsequently to the delayed filing of the chattel mortgage." This proposition is not a sound one, and cannot be maintained. It is provided in article 3328, Rev. St. 1895 (Sayles' Civ. St. art. 3190b), that: "Every chattel mortgage, deed of trust or other instrument of writing intended to operate as a mortgage of, or lien upon personal property which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the property mortgaged or pledged by such instrument shall be absolutely void as against the creditors of the mortgagor or person making the same and as against subsequent purchasers and mortgagees or lien holders in good faith, unless such instrument or a true copy thereof shall be forthwith deposited with, and filed in, the office of the county clerk of the county where the property shall then be situated, or if the mortgagor or person making the same be a resident of this state, then the county of which he shall at the time be a resident." We are of the opinion that appellant cannot properly be placed in either class of persons against whom the statute

¹ Rehearing denied.

declares that the mortgage not filed forthwith shall be void. We have seen no case that holds that the mere omission to deposit and file the instrument forthwith will render it void as to those who become creditors after the delayed filing. The creditors referred to in the statute are those who had become such prior to the filing of the instrument. *Vickers v. Carnahan*, 4 Tex. Civ. App. 305, 23 S. W. 338, and authorities therein cited. The judgment is affirmed.

MALONE v. MAYFIELD et al.

(Court of Civil Appeals of Texas. May 2, 1896.)

MECHANICS' LIENS—ENFORCEMENT—EVIDENCE.

Where the building contract provides that, on failure of the contractor to complete the building, the owner may do so, and deduct the cost from the contract price remaining unpaid, and that the certificate of the architect as to the cost of completing the building shall be conclusive as to the cost thereof, the certificate is admissible to show the cost of completing the building, as against persons seeking to enforce mechanics' liens for material furnished the contractor; the latter having defaulted, and the owner having finished the building.

Appeal from district court, Clay county; George E. Miller, Judge.

Action by J. S. Mayfield and others against M. Malone to enforce mechanics' liens. From a judgment for plaintiffs, defendant appeals. Reversed.

Stine, Chesnutt & Hurt, for appellant. Templeton & Patton, for appellees.

STEPHENS, J. By this suit J. S. Mayfield and others sought to foreclose their several liens for material furnished Squires & Kilgore, and used by them in the construction of a couple of brick houses for appellant on adjacent lots in the town of Henrietta. The contract between appellant and Squires & Kilgore was written, and required the latter to furnish all labor and material, and complete the buildings by December 1, 1892, according to plans and specifications therein referred to, for which the former obligated herself to pay them \$6,850, as follows:

When first-story joists are on.....	\$ 600 00
When second-story joists are on and iron work set.....	1,600 00
When plastering is done, and all sash in	900 00
When complete, and accepted by the architect and owner.....	2,350 00

Squires & Kilgore failed to complete the buildings, and seem to have abandoned the undertaking in the early part of January, 1893, whereupon appellant employed Ferrier Bros. & Wirz to finish the work, which they did, under the following contract: "Henrietta, Texas, Jan. 14, 1893. I hereby agree to employ Messrs. Ferrier Bros. & Wirz to furnish all necessary labor and material to complete said building, and to complete it in accordance with the plans and specifications,

and to pay them therefor the actual costs of said work and material, and the sum of three hundred (\$300) dollars for their own time and labor: provided, however, that all claims are audited by the architects, and certified to by them as correct, payments to be made every two weeks upon certificates issued by the architects. [Signed] Margaret Malone. Ferrier Bros. & Wirz." The original contract with Squires & Kilgore contained the following article: "(12) Should the contractors at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of material of proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements on their part herein contained, such refusal, neglect, or failure being certified by the architects, the owner shall be at liberty, after three days' written notice to the contractors, to provide any such labor or material, and to deduct the cost thereof from any money then due or thereafter to become due to the contractors under this contract; and if the architects shall certify that such refusal, neglect, or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractors for said work, and to enter upon said premises and take possession of all material thereon, and to employ any other person or persons to finish the work and to provide the material therefor; and, in case of such discontinuance of the employment of the contractors, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner, the difference shall be paid to the contractors, but if such expense shall exceed such unpaid balance the contractors shall pay the difference to the owner. The expense incurred by the owner, as herein provided, either by furnishing material, or for finishing the work, and any damage incurred through such default, shall be audited and certified by the architects, whose certificate thereon shall be conclusive upon the parties."

Appellant read in evidence the certificates of the architects named in this original contract, showing that it had cost her \$2,900 to have the buildings completed by Ferrier Bros. & Wirz; but they were excluded on motion of appellees, because the original plans and specifications, which were in possession of the architects, had not been produced. To this ruling the thirteenth error is assigned, under which the following proposition, which we approve, is submitted: "The certificates of the architects of the amounts due Ferrier Bros. & Wirz for completing the buildings were admissible, because, by the original contract between Mrs. Malone and Squires & Kilgore, the certificates of the architects as to the cost of completing the buildings in the event Squires & Kilgore abandoned the work

were to be conclusive." By the very terms of the article quoted above from the original contract, by which the rights of all parties are to be measured, these certificates were not only made competent, but conclusive, evidence of that for which they were offered, including the conclusions of the architects. No attack was made upon them for fraud or mistake. *Kilgore v. Society* (Tex. Sup.) 35 S. W. 145. The mechanic's lien law expressly provides that in no case shall the owner be compelled to pay a greater sum for material furnished than the price stipulated in the original contract between the owner and the original contractor. *Sayles' Supp. art. 3166*. Appellant had the right, under the original contract, to have the houses built as therein provided, and, in case of failure or refusal on the part of Squires & Kilgore to do so, to have it done herself, and deduct from the original contract price the amount required to so complete the buildings, though it left nothing for those who sought to fix liens. Their rights were subsequent and subordinate to this right of appellant, of which they were bound to take notice in furnishing material to the contractors. They could not vary or change that contract, but could have declined to furnish material under it. We think the evidence was not only competent when offered by appellant, with or without the plans and specifications, but do not very well see how appellees could have clearly made out their case without showing what it had cost appellant to complete the buildings according to the plans and specifications; it not distinctly appearing from the evidence that a sufficient amount had been paid on the orders of Squires & Kilgore, after appellees had given notices of their liens, to cover the total amount of these liens as adjudged in this case. Some of the charges complained of seem also to be at variance with the views here expressed. The judgment must therefore be reversed, and the cause remanded for a new trial.

GAAR, SCOTT & CO. v. STARK et al.

(Court of Chancery Appeals of Tennessee. Dec. 7, 1895.)

SALE—WARRANTY—NOTICE OF DEFECTS—NOTICE TO AGENT—NOTICE BY MAIL—ACCEPTANCE—COST OF REPAIRS—VOLUNTARY PAYMENTS.

1. A warranty on the sale of a threshing machine provided that "if, in one week from the time of starting, it shall not perform" as warranted, "the purchaser agrees to notify" the vendor and its agent, named. *Held*, that the warranty must be construed as providing that if, after a week's trial, the machine did not do the work it was warranted to do, notice should be given within a reasonable time, and not necessarily within the week.

2. Notice to the vendor's general agent within two weeks is notice to the vendor, within the provision of the warranty.

3. Proof that a notice, properly addressed to a certain person, was deposited in the post office, prepaid by sufficient postage, was suffi-

cient to show notice to that person, within the meaning of an agreement requiring notice to be given to that person, although it was not shown that the letter was received.

4. Notice of the defects, given by the agent to the vendor in accordance with the requests of the purchaser, is a compliance with the warranty, it not being necessary that notice should be from the purchaser direct.

5. Under a warranty providing that if, in one week, the machine sold does not work satisfactorily, the purchaser shall notify the vendor and his agent, and that, if they do not make it work, the machine shall be returned by the purchaser to the place whence received, and that more than one week's use shall be considered an acceptance, use of the machine after the first week, complaint having been made of its defects, in accordance with the request of the agent to give it further trial, and under a promise that the defects shall be remedied, is not an acceptance.

6. The storage of the machine in a place designated by the agent is a delivery, within the warranty.

7. The purchaser cannot, upon continued use of the machine, recover of the vendor for the loss sustained by running the machine or the amount paid out for repairs.

8. The purchaser cannot recover back money paid on the price after discovery of defects in the machine, such payments being voluntary, under claim of right.

Appeal from chancery court, Sumner county; J. S. Gribble, Chancellor.

Bill by Gaar, Scott & Co. against J. H. Stark and others to recover on a note given by defendants as a part of the purchase price of a threshing machine. Defendants filed a cross bill. Dismissed.

W. W. Pardue and W. S. Callender, for complainant. B. D. Bell, for defendants.

BARTON, J. This is a bill to collect a \$150 note given in part consideration for a threshing machine sold by complainant, a corporation, to defendants. Defense is failure of consideration, in that the machine was defective and worthless, and the answer is filed as a cross bill to recover back, on breach of warranty, \$325 paid on it, and \$250 damages for loss occasioned by repairs, loss of time, etc., the result of the defective machine. We find the facts as follows:

On the 5th of April, 1889, the defendants, on one of the written forms of the company, through W. H. Brown, the local agent of the complainants at Gallatin, Tenn., made a conditional order or purchase from the complainants of the machine in question. The price to be paid was \$450, evidenced by notes,—one due October 1, 1889, for \$150; one October 1, 1890, for \$150; and one October 1, 1891, for \$150,—all of which bear interest, and were signed by defendants and T. A. Stark as security. The first note was paid in full, and about \$17 was paid on the second. Nothing has been paid on the note sued on. This order expresses the terms and warranty on which the machine was sold as follows: "Warranty: The machine herewith ordered is warranted, with proper use and management, to work equal to or better than

any first-class machine made for doing the same work. If, in one week from the time of starting, it shall not perform as the above warranty provides, the purchaser agrees to notify Gaar, Scott & Co., and their agent, above named [W. H. Brown], and allow them to remedy the defects, if there are any (if it be of such a nature that the remedy cannot be suggested by letter), the purchaser agreeing to render necessary and friendly assistance. If the machine cannot be made to fill the warranty it shall be returned by the purchaser to the place where received. More than one week's use of said machine shall be considered an acceptance of it, and this warranty shall not be binding if the machine shall be delivered before settlement shall have been made for the same as stipulated. Defects or failures in any one part shall not affect or condemn any other part. The ownership or title to all the machinery described in this order shall remain in Gaar, Scott & Co. until the same is settled for according to the terms above named." This machine was delivered at Gallatin, Tenn., about April, 1889, through Mr. William H. Brown, agent. Until this time the purchaser had never seen nor examined it. At this time Mr. J. H. Stark noticed defects in the machine, such as that the grain pan or shaker was rotten, and full of wormholes, but had been puttied up; that there was a crack in the iron brace that held the cylinder in place; that some of the tools were missing, and it looked like it had fallen and split one of the main sills. These defects were called to the attention of the agent, Mr. Brown, who said the company would make good these or any other defects there were about it. It was started under the directions of an expert of the company, and his attention was called to a defect in the main brace, and he said it would not be serious, but if anything was wrong the company would fix it, and he agreed to notify the company of it. The expert did not remain to get the machine to work successfully. The evidence shows the machine, for some reason, probably defective material and workmanship, was defective, and practically worthless for the purposes for which it was sold, from the beginning. It was tried by defendants for parts of three seasons, but they were never able, though they had it in the hands of suitable and experienced men, to make it work successfully, and could never work it except at a loss. It had proper use and management, and it did not work better nor equal to any first-class machine made for doing the same work. In fact, it would not work at all, except at a loss to those owning and using it. It was not fit and suitable for the purpose for which it was sold, but was broken, rotted in parts, badly adjusted, and defective. The defendants attempted to run the machine a part of three seasons, but disastrously each time, and were only able to thresh a few crops each season, and those at a loss,

and not well done, and had to abandon the effort each time, and finally to lay aside this machine, and get another, which they did. We find the above to be true. The evidence on these points is full and without conflict. These facts are proven by J. H. and T. A. Stark, W. H. Edwards, J. C. Crutcher, Milton Kirkpatrick, W. T. Dugger, and W. D. Williams; and there is nothing in the record to conflict with this, except the inferences to be drawn from the length of time the defendants kept the machine, and their alleged failure to make complaint, to be hereafter noticed. Although the agents and some of the officers of the company are examined, they are not even asked, and do not say, even, that the machine was a good and suitable machine when delivered, or that it was apparently sound and of good material, or that it was at all up to the warranty, or suitable for the purposes for which it was sold, though this was the point in issue. The names of the parties for whom the defendants threshed are given, and yet not one of them is brought forward to prove the machine was a success. Oldham, one of the complainant's witnesses, who worked for Mr. Brown, and who was present when the machine was started, does say it started off very well, and was working nicely; but the proof is that he and the expert sent out to start it did not stay 20 minutes, and not long enough to see how it did work, and even this witness says there was a piece of timber in the machine that proved to be "doty," and had wormholes in it, and gave way, and was afterwards replaced, and that Stark made complaint of this the day it was at the depot. So we find the positive proof is that the machine was rotten, defective, unsuitable for the purposes for which it was sold, and not at all up to the guaranty.

The contention of the complainant is, however, that the defendants accepted and kept the machine, and made no complaint; that the terms on which complaint was to be made, and the terms of the guaranty were fully expressed in the written contract; and that the defendants are bound thereby, not having pursued the methods there laid down, nor given the notice there required. As to this we find the facts are as follows: When the machine was at the depot, before delivery, defendant J. H. Stark pointed out and objected to several defects to the local agent, W. H. Brown, who promised to have the same fixed. He pointed out the same defects, and others, and made complaint to the expert sent out to start the machine, and he said the company would fix it, and promised to notify them of the defects. In about five days after the machine was started, the defendants notified Brown, the local agent of the complainant company, of the defects and failure of the machine, and he promised to have it fixed, and to write to the general agent at Nashville, and to the company at Richmond, Ind. Oldham, complainant's wit-

ness, says he thinks Mr. Brown, for whom he was working, wrote to Gaar, Scott & Co. about it, or to Mr. Henry, their agent. Mr. Brown, at this time, about five days after the machine commenced running, wrote a letter to Gaar, Scott & Co., ordering a piece that was broken, and notifying the company of the breaking down of the machine, and this letter was placed by Mr. T. A. Stark in the post office, postage paid, mailed by him, and addressed to Gaar, Scott & Co. at Richmond, Ind. Two of the employes of the company, the secretary and correspondent, say that this letter was not on file, and they could find no letters from Brown on this subject; but they are both men over 70 years old. They develop, in their deposition, some weakness of memory or loose business methods, as they have evidently lost trace of some letters written by Stark Bros. and received on this subject, one of which had been produced, and one never was. But that this letter was not on file is not proof that it was not received, and is not, in our opinion, sufficient to overcome the presumption that it was. We believe, and find, this letter was sent and received. We further find that, on the 15th of July, within two weeks, and probably within a week after the machine was started, the local agent, Brown, in accordance with the request of defendants, and in compliance with his promise to them, wrote to Henry, the general agent of complainant for the state, with headquarters at Nashville, as follows: "Stark's thrasher is out of fix. He says that one whole side of it is rotten, and that he cannot hold it together. Come at once yourself, or send a competent man to examine it. Yours, truly, W. H. Brown." This letter was duly received by Henry, a part of whose business, he says, it was to start and look after machines, and in a few days he went out to see about it, and got in about a half a mile of where the machine was, and turned around, and went back without investigation, because some one told him that they had the broken parts repaired. It does not appear that this was any one representing, or authorized to represent, the defendants. After this the defendants made repeated complaints to Brown, the local agent, who asked them to keep and make further trials of the machine, and promised that the company would fix it all right. In August, 1889, several telephone messages were sent by defendants to Henry, general agent of complainants, at Nashville, notifying him of trouble with machine, and requesting him to come and fix it, which he failed to do. Complaint was made all along, while defendants tried to use the machine, to Brown, the local agent, and he said he wrote to the company every time complaint was made. The only reply to this is: "No letters of Brown's were found in the company's files." On the 15th of November, 1889, Stark Bros. wrote to Gaar, Scott & Co., at Richmond, Ind., in

which they notified them of trouble with machine, and wrote them to send agents to adjust matters. To this complainants replied on the 18th of November, 1889, stating it was the duty of the defendants to notify them at once of any breaks, and to give them opportunity of remedying it, and asking for further description of broken parts and defects. Defendants wrote another letter on the 26th of November, 1889, which is not produced, in which they evidently made complaint. To this complainant replied on the 29th of November, 1889, saying they didn't understand how the break could have occurred, but say their warranty says: "Whenever anything breaks from any defect of ours, we will send a new piece to take its place, etc., and agree to send new pieces to cure defects." They further say: "We think it would be much better for you to pay your note, as we always do right with our customers in reference to such things, and fulfill the warranties, and there is no use to put you to extra expense and lawyer fees on you for this collection," etc. The proof further shows that defendants offered to return the machine, but were requested by Brown, local agent for complainant, to place it, instead, under a shed of one of the defendants, and this was done. The repeated trials of the machine were made by the defendants at the request of Brown, local agent. T. A. Stark, brother of the defendants, and security on the notes, wrote Gaar, Scott & Co. the two letters of November 15th and 26th complaining of the machine. These letters he signed, "Stark Bros., per T. A. Stark." After this he wrote letters of November 5, 1890, December 4, 1890, January 20, 1891, March 5, 1891, and May 20, 1891,—all of which he signs as "T. A. Stark," in all of which he asks for further time, and gives excuses for not paying up, but makes no complaint of the machine. In two of these letters, those dated March 5, 1891, and December 4, 1890, he makes remittances of \$40 and \$75, respectively. In all of these letters he speaks of the debt as his own, of having to pay it, and that he will have to stay it if sued on the notes. In the letter of November 5, 1890, he says: "As I have the note to pay, I will ask you to give me more time, say until about 25th Nov." These letters are filed as Exhibits A, B, C, D, E, F, and G, to T. A. Stark's deposition. It appears that he helped to run the machine for his brothers. He says he remitted the money his brothers left with him. He says some of these letters were written without his brothers' knowledge. He further says that these promises were made, and the machine retained, under constant promises and assurances from Brown, the local agent, that the machine would be made all right, and the guaranty complied with. It further appears that he at one time made, or undertook to make, a compromise of the matter, which was agreed to by the company, by which

the defendants were to pay or secure one-half of the last note, the other half to be released. This compromise his brothers repudiated, saying they would pay nothing more, having already paid too much on the machine. None of the promises, except those in the first two letters above named, appear on their face to have been made on the part or in behalf of the defendants, but on behalf of and in his own name. He was not in partnership with his brothers, nor part owner of the machine, but worked for them. It further appears that, while they had the machine, the defendants paid out the sum of \$75 in repairs. We also find that defendants were damaged and lost money in trying to run the machine, on account of its defects,—to what amount the proof does not show.

On these facts the question arises, did defendants comply with terms of written contract, and give the required notice, etc.? What is the meaning and what are the terms of the contract? The complainants' contention is that notice must be given by defendants both to Gaar, Scott & Co. at Richmond, Ind., and Brown at Gallatin, of defects complained of, and within one week from the time the machine started. We do not think this the meaning or proper construction of the contract. The true meaning, as we understand it, is that the machine is to be given a week's trial, a week's use. If, during that time, it did not come up to the warranty, then the notice of defects must be given,—not within the week, but with reasonable promptness after the week's trial,—and complainants were then to be given an opportunity to remedy the defects. How long is not specified, but it would be for a reasonable time. If the machine was worked and used more than a week, then this was to be taken as an acceptance of the machine. Under this, we take it, if the machine worked satisfactorily for a week, it was the test agreed on by the parties; and if defendants continued to use it, making no complaint, it was to be taken as a decision by them that it was all right. But, if, during this week, defendants discovered defects, it would be their duty to make complaint with reasonable promptness, to avoid the presumption of acceptance, and probably they ought not to make further use of machine until notice given. However, we are satisfied that notice was given promptly, and the weight of evidence is within a week, to the local agent, Brown. He requested continued tests of the machine, and wrote to Gaar, Scott & Co., and to the state agent, Henry, of the troubles. Whether the notice had to be sent to Gaar, Scott & Co., at Richmond, Ind., the headquarters of the company, or whether the notice to General Agent Henry would be sufficient, is unnecessary to determine, because we find notice was sent to both, though we incline to the opinion that Gaar, Scott & Co., being a corporation, and only capable of receiving notice through its

officers and agents, and the guaranty not prescribing where nor to what agent the notice should be sent, that a notice to the general agent in Tennessee, particularly when it was a part of his business to look after these machines in this shape, would have been entirely sufficient. But, as we say, notice was sent to both, given to Brown, and mailed to Gaar, Scott & Co., within the week, and sent to Henry within two weeks, and within the reasonably prompt time which, we think, the law would require. The contract does not require the notice to be in any particular way or shape. So we think that a verbal notice given to Brown, and these letters written by him for and at the request of the defendants to Gaar, Scott & Co. and Henry, notifying them of defects and trouble, and requesting the machine be fixed, would be a sufficient compliance with the contract, as being notice from them; the pith of the contract being that complainant was to be promptly notified of trouble, and given opportunity to remedy matters. Contracts will always be construed reasonably, and in accordance with what the evidence shows the subject-matter to be, and the consequent object of the parties to it. *Railroad Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 566.

The complainants' counsel cite us to the case of *Aultman & Co. v. McClannahan & Bro.*, decided by the supreme court of this state in February, 1894, as decisive of this case, and as authority that the notice must be given within a week. There was no written opinion in that case, but we have carefully examined the decree of the court and the transcript of the record, and find that the contract in that case was essentially different from this. The character of notice, how, when, and within what time to be sent, were there expressly and in precise terms provided for. We are also referred with confidence, by complainants' counsel, to the case of *Lewis v. Hubbard*, 1 Lea, 436. In that case the contract was that sellers "guaranteed the machine to do superior work, to be made of good material, durable, and with proper care. If the machine does not bear the guaranty, after reasonable trial, we are to be notified of the same at once; and if we fail to make the machine work well, or do not furnish another that will answer the guaranty, it may be returned." In a suit on the note given for the machine, the proof was the sale was made 13th of July, 1873. The note was due at four months after date. The machine was used by defendant for the season of 1873 without notice or complaint. During the winter of 1873-74 defendant met one of complainants' agents, and told him the machine had not worked well, but proposed to keep it, and use it during the season of 1874, as he supposed its failure might be due to the fact that the horses were too light. That it was tried during the season of 1874, and proved a worse failure than before, but it did not appear in proof that, after the test in 1874.

there was any notice to plaintiffs, or offer to return the machine. The circuit judge told the jury that a failure to make an offer to return the machine deprived the defendants of the right to return it, and amounted to an election to keep it at what it was reasonably worth, and that, in that view, if the proof showed the machine not to be as represented, the defendants were entitled to an abatement to the extent of the difference between the contract price and real value of the machine. The jury allowed plaintiffs nothing. The supreme court said: "The charge would be correct in case of an ordinary warranty, without the special terms in favor of the warrantor; but, under the stipulation referred to, the defendants had not the right to abandon the machine without notice, and without giving them an opportunity to cure the defect or to supply another machine." This was clearly right. The parties had agreed exactly on the remedy, and the course to be pursued in case of defect, and one of the parties was trying to deprive the other of the rights so fixed. But in this case, as we have found, there were repeated notices, when the machine was attempted to be delivered in the first place, and agents' attention called to the fact. After a trial of five days, there were notices to the local agent and home office of the company, and a few days later to the general agent for the state; then, after that, in November, notices to the home office, and request to remedy defects, and to send a man for this; and, after the trials in the second and third season, an offer to return, and a return and delivery by placing the machine where the agent directed it to be done. The proof is not clear that, after November, 1889, there was any direct notice to the home office of the company; but we think this not essential, as the company had full notice once, and after this it was held and tried by defendants under assurances that matters would be arranged and defects cured, but they never were. The complainants had every opportunity the contract contemplated, and never even sent a man to see the machine. That case, however, is, in our opinion, applicable to one phase of this case; the principle decided being that parties are remitted to the remedies and measures provided for in the contract. The contract in this case contemplates that, if the machine did not work, the plaintiff, on notice, which it had, had the right to remedy the defects, which it did not do, and, in case it failed to do so, defendants were to return the machine, which they finally did. But, under the stipulations of this contract, defendants would have no right to spend money on this machine and charge same up to plaintiff, nor to run it at a loss and recover such damages against plaintiff. This, as we take it, was exactly one of the contingencies intended to be provided against if the machine would not work. The remedy was to return it,—not to run the plaintiff in debt by

the unauthorized use of it. A retention of the machine awaiting repairs, or for further trial, whether by mutual agreement or at special request of plaintiff's agent, could not, we think, render defendants liable for the entire price, nor make plaintiff responsible for repairs it did not authorize, nor losses and damages it did not contemplate.

We are further of the opinion that, as the money paid by defendants to plaintiff on the machine was all paid under a claim of right by defendants, after discovery and full knowledge of defects, and after plaintiff had failed to remedy defects, though requested to, such payments must be held to be voluntary, and cannot be recovered back. While we are of the opinion, and hold, that the assurances of complainant's agents that defects would be repaired is a sufficient excuse for the long time the machine was kept by the defendants, and that, under these circumstances, such retention and repeated trials will not enable the complainant to hold defendants for full price, and amounts unpaid on the machine as being an acceptance and approval of the machine as being up to the warranty, yet the complainant was insisting on these payments as a matter of right, and the defendants, with full knowledge, yielded, and made the payments. The plaintiff never at any time agreed to pay back such sums so paid, but insisted on them as of right, and simply agreed to furnish and replace defective parts. "A voluntary payment of money under a claim of right cannot be recovered back." 18 Am. & Eng. Enc. Law, p. 214, note 1, and numerous authorities there cited. See cases discussed in *Carew v. Rutherford*, 8 Am. Rep. 291, and also the very full discussion of this subject in 2 *Smith's Lead. Cas.* p. 453, note to case of *Marriot v. Hampton*, where it is shown that the rule announced by Justice Patterson in case of *Duke de Cadaval v. Collins*, 4 Adol. & E. 858, in these words: "When there is money paid with full knowledge of facts, though there be no debt, it cannot be recovered back,"—has been repeatedly affirmed in leading cases. The rule is universal, unless fraud or duress is used to procure the payment. See, also, *Hubbard v. Martin*, 8 Yerg. 499; *Cauvin v. Mayor, etc.*, 3 Baxt. 454. It therefore results that the cross bill was properly dismissed, as defendants were, under the facts developed in this case, entitled to no relief. But we are equally clear that, in view of all the facts, the complainant is likewise entitled to no relief, and that the original bill should be dismissed. The proof shows the consideration of this note sued on wholly failed. Whether we treat it as a conditional sale, never completed, or a failure of consideration, after sale and passage of title to the property, or whether we should sustain the cross bill on the warranty to this extent, and allow the offset, the results would be the same. We hold the consideration for which this note was given failed, and direct a decree dismissing both bill and cross bill.

Complainant will pay all the costs of this cause, except the costs incident to filing the cross bill, which will be paid by defendants.

BRADFORD, Sp. J., and NEIL, J., concur.

Affirmed orally by supreme court, December 20, 1896.

GIBSON v. WILLIS et al.

(Court of Chancery Appeals of Tennessee.
Dec. 7, 1896.)

ACTION BY ADMINISTRATRIX—BENEFICIAL INTEREST IN PROCEEDS—RIGHTS OF ADMINISTRATRIX.

1. One who, as administratrix of her father's estate, obtained a decree of foreclosure upon certain undorsed vendor's lien notes executed to the intestate by his son, is not precluded, in a subsequent suit by said son to enjoin the enforcement of said decree, from claiming the entire beneficial interest in said notes by gift from said intestate.

2. It is not necessarily implied, in a suit by an administratrix on certain undorsed notes executed to her intestate, that the estate has the beneficial interest in said notes; and where there was no allegation that the estate was such owner, nor even a general allegation that the notes belonged to the estate, the administratrix is not precluded from afterwards claiming the proceeds of said notes by reason of a gift thereof from her intestate to herself, particularly where the pleadings in the action on said notes were not sworn to.

3. Where certain vendor's lien notes executed by a son to his father were delivered without indorsement, as a gift, by the latter to his daughter, and said daughter, as administratrix of her father's estate, brought suit upon said notes after her brother stated that he would settle with her if she would qualify as administratrix, said son cannot afterwards claim, in the proceeds, the distributive share of himself and the other heirs, from whom he procured assignments, particularly where he paid nothing for such assignments, and was not in any way prejudiced by the suit on said notes.

Appeal from chancery court, Sumner county; George E. Seay, Chancellor.

Bill by A. M. Gibson against Martha C. Willis and others to enjoin the execution of a decree of foreclosure. From the decree rendered, complainant appeals. Affirmed.

J. J. Turner, for appellant. Wilson & Par-due and Dismukes & Seay, for appellees.

NEIL, J. The bill in this case was filed September 4, 1888, by A. M. Gibson against Martha C. Willis, individually and as administratrix of Elisha Gibson, deceased, and her husband, Joseph S. Willis, and James and Walter Gibson, minors, and their guardian, William Rice. The bill charged Elisha Gibson died in 1884, and that defendant Martha Willis qualified as his administratrix in May, 1885; that her bond was insolvent; that she was a married woman at the time she administered, and that for this reason, and because of the fact that she had no separate estate, her administration was void; that complainant's father on March 3, 1883, sold him a tract of land, and made him a deed to it; that the consideration was \$800, and that he paid a portion of it; that defendant Martha C. Wil-

lis, administratrix of Elisha Gibson, filed a bill against him on said notes, and to enforce the vendor's lien thereon; that he did not answer the bill, and it was taken for confessed against him at the June term, 1888, and that a decree was rendered against him June, 1888, for \$941 and costs of suit; that said decree was declared a lien upon said tract of land, and that the land was ordered to be sold for the enforcement of said lien by the September rules unless the money should be sooner paid, and that the money had not been paid; that defendant Martha Willis had never made any settlement as administratrix; that Elisha Gibson originally had seven children, but left no widow; that the children were Pinckey Gibson, Mary A. Bradley, Thomas Gibson, Henry G. Gibson, Joseph H. Gibson, Martha C. Gibson, and complainant, A. M. Gibson; that Thomas Gibson died, leaving, as his children, William Gibson and E. B. Gibson, adults, and John Gibson and Walter Gibson, minors, who have for their guardian defendant William Rice; that Henry G. Gibson died, leaving, as his children, A. B. Paschell, Ella T. Gibson, Lula Barnes, A. H. Gibson, Seth Gibson, and P. T. Gibson. The bill further charged that the estate of complainant's father, Elisha Gibson, consisted alone of said vendor's notes, and said decree, rendered thereon at the June term, 1888. The bill further charged that complainant had procured a release and settlement of all interests in said estate, except the interest of the said Martha C. Willis, and that she by law would be entitled to one-seventh, and except the interest, also, of the minors John and Walter Gibson, and that they were entitled to one-fourteenth of the estate. Complainant therefore claimed that he was entitled to all of the fund that would be realized by a sale of the land under said decree, and that the land should not be sold until the justice of his claim could be settled. The bill then charges that defendant Martha C. Willis had received advancements from her father to the amount of \$2,250. The prayer of the bill is that Martha C. Willis be removed as administratrix, or, if not, that she be required to settle her accounts in the chancery court; that advancements be settled; that the sale be enjoined until an account can be taken and his rights be ascertained; and for general relief.

September 24, 1889, Martha C. Willis and her husband, Joseph S. Willis, filed their answer and cross bill. In this pleading they admit the qualification of defendant Martha C. as administratrix of Elisha Gibson, deceased; deny that the sureties on her bond are insolvent; admit that, at the time of her appointment, she was a married woman, and was still such at the time of filing her answer and cross bill; deny the right of complainant to have her removed; admit that "she did file the bill on said notes in this court, and a decree has been obtained for sale, and [the land] will be sold by the master unless prevented by this court"; admit the lien was declared and re-

covery had for \$941 and costs. Answering further, she says: "She has never made any settlement for the reason she has never had anything to settle. The estate consists of nothing except these notes, and that only nominally, as the notes belong to her, as will be hereafter explained." Respondent alleges that, during the lifetime of her father, for some 14 years and 9 months before he died, almost blind and otherwise afflicted, and 83 when he died, he was taken care of and waited on by her, at her own house and at her own expense, and most of the time had to be fed with a spoon, and for some time he could not walk. He gave her these notes on complainant to take care of him, and this was right at the time they were given, or close at the time. The notes were then delivered to her, and she held them until her father died, and has held them as her own property, and they now belong to her. At the time the bill was filed, she informed her attorney of this, but he did not remember the same, and perhaps the bill should have been filed for her use and benefit; but, be this as it may, she is advised that this can work no prejudice to her rights, as she will be abundantly able to show the gift complete to her by her father. As to advancements, she admits that she has been advanced to some extent, but insists that complainant's advances exceed hers. She denies that the shares in her father's estate are correctly set forth in the bill. She says there were only six children, in fact; that there were seven, but one died only eight years old. She denies that complainant is entitled to anything under the transfer of shares or interests in the estate claimed by him in the bill. The answer proceeds: "If her appointment is declared void, or she should be removed for any cause, then she will ask to file this answer with her husband as a cross bill, to the end that she be given a decree for this money received from the complainant for this land. There were or are debts for his burial, etc., against her father. She will ask to file this as a cross bill, and adopts all the statements herein made as part of the cross bill, and for a decree in her favor for the notes as a gift to her from her father, and a decree for the money to be paid to her. Or, if this cannot be done, then she will ask that an account be had to ascertain her services in waiting on her father, and she be given a decree for the same, and this may be that way appropriated. If necessary, to settle all matters between her and complainant and the other heirs of the said Gibson, let an account be taken of the advancements made to each, and let each one be charged with what they have been advanced, and settle their rights accordingly. But this is only asked in event she is not decreed these notes as a gift, or that she is not given the same as a debt for waiting on her father." Prayer for "all other relief, general and special, to which she may be entitled." Process was issued upon the answer as a cross bill.

A. M. Gibson answered the cross bill June

22, 1891. He pleads the "statutes of limitation of two years, two years and six months, three years, three years and six months, six years, and seven years in bar of all claims and rights presented by said cross bill." He further insists that it was her duty to make settlement in the county court, and retain for anything due her within two years and six months from May 25, 1885, the date of her qualification, and that, not having done so, she is now entitled to no relief for such indebtedness. Further answering, he says: "He denies that the notes in question—viz. four notes, dated April 1, 1882, and each for two hundred dollars, one due in one day, and the second one due April 1st, 1883, and the third one April 1st, 1884, and the fourth one dated [due] April 1st, 1885, and executed by respondent to Elisha Gibson—were ever transferred, or assigned, or in any way given to said Martha C. Willis or husband, or to anyone else, and he insists that they were the property of Elisha Gibson at the time of his death, and therefore passed to his administrator, and must be administered on as part of his estate. He calls for full, strict, and legal proof of said pretended gift, and the claims of the same." He insists that she was fully paid for all her services, and that the claim of the gift of the notes is an afterthought. The answer proceeds: "As a matter of estoppel as against her, he says that said Elisha Gibson, when he died, had no estate at all, real, personal, or mixed, except said four notes, and this was well known to said Martha C. Willis. She administered on his estate May 25, 1885, and gave bond, and did so alone to administer on said notes for said estate. He also states that she filed a bill in the Sumner county chancery court October 28, 1885, styled 'Martha C. Willis, Administratrix of Elisha Gibson, Deceased, v. A. M. Gibson.' In said bill she set up her administration, and sought a decree on said notes against him as administratrix of said estate. She, upon the ——— day of June, 1888, procured a decree against him for \$941 and costs, and it was in her name as administratrix of said deceased, and she had the same [the land] advertised for sale under said decree." He files as an exhibit to the bill what is claimed to be the record in said cause.

William Rice, guardian of John and Walter Gibson, also filed his answer to the cross bill, making the same defenses as made by A. M. Gibson.

The chancellor rendered a decree in favor of Mrs. Willis' administrator, she having died pending the litigation, against A. M. Gibson on the notes for \$1,173.16, and directed the land to be sold to pay the same. He further decreed as follows: "The court is further of opinion that the judgment in the case of Martha C. Willis, administratrix of Elisha Gibson, on these notes, is void, because the notes were the property of Martha C. Willis, and proved no part of the estate of Elisha Gibson, deceased." From this decree com-

plainant prayed an appeal, as follows: "To the above decree A. M. Gibson excepts, and prays an appeal to the supreme court from said decree, and in refusing him relief upon his original bill, which is granted upon his giving bond for the costs of the cause, which is here done."

The facts are as follows: Elisha Gibson lived with his daughter, the aforesaid Martha C. Willis, some 14 years next prior to his death, and was looked after and cared for by her with unusual tenderness and assiduity. He was very old and infirm, and nearly blind, and needed most constant and watchful care during all the years he lived with his said daughter, and she gave him all the care and attention that a devoted and loving daughter could bestow upon an aged father. The proof shows her conduct to have been worthy of all commendation. In recognition of her filial conduct, and to repay her for her care and attention, Elisha Gibson gave to his said daughter the four notes above described, by delivering the same to her for that purpose, but he did not indorse them. A short time after Elisha Gibson died, the complainant went to see his sister, Mrs. Willis, and wanted to make some settlement with her about the notes. She offered to deduct \$100, and wished him to pay the balance. He did not agree to this, but told her if she would administer he would settle with her. She did administer. He then offered her \$250 to settle the notes. She refused this. In the year 1885, Martha C. Willis filed her bill in the chancery court at Gallatin against the said A. M. Gibson to collect said four notes. The caption of the bill is as follows: "The bill of complaint of Martha C. Willis, administratrix of Elisha Gibson, deceased, a citizen of Sumner county, Tennessee, v. A. M. Gibson, also a citizen of Sumner county, Tennessee." The bill then proceeded to set out the death of Elisha Gibson intestate, and her qualification as administratrix; that Elisha Gibson owned certain land, which he sold April 1, 1882, to A. M. Gibson; that, at the time said land was so purchased by A. M. Gibson, he executed the four notes before mentioned; that these notes were due and unpaid, except as to certain credits appearing upon them,—and exhibited the notes with the bill, and prayed for a sale of the land to enforce the collection of the notes. December 17, 1885, the cause was heard on bill and order pro confesso, and decree was entered as follows: "It appearing that complainant is the administratrix upon the estate of Elisha Gibson, deceased, appointed by the county court at Gallatin, and that, during the lifetime of the intestate, Elisha Gibson, on the 1st day of April, 1882, [he] sold the real estate mentioned and described in the pleadings to defendant A. M. Gibson, and that defendant gave him the four notes exhibited with the bill [describing them, also setting out credits], upon all of which notes there is now due, less credits, principal and interest,

the sum of \$941.74, which is a vendor's lien upon the land sold, and mentioned and described in the pleadings, it is decreed that complainant, administratrix of Elisha Gibson, will recover of A. M. Gibson said sum of \$941.74, and the costs of this cause, for which *fi. fa.* may issue." Then follows an order to sell the land. We further find that, in July, 1888, the said A. M. Gibson procured the following paper from the persons whose names are signed thereto, viz.: "Whereas, our father, Elisha Gibson, died several years since, and Martha C. Willis has administered on his estate; and whereas, she has filed a bill in the Sumner chancery court to enforce the vendor's lien upon four notes given by A. M. Gibson to his father, Elisha Gibson: Now, in consideration of advancements made to us by our father, and what said A. M. Gibson did for our father, and paid him, we, as heirs and distributees, hereby release and quitclaim to said A. M. Gibson all our right, title, and interest to him from said notes, and authorize him to receipt for the same in our names. July, 1888. [Signed] Addie B. Paschall. Seth P. Gibson. E. B. Gibson. P. T. Gibson. A. H. Gibson. P. Gibson. Lula Barnes. Mary A. Bradley." This represents three and one-fourth shares of the estate of Elisha Gibson, viz.: Pincky Gibson and Mary A. Bradley, each one share; E. B. Gibson, one-fourth of one share; and A. B. Paschall, Ella T. Gibson, Lula Barnes, A. H. Gibson, Seth Gibson, and P. T. Gibson, together representing one share, being the children of Henry G. Gibson, a deceased son of Elisha Gibson. Advancements were made by Elisha Gibson during his lifetime to the following children, viz.: Pincky Gibson, Thomas Gibson, Mary Ann Bradley, A. M. Gibson, and Martha C. Willis. It does not appear that advancements were made to any of the other children. We deem it unnecessary to go into the particulars of these advancements. Elisha Gibson died in 1884. He left no estate, unless the four notes before mentioned belonged to his estate.

As to the principles of law involved, the case turns upon the effect of the proceedings in the case of Martha C. Willis, administratrix, v. A. M. Gibson. Is the decree in that case a bar, by way of *res adjudicata*, to the rights asserted by Mrs. Willis in this case? In the case of Coulter v. Davis, 13 Lea, 451, 455, it is said: "To make a judgment or decree a bar to another suit between the same parties, it must appear or be shown that the subject-matter of the former suit was the same, that the proceedings in that suit were for the same object and purpose as those of the new suit, and that the same issue was joined." Compare, also, *Jourolmon v. Massengill*, 86 Tenn. 81, 5 S. W. 719; *Battle v. Street*, 85 Tenn. 292, 2 S. W. 384. And in *1 Herm. Estop.*, at section 129, it is said: "The principle upon which judgments are held conclusive upon the parties requires that the rule should

apply only to that which was directly in issue, and not to everything which was incidentally brought into controversy during the trial." At section 130, quoting from the celebrated judgment of Chief Justice De Gray, in the *Duchess of Kingston Case*, 20 How. State Tr. 578, it is said (page 142): "Neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which comes collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." In the same authority, at page 284, it is said: "The judgment is conclusive on the parties and their privies in estate. The matter in litigation, having passed in rem judicatum, is finally settled, and is concluded when arising on a subsequent proceeding, though before a different tribunal. But where points come collaterally or incidentally under consideration, or can only be argumentatively inferred from the decree, the rule does not apply." To same effect, see 21 Am. & Eng. Enc. Law, pp. 192, 193. Again, it is said, in the last-mentioned authority, at pages 136, 137: "It is just as important that the parties in both suits should be acting in the same capacity in each, as that the parties should be the same." Now, in the case, before referred to, of *Martha C. Willis, Administratrix, v. A. M. Gibson*, the single issue presented was the liability of A. M. Gibson to the administratrix of Elisha Gibson in that capacity. It was not necessary to inquire into who might be the equitable owner of the fund represented by the notes. It may have been inferred that this fund belonged to the estate of Elisha Gibson, but that was not necessarily, or even properly, a matter in issue. The notes had not been indorsed. The legal title, therefore, was in the estate of Elisha Gibson; that is, in his personal representative as such. This, with possession of the notes with purpose of suit, was sufficient to support the suit. Therefore, it was not necessarily a determination of the ultimate ownership of the funds represented by the notes. Again, it is to be observed that, in that suit, A. M. Gibson appeared, not in the capacity of a distributee of Elisha Gibson, but in a capacity apart from that; in short, as any other debtor unallied to the intestate by blood. But, as before stated, to make the bar effectual, the parties must act in the same capacity in the two suits. Hence we conclude that the decree in the first case, said case of *Martha C. Willis v. A. M. Gibson*, does not operate as a judgment bar against the rights claimed by her in the present suit.

But it is said that the proceedings in that suit amount to a judicial admission, and we are referred to a section of 1 Greenl. Ev. § 27, quoted in *Watterson v. Lyons*, 9 Lea, at page 571. It is there said: "In addition to estoppels by deed, there are two classes of admissions which fall under this head of

conclusive presumptions of law, viz.: Solemn admissions, or admissions in judicio, which have been solemnly made in the course of judicial proceedings either expressly, and as a substitute for proof of the fact, or tacitly by pleading; and unsolemn admissions, extra judicium, which have been acted upon, or have been made to influence the conduct of others, or to obtain some advantage to the party, and which cannot afterwards be denied without a breach of good faith." But there is no admission made in the pleadings, nor any statement in the decree, necessarily at war with Mrs. Willis' present claims. The allegations of the bill were, simply, as we have already set forth in our finding of facts, that Elisha Gibson had, in his lifetime, sold a certain tract of land to A. M. Gibson, and that A. M. Gibson had executed four notes for this land, as purchase money, and that these notes were due and unpaid, and that the complainant in that case was administratrix of the deceased. Then the bill prayed for judgment on the notes, and for a decree to enforce the vendor's lien. There was no allegation that the estate was beneficial owner of the notes, nor even a general allegation that the notes belonged to the estate. Unless the mere fact that she sued as administratrix was tantamount to an allegation that the notes were the property of the estate, both technically and beneficially, then there could be no judicial admission of the character referred to in the authority last cited. But we have already shown that no such statement or claim is necessarily implied in Mrs. Willis' suing as administratrix, inasmuch as the notes had not been indorsed, and the legal title, therefore, remained in the estate, although the beneficial interest was in her personally. Moreover, the doctrines governing the subject of judicial admissions are stated more at large in cases subsequent to the 9 Lea case. In *Allen v. Westbrook*, 16 Lea, 251, it is said, at pages 255, 256: "It is insisted, in behalf of the complainants, that the defendant is estopped to assert title to the property by his statement, under oath, in the replevin suit brought by the complainants against one of his creditors for some of the personalty, that the property sued for did not belong to him, but to the complainant Jane under the deed of gift. And it may be considered as settled by the decision of this court that a person cannot, upon grounds of public policy, be permitted to set up title to property after a solemn disclaimer of title under oath, or a solemn admission under oath of title in another, in a pleading or deposition in a previous suit. *McEwen v. Jenks*, 6 Lea, 289; *Cooley v. Steele*, 2 Head, 605; *Stillman v. Stillman*, 7 Baxt. 169; *Stephenson v. Walker*, 8 Baxt. 289; *McCoy v. Pearce*, *Thomp. Tenn. Cas.* 145. It is equally well settled that such statements will not estop the party from proving the truth, if he can show that they were

made inconsiderately, by mistake, or without full knowledge of the facts. *Seay v. Ferguson*, 1 Tenn. Ch. 287; *Chilton v. Scruggs*, 5 Lea, 308; *Smith v. Fowler*, 12 Lea, 163; *Hamilton v. Zimmerman*, 5 Sneed, 39. In other words, the oath, to be binding as an estoppel, must be willfully false, or must have the effect of misleading the other party to his injury. *Behr v. Insurance Co.*, 2 Flipp. 692, 4 Fed. 357. Our cases have generally involved admissions or statements by some pleadings or depositions; but, as statements in pais will often estop the party making them, an oral statement under oath, if willfully false, or acted upon, must be equally as binding as if reduced to writing." In view of the principles thus announced, it cannot be held that Mrs. Willis is estopped, by the form of her suit on the notes, to set up in the present suit her ownership of the fund to be realized by the collection of said judgment. At most, her suit in that form was a mere inadvertence, and, no doubt, superinduced by her brother's statement to her that he would settle with her if she would qualify as administratrix. After leading her into this pitfall, it would be monstrous, now, to allow him to take advantage of his own unfair conduct in thus misleading her.

In what has just been said we have treated the subject as if the bill had been sworn to, while in fact it was not, and as if it were a judicial admission in the stringent form insisted upon by defendant,—that is, under defendant's construction of the bill,—and have found that Mrs. Willis could be relieved of such admission as an inadvertence, through which the real truth of the case was obscured, to her prejudice. Surely, then, under the authorities referred to, if a judicial admission, made under the solemnity of an oath, can be thus relieved from, it will not be difficult to relieve a litigant of the force of an unsworn statement, when it does not appear that the making of such statement has resulted to the prejudice of the party now seeking to take advantage of it. At most, defendant's contention is a bare technicality, devoid of any substantial merit, or of any equitable consideration whatever. He admits that he owed the notes, and that they were a lien upon his land. The decree rendered in said case of *Martha Willis, Administratrix, v. A. M. Gibson* only ascertained these facts, and directed a sale of the land. Viewing him simply in the capacity of a debtor, in which capacity, alone, he appeared in that suit, it was immaterial to him to whom the funds should ultimately go. He was in no way prejudiced or injured by what was done. His indebtedness was ascertained in such a way as to be binding, not only upon the ostensible owner, the administratrix, but also upon her personally. A payment under that judgment would have protected him completely. That was all he had the

right, as debtor, to ask. Nor, by said proceedings, was he in any manner induced to change his position prejudicially. True, pending the suit, he did procure the agreement, heretofore copied, from some of his brothers and sisters, or their children; but it cost him nothing. Besides, although he procured that agreement before the cause went to a decree, he seems to have carefully refrained from calling his sister's attention to it, by setting it up as a defense in the cause, although the order pro confesso was not taken against him for three years. He seems to have reserved that instrument for the very purpose for which he is using it in the present litigation. It can avail him nothing. To sanction his pretensions would be a perversion of justice.

In the present litigation, the issue is presented as to who is the beneficial owner of the fund to be realized by the collection of the decree in the said case of *Martha C. Willis, Administratrix, v. A. M. Gibson*. This issue has never before been presented or passed upon. A. M. Gibson claims that the beneficial interest is in the estate of Elisha Gibson. On the other hand, Mrs. Willis claims that the beneficial interest is in her, and that the estate had only a nominal or technical interest. We think her contention is correct. A decree will therefore be entered here, declaring the rights of the parties as above indicated, and dissolving the injunction restraining the sale of said land, and declaring the right of Mrs. Willis—or of her administrator, she being now dead—to proceed to the enforcement of the decree in said case of *Martha C. Willis, Administratrix, v. A. M. Gibson*. Owing to the death of Mrs. Willis, some supplementary proceedings may be necessary before said decree can be enforced, but as to what these should be does not fall within the scope of the present litigation. We mention the matter only to prevent any misconception as to the effect of our decision. That cause is not before us so that we can make any order as to its disposition, further than to dissolve the injunction granted against the sale in that cause, and to settle the ultimate ownership of the funds when they shall be realized, on the issue as to such ownership presented in the present litigation. As to the costs, inasmuch as the decree of the chancellor appealed from was erroneous as to the relief granted therein, and though that decree is herein reversed, yet the substantial result is still against the complainant herein, we are of opinion that the costs of this court should be equally divided between complainant and defendant. The costs of the chancery court should be paid by the complainant. Decree accordingly.

BRADFORD, Sp. J., and BARTON, J., concur.

Affirmed orally by supreme court, December 24, 1895.

HORNSBY et al. v. DAVIS et al.

(Court of Chancery Appeals of Tennessee.

Aug. 31, 1895.)

ADVERSE POSSESSION—CHARACTER AND CONTINUITY OF POSSESSION—COLOR OF TITLE—WILLS—CONSTRUCTION—NATURE OF ESTATE.

1. Where the vendee of a portion of a tract of land takes possession before receiving his deed, his possession does not constitute possession by the vendor of the larger tract.

2. It appeared that defendant claimed under grants to L. of about 15,000 acres of mountain land, having spots easily cleared; that such grants interlapped a prior grant, under which complainants claimed; that in 1867 L. leased land lying within the interlap, consisting of 31 acres, to A., who built a cabin, and cleared from 1 to 5 acres, and left the place January 1, 1869; that in August, 1870, M. moved there as L.'s tenant, and remained 3 years or more, adding clearings, and left, after selling the lease to one who sold it for value to L.; that in about a year M. returned, and took possession under L.; that from that time M., and other tenants claiming under defendant, held open and adverse possession until 1890, adding improved land, so that it then amounted to 23 acres; that when M. left, 3 years afterwards, there were inclosures of 5 or 6 acres of cleared fields, and 2 or more habitable houses; that while M. was away C. occupied the place part of the time as tenant; that during such time one S. laid claim to the land, and put certain persons in possession of the M. improvements as his tenants; that L. immediately brought suit, and recovered possession; that the lease to M., and leases which were made by L. to several other persons, of land outside the interlap, were intended to give the tenants the right to extend their improvements ad libitum, and to the boundaries of the grants, but not so as to conflict with each other; that it was the object of L. to extend the effect of the tenants' possession to the boundaries of the grants, so as to perfect his title; that L., for 40 years prior to 1890, endeavored to assert his right to control such land, and from time to time grazed cattle thereon, and allowed others to graze, for compensation. *Held*, that defendant's continuous adverse possession of the land within such interlap began with the entry of M., in August, 1870.

3. In such case, defendant's possession was not limited to the actual inclosures, but extended to the boundaries of the title papers.

4. Testator directed his executor to make sale of his "mountain lands," and that the proceeds be equally divided between his heirs. He stated in the will that such land was not included in his estate which he undertook to divide. In another clause he directed that it, and certain other land and other property not included in his estimated \$25,000 worth of property which he had devised, should "be divided among my children as they may agree." *Held*, that the mountain lands were not disposed of by the will.

5. Where testator directs his executor to dispose of certain land by making sale thereof, the proceeds to be equally divided between his heirs, the land is not devised to the executor.

On Rehearing.

1. In ejectment, defendant claimed by adverse possession under a deed of an undivided interest, from his father, dated in 1872, which had been lost, but was found in 1875, and then registered. It appeared that in 1873 defendant's father made him another deed of the entire interest, which recited the execution of the former deed, and provided that, if it was found, it should be void, and that the second deed was in lieu of it. The second deed also recited that the first deed was acknowledged, which was not true. The deed of 1873 was not reg-

istered until 1886, but both deeds were of record when the suit was commenced, and no issue was raised on them in the pleadings. The second deed was in evidence, and was probated by two witnesses, who testified that the grantor acknowledged it in their presence on the day of its date. *Held*, that the deed of 1873 was sufficient as color of title operating from its date.

2. A grant of 5,000 acres of wild mountain land, which conflicted with a prior grant, described it by metes and bounds, courses, distance, old lines, trees, and objects; and the description ended with the words, "to the beginning," and a period. These were followed with the words, "containing, by estimate, 5,000 acres, excluding older titles." The beginning corner was within an interlap; and the bounds, as surveyed, covered 6,600 acres, 3,600 of which were within the interlap. There were no possessions on the land when the last grant was made, and its location or existence was then unknown to the grantee and the officer issuing the grant. *Held*, that the junior grant was color of title, as against the senior, as to the land within the interlap. *Bleidorn v. Mining Co.*, 15 S. W. 737, 89 Tenn. 211, distinguished.

Appeal from chancery court, Blount county; Henry R. Gibson, Chancellor.

Action of ejectment by Angelina Hornsby and others against E. H. Davis and others, which was dismissed as to complainant Hornsby. From the decree, defendants appeal. Modified.

Washburn, Pickle & Turner and Webb & McClung, for appellants. C. T. Cates, Sr., and C. T. Cates, Jr., for appellees.

BARTON, J. This is an ejectment suit, begun April 9, 1891. Complainants claim under grant No. 22,172 issued November 29, 1838, by the state of Tennessee to John McCampbell, Joseph Esterbrook, and William Murray. Defendants Davis, Moores, Metcalf, Stinnetts, Wetzell, Rumsey, Watts, and Line answer, denying complainants' title; claiming title in defendants Watts and Line to so much of the lands sued for as lie within the boundaries of the grants from the state of Tennessee,—No. 24,585, issued January 21, 1842, to Joab Line and Jacob Grubb; No. 27,618, issued July 18, 1850, to Joab Line and George Wright; and No. 24,593, issued January 28, 1842, to Joab Line; disclaiming title to all the rest of the lands sued for; and relying on their adverse possession and the statute of limitations as a bar to complainant's recovery. As to complainant Angelina Hornsby, the suit was by her dismissed.

Title under grant No. 22,172, under which complainants claim, is traced as follows: First. Joseph Esterbrook, on the the grantees, died intestate May 18, 1855, leaving one child, Joseph Esterbrook, Jr., who died July 15, 1855, leaving his mother, Angelina M. Esterbrook, as his heir. She married William J. Hornsby July 23, 1868, and is still covert. She represented a one-third interest. Second. William Murray, another grantee, by will dated September 14, 1891, and probated October 8, 1891, devised his one-third interest to the heirs of John McCampbell, the other grantee. Third. John McCampbell, the other grantee,

by will dated November 14, 1853, and probated December 6, 1853, appointed James Anderson his executor, and in reference to these lands said: "I direct my executor to dispose of my mountain lands, lying in Blount county, Tennessee, as follows: To make sale thereof, and the proceeds thereof to be equally divided between my legal heirs at law." Fourth. On January 12, 1855, James Anderson, as executor of John McCampbell, deceased, conveyed to J. H. Martin one-sixth undivided interest in these lands. J. H. Martin, on February 7, 1887, died testate, leaving six children, complainants herein, as his heirs at law. A copy of his will is found on page 93 of the record, and is hereinafter referred to. Fifth. The heirs of John McCampbell, who have living representatives, were seven in number: Flora Anderson, Bessie Hair, Jane McCampbell, Sallie Hale, Bennett McCampbell, John M. McCampbell, Polly Mitchell, and Catherine McCampbell. Only three of these are represented, and two of them only partially, by complainants in this suit, to wit: (1) John M. McCampbell, who died in August, 1872, intestate, leaving two children, of whom complainant Kate Jenkins is one. She was married, November 1, 1869, before her father's death. (2) Polly Mitchell died between 1874 and 1876. Married 60 years ago. Her husband still survives her. She has three heirs: (a) Margaret Alexander's children, not suing; (b) complainant Prudence Chambers, who married March 6, 1864, before her mother's death, and is still covert; (c) Martha McCampbell, who died many years ago, leaving one child, complainant James H. McCampbell, now 36 years old. (3) Catherine Anderson, who died April 1, 1864, leaving three children: (a) Complainant Isaac Anderson; (b) complainant Mary Cochran, who married January 10, 1856, before her mother's death and is still covert; and (c) Robert Anderson, who died in 1889, leaving three children, complainants Ed. G. E., Robert L., and Mary G. Anderson. The defendants Watts and Line claim under the grants to Line and Grubb, Line and Wright, Joab Line, and one to Alexander McKenzie, No. 20,816, issued by the state of Tennessee on May 27, 1837, for 200 acres. They connect themselves with these grants by regular chain of conveyances. The grant under which complainants claim conflicts with each of the grants under which defendants claim.

This cause was heard by the chancellor on February 3, 1893. He found in favor of the defendants, to the extent of the McKenzie grant, covering 169 acres of the land sued for. He also found that defendants had held such adverse possession of part of the land in dispute as barred the rights of all the complainants except Mary Cochran, Prudence Chambers, and Kate Jenkins. As to them, he held that their disabilities of coverture protected them. But he confined defendants' possessions to the limits of their inclosures, decreed for complainants as to the rest of the

lands in dispute and against defendants for all the costs of the cause, ordered a survey of defendants' inclosures to define definitely their boundaries, and refused defendants an appeal from that decree. On June 20, 1893, the surveyor and commissioner reported his survey of defendants' possessions, with map thereof and of lands in dispute, and thereupon the chancellor made a final decree in accordance with the holdings announced in decree of February 8, 1893, and defendants appealed. This report of the special commissioner and surveyor shows that 169 acres of the land sued for lies within the McKenzie grant, and that defendants' inclosures on the Line and Grubb, the Line and Wright, and the Joab Line grants, and outside the McKenzie grant, covered 31 acres of the land sued for.

Appellants, by their solicitor, assign the following errors, alleged to have been committed by the chancellor in said decrees: "(1) The court erred in limiting defendants' possessions to their actual inclosures. That these possessions were held under color of title, and should have been held to operate to the boundaries of said title papers; and complainants' bill should have been dismissed as to all, except, perhaps, Mary Cochran. That the lands in question were for the most part rough mountain lands, with but little of them fit for cultivation, but mainly valuable for timber and grazing. These inclosures, with many others, outside of the laps on complainants' grant, were made by tenants of defendant Line of lands fit for cultivation. That they built houses and fences wherever they pleased on these lands, lived on and cultivated the best part of the land, and used the rest for timber and pasturage; and that, besides the tenants' use, Line himself exercised an active control over the uninclosed lands for the pasturage of cattle and the exclusion of all trespassing cattle. That the chief object and purpose of these possessions on his part were to assert and maintain his title to these lands. That the intention determines largely the extent to which such possessions operate, and that in this case the possessions were open, notorious, adverse, and continuous, and there is no good reason for limiting them to actual inclosures. (2) The court erred in holding that complainants Prudence Chambers and Kate Jenkins were protected by their disabilities of coverture from the bar of the statute of limitations. (3) That the court erred in taxing defendants with all the costs of the cause. That they were successful to the extent of the conflict with McKenzie grant, 169 acres, and of their actual possessions, about which much of the evidence was taken and the costs incurred. That complainants should be operated with at least some substantial part of the costs of the cause. (4) That the court erred in finding that J. H. Martin died intestate as to his interest in lands sued for, and pronouncing decree in favor of Mary R. Parrott for any interest in said land. That by his will said J. H. Mar-

tin disposed of his whole estate, including his interest in these lands. They are only excluded from the estimate of the value of his estate. Said Mary R. Parrott is expressly excluded from any share or interest therein. The presumption of law is against intestacy as to part of testator's estate. (5) That the court erred in decreeing to complainants, other than Martin's devisees, any part of the interest of John McCampbell in the lands sued for. He did not give these lands to his heirs and they never descended to them. Under his will, his interest therein passed to his executor, and not to his heirs. He gave to them a mere money legacy, to be paid out of the proceeds of the sale of these lands. The executor is not a party to this cause, and no reason given for his not being made such. That for the foregoing alleged errors the decree of the court below should be reversed and modified."

Under the issues thus presented, in addition to the statement above, showing the names of the parties and of the deraignment of title of both the complainants and defendants, which we find as above stated, we find the facts to be as follows: The defendants claim under three different possessions, on different parts of the land in litigation, which are as follows: (1) What is known as the "Stinnett Possession," which lies wholly within the interlap of complainants' grant and that of the Line and Wright grant. (2) The possession known and designated in the proof and on the maps as the "Buck Jennings or Watson Possession," which lies wholly within the interlap under the Joab Line grant. (3) The possession known as the "Abbott or Moore Possession," which lies within the Line and Wright and Line and Grubb grants, and within complainants' grant.

First, as to the Stinnett possession, we find that this possession commenced in the year 1885 or 1886, within seven years before suit brought, and that there was no actual substantial possession at this place prior to this time, such as would create a bar under the statute of limitations.

Second, as to the Buck Jennings or Watson possession, we find that Buck Jennings, as a tenant, claiming through and under Line, went on this place in the spring of 1877, erected inclosures, and took substantial possession, which continued up till October, 1881, at which time Line purchased from him his rights under the lease, and he very soon thereafter sold the land covered by the possessions to George W. Watson. We find that the sale to Watson included and embraced all the substantial improvements, inclosures, and possessions which had been held by Jennings, and that thereupon Watson went into possession of the same, holding and claiming the same for himself, under the purchase made by him from Line. We find that Line executed his deed for this land to Watson on the 24th day of January, 1885, but had made

the sale to him in 1881, from which time on Watson has held possession for himself of said land included in the purchase by himself and tenants up to the time of the bringing of this suit.

Third, as to the Abbott or Moore possession, we find that Abbott took a written lease from the Lines for this place in July, 1867, and moved there in November following; that at this time he built a cabin and cleared and fenced some one to five acres of land; that he left the place on the 1st of January, 1869; that the place then remained without a tenant until August, 1870, when Rachel Moore, a widow woman, and her boys, Dave and Burt, and her son-in-law, moved there as the tenants of the Lines. They remained there for three years or more, adding additional clearings; then left the place for one year; then returned and took possession under the Lines; and that they and other tenants claiming under the defendants have held, since that date, continuous, peaceable, open, notorious, and adverse possession for the Lines, up to the bringing of the suit, adding to the clearings and improved land from time to time until the bringing of this suit, when there were some 28 acres cleared and improved at this point. We find that the clearings and improvements made by Abbott, as well as that of the Moores and other tenants holding subsequently, were on both sides of the line between the Line and Grubb and Line and Wright grants, and within the lines of complainants' grant. We find that, at the time the Moores moved on this place, in August, 1870, the cabin, which was the only house upon it, was only a wall, standing there, and that it had no roof upon it; that the roof had either been blown or rotted off; that there was no fence around the improved land; that the place did not look like it had been recently occupied, or that it had been occupied within four or five years, and it had the appearance of having been abandoned. While the Moores were away the possessions were kept up, and one James Carnes occupied it for at least part of this time as a tenant of the Lines. During the absence of the Moores one Sutton laid claim to the land, and placed Henry and Ben Stinnett in possession of the Moore improvements as his tenants. Line immediately brought suit, and recovered possession, and has had tenants in possession ever since.

Under these facts we further find and conclude that the possession begun under Abbott in 1867, whether intentionally or not, was not kept up, and that the defendants cannot receive any benefit from that possession; but we find that the possession begun by the Moores, as tenants for Line, in August, 1870, has been kept up since that date, and has been open, notorious, and continuous, and adverse to all except the Lines, and those claiming by, through, and under them, since that date, to wit, August, 1870. As to

the character of the possessions, we find the facts to be, in addition to what is above stated, that the land was, in the main, rough, wild mountain land, such as has been used mainly, in that section of the country, for grazing purposes, but having spots in different places easily cleared and subject to cultivation. We find that the Lines have, since the 40's, endeavored to assert their rights to control these lands, and have from time to time grazed their own cattle thereupon, allowed others to graze for a compensation, and have, at times, endeavored to prevent the grazing of cattle by others in these lands without their permission; but these efforts have been spasmodic, and, in the main, unsuccessful. And we find and conclude that these acts of defendants and those under whom they claim, as to grazing, have not been such as would constitute any substantial, open, and notorious possession, and that there have been no other possessions on said land, within the interlaps, except by their tenants as above mentioned. We find that these grants covered a large area of land, some 15,000 acres, and, besides the possessions mentioned as the Buck Jennings or Watson and Moore possessions, the defendants and those under whom they claimed had various possessions and different tenants within the lines of their grants, but outside of the conflicts or interlaps above mentioned. The leases or contracts of rent made with outside tenants, and also those made with Jennings, and those who occupied the Moore-Abbott possession, were what was known and described by the witnesses as "running leases." These tenants were given the right to go to certain places, designated as the Buck Jennings and the Abbott places, and others, and to enter upon the possessions as tenants of the said Line, and to clear from time to time as much land as such tenants desired, and cut and use all the timber they might need for their use on these places, at any point within the Line grants. While the extensions of their clearing and inclosures were not limited, and they might, in theory, conflict with each other, it was seen and understood, as a matter of fact, that they would not. We find and hold that it was the intention of the lessors not to limit their tenants in the area of their improvements and possessions, but to give them right to extend ad libitum, and to the boundaries of their grants, but not so as to conflict with each other; and that it was the main purpose, intent, and object of the lessors to extend the effect of the possessions of their tenants to the boundaries of their grants, so as to protect and perfect their titles.

It results, as above stated, under our findings, that the possession known as the "Stinnett Possession," lying wholly within the Line and Wright grants, cannot avail the defendants anything in this case, other than as a matter of evidence as to the character and intention of their other holdings.

As to the Watson or Buck Jennings possession, commencing, as we find, in 1877, and terminating, as far as the defendants are concerned, at the time of the sale to Watson, which we find to have been immediately after Line's purchase of the Jennings lease, which was in 1881, though his deed was not made to Watson until 1885, and thus being a possession, within the interlap of complainants' and Joab Line's grant, of less than seven years, it results that all of the complainants, if there are no other difficulties in their way, will be entitled to recover their interest in the land in litigation within the Joab Line grant, except that covered by the McKenzie grant, as to which there is no dispute. As to the effect of this sale there can be no doubt. See *McClung v. Ross*, 5 Wheat. 124; *Ellicott v. Pearl*, 10 Pet. 444; *Ross v. Cobb*, 9 Yerg. 470.

This brings us down to the Abbott-Moore possession, which lies, as above shown, within the lines of both the Line and Wright and Line and Grubb grants. The contention of the parties, as presented by the assignment of errors in the record, raises two serious questions as to the extent and effect of this possession: (1) As to when the continuous adverse possession on the part of the defendants began, and (2) as to the character and effect of the possessions at this place. On the part of defendants it is contended that the possession began with the entry of W. G. Abbott in 1867 or 1868, and has been continuous since. On the part of the complainants it is contended that the continuous adverse possession under Line and his tenants did not begin until the 11th of February, 1876, since which time, they admit, the possession has been continuous. As above appears, we have found that the possession taken for the defendants by Abbott was not kept up, but was abandoned; but we find that a possession was begun in 1870 by the Moore tenants, claiming under Line, and our findings and conclusions are that this possession has been continuous from that date to the bringing of the suit in this case. It is contended, in a very able and ingenious argument by complainants' counsel, that there are three breaks in defendants' possession: (1) The abandonment of the Abbott possession, as to which we concur; (2) the period of one year, or perhaps longer, from the time the Moores abandoned the place, in 1873, to the date at which the tenants of one Sutton, claiming adversely to Line, put the Stinnetts in possession as his tenants; (3) the period of one year in which the place was occupied by Sutton's tenants, which, it is claimed, was in the year 1875.

This being a point of vital importance to at least some of the complainants, we have made a very thorough and careful study and analysis of the evidence on this subject, which has left no doubt in our minds as to the continuity of the defendants' possession. There is no question made but what the

Moore possession began in 1870, and that they remained on the place as tenants of Line about three years, which would take them to 1873 or 1874. All the witnesses, some six or seven, agree in stating that the Moores were absent from the place about one year. The evidence also shows that the entry of the Stinnetts under the claim of one Sutton was during the time of this absence. G. W. Turner says: That, at the time the Moores went away, or shortly before, with the consent of Line, and after a consultation with him, he bought the Moore lease. That he thinks this was about the year 1873, but cannot be sure of the exact time. He says he sold this right of possession and lease to Line the same fall after he bought it, and that, between the time the Moores moved away and the time he sold to Line, which was in the fall, no one occupied the premises. That, after he sold to Line, which, according to his testimony, it will be seen, was in the fall of 1873, Ben and Henry Stinnett took possession, claiming under one Russ Sutton, and that the Stinnetts made a crop on the land. That, as he recollects, there was one crop lost on the land. That he paid a muley cow for the improvements. That the Moores were absent about a year; that is, some of them. He never lived on the land. That the Moores came back the same year, or the year after, they went away. Does not think they were absent quite a year. W. G. King says the Moores were off of the land about one year, or part of a year, and that, with this exception, they had been on the land, using and claiming it under Line, ever since they went on it, in 1870. Rachel Moore says they were absent about a year. James Carnes says the Stinnetts raised a crop on the Moore place in 1874; that he tended the land in 1875; that the Stinnetts paid rent to Line; that he had all the land in his possession and control in 1875, stayed there two years, and left in the fall of 1876. A. M. Line says: The Moores were absent about a year, some of the time. That James Carnes lived on the land the year they were away. That the Moores came back the same year or the year after they went away. Does not think they were absent quite a year. That he had a written contract with Carnes, or lease, for the year 1876, which appears in the record, and is dated February 11, 1876, and is for the year 1876. He says he paid Turner a cow for his lease. That, after the Moores left, one Russ Sutton laid claim to the land, and put Henry and Ben Stinnett in possession. That he sued them as quick as he conveniently could. Says he sued the Stinnetts and Sutton before a justice of the peace for the possession of the land. Sutton would not defend the lawsuit. That it went by default to him. That he compromised it with the Stinnetts, and they rented from him, and paid him the rents. He says that he meant, by the compromise, that the Stinnetts rented from him, and gave up their claim

under Sutton,—paid him rent for all the time they were there, including the time they had claimed under Sutton. Carnes also says, in his proof, that the Moores returned to the land in 1875 or 1876, holding under him, and that, during the time he cultivated the land, he gave them leave to go into an empty house that was there; that he rented and cultivated it for the years 1875 and 1876. The lease from Line to Carnes was evidently for the last year that he stayed there.

We feel bound to conclude, from this evidence, that Carnes and the Moores were in possession in 1875 and 1876; that the Stinnetts were in possession and raised a crop on the land in 1874, part of which time they were holding and claiming under Line, and paid him rent for the entire time; and the Moores left the land, as all witnesses state, in the year 1873. So it will appear that, during all this time, there were considerable inclosures there, two or more habitable houses, and every public, open, and notorious evidence of the claim of ownership; there being nothing in the evidence to indicate or show an abandonment of the possession. It appears, as above shown, that the improvements and rights under the lease were considered as of some value, as Turner bought them and held them awhile, although he did not go upon the land to live himself, and that afterwards he sold them for value to Line. It is clear that there was no intention on the part of Line to abandon this possession or his rights under it, and this is evidenced by the fact that he immediately brought suit against the Stinnetts as soon as they entered and claimed adversely to him. Under the rules of law as now established, it is held that the mere nonuser of the premises is no evidence tending to show an abandonment. There should be either some evidence of an intention to abandon, or, at least, that absence of all evidence indicating a substantial and live claim of ownership. It has been held that, where a fence was accidentally burned, rendering the lands unfit for use for several years, this was no evidence tending to show an abandonment of the adverse possession, and that the statute did not cease to run during such nonuser. *Ford v. Wilson*, 35 Miss. 490; *Wood, Lim. Act. § 269*. It is there stated that the question as to whether there has been such an abandonment of the possession as to break the continuity thereof depends upon whether the premises were vacant for such a length of time and under such circumstances that the constructive possession of the owner can be said to have reasserted itself. "Where the premises are at times vacant, but no intention to abandon the possession exists, the possession will not be interrupted." 1 Am. & Eng. Enc. Law, p. 274, note, and numerous authorities there cited. Here there was certainly no intention to abandon the possession, in fact, and there were ocular, visible, and substantial evidences of the possession, such as would naturally give

notice to all adverse claimants and the world of a claim of right and possession. After the Abbott possession terminated, and at the beginning of the Moore possession, there was every evidence that the place had been abandoned, but at this time there was not. "A possession may exist without actual residence on the land, and be denoted by inclosed fields, or, in fact, by any open, visible, and continuous acts or evidence of a claim of ownership or possession, or the exercise of dominion, that will show or indicate that they are done in the character of owners, and not of an occasional trespasser." *Hopkins v. Calloway*, 3 Sneed, 16; *Hammett v. Blount's Lessee*, 1 Swan, 386; *Copeland v. Murphey*, 2 Cold. 71; *Pullen v. Hopkins*, 1 Lea, 745; *Creech v. Jones*, 5 Sneed, 633; *West v. Lanier*, 9 Humph. 762; *Waddle v. Stuart*, 4 Sneed, 534; *Norvell v. Gray's Lessee*, 1 Swan, 96. So we hold, in this case, the facts showing cleared fields and inclosures of five or six acres, with two or more habitable houses thereon, even though without an occupant for about one year or less, this was an open and notorious evidence of the claim of possession, and that there was no sufficient indication of an abandonment as would break the continuity of the possession.

But it is contended by the complainants' counsel that, at least, the defendants' possession was broken by the adverse entry of the Stinnetts under one Sutton, who claimed, under a title of his own, adversely to the Lines. This contention we do not think can be maintained, either on principle or authority. It would certainly be contrary to public policy to allow entries of this kind to interfere with the possessory rights or claims of parties previously in possession, and, if allowed, would be productive of breaches of the peace, inviting to personal contention and bloodshed, instead of a resort to the courts. This point we think clearly settled by authority, both in our state and elsewhere. See *Wood, Lim. Act. § 269*. An entry made, even by the legal owner, with a high hand and forcibly, does not defeat the continuity of the possession of the adverse occupant, if he subsequently regained possession by an action of forcible entry and detainer. *Wood, Lim. Act. § 270*, and authorities there cited. A forcible entry upon the actual adverse possession of another, followed by an unlawful detainer, does not interrupt the adverse possession, if an action of forcible entry and detainer is commenced within a reasonable time, and prosecuted to a successful termination. 1 Am. & Eng. Enc. Law, p. 274, and numerous authorities there cited. See, also, *Id.* p. 273, and notes and authorities. Such, also, is the logical effect of the holding of our supreme court in the cases of *Waddle v. Stuart*, 4 Sneed, 542, and *Creech v. Jones*, 5 Sneed, 634. The point is conclusively settled in the case of *Norvell v. Gray's Lessee*, 1 Swan, 101 et seq., where it is held: "The operation of the statute of limitation which has commenced running in

favor of a party who is in the actual adverse possession of land is not ousted by the entry upon the land even of the person having a legal right thereto, unless the entry be peaceable in a legal sense and of such a character as to vest him who enters with a seisin of the land." Judge McKinney, in delivering the opinion, says: "A peaceable entry does not mean one merely unaccompanied with actual violence or breach of the peace. In law, every entry upon the soil of another, in the absence of lawful authority, without the owner's license is a trespass. The entry being illegal, which was established by their being dispossessed at law, was a nullity, and could have no effect upon the operation of the statute of limitations." There entry was by the legal owner. In this case, at law, the entry was not even under the legal owner, but by mere trespassers, who afterwards abandoned their claim and held under the Lines.

The second question arises on the contention between the parties as to the character of these possessions and the results that shall follow from them; it being contended by the defendants, in their assignment of errors, that the chancellor erred in confining the defendants' possession to their actual inclosures. They say, as above shown, that these possessions were held under color of title, and should have been held to operate to the boundaries of the title papers, and that complainants' bill should have been dismissed as to all parties except Mary Cochran. The contention of the complainants is that the holding of the chancellor was correct, because they say that the leases made by Line were not made for either of the 5,000-acre grants as a whole, but only for the lands actually cleared at the time of the lease, and for such additional lands as the tenants might clear; and that the possessions were so limited, and intended to be limited, at the Moore-Abbott place, is shown by the following facts: (1) That Line leased different portions of the three tracts to other parties than those to whom he leased the Abbott place,—as the lease to the Stinnetts at the Hickory flats, the Buck Jennings lease, the Andy Moore lease on Mark's creek, the lease to Thomas Wilkinson, the lease of the John Walker place, the Derby house, and the Husker improvements on Meigs Mountain, all outside of the complainants' grant, but within the lines of the defendants,—and that he could not have leased all the lands to any one tenant without his rights conflicting with the others. (2) Because the lease to Carnes by express words is confined to the land on Little river known as the "Gilbert Abbott Lease," on both sides of the river." To give the complainants the full benefit of all the facts that appear in the record, we do find that there were a number of these leases in operation, at the same time, to different tenants, on different parts of the tract, as stated; that, notwithstanding the leases, Line did endeavor at times to assert by himself, and at other times

through his tenants, a right to control the grazing on the tracts, and that the lease to Carnes was in these words: "That the said Line leases or rents to the said Carnes the land on Little river known as the 'Gilbert Abbott Lease,' on both sides of the river; that the land not heretofore cultivated said Carnes is to have rent free." But we further find the facts to be that Gilbert Abbott was given, under his lease, a right to clear land anywhere on the estate; that the terms of the contract made with Mrs. Moore and her children substantially were that they were to go to the Abbott place, and clear lands at any place they wished within the boundaries of the Line grants, and to get and use timber for the place anywhere within these lines, and to hold possession for Line, and those claiming under him, to the extent of his boundaries; that similar rights were given to other tenants, but that it was not expected that their clearings would conflict; and that it was the intention and purpose of Line that these possessions should evidence his claim to the extent of his boundaries. It is shown, by all the witnesses and all the proof in the case, that these leases were known as "running leases," by which it was meant that tenants were not to be restricted in their rights or occupancy by particular metes and bounds, but could locate and use any unoccupied lands within the boundaries of the Line grants. Our legal conclusions from these facts are that the chancellor erred in his holding in restricting the defendants to the actual inclosures on the Moore place, and we conclude and hold that the defendants are entitled to rely upon the benefits of this adverse holding to the extent of the boundaries of their grants.

We have carefully studied the authorities referred to by the complainants' counsel,—the cases of *Ross v. Cobb*, 9 Yerg. 469, 470; *Massengill v. Boyles*, 11 Humph. 112; *Ellicott v. Pearl*, 10 Pet. 444,—and also the authorities cited from other states so far as we have been able to have access to them; but we do not think these cases conflict with our conclusions and holdings in this case. In these cases the possession of the tenants was expressly limited by boundaries prescribed in the deeds; and in the 10 Pet. case, referred to, it is stated by Judge Story, in delivering his opinion, "that if a landlord settles a tenant without bounds upon a tract of land, he is in possession to the limits of the claim." This is also the result of the holding of the supreme court of the United States in the case of *McClung v. Ross*, 5 Wheat. 124. This principle is also, in effect, stated in the 11 Humph. and 9 Yerg. cases. In support of this holding we also refer to cases found in 2 Cold. 28 (*Cass v. Richardson*); *Id.* 71 (*Copeland v. Murphy*); 1 Lea, 741, 746 (*Pullen v. Hopkins*); and 1 Swan, 386 (*Hammitt v. Blount's Lessee*). But the case of *Waddle v. Stuart*, 4 Sneed, 535, would seem to be conclusive of this point. In this case it is

held that the tenant is merely the instrument of the landlord in gaining and holding possession, and the question of the effect of the possession is one as to the intention of the landlord; that, although the tenant may be ignorant of the landlord's intentions, this fact will not affect nor limit the extent of the landlord's claim. We think, in this case at bar, it was the intention and purpose, clearly, of the landlord, as well as the tenants, that the extent and the effect of the holding should be to the boundaries of the grants. It would seem clear that the rights given by these leases would effectually protect these tenants from any action by the landlord against them for any clearing or cutting of timber on any land not actually occupied by the other tenants anywhere within the lines of his grants, and hence their possessory rights were to the extent of his boundaries; and we do not see how his reserved rights of grazing could interfere any more with these possessions than a reserved mining or hunting or fishing right would. These reasons would seem to force the conclusion that the effect of these possessions inures to the benefit of the defendants to the extent of their boundaries.

The third assignment of error is as to the decision of the chancellor on the costs, which will be hereafter disposed of.

We think that the fourth assignment of errors of the defendants is not well taken. Joseph H. Martin states, in his will, found on page 98 of record, and adopted as a part of our findings of facts, that the Blount county land is not included in his estate which he undertakes to divide. In one clause he does state that it is in the hands of Gen. Hood for sale, and, if sold, he directs distribution of proceeds, but gives no direction as to what shall be done if not sold. In another clause he directs that that part of his property, including some Florida lands, and other property and things not included in his estimated \$25,000 of property which he had devised, "shall be divided among his children as they may agree"; thus, as we understand, leaving it undisposed of.

We do not think that the defendants' fifth assignment of error is well taken. As we think, the land was not devised to the executor, but he was simply clothed with the power to sell, that the legal title passed to the heir, and that this suit was properly brought by the heirs of John McCampbell. See *Pritch. Wills*, § 662; *Peck v. Henderson's Lessee*, 7 Yerg. 18; *Porter v. Greer*, 1 Cold. 564; *Rogers v. Marker*, 12 Heisk. 645; *Brown v. McCloud*, 3 Head, 280. These cases are clear and conclusive, and do not, as we think, conflict with the cases of *Barton v. Cannon*, 7 Baxt. 398, and *Browder v. Jackson*, 3 Lea, 151, relied on by defendant's counsel. It is clear the 3 Lea case does not, and, if there be a seeming conflict in the 7 Baxt. case, the 12 Heisk. case, above cited, is a later case, and would overrule the Baxt. case. In the Heisk. case the precise and exact question

raised in this case was the point under decision, and the distinction is there made clear, and sustained by authority, between a devise to executors to sell, which passes an interest, and a devise that executors shall sell, which gives a mere power or authority, leaving the title to descend to the heir.

The result is the decree of the chancellor will be modified, so that the complainants may have a decree for the land covered by their grant within the interlap of that grant and the Joab Line grant, except that covered by the Watson possession and the McKenzie grant. Complainant Mary Cochran will be entitled to a decree for her interest in all the land sued for, except the McKenzie grant. As to all the other complainants, the bill will be dismissed, so far as it seeks to recover any of the land within the Line and Wright and Line and Grubb grants. The decree being for the defendants as to the interlaps in these grants, the complainants will pay four-fifths of the costs of the cause, and the defendants one-fifth.

NEIL and WILSON, JJ., concur.

On Rehearing.

This cause is before us on a petition to rehear on two points. The last question raised, but the first we will discuss, is one considered in our previous opinion, as to the proper construction of the lease from Line to Carnes and the effect of the possessions at the Moore-Abbott place. We carefully considered this before reaching our first decision, but have again looked carefully into the matter, and see no reason to change our former opinion. It is true the language of this lease is that "Line leases or rents to Carnes the land on Little river known as the 'Gilbert Abbott Lease,' on both sides of the river." The right is recognized in the lease to clear and put in cultivation other land, which Carnes was to have rent free. There were no limits set to his extension or possession. It is clear, beyond doubt, that the landlord's intention was to not limit, but that the effect of this holding should be to the limits of his title papers. The Gilbert-Abbott lease, according to the proof, had itself been without limitation. All the facts considered, our convictions are clear on this point, and we are content with our former holding.

The other point raised by the petition is a new one, not raised in the assignment of error, written argument, or oral discussion, and is one to our minds of much interest and difficulty, and, if desired, we should have been glad to have oral argument thereon, and have considered carefully the briefs filed. The contention is that defendants' grant No. 27,618 was not a color of title, as against grant 22,172, which is older and superior, and grant No. 27,618 expressly excludes older titles. The case of Bleidorn v. Mining Co., 5 Pick. 210, 211, 15 S. W. 737, is cited and relied on. The defendants, as answer, rely

principally on a mere conveyance from Line to his son, A. M. Line, dated May 3, 1873, which describes the land by metes and bounds, and has no exception or excluding clause. To this complainants reply that defendant was really holding under a deed made by his father, June 27, 1872, which is shown by the last-named deed, being acknowledged after it was found, in 1875, and thereafter registered, and because the 1873 deed was not registered till August 24, 1886. The deed of 1872 simply calls for lands. Joab Line's interest in lands is covered by grant 27,618. The deed of 1873 recites the previous execution of deed of 1872, and provides, if found, that deed of 1873 is to be in lieu, and it (meaning, as we understand, the deed of 1872) is to be null and void, if found. This deed of 1873 also recites that the deed of 1872 had been acknowledged, which, it appears from the subsequent acknowledgment and registration, was untrue. These circumstances excite some suspicion, it is true; but the deeds were of record when this suit was commenced. No issue was raised on them in the pleadings, and, while this may not have been necessary, it would not have been improper; but, in any event, the deed of 1873 was in evidence, and could have been attacked by the proof, but was not. The deed was probated by two witnesses, who testified the grantor acknowledged the same in their presence the day and date it bears date; and, in the absence of more definite proof of fraud, we feel bound to receive and treat the deed of 1873 as genuine and bona fide. The recital of the deed of 1873, that the deed of 1872 had been acknowledged before the county court clerk, was a very natural mistake, in case of its loss. In fact, the acknowledgment may have been made, but not certified to. We do not see that the subsequent registration of the deed of 1872 alters the situation, as its registration would be proper as a matter of preserving the history of the transaction. Besides, it should be noted that the deed of 1873 covers the entire interest in the Line and Wright tract, while the deed of 1872 only conveyed an undivided interest. We can see no reason, founded on fact, law, or equity, why defendants may not have and may not claim under both deeds for all they are worth. And we hold that the deed of May 3, 1873, was a color of title to all lands within its boundaries, operating from that date.

This deed, however, does not protect the defendants from the claim of complainant Kate Jenkins, who was married in 1869, and whose father, from whom she inherited, died in 1872, and who was therefore under coverture May 3, 1873; and this compels us to consider the effect of the exception or exclusion clause in grant 27,618. The only case to which we are cited by the complainants is the Bleidorn Case, 89 Tenn. 211, 15 S. W. 737. That case refers to two cases, Bowman v. Bowman, 3 Head, 47, and Fowler v. Nixon, 7 Heisk. 719. The case in 3 Head

was not a case of color of title or possession. The plaintiff claimed under a grant issued in 1853 for 1,400 acres, but within the boundaries given there were upwards of 6,000 acres, and the grant contained this clause: "Plotting out the lands previously surveyed, represented to me by Cornelius Bowman to be 4,000 acres." The defendant was in possession of a small tract within the boundaries, and did not show his title, but contended that complainant, as there was an exclusion clause, must show affirmatively the exact land he had, and affirmatively that he (defendant) was in possession outside of the excluded 4,000 acres. The supreme court held to the contrary, and said, among other things: "Neither is there, in the certificate of survey or in the grant, anything to identify the lands assumed to have been held by (prior) patents or surveys." Judge McKinney, delivering the opinion, further said: "Upon the state of the record, it cannot be assumed that, in point of fact, any portion of the land included in the boundaries of the 1,400-acre patent had been previously appropriated, except the two small tracts of 50 and 150 acres, above mentioned. * * * If the state allows the grant to stand, there can be no question but that, in a court of law, it must be regarded as investing the grantee with the legal title to all the land included by its boundaries not shown to be held by a superior title. The plaintiff having shown a prima facie legal title, and that defendant was in possession of a part of the land covered by such title, was entitled to recover, in the absence of proof of a better title in the defendant or outstanding in another." It seems to us the logical effect of this decision—the grant being held, notwithstanding its general exclusion clause, a prima facie title—is that such a grant is color of title over all lands within its general boundaries, unless the excepted land was definitely described or clearly indicated. The 7 Heisk. case of *Fowler v. Nixon*, on this point, was also not a case of adverse possession or color of title. The grant in that case contained the general description, ending with these words: "Thence down said river, as it meanders, to the beginning, including and excluding 1,000 acres of land held by prior claim." The defendants insisted the grant was void on its face for not questioning the prior claim of 1,000 acres therein included and excluded, not being described by metes and bounds. To this the supreme court said, "No," and cited *Bowman v. Bowman* as recognizing the validity of said grant, and as deciding "that it invested the grantee with a legal title to all land not shown to be held by a superior title"; in other words, as, prima facie, covering the entire boundaries. And the court further says a grant may include lands previously granted. It is true the court says the grant cannot be operative only as to lands included in its boundaries not previously granted, but it is obvious this

means possession aside, and refers to the passing of the actual title at the time of the conveyance.

We are aware that the language of the *Bleldorn Case* is seemingly broad enough to cover the contention of the complainants in this case, and we take it to be our duty, as well as our pleasure, to conform strictly to the latest rulings and decisions of our present supreme court, and have no idea of attempting to overrule that case; but we think, when carefully analyzed, and construed in the light of the cases referred to in that opinion, of the actual case there decided, which alone speaks for the whole court, and of the entire history and policy of our statute of limitations, it will be seen that that case does not go to the extent supposed. And, in any event, we do not feel justified in extending our rulings beyond the limits there actually laid down, as we would have to do to yield to complainants' insistence in this case. In that case there was a contest, in which three grants figured, as to the point in question, as follows (we number by their entries): No. 1,925, special entry and oldest title; 1,949, June 30, 1838; 1,727, general entry grant, dated December 28, 1838. The possession on which the contest was made was within the interlock of the three grants, and this possession was held not to be operative for the benefit of 1,727, being on a grant older than the other two; and the court does refer to the exclusion clause in grant 1,947, under which complainant claims, and says that 1,925, being the oldest title, came under the exclusion, and as to this part 1,949 was not even a color of title, and therefore there was no interlock at this point, and no adverse possession for 1,727. Now, it is clear that, even if complainant in 1,949 had been with color of title for this land, never having been in possession, he could not have ejected any one from this ground, and could, 1,925 being the older title, have brought or maintained no suit for any lands within its bounds; and this, we think, was the actual case decided; and this view is strengthened by a study of the other cases referred to in that opinion as authority. *Kelly v. Hare*, 1 *Humph.* 163; *Smith v. Lea*, 1 *Cold.* 549, and *Peck v. Houston*, 5 *Lea*, 227, were cases involving occupant entries, and where questions were discussed as to whether possession had extended beyond the bounds of these prior entries.

We have found no case where the possession and the facts were, like the one at bar, directly adverse to the grantor's color of title. In the *Bleldorn Case*, it will be noted, too, the controlling idea seems to be, and it is undoubtedly correct, too, to ascertain the exact land intended to be conveyed and covered by the grant,—the true purpose of all conveyances. This is apparent from Judge Lurton's statement that entry 1,949 described the granted land as 2,500 acres, and that the concluding words of the description were "including in

the above calls of prior and legal claims 3,088 acres of land," and that a calculation showed 5,590 acres within the boundaries, of which only 2,500 were intended to be granted, and 3,088 from 5,590 leaves 2,502,—only 2 acres more than the grant calls for. Now, in the case at bar, the grant calls for 5,000 acres, and gives a description by metes and bounds, courses and distances, old lines, trees, and objects, and the description ends with the clause "to the beginning," followed by a period. Then occurs the sentence, "Containing by estimate 5,000 acres, excluding older titles." Here the conveying words and description ends, and an estimate is given, making a difference from case cited. The bounds, as surveyed out, a calculation will show, cover about 6,600 acres, and complainants interlap about 3,600; leaving within defendants' grant only a little over half the acreage called for, and thus showing at least complainants' claim was not actually in the minds of the officers and grantee when the grant was issued. There were no possessions on it, and its location or existence was then evidently unknown to the grantee and the officer issuing the grant, when the grant was issued, and it was not the real intention to except it. Another strong circumstance is: The beginning corner of defendants' grant is within the interlap claimed by complainants, and here is a strong and frequent circumstance showing there was no intention to except the land covered by complainants' grant. The actual intention of the parties was certainly to cover this ground, and is not the language broad enough? The force of this view becomes more apparent when the history and the policy of the statute of limitations is considered, especially that of the first section of the act of 1819, which was new and peculiar to this country. Its very enactment assumes and presumes the existence of older titles, covering the same lands, and some of the conflicts at the time being between different grants issued by the same officers and authorities. The country was new, unsettled, and unsurveyed. Entries and grants were so made that their boundaries were practically unascertainable, except at great trouble and expense. Lands were becoming unsalable and "titles perplexed," and, to protect the actual possessions, as against the foreigners and outsiders, the act of 1849 was passed. Seven years under a mere "color of title" perfected title, and all prior rights and equities, without regard to strength and justice, were extinguished. Everything went to the limits of the boundaries of the color of title. So a man producing a deed and proving his possession had his title, and land which he could sell. Do not these reasons and policy still exist in our wild mountain lands, and should we introduce or extend a policy that would limit the beneficial and curative effects of the statute of limitations? Should we increase the uncertainties which hang around land titles? If, as Judge McKinney says, in *Bowman v. Bowman*, 3

Head, 47, a grant with a strong excluding clause coupled with the very description of the land conveyed, and a part of it using the words "plotting out 4,000" acres, shows a *prima facie* legal title to all the lands within the bounds of the grant, is it not, perforce, a color of title to all such lands? How could it be *prima facie* and not a color? And if, on a straight contest for the land, no question of adverse possession, arising in the absence of a superior title shown, it would be construed to cover so as to hold all lands within the bounds, even in an action of ejectment, can it be denied to be a color of title for such lands? It purports to convey title to what it does cover, and *prima facie* covers. It seems to us this is just what a color of title is. So, without meaning to be understood as questioning the correctness of the decision of the *Bleldorn* Case, we feel that we are not justified in extending the operation of the rule there seemingly indicated, as we would have, as we think, to do by assenting to the complainants' contention in the petition to rehear.

These questions are staid matters of law not invoking any equitable principles, and having their chief importance in the maintaining of settled rules of property; and while the opinions of the court are not final, nor authority, we deem it our duty to add our mite by the most exact conformity to those settled rules as nearly as we can ascertain them. And, in view of all these considerations, we think the grounds for the petition are not well taken, and the same will be disallowed and dismissed.

NEIL and WILSON, JJ., concur.

SCHMIDT v. LOUISVILLE, C. & L. RY. CO.

(Court of Appeals of Kentucky. June 17, 1896.)

Petition for modification. Granted.

For former opinion, see 35 S. W. 135.

Court's Response to Petition for Modification.

PER CURIAM. The petition for modification has been carefully considered, and while it is true that the appellee, the Louisville, Cincinnati & Lexington Railway Company, has no interest in the matters in regard to which a modification of the opinion is sought by it, it is perhaps also true that the opinion went too far in stating that the questions were decided which were not strictly before the court upon the appeal. It has been the custom of courts, since opinions were written, to state the existence of a remedy which was not sought, as a reason for denying the remedy which was sought. In thousands of cases it has been stated that the relief sought in equity was denied because an adequate remedy at law existed. This, however, is universally considered, and properly so, to be stated *arguendo*; and the opinion in this case

should have been confined in that respect to stating, as argument, that the Louisville & Nashville Railroad Company was bound by the judgment if the matters stated in the tendered amended petition were true, and without indicating the exact course of procedure to be adopted. To the extent herein indicated, the opinion is modified.

MIZE v. GODSEY.

(Court of Appeals of Kentucky. June 13, 1896.)

PLEADING AND PROOF—EVIDENCE.

It is error to admit evidence of a claim which is not declared on, and to instruct the jury to find for plaintiff thereon.

Appeal from circuit court, Wolfe county.

"Not to be officially reported."

Action by D. S. Godsey against W. O. Mize. Judgment for plaintiff, and defendant appeals. Reversed.

Thos. H. Hines, for appellant. Jas. Andrew Scott, for appellee.

GUFFY, J. This appeal is prosecuted from a judgment of the Wolfe circuit court, rendered in the action of appellee against the appellant. The plaintiff in the court below declared on an alleged indebtedness due him on account of land sold to J. F. Day, and which defendant, appellant here, assumed to pay; and also some other accounts, and for usury alleged to have been paid appellant by appellee. The appellant denied the indebtedness, and also pleaded payment. A trial resulted in a verdict and judgment in favor of appellee, and, appellant's motion for new trial having been overruled, he appealed to the superior court, which court reversed the judgment, but certified an appeal to this court. The appellee was allowed to prove that appellant promised to pay to him a check for \$500, given to appellee by appellant on the new Farmers' Bank of Mt. Sterling, which appellee had not collected, after holding the same for nearly 20 days, and the bank having failed in the meantime; and of this appellant complains. The suit was not brought to recover on that promise, nor for the nonpayment of the check; hence it was clearly error to admit such proof. The court also erred in giving the peremptory instruction to the jury to find for the plaintiff the \$83.60 usury, and the same may be said of the instruction given to find for the plaintiff the amount of the check. The pleadings in the case are not very clear as to the issues intended to be submitted for trial, and upon the return of the case the circuit court should allow the parties, if they so desire, to amend their pleadings. For the reasons indicated, the judgment of the circuit court is reversed, and cause remanded, with directions to set aside the verdict and judgment, and award the appellant a new trial, and for proceedings consistent with this opinion.

AMERICAN ACCIDENT CO. OF LOUISVILLE v. CARSON.

(Court of Appeals of Kentucky. June 13, 1896.)

ACCIDENT INSURANCE—EXTERNAL, VIOLENT, AND ACCIDENTAL MEANS—EXCEPTIONS OF POLICY—ENGAGING IN MORE HAZARDOUS OCCUPATION—COMPLAINT—NECESSARY ALLEGATIONS.

1. A person who is unexpectedly shot by another, without cause or provocation, is injured by "external, violent, and accidental means," within a policy insuring against such injuries.

2. Where a policy insures against death or injury by external, violent, and accidental means, a provision that it shall not cover intentional "injuries" inflicted by the insured or any other person refers only to nonfatal injuries.

3. Under a policy providing that, if the insured is injured or killed in any occupation classed by the company as more hazardous than that recited in the application, the beneficiary shall be entitled only to a reduced sum, a beneficiary who sues for the entire amount of the policy must allege and prove that the insured was not killed in a more hazardous occupation.

Appeal from circuit court, Jefferson county.

"To be officially reported."

Action by A. Carson against the American Accident Company of Louisville on a policy of insurance. Judgment for plaintiff, and defendant appeals. Reversed.

O'Neal, Phelps, Pryor & Silligman and Bullitt & Shields, for appellant. R. O. Warren, M. C. Saufley, W. G. Welch, and D. W. Sanders, for appellee.

HAZELRIGG, J. In April, 1891, the appellant company, in consideration of certain agreements, statements, and warranties made in the application of one Stephen M. Carson, and the sum of \$7, issued to him, under division A, wherein Carson's occupation was described as that of a druggist, a policy of insurance known as an "accident policy," by which, for the term of three months, the applicant was insured against bodily injuries, effected through "external, violent, and accidental means"—First, which wholly disabled him; second, such injuries as partially disabled him; third, such as resulted in the loss of an eye; fourth, loss of a hand or foot; and, lastly, loss of both hands or feet, etc., in which event the full principal sum of \$5,000 was to be paid to the insured, if he survived, or, if he died, then to his father, A. Carson, the appellee here. In the body of the policy it was provided that, if the insured was injured or killed in any occupation or exposure classed by the company as more hazardous than that recited in the application, the insured or his beneficiary should be entitled only to such sums as are named in the division so classed as more hazardous. And on the back of the policy, among many other conditions under which the policy was issued, we find the following: "This insurance does not cover disappearances; nor suicide, while sane or insane; nor injuries, whether fatal or otherwise, of

which there is no visible mark upon the body; nor accidental injuries or death resulting from or caused, directly or indirectly, wholly or in part, by hernia, fits, * * *; nor extend to or cover intentional injuries inflicted by the insured or any other person, or injury or death happening while the insured is insane, or under the influence of intoxicating drinks or narcotics," etc. It appears that the insured met his death in May, 1891, and under circumstances to be presently considered. The company denying any liability, the beneficiary, A. Carson, brought this action in the Jefferson circuit court for the principal sum indicated in the policy; and upon peremptory instructions, at the conclusion of the testimony, a verdict was rendered in his favor. From the judgment thereon the company appeals.

After certain preliminary statements, the petition avers that "on the 8th day of May, 1891, and before the said term of insurance had expired, the said Stephen M. Carson was shot through the body by a ball from a gun or pistol, and thereby instantly and intentionally killed, by one Jesse Burton, in the vicinity of Branford, in the county of said Carson's residence, in the state of Florida"; that "the said shooting and killing by the said Jesse Burton was not done in a mutual affray, was not provoked by any misconduct on the part of the said Carson, and was not foreseen by him in time to have been avoided, but was wanton, causeless, unprovoked, and unexpected by him." It is evident, and it is so argued, that the pleader's object in setting out the fact that the insured came to his death by a shot fired through his body intentionally by another (thus anticipating the probable defense) was to provoke a demurrer, and thus present fairly to the court for construction the meaning of the words, "nor extend to or cover intentional injuries inflicted by the insured or any other person," found on the back of the policy, and therefore not necessary to be adverted to in declaring on the contract. The expected demurrer was filed and overruled, and thus are presented for our consideration two questions: First, were the "means" producing the death of the insured "external, violent, and accidental"? and, second, was the death of the insured "an intentional injury inflicted by another," within the meaning of the policy? On the first point little need be said. While our preconceived notions of the term "accident" would hardly lead us to speak of the intentional killing of a person as an accidental killing, yet no doubt can now remain, in view of the precedents established by all the courts, that the word "intentional" refers alone to the person inflicting the injury, and if, as to the person injured, the injury was unforeseen, unexpected, not brought about through his agency designedly, or was without his foresight, or was a casualty or mishap not intended to befall him, then

the occurrence was accidental, and the injury one inflicted by accidental means, within the meaning of such policies. Thus, when one was waylaid and assassinated for the purpose of robbery, his death was held to have been caused through "external, violent, and accidental means." *Hutchcraft's Ex'r v. Insurance Co.*, 87 Ky. 300, 8 S. W. 570. So death by hanging, at the hands of a mob, was held to be an accident, within the meaning of a policy against injuries through "external, violent, and accidental means." *Casualty Co. v. Johnson (Miss.)* 30 Lawy. Rep. Ann. 206, 17 South. 2. So the death of a person who is shot by one whom he is trying to eject by force from an hotel office is a death by accident, and "not a risk voluntarily assumed, when he makes the attempt without knowing that the other person is armed." *Lovelace v. Association*, 126 Mo. 104, 28 S. W. 877. See, also, numerous authorities to the same effect in notes to case last cited, in 30 Lawy. Rep. Ann. 207, 17 South. 2.

In the *Hutchcraft Case*, however, and in others cited, a recovery was denied because, while the killings were accidental, within the meaning of the words "external, violent, and accidental," as used on the face of the policy, yet certain conditions or provisos protected the company against loss where "the death or injury may have been caused by intentional injuries inflicted by the insured or any other person." And a consideration of this feature brings us to the second question presented by the demurrer. In the cases to which our attention has been called, involving accident policies in many different companies, it is noticeable in all that the form of the usual protecting proviso against loss from "intentional injuries" is somewhat different from the corresponding clause in the policy before us. The clause in the *Hutchcraft Case* against the *Travelers' Insurance Company* well illustrates this. It is as follows: "And no claim shall be made under this ticket when the death or injury may have been caused * * * by intentional injuries inflicted by the insured or any other person." This is not merely protection against injuries so inflicted, but against death as well. In express terms, that policy excepts death from intentional injuries inflicted by any other person, and does not content itself with providing merely that no claim shall be made when the injuries may have been intentionally inflicted. The language is "death or injury," and the policy protects against either death or injury when caused by intentional injuries inflicted by the insured or any other person. In the present case, as we have seen, the policy is not to extend to or cover intentional injuries inflicted by the insured or any other person. Here we find a difference between the policy under consideration and all others we have examined. The words "death or injury" are used in all

of them, and indeed in this policy we find those words separated for the first time in the clause under discussion. We find it provided in the preceding clause that "this policy does not cover accidental injuries or death resulting from hernia," etc.; and immediately succeeding the clause in dispute the language is, "or injury or death happening while the insured is insane," etc. We notice, too, that the policy is not to cover injuries, whether fatal or otherwise, of which there are no visible marks upon the body. And it appears well settled that this exception, without the words "fatal or otherwise," has reference only to cases of bodily injury which do not result fatally; that is, the word "injury" is used in its usual sense, as implying a hurt not resulting in death. *McGlinchey v. Casualty Co.*, 80 Me. 251, 14 Atl. 13. The words "injury or death," and "injured or killed," are used in the policy some eight times or more, and seemingly in sharp contrast, and the significant omission of the word "death" in this particular clause requires us to hold that the exception referred only to nonfatal injuries intentionally inflicted by the insured or any other person. We conclude, therefore, that the petition stated a good cause of action, so far as the points discussed are concerned.

It is insisted, however, that as the plaintiff sued for the full principal sum of \$5,000, he ought to have negatived the conditions stated in the face of the policy, under which, if they existed, that sum must have been reduced, and the policy scaled. The insured agreed that, if he was killed in any occupation or exposure classed by the company as more hazardous than that of druggist, his beneficiary was to get only the reduced sum; and it seems evident that his beneficiary must allege, if he can truthfully do so, that the insured was not so killed, else the court could not render judgment for the sum to which the policy, under its terms, entitled him. The policy was made part of the petition, and forms the basis of the action. The claimant must bring himself within its terms and conditions as stated on its very face. It cannot be said that this should come from his adversary. Whether the insured was engaged at the time of his death in a more hazardous occupation or exposure than that of a druggist was peculiarly within the knowledge of the insured and his beneficiary, who must be held to a general knowledge of the divisions and classifications of risks, and to have acted intelligently in accepting insurance in division A. Of course, if the true issue is in fact made, it does not matter from whom the exceptional matter comes; and it is true that the company pleaded that the insured was killed while acting as deputy sheriff, and attempted to plead that he was insured as a druggist or dealer, and not otherwise. But just what its pleas would have been, had the plaintiff been required to set up its

cause of action according to the terms of the contract, we do not know; and, convinced of this error occurring at the inception of the proceedings, no other questions need be considered. Judgment reversed for further proceedings consistent with this opinion.

EAST TENNESSEE TELEPHONE CO. v. SIMMS' ADM'R.

(Court of Appeals of Kentucky. June 6, 1896.)

DEATH BY WRONGFUL ACT—PETITION—EVIDENCE—NEGLIGENCE—SUFFICIENCY.

1. Const. § 241, provides that, when the death of a person results from a wrongful act, damages may be recovered from the corporations and persons so causing the same; that until otherwise provided by law the action shall be prosecuted by the personal representative of deceased; that the general assembly may provide how recovery shall go, and to whom belong, and until such provision is made the same shall form a part of the personal estate of deceased. *Held*, that in an action by an administrator for the death of his intestate, caused by defendant's negligence, before the legislature provided how the recovery should go, or to whom it should belong, it was not necessary for the petition to allege that deceased left a wife and child.

2. A petition which showed that the action was under Const. § 241, for the death of plaintiff's intestate, caused by the "willful, gross, and reckless negligence" of defendant, was sufficient.

3. In an action by an administrator for the death of his intestate, caused by defendant's negligence, as authorized by Const. § 241, compensatory damages are recoverable.

4. In an action against a telephone company for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence in allowing a "dead wire" to exist for two years in close proximity to an electric light wire, defendant claimed that the death was caused by other wires, over which it had no control, and also that deceased died of heart disease. *Held*, that it was error to admit in evidence a letter by defendant's secretary, after such death, to the effect that the dead wire caused it; it being opinion evidence, based on hearsay.

Appeal from circuit court, Harrison county. "To be officially reported."

Action by Richard Simms' administrator against the East Tennessee Telephone Company and an electric light company for the death of plaintiff's intestate, caused by defendants' negligence. From a judgment in favor of plaintiff against the East Tennessee Telephone Company only, it appeals. Reversed.

J. Q. Ward, for appellant. Ward & Laferty, for appellee.

HAZELRIGG, J. The appellee, as administrator of Richard Simms, recovered judgment against the appellant for \$7,000 in damages for the death of his intestate, which was caused, it is alleged, by the willful and gross negligence of the appellant and the electric light company. Briefly stated, the facts are that in 1887 the appellant, then operating a telephone system at Cynthiana, put up a wire from its central

office in that city to the residence of W. T. Handy, about one mile out. On December 13, 1892, this wire was still in use by Handy, or in condition for use, under his lease or contract with the company, though, it appears that he was away, with his family, in Florida, and his term of rental was out, or about out. Simms, as a tenant, occupied two rooms in the rear of the Handy residence, and, for purposes of protection, over-looked the premises. At about 10 o'clock on the night of the 13th, the family of Simms heard a noise in front of the residence, and, in company with his son and two nephews, he went around to the front porch with a lantern. They discovered the storm doors swaying back and forth, and, fastening them, they came down from the porch onto a pavement, when sparks were seen on some trellis wires about the porch. Simms stepped off the pavement, saying, "What is that?" at the same time reaching out towards the wires. His nephew exclaimed, "Don't touch it!" But at that instant Simms fell dead, and it is supposed that he had touched the wires with his outstretched hand, although there were no burns found on his hands or body. These wires had become charged with electricity from contact with the telephone wire leading from the box in the hall onto the porch, and thence to the ground. And the telephone wire had, in turn, become over-charged from contact with the electric light wire within the city. Just how this came about, forms the chief ground of dispute in this record. It appears that some two years prior to the night in question the telephone company had discontinued a wire theretofore rented to Victor & Whaley, and this wire had been taken down, save a few hundred feet which had been left on the poles. One end of this "dead wire" was connected with the Handy wire, and the other was fastened to a bracket on a pole of the Western Union Telegraph Company, also in use by the light company. This bracket became loose, and turned down, and the dead wire was left to sway and vibrate, sometimes touching the light wire. On the evening in question there was a heavy wind, and some rain, and at about 5 o'clock the bracket was so shifted that the two wires were brought in contact, the one perhaps resting on the other. The current of the electric plant had been turned on at about 4½ o'clock that evening, and a disturbance was noticed at the central office of the telephone company between 5 and 6 o'clock, when the wire in the keyboard was burned. An investigation made at once seems to have located the cause of the disturbance on the Handy wire, but there the matter rested for the night. The effort of the plaintiff was directed to showing negligence on the part of the telephone company in allowing its dead wire to hang for so long in close proximity to the light wire, and in so putting up the wire at the residence of Handy as that it could come in

contact with the trellis wires then about the porch. Without setting out the details of the proof, it is sufficient to say that it conduced to show negligence in the particulars mentioned; and the court therefore properly overruled the appellant's motion for peremptory instructions upon the conclusion of the plaintiff's proof. Such a motion, however, was sustained for the light company. The appellant attempted to show that it had kept up the usual inspection of its line, and had no reason to apprehend danger from the dead wire remaining on the poles; that the trellis wires were so placed by Handy, or others over whom it had no control, as that connection with its wire was made without its knowledge or consent; and, moreover, that the deceased was the subject of heart disease, and likely to die suddenly, under undue excitement, and that he had probably died from natural causes, and not from an electric shock. The jury found against these contentions, and we proceed to notice the errors of law complained of.

And first it is insisted that the petition was fatally defective, in that it failed to allege that the intestate left a wife or child. We are of opinion that this was not necessary. Const. § 241, provides that "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death, from the corporations and persons so causing the same. Until otherwise provided by law, the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The general assembly may provide how the recovery shall go and to whom belong; and until such provision is made the same shall form part of the personal estate of the deceased person." This section was in force when Simms lost his life, though the legislature had not then provided how the recovery should go, or to whom it should belong. It was wholly immaterial, therefore, whether there was, or not, a widow or child. It is true that under the old statute (Gen. St. c. 57, § 3), providing for a recovery where death was caused by "willful neglect," it had been held more than once that no recovery could be had unless the deceased left a widow or child; but it seems probable, as held in *Wright v. Woods*, Adm'r, 96 Ky. 58, 27 S. W. 979, that the constitutional provision has in view the correction of this supposed defect in the law, and gave a right of recovery to the personal representative in any event, leaving to the legislature the mere distribution of the recovery. And it is true that in *Wright v. Woods*, where the recovery had been effected in a suit under the old statute on "willful neglect," this court held that the distribution should be made under that statute, and to this extent the old statute was said to be still in force, or was until in July, 1893, when the present statute on the subject was adopt-

ed. The provision of the constitution (section 241) authorizes a recovery for death resulting from negligence, including all supposed degrees of it, and was intended to abrogate the further use of the words "willful neglect" in our law. The present statute follows the constitution, and nowhere uses those words, but does provide that if the "negligence" is gross, or the "wrongful act" by which death is caused is willful, punitive damages are recoverable. The words, "wrongful act," of the constitution, and "willful act," of the statute, do not primarily refer to an act of negligence, which is the opposite of those terms. The word "gross," when used to qualify the word "negligence," is a relative one, and is supposed to emphasize merely the want of due care and negligence, as "gross" or "ordinary," according to the circumstances, relations, and conditions under which due care is omitted to be exercised. In this case there appears to have been no intention of conforming the petition to the old statute. It is not a suit for "willful neglect," but recovery is sought for the death of the plaintiff's intestate, caused by the "willful, gross, and reckless negligence" of the company, the word "willful" being used, manifestly, as the synonym of "gross." The demurrer to the petition was therefore properly overruled. It follows from what we have already said that compensatory damages were recoverable in the action, and hence there was no error, as is insisted by counsel for appellant, in the instruction authorizing such recovery. The case relied on, of Railroad Co. v. Privitt's Adm'r, 92 Ky. 223, 17 S. W. 484, was one under the old statute, and it was held that, unless "willful neglect" was shown, no recovery could be had. We perceive no error to appellant's prejudice in any of the instructions given.

The court, however, committed a serious error, to the prejudice of the company, in permitting the alleged letter of Mrs. Lake to Handy to be read as evidence. She was the secretary of the company, it is true, but she was not its agent in making damaging admissions after the transaction occurred in which Simms lost his life. Railroad Co. v. Ellis' Adm'r (Ky.) 30 S. W. 979. The letter was to the effect that the dead wire caused Simms' death, and completely silenced the company's contention that Handy's trellis wires were placed in contact with the telephone wire without its knowledge, and thus caused his death, or contributed to it, or that his death was due to natural causes. Moreover, if otherwise competent, it must have been mere opinion, based on hearsay, as the writer had no personal knowledge of the facts, though the statement, coming from one connected with the company, had the force of an absolute admission, and one fatal to the company's defenses. For the reason indicated the judgment is reversed, for proceedings consistent with this opinion.

LOUISVILLE & N. R. CO. v. JACKSON.
(Court of Appeals of Kentucky. June 10, 1896.)
CARRIERS—RAILROAD—CARRYING PASSENGER BEYOND DESTINATION—DAMAGES.

For the negligence of a conductor in failing to stop at a station, whereby plaintiff, a passenger, was carried beyond her destination, a railroad company is liable for compensatory damages only; and an instruction authorizing the jury to award punitive damages if defendant's agents were "rude and insulting in words, tone, or manner," where there was no evidence to authorize a finding of such conduct, was prejudicial error.

Appeal from circuit court, Bullett county.

"Not to be officially reported."

Action by Viola Jackson against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Fairleigh & Strauss, for appellant. J. F. Combs and J. W. Croan, for appellee.

PAYNTER, J. Appellee purchased a ticket at Shepherdsville, which entitled her to ride from that point to the "Gap-in-Knob," on a regular passenger train of appellant. She boarded the train, and, before reaching the Gap-in-Knob, the conductor on the train took up her ticket. While he was looking after a drunken passenger, the train passed the station without stopping, thus carrying appellee beyond her destination. The conductor refused to carry her back to the station, because it would have been in violation of the rules of the railroad company. Huber was the next station on the road. The conductor testified that he proposed to carry appellee to South Louisville, and put her on a train which would within less than an hour carry her to the Gap-in-Knob. The brakeman testifies to the same effect. The appellee denies that such offer was made, and says that the conductor refused to carry her back to the station, but told her she would have to get off at Huber; that he took her by the arm, and went to the steps with her, and, when the train stopped, stood on the steps, and assisted her to alight from the train; that she was carried two or three hundred yards beyond the station; put off on some rocks that were broken up; that the conductor said, after helping her off the train, if he had any conveyance, he would have her conveyed back. What occurred after she got off the train is not material for the purpose of the present inquiry, as to the correctness of the instructions which the court gave the jury. It was admitted in the pleadings and on the trial that appellee was carried beyond the station where she was entitled to leave the train. The company was liable to the appellee for the act of the conductor in carrying her beyond her station, for such damages which proximately resulted from such act.

The facts did not warrant the court in giving an instruction authorizing the jury to award punitive damages. There is no testimony conducing to prove that the conduct-

or, in assisting the appellee from the train, was insulting, either in words, tone, or manner. That he was such cannot be fairly deduced from the testimony of appellee. It is perfectly manifest that he took her by the arm to assist, not to force, her off the train. According to her testimony, the conductor stood on the steps to assist her off the train, but expressed regret that he did not have a conveyance to carry her back. The regret the conductor expressed that he did not have a conveyance shows that neither his words, tone, nor manner were insulting. The court told the jury that they were authorized to award punitive damages if appellant's agents, etc., in putting appellee off the train, were "rude and insulting in words, tone, or manner." There was no evidence upon which to base such an instruction. Had it been proper to submit the question of punitive damages to the jury, the instructions given were erroneous. The court told the jury, in instruction No. 2, that they were the judges of the degrees of negligence, etc., and that, if the defendant was guilty of "ordinary" negligence, the damages were compensatory. In No. 3, the court told the jury that if the defendant was guilty of "willful" neglect, etc., or if the defendant's agents, etc., were "rude and insulting in words, tone, or manner," they were authorized to award punitive damages. The word "willful" has no proper place in instructions in a case like this. If it had, then there was no instruction defining these degrees of negligence; on the contrary, the jury were told that they were the judges of the degrees of negligence. There being no instruction defining degrees of negligence, the jury were made the judges of the law in this respect, as well as of fact. The instructions were substantially correct except in the particulars mentioned. The verdict was for \$800, and the jury could not have awarded this sum as purely compensatory for the injury complained of. The judgment is reversed, with directions to grant appellant a new trial, and that further proceedings conform to this opinion.

LOUISVILLE & N. R. CO. v. GAINES.

(Court of Appeals of Kentucky. June 9, 1896.)

CARRIERS — EJECTING PASSENGER — MISTAKE IN TICKET.

One who asks the ticket agent for a first-class ticket, and missing the train, though proceeding immediately after getting the ticket to the depot, takes the next train the following morning, and is put off it, the ticket proving to be a first-class limited ticket, out of date the day previous, may maintain an action of tort for forcible ejection.

Appeal from circuit court, Carroll county.
"Not to be officially reported."

Action by George F. Gaines against the Louisville & Nashville Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Winslow & Winslow, for appellant. Gaunt & Downs and J. A. Donaldson, for appellee.

PRYOR, C. J. The appellee purchased of the ticket agent of the appellant a first-class ticket to Crab Orchard, from the city of Cincinnati. The office was at Fourth and Vine streets. He paid for his ticket, and proceeded at once to the depot, when he discovered the train was then moving off and out of his reach. He returned to the hotel, and left on the next train, the following morning. After starting on his journey, the conductor on the train of appellant applied for his ticket, and, upon examining it, found it was a first-class limited ticket, and out of date the day previous. He refused to receive the ticket, and under instructions from those in authority, having consulted them by telegram, took the appellee by the lapel of his coat, and, against his will, led him off the train. Some loud talking between them preceded his removal, the appellee refusing to leave the train, but claiming the right to be carried to his place of destination. When the ticket agent made out his ticket, he placed it in an envelope, and handed it to the appellee, the latter making no examination of it. The appellee was taken from Covington to Milldale, and there transferred to another train of appellant, and from this last train was ejected. The appellant's agent contradicts the statement made by the appellee, and says he sold him the ticket as a limited ticket, for \$4.39, while the regular first-class ticket was \$6, and this would seem to sustain the agent in his version of the matter. We think, however, that there was evidently a mistake made by the ticket agent, as it does not appear that the appellee knew they were selling such tickets, and he swears he applied for a first-class passenger ticket to Crab Orchard, and there is no doubt but what he supposed he had paid for such a ticket. So positive was he of his right to go upon the ticket that he requested the conductor to inform himself by telegram, and the answer he received was to "put him off the train." He was made to leave the train about 30 miles from his home, and, it seems to us, without much reason on the part of the company; but, in so far as the conductor was concerned, it was his duty to obey the order of his superiors, and he is in no wise to blame. He, of course, looked to the ticket presented to him, and by that he was to be controlled in his action; and, but for the mistake made by the ticket agent, the company could not be held responsible. It is claimed, however, there was no mistake made; and there was none if the ticket agent is right in his recollection of what transpired when he sold it. But the jury heard the testimony, and seem to have been satisfied that the history of the purchase of the ticket was as stated by the appellee. It is argued that no recovery can be had except on the breach of the contract to carry, and not then if the ticket presented does not evidence the obligation to transport

the passenger. This would evidently be the correct rule if the mistake had not been with the company, as it can scarcely be held that a ticket worthless for travel when sold by the agent of the company can justify the ejection of the passenger from a train when the fault is that of the company, and not that of the passenger. It is claimed that this is an action *ex contractu*, and not *ex delicto*. We cannot take this view of the petition. While many unnecessary facts are stated in the petition, they are mere matters of inducement; and what transpired when the ticket was purchased, and his going to the depot, and entering the train, were facts stated showing the rights of the plaintiff as a passenger, or, in other words, his right to be on the train. When the appellee was taken off the train against his will by the conductor laying hands upon him for that purpose, it was an assault and battery; and, while no wounding or bruising of the person appears, the doctrine of *moliter manus impositus* does not apply, because the conductor had no right to remove him from the train. The entire case rests on the testimony of the appellee, and that of the ticket agent; and, the verdict not being palpably against the weight of the evidence, the verdict for \$200 will not be disturbed. The right to bring such an action is evident. If the fault of the agent of the company, the remedy by an action for tort, where the passenger is forcibly ejected, ought not to be questioned. *Hufford v. Railroad Co.*, 64 Mich. 31, 31 N. W. 544; *Railroad Co. v. Fixe*, 11 Am. & Eng. Ry. Cas. 100; *Railway Co. v. Hennigh*, 39 Ind. 509; *Head v. Railway Co.* (Ga.) 7 S. E. 217. There was no question made as to the jurisdiction for want of service, but, on the contrary, the party appeared, and made defense. Judgment affirmed.

GRAZIANA et al. v. GRAZIANA.

(Court of Appeals of Kentucky. June 10, 1896.)

DEED—ESTATE CONVEYED—REFORMATION.

Where testator conveyed to his daughter, by way of advancement, a life estate, with remainder to her children, the deed will not be reformed, on the ground of her ignorance of its contents, so as to take away the remainder from the children, and give the grantee the fee.

Appeal from circuit court, Campbell county.

"Not to be officially reported."

Action by Keturah L. Graziana and others against Addie Graziana. There was judgment for defendant, and plaintiffs appeal. Affirmed.

Wright & Anderson, for appellants.

PRYOR, C. J. We have no doubt, from an examination of the record before us, that it was the intention of the father of the female appellant to give her a life estate only in the property conveyed to her by way of advancement, and, while the other chil-

dren may have the fee in what was given to them, the children of the appellant get the remainder interest. She has children, who are defendants to her petition; and there seems to be no reason why the remainder should be taken from the children, and given to the mother, when, to do so, the conveyances under which she holds will have to be reformed, on the idea of her ignorance as to their contents. Judgment affirmed.

McDOEL v. OHIO VAL. IMPROVEMENT & CONTRACT CO.'S ASSIGNEE.

(Court of Appeals of Kentucky. June 10, 1896.)

PRINCIPAL AND AGENT—DOUBLE AGENCY—VOIDABLE AGREEMENT—RATIFICATION.

1. Defendant authorized R., as his agent, to purchase for him 100 shares of stock in a corporation of which R. was president; R. representing that the company had no stock unsold, but that he could induce other stockholders to surrender some of their stock at a premium. At that time the company held some shares of stock which had been surrendered without premium, and these, with others afterwards obtained, were transferred to defendant at a premium on the whole amount, the company receiving over half of the premiums so paid. *Held*, that the agreement to purchase was voidable at the election of defendant, on the ground of the double agency of R.

2. The payment by defendant of part of the purchase price before discovering the double agency of R. was not a ratification of his acts, rendering defendant liable for the whole amount.

Appeal from court of common pleas, Jefferson county.

"Not to be officially reported."

Action by the assignee of the Ohio Valley Improvement & Contract Company against W. H. McDoel. There was judgment for plaintiff, and defendant appeals. Reversed.

Pirtle & Trabue, Helm & Bruce, and G. W. Kretzinger, for appellant. Rozel Weissinger and John B. Baskin, for appellee.

HAZELRIGG, J. The trust company, as assignee of the Ohio Valley Improvement & Contract Company, sought in this action to recover of the appellant a balance of \$2,500, due from him on account of his alleged purchase of 100 shares of the stock of the contract company. The averment of the petition is that the defendant, McDoel, induced the contract company to procure the transfer to him of subscriptions made by other parties to its capital stock, to the amount of 100 shares, and, in consideration thereof, agreed to accept and purchase same, and pay therefor the sum of \$11,000, etc. In the amended petition, it is alleged that McDoel agreed and promised to accept and purchase from the contract company 100 shares of its capital stock, and pay therefor the sum named. The chief defense of the appellant is that he made no contract whatever with the contract company, and authorized none to be made with that company, but that Richards, the president of the contract company, though volun-

teering to act as his agent to procure stock for him from certain subscribers, because the company, he alleged, had none to sell, actually sold him stock owned or controlled by the company, and in fact made a profit for the company, and was therefore practically the agent of both buyer and seller, though not disclosing his double agency. His counsel contend that, while there was no fraud or intentional wrong in this on the part of the agent, yet, upon discovering the fact, McDoel had his election to repudiate or ratify the contract, and that he elected to repudiate it upon a discovery of the facts.

It appears from the proof that the contract company was organized to contract the Richmond, Nicholasville, Irvine & Beattyville Railroad, and about October, 1889, had concluded a contract with the Louisville, New Albany & Chicago Railroad Company (known as the "Monon Road") by which the former undertook to guaranty the bonds of the latter,—an arrangement supposed to be of great advantage to the contract company, and to add greatly to the value of its stock. Richards, on behalf of his company, was anxious to have appellant and others who were officers in the Monon take some of this stock, and suggested such taking to McDoel. He represented to McDoel that all the capital stock of his company had been subscribed for, but that he thought he could buy the stock for him from some of the original subscribers, though he would have to pay a premium for it. To this McDoel assented. Richards was thus the agent of McDoel, and, as such, proceeded to have certain subscribers agree to surrender to him, as trustee, a certain number of their shares, to be placed at cost or par and 10 per centum premium. It appears, however, that he already had in his hands or under his control a large block of stock originally subscribed for by the Louisville Southern Railway Company, and which had not been paid for by that company, and the bulk of which had been replaced by Richards, but a part of which McDoel got. The stock surrendered by the subscribers, including that surrendered before as well as after the Richards-McDoel contract, was reissued by the contract company directly to McDoel and his associates; and McDoel, at Richards' instance, was entered on the books of the company as a subscriber for 100 shares of stock, at the price of \$11,000. The premium of \$1,000 paid by McDoel was divided about equally between the contract company and some of the subscribers who surrendered their stock, and to the extent of this premium, at least, Richards made for his company a profit of \$550, out of his transaction with his principal, McDoel. While McDoel knew that Richards was president of the contract company, it was not disclosed or intimated in the negotiation between them that Richards was selling any of the company's stock, or that that company would get any profit out of the deal. And

if we concede that at that time the company, in fact, had no stock to sell, as Richards represented to McDoel it had not, yet, in carrying out the transaction, it did get it, and through Richards, and without the knowledge or authority of McDoel, sold it to McDoel at a premium. It is upon this contract with the company made by Richards for McDoel that this suit is brought. It is altogether manifest that no intimation was given McDoel that he was having any transaction with the contract company, and certainly none out of which that company was to make a profit; and it may be fairly inferred that, had he been so informed, the solicitation of the president of that company to be permitted to act as his agent would have received less consideration. Richards testifies that "the premium on the stock went partly to pay the parties who had already subscribed for it, and agreed to retransfer it, and partly to the Ohio Valley Contract Company, for stock that it did not pay any premium on for getting the subscription canceled." So the agent of McDoel made for himself, as stockholder of the company, and for his company, a clear profit out of his principal, as it is conceded no premium was paid for part of the surrendered stock. It is wholly immaterial that Richards believed the stock a good investment. His good faith is unquestioned, as he proved it by investing largely in the enterprise and in the stocks of the company. The contract is clearly voidable, at the option of the principal.

Much is said of the ratification of the contract by McDoel. It appears that he forwarded the sum of \$6,500 at one time, and \$1,000 on two other calls by the company. But, evidently, the contract he was thus ratifying was the one he supposed his agent had made, in pursuance of the authority conferred on him, and not one out of which a profit had been made for the agent and his company. The judgment is reversed, with directions to dismiss the petition.

RAINS v. LEE et al.

(Court of Appeals of Kentucky. June 10, 1896.)

NOTE—CONSIDERATION—COMPROMISE—ABATEMENT AND REVIVAL.

1. Compromise of plaintiffs' claim against defendant, asserted in an action by them against him and another, and the dismissal of the action as to defendant, constituted a sufficient consideration for the note executed by defendant to plaintiffs for what was supposed to be amount for which defendant was liable.

2. One of the plaintiffs having died, the court should, before entering judgment, have abated the action as to him, on suggestion of his death, and revived it in the name of his administratrix, on her petition to be made a party, accompanied by letters of administration.

Appeal from circuit court, Marion county. "Not to be officially reported."

Action by A. Lee and others against J. M. Rains. Judgment for plaintiffs. Defendant appeals. Reversed.

H. P. Cooper, for appellant. John McChord, for appellees.

LANDES, J. The compromise of the claim of the appellees against the appellant, asserted in the action brought by them against A. K. Russell and the appellant, in the Marion circuit court, to recover railroad taxes alleged to have been collected by them, and for which they had not accounted, and the dismissal of the action as to the appellant, constituted a sufficient consideration for the note sued on, which was executed by the appellant to the appellees, secured by mortgage on his property, for what was supposed to be the amount for which the appellant was liable. *McDaniel v. Evans*, 90 Ky. 568, 14 S. W. 541. There was no plea of fraud or mistake whereby the appellant was induced or led to execute the note, and there is no hint in the evidence of any such defense, and the judgment of the court below on the merits is without error. But before rendering judgment the court ought, by proper orders, to have abated the action as to plaintiff Thomas Durham, on the suggestion of his death, and to have revived it in the name of his personal representative. We think that upon the suggestion of his death, and the consequent abatement of the action as to Durham, it would have been proper for the court to have revived the action, without delay, in the name of his administratrix, upon her petition to be made a party plaintiff, accompanied by letters of administration. The evidence shows that the appellant's claim for \$207.35 for making tax sales at the instance and for the benefit of the appellees, who were sureties on the bond of Russell as collector of the taxes, and for \$100 for services in overhauling the settlements made by Russell for taxes collected, are just, and they both ought to have been allowed as credits to the appellant, by way of set-off against the note sued on. For the reasons indicated the judgment is reversed and the cause remanded, with directions that further proceedings be had, consistent with this opinion.

RATCLIFF v. LOUISVILLE COURIER-JOURNAL CO. et al.

(Court of Appeals of Kentucky. June 10, 1896.)

LIBEL—EVIDENCE.

1. In an action for libel, the statement of the article, that plaintiff had "been in more rows than any other one man in this county," being averred by the answer to be true, evidence of many instances of quarrels and disturbances in which plaintiff had been concerned is admissible in support thereof.

2. Recovery cannot be had, in an action for libel, the article being substantially true as published.

Appeal from circuit court, Marion county.

"To be officially reported."

Action by Lewis J. Ratcliff against the Louisville Courier-Journal Company and oth-

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ers. Judgment for defendants. Plaintiff appeals. Affirmed.

Thompson & McChord and L. S. Pence, for appellant. F. Hagan, for appellees.

LANDES, J. This was an action to recover damages for an alleged false, malicious, and libelous publication concerning the appellant. It was a dispatch sent by a special correspondent to, and published in, the *Times* newspaper, describing the alleged tragic killing and decapitation of the appellant by one Mahoney at his distillery in Marion county, as the result of a quarrel which it was stated the appellant "picked with Mahoney," who was described as "a quiet and peaceable man," while of the appellant, whose home was said to be in Marion county, it was stated, "He has been in more rows than any other one man in this county." The dispatch was embellished in the columns of the *Times* with startling and sensational headlines, like the following: "Brained His Adversary," "And Then Deliberately Chopped Off His Head." These were designed and had the effect to attract the attention of the readers of the *Times* to the libelous dispatch, and thus cause it to be widely circulated in Marion county. "among his friends and acquaintances, and the public in general," resulting in great damage to "the good name of plaintiff," who, it was alleged, by reason of "said false publication," had already been exposed "to hatred, contempt, and ridicule."

In proof of the extensive circulation of the libel, and in aggravation of the damages, during the progress of the trial the court, over the objections of counsel for the appellees, permitted the appellant to exhibit in evidence before the jury a copy of the *Police Gazette*, published in New York, containing the substance of the obnoxious publication, illustrated with a picture representing Mahoney in the bloody act of decapitating the appellant with the hatchet with which he had dealt him the fatal blow. The answer of the appellee company contained a denial of the malice charged in the petition, and of injury to the character of the appellant by reason of the publication of the alleged libel, and an averment, in substance, of the truth of the statement that the appellee picked a quarrel with Mahoney at his distillery, who struck him a fearful blow with a hatchet, and that appellant's home was in Marion county, "and he had been in more rows than any other one man in this county." The issue being joined, the case was submitted to a jury, and after the evidence was heard, and the instructions given, the jury returned a verdict for the appellees, upon which a judgment was rendered dismissing the petition, and for appellees' costs against the appellant, from which judgment this appeal is prosecuted.

During the progress of the trial, many witnesses were introduced in behalf of the appellees, and testified concerning the general

character of the appellant. This was proper, for in such cases the character of the plaintiff is deemed in issue, as it is the foundation for his claim for damages. 2 *Suth. Dam.* (2d Ed.) § 152. But the appellees were permitted, over the objections of the appellant, to bring out in testimony before the jury many instances of quarrels and disturbances in which the appellant had been concerned or engaged, in Marion county, and this is earnestly urged as error by counsel for the appellant. We hold, however, that this testimony was properly admitted, as it was pertinent to the issue made by the averment in the answer of the truth of that part of the obnoxious publication which represented the appellant as having been in more rows than any other one man in the county, which may be said to be the only part of it that was libelous per se. Just how far the testimony as to specific acts of disorder on the part of the appellant went towards establishing the truth of the libelous charge, was for the jury to decide. Such testimony would not have been admissible to impeach the general character of the appellant, and it was not offered or admitted for that purpose. But that the appellees had the right to prove the truth of the alleged libelous charge in this way, there can be no doubt.

Exception was also taken, in behalf of the appellant, to the testimony of some of the witnesses who were introduced to impeach his general character, on the ground that they did not qualify themselves as witnesses as to his general character, by showing that they were acquainted with it. A few of the witnesses did not show clearly that they were acquainted with appellant's general reputation, in strict compliance with the rule on that subject; but, on examining their testimony, we do not think, in the light of all of the testimony, that it was prejudicial to the substantial rights of the appellant on the merits.

The instructions given by the court contained a fair presentation of the law of the case. After properly defining malice, in its legal sense, to be a wrongful act done to another without just cause or excuse, the jury were told, in substance, that the appellant was entitled to a verdict at their hands if the evidence showed that the publication was untrue, and that in that event the amount of recovery was to be fixed by them, not exceeding the amount claimed, from a consideration of all the facts and circumstances proved in the case. This was done at the request of the appellant, and, although excepted to by the appellees, it was not objectionable, when taken in connection with other instructions that were given. Two other instructions were requested by the appellant, and refused by the court. In one of them the court was requested to submit a state of case in which the jury might give punitive damages, and it was properly refused because there was no evidence that would have

authorized such an instruction. The other was properly rejected because it was substantially covered by the instruction above recited, submitting the state of facts upon which the appellant was entitled to recover, from the standpoint of the appellant.

In behalf of the appellees, counsel requested the court to instruct the jury, in substance, (1) that if the dispatch containing the alleged libelous statements was published without actual malice, but in good faith, and in the belief that it was true; and (2) that if the publication was proved to be true in fact, or substantially true as published,—they should, in either event, find for the appellees. These requests were granted, and exception was taken in behalf of the appellant. The second request was properly granted. *Vance v. Courier-Journal Co.*, 95 Ky. 41, 23 S. W. 591. But the first is subject to the objection that it based the immunity of the appellees upon the absence of actual malice, when a state of facts had been submitted, upon which the jury were told that the appellees might be held liable, from which, if they were proved, malice was to be implied. But, looking at the whole case, we are satisfied that the substantial rights of the appellant, on the merits, were not prejudiced by this objectionable instruction. And upon the facts and circumstances in evidence, and the law as given, the jury having found, in effect, that the libelous part of the publication was substantially true, and there being sufficient evidence to support that finding, and no error having been committed that was prejudicial to the substantial rights of the appellant, the judgment is affirmed.

AMERICAN HARROW CO. v. MARTIN. (Court of Appeals of Kentucky. June 11, 1896.)

SALE—FALSE REPRESENTATIONS—RESCISSION.

Representations which prove untrue, by the seller of a combination harrow, seeder, and cultivator, as to the efficiency of the implement, due to the fact that the wheat sown thereby would not properly germinate, is not ground for rescission, where it appears that the buyer himself tested the implement six weeks before completing the purchase, as by ordinary care he should have discovered such fact prior to the purchase.

Appeal from circuit court, Livingston county.

"Not to be officially reported."

Action by the American Harrow Company against J. L. Martin. There was a judgment for defendant, and plaintiff appeals. Reversed.

J. K. Hendrick and Wm. Marble, for appellant. N. H. Bigham and J. C. Hodge, for appellee.

LEWIS, J. The American Harrow Company brought this action on a promissory note for \$600, executed by J. L. Martin, November 5, 1892, and due December 1, 1893, the consideration being 12 farming implements, each

being called and known as a "seeder, harrow, and cultivator combined." The ground of defense is alleged fraudulent representations made by plaintiff to defendant as to the quality, efficiency, and utility of the implements. And the question on this appeal is whether the lower court properly overruled the demurrer to the answer, which, because plaintiff declined to plead further, was followed by judgment dismissing the action. In determining whether the buyer of personal property is entitled to rescission upon the ground of fraudulent representation as to quality and capability of the article sold, the distinction must be kept in view between the statement of a material and essential fact in regard to it and mere commendation of its value and utility. And it is a fundamental condition of the buyer's right to rescind upon such ground that he was actually deceived, and induced to purchase by the alleged false representation of material fact or facts. Also the rule caveat emptor generally applies when the article offered for sale is open to inspection of the buyer. But that rule does not apply when the seller has full knowledge of the quality, character, and capability of the article or implement, and the buyer, by reason of lack of experience or capacity, has not such knowledge, and must necessarily and does rely upon representations of the seller. Many representations as to the character and capability of the farming implements in question are alleged in the answer of defendant to have been made to him by plaintiff. But most of them were evidently mere commendations of the machine, and not representations of material facts. But the alleged representations that it could be used successfully and profitably as a plow, harrow, rake, and seed sower; that it would harrow through stalks or mud as well as clean ground; and that it worked well in roots which did not interfere with its operation,—were material, and in regard to which plaintiff, being the manufacturer, must be considered to have had full knowledge, while defendant was comparatively uninformed. But it is admitted in his answer that defendant, before concluding the purchase and executing the note sued on, did actually test one of the implements by sowing with it about 40 acres of wheat; and that was done more than a month before conclusion of the purchase of the 12 implements, all but one of which he evidently purchased for resale. It is true, he states it was not known to him at date of the note—the fact afterwards found out—that the wheat so sown did not fully germinate. But it seems to us a person of ordinary experience and diligence might, by examination, have discovered at date of the note whether wheat sown six weeks previously had germinated. As, therefore, defendant had, before completing the purchase, ample opportunity to, and did, test the character and quality of the implements, and it is not

alleged they are wholly valueless, the rule caveat emptor should be applied; and consequently the lower court erred in overruling plaintiff's demurrer to the answer and counterclaim. The judgment is reversed for further proceedings consistent with this opinion.

NORTHCUTT et al. v. JUETT et al.
(Court of Appeals of Kentucky. June 11, 1896.)

JUROR—RELATIONSHIP TO PARTIES.

The fact that a juror was a relative of both appellants and appellees in the eighth degree, where he was not aware of it when sworn, and it does not appear to have prevented a fair trial, is not ground for reversal.

Appeal from circuit court, Harrison county.

"Not to be officially reported."

Proceeding by Samuel Juett and others in the Harrison county court for the probate of the will of Adam Juett, Sr., deceased. From a judgment of the circuit court on appeal admitting the will to probate, G. V. Northcutt and others appeal. Affirmed.

J. T. Simon and W. S. Cason, for appellants. Blanton & Berry, for appellees.

GUFFY, J. A paper purporting to be the last will of Adam Juett, Sr., was presented to the Harrison county court for probate, and the same was denied. From the judgment of the county court refusing to admit the will to probate an appeal was taken to the circuit court by Samuel Juett, Hester A. Chipman, and others. A trial in the circuit court resulted in a verdict and judgment finding the paper in question to be the true last will and testament of decedent. The appellants' motion for a new trial being overruled, they have appealed. A number of grounds for new trial were filed, but the only one insisted on in the brief filed is that George P. Martin, one of the jury, was a relative of appellees, being a relative in the eighth degree. It also appears that he is also of kin to the appellants in the same degree. It seems to us that the relationship was too distant to prejudice appellants, or to entitle them to a new trial. It seems that the juror was not aware of the relationship at the time he was examined and accepted. It does not appear that the relationship of the juror prevented the appellants from having a fair and impartial trial. It seems to us that the instructions given by the court correctly presented the law of the case, hence no error was committed to the prejudice of appellants in refusing the instructions asked for by them, nor do we perceive any error in the admission or rejection of evidence. It may be conceded that the testimony is conflicting, but it was the province of the jury to weigh and determine the weight to be given to the evidence, and we cannot say that the verdict

is against the evidence, or not supported by sufficient evidence. We see no reason to support the motion made in the circuit court to dismiss the appeal taken to that court from the judgment of the county court. The judgment below is affirmed.

BOARD OF COUNCILMEN OF CITY OF FRANKFORT v. MURRAY.

(Court of Appeals of Kentucky. June 10, 1896.)

STREET IMPROVEMENT—ORDINANCE.

1. Under St. §§ 3449, 3450, providing that the common council may pass ordinances to require the improvement of streets at the cost of the abutting owner, and that, on the passage of the ordinance, it shall be the duty of the mayor to enter into contract with any person offering to do the work, on the best terms, etc., an ordinance is not invalid because giving the abutting owner opportunity to do the work before it is let by contract.

2. An ordinance for construction of sidewalks, designating the location of the streets to be improved, and providing that the sidewalks shall be of "brick, and curbed with stone, and provided with stone gutter ways; the sidewalks to be eight feet wide, * * * and to be at the grade * * * heretofore fixed by the city engineer, * * * as shown * * * by stakes already set in front of said respective lots, or parts of lots,"—sufficiently complies with St. § 3449, providing that the ordinance shall "fully declare and prescribe the kind and extent of improvements to be made."

Appeal from circuit court, Franklin county.

"Not to be officially reported."

Action by the board of councilmen of city of Frankfort against James A. Murray. Judgment for defendant. Plaintiffs appeal. Reversed.

Hugh Rodman and W. H. Julian, for appellants. Geo. C. Drane, for appellee.

HAZELRIGG, J. The common council of the city of Frankfort, a city of the third class, adopted an ordinance requiring the appellee and other owners of certain described property, within 30 days, to construct sidewalks, curbing, and gutter ways, of a particular description, in front of their respective lots. The appellee failing, for the time indicated, to comply with the ordinance, after notice of its passage, the mayor, after advertisement, as provided by law, contracted for the construction of the work with the appellant Noonan, which contract was ratified by the council. The work was thereupon completed under the supervision of the mayor and engineer, and the cost apportioned among the property owners, as required by the charter of the city. The board approved the estimates and apportionment, but the appellee, insisting that the ordinance is invalid, refuses to pay this assessment against him, of \$138.60. The ordinance is alleged to be invalid because not in accordance with the provisions of the city charter. Section 3449 of the Kentucky Statutes provides that "the common council shall have power to pass ordinances to require the im-

provement of streets and alleys, subject to the mode and manner herein designated, either by grading and paving, or by grading, paving and macadamizing, at the cost of the owner or owners of the ground fronting such improvement, and the cost of such improvement to be apportioned according to the number of feet front each may own," etc. Section 3450 provides that "upon the passage of any ordinance requiring the improvement of streets and alleys, or parts thereof, it shall be the duty of the mayor to enter into contract with any person or persons offering or agreeing to do the work required to be done by such ordinance, upon the best and most advantageous terms," etc. The contention of appellee is that the ordinance is violative of the law, in that it requires the lot owners to construct the improvement in front of their respective lots, when the section quoted does not authorize the council to so require, but, on the contrary, provides that, upon the passage of the ordinance, the mayor shall enter into a contract with any person, etc. The trial court seems to have been of that opinion. At any rate, it sustained a demurrer to the petition seeking to enforce the lien provided by the statute, upon the ground, as argued by appellee's counsel, that the ordinance was invalid, because it did not conform to the sections quoted. We cannot reach this conclusion. It may be that the council may require the improvement to be done at the cost of the owner, under the mayor's contract with some other person, without affording the owner an opportunity of doing it himself; and we are inclined to think that the law admits such a construction. But it does not follow, because such an opportunity is afforded by the ordinance, that the owner can complain. Very serious complaint is often urged in cases of this kind because such an opportunity is not given, and with a better show of reason than when the owner is given a chance to do the work himself. Besides, the work here has in fact been done, and done under the mayor's contract with Noonan, after approval by the council, as required by the charter.

It is also argued by counsel that the ordinance does not "fully declare and prescribe the kind and extent of improvement to be made." Section 3449. An inspection of the ordinance, however, shows a substantial compliance with this provision. In *Hydes v. Joyes*, 4 Bush. 464 (a case relied on by counsel), the ordinance provided that certain sidewalks "or such portions of said sidewalks, as the city engineer may direct, be graded and paved at the costs of the owners of property bounding thereon; said work to be done subject to the supervision and control of the city engineer," etc. And this court held it invalid, because it was an attempted delegation of legislative power. The engineer might have determined, the court reasoned, to pave one portion with brick, one with stone, and an-

other with plank, without transcending his authority, though such an ordinance would hardly have received any support in the legislative body of the city. Here the location of the streets to be improved, and the lots and parts of lots of the owners, were sufficiently designated in the ordinance, and the sidewalks were to be of "brick, and curbed with stone, and provided with stone gutter ways; the sidewalks to be eight feet wide from the line of the respective lots to the inside line of the curbing, and to be at the grade or elevation heretofore fixed by the city engineer, and adopted by this board, and as shown and established by stakes already set in front of said respective lots or parts of lots." We do not think the ordinance is invalid because the kind of stone, and its thickness and width, are not prescribed. Some of the details of this kind of work may properly be left to the city engineer, without a violation of the law forbidding the delegation of legislative power.

In our opinion, therefore, the petition of the appellants states a good cause of action, under the provisions of the statute, and the demurrer ought to have been overruled. Judgment reversed, for proceedings consistent with this opinion.

LOUISVILLE & N. R. CO. v. OFFUTT.

(Court of Appeals of Kentucky. June 12, 1896.)

MASTER AND SERVANT—CONTRACT OF HIRING—INTERPRETATION—VALIDITY—STATUTE OF FRAUDS.

1. Plaintiff alleged that defendant agreed to give him regular work as freight conductor, and "that said regular work would continue so long as this plaintiff did faithful and honest work," at a specified compensation per month. *Held*, that the contract was indefinite as to term of service, and terminable at any time by either party.

2. Where a contract of hiring does not bind the employé to serve the employer either a definite or indefinite time, the employer may terminate the contract at any time, though he agreed to give the employé work as long as he did honest and faithful work.

3. An agreement by an employer to give the employé regular work as long as he does faithful and honest service is legal.

4. A parol agreement by an employer to give the employé regular work as long as he does faithful and honest service is not within the statute of frauds.

Appeal from circuit court, Warren county.
"To be officially reported."

Action by James T. Offutt against the Louisville & Nashville Railroad Company for breach of a contract of hiring. From a judgment for plaintiff, defendant appeals. Reversed.

J. A. Mitchell, H. W. Bruce, and Wm. Lindsay, for appellant. E. W. Hines, Sims & Covington, and H. B. Hines, for appellee.

LANDES, J. The appellee, having been employed for a number of years as brakeman and freight conductor by the appellant on its road from Bowling Green, Ky., to Nashville, Tenn., was discharged in the

month of April or May, 1890, for violating some of the rules of the company. Early in the month of July following, there was a pending strike among the trainmen of the company at Wilder's Station, near Cincinnati, Ohio, when it became necessary for the company to procure men to take the place of the strikers, in order that it might be enabled to handle its freight traffic promptly. For this purpose, one W. J. Stewart, who was at the time a "detective" or "special agent" in the employment of the company, was sent by Mr. Metcalfe, the general manager, to Bowling Green, and, under special authority conferred upon him by the general manager, proposed to hire the appellee to go to Wilder's, and work for the company in moving its trains, which had been stopped by reason of the strike, offering him \$5 per day and his expenses for the time he might be thus employed. The appellee accepted this special employment, went to Wilder's on transportation furnished him by the company, worked for the company for two or three days, returned to Bowling Green after the trouble with the strikers was settled, and was paid for the whole time he was absent, including the days of his actual service, making eight days in all, the sum of \$40. The appellee claims that, at the time he accepted the employment for the special service referred to, he asked Stewart that he might be restored to the position in the service of the company from which he had been discharged as above stated, and that Stewart then and there promised and contracted with him, in substance, that he should be restored to the position, and that he should keep it so long as he did faithful and honest work for the company. He claims that the same contract was made with him also by G. E. Evans, who was the superintendent of transportation in the service of the company, and whom he met at Wilder's, and subsequently, after the special employment was terminated, by Mr. Kellohn, who was the assistant general manager of the company. But each of these men denied in his testimony that he made any such bargain or contract with him; and it appears from the testimony of both Stewart and Evans that they had no authority to make any such contract for the company; that such authority did not appertain to the positions which they held; but that the employment of men for such regular service of the company was within the purview of the authority and duties of the division superintendents and their superior officers. But it appears from the evidence that the appellee was kept on the pay roll as freight conductor, with directions to wait until a place could be found for him, and that, besides the \$40 paid to him for said special service, he received \$46 as the balance of his pay for the month of July, and \$80 for the month of August, and that on the 26th day of September, 1890, he received formal notice from the company that he

would be allowed no more time, which was equivalent to a discharge from the service of the company.

This suit was brought by the appellee on the 11th day of October, 1890, to recover pay for the time, to the 26th day of September, for which he had received no pay, and the sum of \$10,000 damages for breach of the alleged contract for regular or permanent employment. There is no controversy between the parties as to the special employment of the appellee by Stewart for service at Wilder's, or as to the pay he was to receive, and did receive, therefor. But the alleged contract for regular employment is stated in the petition to have been made at the time the contract for the special service was made, and is set forth in these words, viz.: " * * * And at said time the said defendant further agreed and promised and contracted with this plaintiff that when said strike was ended, and the regular trainmen returned to their work at said points, it would give to said plaintiff regular work as freight conductor on its road from Bowling Green, Kentucky, to Nashville, Tennessee, and would restore him to his old crew with which he had worked prior to his going to the state of Ohio, and that said regular work would continue so long as this plaintiff did faithful and honest work for the defendant." In an amended petition, the same statement of the alleged contract was substantially made, with this addition, viz.: " * * * And that, as his compensation for such work, they would pay him at the rate of \$95.00 per month, which said sum of \$95.00 they agreed and promised to pay him monthly." The allegations of the petition and amendments were denied by the answer, and the issue thus made was tried before a jury in the court below in June, 1891; and, upon a verdict in favor of the appellee for \$575, a judgment was rendered, which was reversed on appeal to the superior court, and the case sent back for a new trial. The second trial resulted in a verdict and judgment against the appellant for \$1,500, and, the court having refused to grant a new trial, that judgment, on appeal, is now before us for revision.

At the conclusion of the testimony, the court, on its own motion, gave to the jury eight instructions, which embodied the views held by the court as to the law of the case, all of which were excepted to by counsel for the appellant. Counsel for the appellant also made three requests for instructions, which were refused by the court, and the action of the court in refusing the requests was duly excepted to. Error in thus giving and refusing instructions, and that the verdict was not sustained by sufficient evidence, and was contrary to law, were, with others, alleged as grounds for a new trial.

Counsel for the appellee, in their brief, rely mainly upon the opinion of the superior

court delivered in deciding the case on the former appeal, which, it is claimed, irrevocably settled the law of the case; and, in attempting to apply the law as it was held by the superior court to the case as it is presented in the record before us, it is contended that the judgment must therefore be affirmed. Ordinarily, it may be conceded, the ruling of this court in such cases has been, and should be, according to this contention of counsel (Adams Exp. Co. v. Hoeing, 88 Ky. Rep. 373, 11 S. W. 205); but we cannot allow that it would be proper for us to follow the opinion of that learned court in any such case, unless the law as therein held applies to the facts in the record before us on a second appeal. On the former appeal, the superior court held that the contract alleged in the petition was not illegal or against public policy; that it was not within the statute of frauds; and that a discharged employé for a fixed term, who sues and whose case is tried before the expiration of his term of employment, can recover damages from his employer for discharging him only up to the date of the trial. These are, undoubtedly, correct principles of law, and the first and second, as stated, unquestionably apply to this case as it appears in the record before us. We can conceive of no reason for holding that a contract of employment or of service, either for a fixed term or for an indefinite time, would not be legal, or would be against public policy. In actual experience, such contracts are constantly made; and, on both principle and authority, such contracts must be held not to be within the statute of frauds, and therefore may be made by parol. The third principle or rule is likewise well settled. But whether it applies to this case must be determined from this record. It is clear to us, after a careful examination of the evidence in the record, that the appellee failed to establish that a contract of any kind was made between the appellant and him, except for the temporary and special service that has been stated, and for which he received, as he admits, the sum of \$40. Beyond this, he failed either to allege or prove that he bound himself to serve the appellant either for a definite or an indefinite time, even conceding that the appellant promised to employ him as alleged in the petition. Upon his own showing, the appellant had no right to make him answer in damages if he failed or refused to enter its service.

It will thus be seen that the essential element of mutuality of obligation was omitted from the alleged contract of hiring for the breach of which his suit was brought. In addition to this, the evidence clearly shows that the two officers or employes of the appellant, Stewart and Evans, the "special agent" or "detective," and the superintendent of transportation in the

service of the appellant, who, he alleged, promised him his old place in the service of the company, had no authority to bind the appellant by any such contract of hiring; and it is scarcely conceivable that the appellee, who had been in the service of the company, as he testified, for 12 or 13 years, did not know that such employes of the appellant had no authority to employ its conductors for regular or permanent service, or that he was not aware that it was the custom of the appellant, which was shown by uncontradicted testimony, to employ conductors, brakemen, etc., without reference to any length of time of service, and subject to dismissal at any time, and with the right on the part of such employes to leave the service at any time. Nevertheless, it further appears clearly from the testimony that the appellant, without being bound by contract so to do, placed the name of the appellee on its pay roll, with directions to him to wait until employment could be found for him, and that it expected and intended to furnish him employment, doubtless of the character of his former employment, from which he had been discharged. Having done this, and having paid the appellee for a portion of the time of his waiting for work, as if he were in actual employment, as he was directed or requested to do, the appellee had the right to expect payment for the whole time of his waiting up to the date on which he was notified of his discharge. But if it be conceded that there was a contract for regular employment, as alleged in the petition and amended petition, still the contract, as alleged and proved, being that "said regular work would continue so long as this plaintiff did faithful and honest work for the defendant," was a contract indefinite as to time or term of employment or service, and was therefore subject to be terminated at any time, at the discretion of either party to it. *Railroad Co. v. Harvey* (Ky.) 34 S. W. 1069. The inevitable conclusion is that the principle or rule of law laid down in the opinion of the superior court, as to the recovery of damages by an employe for a fixed term, who has been discharged without cause by his employer, has no application to the facts of this case as they are presented in the record. The well-settled rule with reference to the character of hiring that is set up in the petition and amended petition is that when the term of service is left discretionary with either party, or when it is not definite as to time, or when it was for a definite time, provided both parties are satisfied, in either event either party has the right to terminate it at any time, and no cause therefor need be alleged or proved. *Wood, Mast. & Serv.* (2d Ed.) §§ 133, 136; 14 *Am. & Eng. Enc. Law*, pp. 776, 790; *Railroad Co. v. Harvey*, supra. In addition to the authorities here referred to, the rule as stated is sustained by the cases re-

ferred to and quoted in the brief of counsel for the appellant; the case of *Railway Co. v. Scott* (Tex. Sup.) 10 S. W. 99, being an especially instructive case.

In the view that we have taken of the case, it is unnecessary to discuss the instructions given to the jury by the court. Being founded upon a theory of the law as applicable to the case radically different from our views, it follows that they were erroneous. Upon the case as it is presented in the record, the appellant had the right to terminate the relation between it and the appellee at will and without cause, and is not liable for damages for so doing. But the appellee had and has the right to reasonable pay for the time he waited for employment or work from the appellant, up to the date on which he received notice of discharge; and the third instruction requested by counsel for the appellant on this point ought to have been given. This will entitle the appellee to reasonable pay for his time to the 26th day of September, 1890, deducting what he has received therefor from the appellant. The judgment is reversed, and the cause remanded, with directions to set aside the verdict, and award the appellant a new trial, and for further proceedings consistent with this opinion.

LOUISVILLE & N. R. CO. v. HARTWELL et al.

(Court of Appeals of Kentucky. June 12, 1896.)

CARRIERS—RIGHT OF CONSIGNOR—PRESUMPTIONS—MEASURE OF DAMAGES FOR WRONGFUL DELIVERY—VERDICT.

1. The shipper of goods, after delivery to the carrier and receipt of bill of lading, may make the delivery to the consignee conditional on the latter's payment of a draft, provided the bill of lading has not been forwarded to the consignee, or some one for his use.

2. Where the consignor, after delivery of the goods to the carrier for transportation, directs that they shall not be delivered to the consignee, the presumption no longer obtains that the consignee is the owner of the goods.

3. The measure of damages for wrongful delivery of the goods by the carrier to the consignee without requiring payment of a draft, according to the directions of the consignor, cannot exceed the value of the goods.

4. Under Civ. Code, § 329, providing that, if by a verdict either party is entitled to recover money, the jury must assess the amount of the recovery, the court, in an action against a carrier for wrongful delivery of the goods to the consignee without requiring payment of a draft in accordance with the directions of its consignor, cannot render judgment on a verdict which fails to assess the amount of recovery.

Appeal from circuit court, Hardin county.

"To be officially reported."

Action by F. W. Hartwell and others against the Louisville & Nashville Railroad Company. There was a judgment for plaintiffs, and defendant appeals. Reversed.

W. H. Marriott, for appellant. R. L. Stith and S. H. Bush, for appellees.

PAYNTER, J. On the 9th of September, 1892, Hartwell delivered to the appellant for shipment to A. Pennington & Co., of St. Louis, Mo., 170 barrels of apples, for which he received from it a bill of lading. On the day following, Hartwell made a draft in favor of the First National Bank of Elizabethtown, Ky., on the consignees, A. Pennington & Co., for \$300, and at the same time delivered to it the bill of lading. He then notified the appellant not to deliver the apples to the consignee unless he presented the bill of lading and paid the draft which he had drawn in favor of the bank. In violation of Hartwell's order, the appellant delivered to A. Pennington & Co. the apples, without requiring them to present the bill of lading and pay the draft. The bank gave Hartwell credit for the draft, but, Pennington & Co. failing to pay it, this action was brought to recover the amount of it of the appellant. The answer denied that Hartwell was the owner of the apples, and alleged that they were owned by Pennington & Co. The shipper of goods may, even after the delivery to the carrier, and after the bill of lading has been signed and delivered, alter their destination, and direct their delivery to another consignee, unless the bill of lading has been forwarded to the consignee, or some one for his use. However, this would not be the case if a state of facts existed which made the delivery of the goods to the carrier a delivery to the consignee and the owner of them only (Hutch. Carr. [2d Ed.] § 134); while the consignee in the bill of lading is presumptively the owner of the goods, and must be treated by the carrier as the owner, unless he has notice to the contrary. When goods are shipped deliverable to the order of the consignor for and on account of the consignee, the carrier cannot deliver them to such consignee except upon the production of the bill of lading, properly indorsed by the consignor. When the goods are thus shipped and deliverable, the carrier must take notice that the consignor intended to retain control of the disposition of the goods. Id. § 130. So, when the shipper gives notice, after they have been received by the carrier for transportation, and before they are delivered to the consignee, that he is not to deliver them to the consignee, he must take notice that the consignor intends to retain control of their ultimate disposition. After such notice the presumption no longer obtains that the consignee is the owner of the goods. Bills of lading are consignable. When properly indorsed, and delivered with the intention of passing the title to them, it is a constructive delivery of the goods. Id. § 129. In the same way they could be pledged to pay a debt, and thus give the assignee control of the goods. There was no proof as to the value of the apples. It was essential that such proof should have been made before there could be a verdict and judgment for the plaintiffs. Civ. Code, § 126, subsec. 4. Unless they had a value, the appellant could not have been damaged, except

nominally, on account of the delivery of the apples to Pennington & Co. It cannot be said, because the draft was for \$300, therefore the apples were of equal value, and that there is an implied obligation on the part of the railroad company to pay that amount. The company can only be made to pay the bank such damages as it sustained, not exceeding in amount the value of the apples, but in no event more than the \$300. Section 329, Civ. Code, provides that, "if by a general verdict either party be entitled to recover money of the adverse party, the jury, in their verdict must assess the amount of recovery." In this case the verdict must be general, and, if anything, the plaintiffs were entitled to recover money of the defendant. The court failed to tell the jury that if they found for the plaintiffs, they should assess the amount of recovery, and the jury did not fix it. The verdict is as follows: "We, of the jury, find for the plaintiffs." Although there had been proof as to damages, the court was not authorized to render a judgment on the verdict, because the jury had failed to assess the amount of recovery. The testimony of Givens and Talbot in rebuttal should have been given in chief. The judgment is reversed for further proceedings in conformity with this opinion.

COX v. DAUGHERTY.

(Supreme Court of Arkansas. June 6, 1896.)

LANDLORD AND TENANT—UNAUTHORIZED AGREEMENT—ADVERSE POSSESSION—BOUNDARIES.

1. A landowner cannot be bound by an agreement concerning boundaries signed by her tenant at will without authority, and such an instrument is inadmissible to affect her interest in the lands.

2. If the holding be adverse, limitations run during the entire time of a landowner's possession, whether the occupation be his own or that of his tenant.

3. By agreement landowners may establish a final and decisive boundary, without reference to the line of the government survey.

Appeal from circuit court, Jackson county; James W. Butler, Judge.

Ejectment by Carrie T. Daugherty against Junius R. Cox. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Gustave Jones and Marshall & Coffman, for appellant. M. M. Stuckey and J. W. Phillips, for appellee.

BUNN, C. J. This is a suit in ejectment by Carrie T. Daugherty, the alleged owner, against Junius R. Cox, tenant in possession of a strip of land extending north and south, 103 feet wide at north and 100 feet wide at south end. Judgment for plaintiff, and defendant appeals to this court.

The facts are as follows, to wit: In October, 1881, Ed McDonald was owner, by inheritance from his father, of the N. W. fractional $\frac{1}{4}$ of section 1, township 11 N., range 3 W., in Jackson county, Ark.; and William Davis of the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said

section 1; and Jerry Martin was the owner of the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section 1. There is evidence that in March, 1881, R. E. McDonald, Davis, and Martin had their said lands surveyed, in order to establish a division line between McDonald's land on the west and those of Davis and Martin on the east side. In pursuance of this agreement, a lane for a public highway was left between the tracts, and the center of the lane was established as the boundary line between McDonald on the west and Davis and Martin on the east; and all their fences, houses, and other improvements were changed to suit this adjustment of the line between them. By agreement of the parties, Felix Simmons, the county surveyor, surveyed the lands, and established this line of division between them, and gave them a certificate of his survey, which is as follows to wit: "This survey begins at the southwest corner of section 1, township 11 north, range 3 west, where I found one of the old bearing trees, agreeing with the notes in distance and bearing, from which I ran north Va. com. 6 degrees east, 42 chains and 42 links, to quarter section corner, and find the old bearing trees standing, agreeing with the notes; thence east Va. com. 9 degrees 45 minutes east, 38 chains and 67 links; set post for quarter section corner, from which a white oak, 14 inches in diameter, bears west 29 links distant, and a black gum, 14 inches in diameter, bears S. 48 & $\frac{1}{2}$ E., 50 links distant; thence east 35 chains to quarter section corner on east side, where the old bearing trees are standing; then begin at northeast corner of section 1, township 11 north, range 3 west, which stands near the residence of J. R. Cox, and which is the established corner, I run west Va. com. 6 degrees east, 36-50 links, and set post for quarter section corner on the north line of section 1, from which a sweet gum, 20 inches in diameter, bears N., 50 deg. W., 181 links distant, and a white oak, 50 inches in diameter, bears N., 32 & $\frac{1}{2}$ E., 135 & $\frac{1}{2}$ links distant. Which survey I certify to be correct, and conforming to the original lines and corners. March 4th, 1881. [Signed] Felix Simmons, County Surveyor." In October, 1881, Davis sold his part of the land to Mrs. C. M. Cox, the mother of defendant and appellant, Junius R. Cox, and put her in possession. At this time the land had not been actually opened in accordance with the survey, but seems to have been soon afterwards. It appears that before this line was established one Eliza Alexander purchased of Martin one acre on the west side of his tract and in making this survey this acre was found to be a part of McDonald's land on the west side of the line, and she subsequently paid him for it, and received his deed on the 24th day of January, 1882. In 1890, McDonald sold his fractional quarter section to Mrs. Carrie T. Daugherty, since Mrs. McDougal, the plaintiff; and on the 3d of December, 1890, the following agreement was executed in writing

by and between McDonald, J. R. Cox, and Martin, to wit: "State of Arkansas, County of Jackson. This agreement, entered into this 3rd day of December, A. D. 1890, by the parties of R. E. McDonald, J. R. Cox, and Jerry Martin, that we will let the lane to be the dividing line between our lands lying in township 11, section 1, range 3 west, until we get the state surveyor to run the lines. The said surveyor to commence at the southeast corner of the northeast quarter of section 1, township 11, range 3 west, run west, and give Martin and Cox the number of chains and links Cox's deed calls for; thence west on the said line to the south corner of the northwest quarter of section 1, township 11, range 3 west, count back giving R. E. McDonald the number of chains and links his deed calls for, leaving the overplus in the center; then beginning at the northeast corner of the northeast quarter of section 1, township 11, range 3 west, running west on the variation of the field notes, giving J. R. Cox the number of chains and links his deed calls for; then west on the same variation to the northwest corner of the northwest quarter of section 1, township 11, range 3 west; then coming back from said corner, giving McDonald the number of chains and links his deed calls for, leaving the overplus in the center, R. E. McDonald receiving one-half of the overplus, J. R. Cox and Jerry Martin the other half; then the corner located by said surveyor shall be final. [Signed] R. E. McDonald. J. R. Cox. Jerry Martin." "When we have the lines run, I will see that Ed McDonald's part is paid. [Signed] J. R. Cox."

The testimony falls to show any authority in J. R. Cox to sign this agreement; his mother, C. M. Cox, still being the owner, and he only her tenant at will. The testimony shows that Mrs. C. M. Cox had been in continuous, uninterrupted possession of her tract since she purchased it from Davis, in 1881. Whether she had held adversely to McDonald and his vendee during this time is one of the principal matters in controversy, as upon the settlement of this question depends the success or failure of the plea of the statute of limitation made by defendant J. R. Cox. The object and effect of the agreement made in 1890 between McDonald, J. R. Cox, and Martin was to destroy the theory of defendant that the adjustment of 1881 was to be permanent and final, and that the possession of the parties given and taken in accordance therewith was adverse the one to the other. J. R. Cox having no authority from his mother to bind her by this agreement, which so vitally affected her interest in her lands, the written agreement of 1890, signed by him, was not admissible in evidence.

In the second instruction given by the court on its own motion over the objection of the defendant, the court, in effect, confined the period of the running of the statute of limitations to the time J. R. Cox held possession of the land, whereas he should have had the

benefit of the whole time of his own and his mother's possession. Moreover, in this same instruction, the court, disregarding the claim of the defendant that the rights of the parties were fixed by the adjustment of March, 1881, made the line between the northwest and the northeast quarters of said section as established by the government surveys the true division line between the parties, as the same was ascertained by one James A. Martin, a surveyor who last surveyed the lands. This was an error. If the first adjustment was in fact intended to be final and decisive, it matters not where the line of the government survey may be. The whole question then turns upon whether or not the adjustment of 1881 was intended by the parties to be final, and not what was the true line between their lands according to the government surveys originally made, in case there was no adverse holding for the statutory period. Other errors may be cured on a new trial by the parties if it is so desired. For the errors named, the judgment is reversed, and the cause is remanded for rehearing.

ARKANSAS & L. RY. CO. v. HARRIS.

(Supreme Court of Arkansas. May 30, 1896.)

CARRIERS—POSTING FREIGHT SCHEDULES—PENALTY—REPARATION—NOTICE.

1. Act March 24, 1887, §§ 7, 12 (Sand. & H. Dig. §§ 6307, 6312), require that all railroad corporations in the state of Arkansas shall keep posted up, at every depot freight office, printed schedules of freight rates; and that, for a violation of the act, they shall forfeit and pay, for every such offense a certain sum, to be recovered by a civil action "by the party aggrieved"; but that a notice in writing of the violation, and a demand for reparation, must be served by claimant 15 days before the commencement of the action. *Held*, that the reparation contemplated by the act was compensation for injuries or wrongs suffered from the failure to post the rates, and that hence only a person so injuriously affected was entitled to the penalty.

2. A notice which does not state how claimant was aggrieved by a failure to post, the extent of his grievances, and the damage occasioned thereby, is fatally defective.

Appeal from circuit court, Sevier county; William P. Fewzell, Judge.

Action by Milton Harris against the Arkansas & Louisiana Railway Company for a violation of the act requiring the posting of printed freight schedules. From a judgment in favor of plaintiff, defendant appeals. Reversed.

During the year 1893, Milton Harris resided at Nashville, in this state, and dealt in country produce. He purchased apples, hides, chickens, and eggs, and shipped them over the road of the Arkansas & Louisiana Railway Company. In this time, the railway company did not keep posted at its depot freight office at Nashville, in a conspicuous place, plainly and legibly printed schedules of its rates of freight and charges; and the consequence was, whenever Harris wished

to find out what the charges for shipping any of his property over the railroad was, he asked the agent of the company for the information, and received it. Finally, growing weary of this manner of doing business, he, on the 12th of December, 1893, gave to the agent of the company the following notice:

"State of Arkansas, County of Howard, Town of Nashville. To W. B. McDonald, Agent of the Arkansas and Louisiana Railway Company, Nashville, Arks.: You are hereby notified that the Arkansas and Louisiana Railway Company has failed to comply with section seven (7) of the statute approved March 24th, 1887, requiring a schedule of the rate of freight charges to be posted up in the depot freight office. I am the party aggrieved by this violation of the law, and I demand that said company make proper reparation to me for each and every day the law has been violated during the year last past. Given under my hand, this 12th day of December, 1893. Milton Harris, by W. S. Curran, His Attorney."

And failing to receive the desired reparation within 15 days, and being out of business, he brought this action against the railway company, to recover the statutory penalty of \$50 to \$1,000 for each and every day in the year 1893 the company had failed to keep the schedule of rates of freight and charges posted at the Nashville depot freight office, and recovered judgment for \$12,000, and the defendant appealed.

Dodge & Johnson, for appellant. W. S. Curran, for appellee.

BATTLE, J. (after stating the facts). While the evidence adduced in the trial of the action was sufficient to show that no schedule was posted at any time during the year 1893 at the depot freight office at Nashville, and that the notice in writing which we have set out in this opinion was given, and the other facts which we have stated, there was no evidence that Harris received any actual injury. He testified, and could not tell when he first examined to see whether or not the schedule had been posted, nor how often he had looked. He testified that he usually went to the agent of the company, and inquired as to rates of freight, which were always given to him upon request. Upon such evidence, was he entitled to recover a penalty?

This action is based on sections 7 and 12 of the act entitled "An act to prevent unjust discrimination and exorbitant charges by railroads," etc., approved March 24, 1887, which are sections 6307 and 6312, Sand. & H. Dig., and are as follows:

"Sec. 7. That all railroad corporations in this state shall, and are hereby required to keep posted up at every depot, freight office, under the control of, or used by, any such railroad corporation, in a conspicuous place therein, plainly and legibly printed sched-

ules, which shall state, first, the different kinds and classes of property to be carried; second, the different places between which property shall be carried; third, the rates of freight and charges for carriages between such places and for all services connected with transportation of such property from its receipt until its delivery or forwarding, and each day the failure to post up such schedule shall constitute a separate offense.

"Such schedule shall be posted at least five days before the same shall go into effect, and the same shall remain in full force until another schedule as aforesaid be posted. And every person and corporation engaged as aforesaid shall receive, load, unload, transport, store, and deliver to the consignees thereof any and all property offered for shipment at and for charges not greater than those specified in such schedule as may at the time be in force, and shall on demand, issue to shippers duplicate freight receipts, which shall state the class of freight shipped, the weight and charges," etc.

"Sec. 12. That any railroad corporation that shall violate the * * * seventh * * * sections of this act * * * shall forfeit and pay for every such offense any sum not less than fifty dollars nor exceeding one thousand dollars and costs of suit, to be recovered by a civil action by the party aggrieved, in any court having jurisdiction thereof, * * * but all such actions shall be brought within one year after the cause of action accrues, or within one year after the party complaining comes to the knowledge of his or her rights, and no such action shall be maintained unless it is alleged and shown that before bringing his action, the party complaining brought the matter to the attention of the railroad company by a notice or statement of facts in writing, accompanied by the papers showing such violation, if any he has, and a demand for reparation delivered to some agent of the railroad company, and that said railroad company, for fifteen days after the reception of said notice, neglected or refused to refund any overcharge or make other proper reparation."

The schedule mentioned is required to be posted for the benefit of those desiring and seeking to ship their property over railroads. So much of section 7 of the act as prohibits the charging of more than the rates fixed by the schedule, and the information afforded by the posting, clearly indicates that this is its sole object. No other person can be benefited thereby, or injured by the failure to post.

But who is entitled to the penalty, allowed by section 12 of the act, for a failure to post the schedule? The statute says the party thereby aggrieved, and that he is not unless the railroad company neglects or refuses to make "proper reparation" within

15 days after demand and notice has been made and given in the manner prescribed by law. The proper interpretation of the word "reparation," as used in this connection, in section 12, will enable us to decide this question, for no one to whom reparation is not due can be entitled to the penalty. What is meant by it?

No reparation can be made for a failure to post schedule in the past by a present posting. The posting is for the purpose of affording information to those desiring and seeking to ship property after the posting. It can be of no service to any one as to shipments made. As to him no reparation can be made, except by compensation for the injuries he has suffered from the failure to post. Compensation, then, for injuries or wrongs suffered by reason of the failures to comply with the act to which penalties are annexed, is what is meant by reparation. Section 7 furnishes an illustration, and that is overcharges paid by the shipper, through ignorance of the regular rates of freight caused by the failure to post the schedule. The refunding of the amount paid in excess of the regular rates and interest would be a proper reparation in that case. The shipper who has looked for the posted schedule, and failed to find it, may be injured by time lost and trouble incurred in the search, and may be entitled to compensation therefor, and to nominal damages if no actual injury has been suffered. Other examples, which are unnecessary to mention, might be given, but those given are sufficient.

The obvious intention of the act is to give to the railroad company an opportunity to make reparation for all injuries caused by its failure to comply with it. For that purpose, the party aggrieved is required to give notice to the company of the violation, of the injury received therefrom, and demand indemnity therefor; and the company is given 15 days in which "to refund any overcharge or make other proper reparation." The notice should specify wherein the company had violated the act, and the damages to the party aggrieved occasioned thereby; otherwise, it would fail to accomplish the object for which it is required, for the railroad company cannot make reparation until it is apprised of the injury and the extent of the damages. Hence notice containing information sufficient to accomplish this purpose should be given. The intention of the act in this respect is to be just, and to afford to railroad companies ample opportunities of making adequate compensation for specified injuries before penalties can be imposed on them.

It follows, then, that the person desiring and seeking in good faith to ship, or who has shipped, his property over the railroad, and who has been injuriously affected by the neglect to post the schedule, and has made demand and given notice according to the act, has failed to receive adequate

compensation for the injuries, and has suffered from such neglect, is the party aggrieved and entitled to the penalty for the failure. No other person—that is to say, no one who has not been injuriously affected—can perform the conditions essential to a recovery of the penalty, and hence is not entitled to it.

The evidence fails to show that appellee is entitled to any relief, by way of a penalty, on account of the failure of appellant to post a schedule of rates at Nashville. He did not state in the notice given how he was aggrieved by the failure to post, the extent of his grievances, and the damages occasioned thereby. His notice is fatally defective. He has not complied with the act, and is not entitled to a penalty.

The judgment of the circuit court is therefore reversed, and a final judgment is rendered by this court in favor of appellant.

BRYANT v. STATE.

(Supreme Court of Arkansas. June 6, 1896.)
INTOXICATING LIQUORS—ILLEGAL SALES—INDICTMENT AND PROOF—VARIANCE.

Where an indictment charges the sale and gift of liquors, and keeping them for sale and gift, in a particular place, proof of sale and gift, and keeping for sale and gift, in any other place, is a fatal variance.

Appeal from circuit court, Green county; Felix G. Taylor, Judge.

John Bryant was convicted of making illegal sales of liquors, and appeals. Reversed.

John Bryant, pro se. E. B. Kinsworthy, Atty. Gen., for the State.

BATTLE, J. The evidence adduced in the trial of the appellant in the circuit court failed to show that he sold and gave away, and caused to be sold and given away, and kept for sale and to be given away, and allowed to be kept for sale and to be given away, in the Baird Saloon building, in the town of Paragould, in the county of Green and state of Arkansas, ardent, vinous, malt, fermented, and intoxicating liquors, and thereby failed to prove that he was guilty of the offense charged against him. Having alleged that the liquors were sold and given away, and were kept for sale and to be given away, in the Baird Saloon building, it devolved upon the state to prove it, in order to convict. Proof of sale and gift, and keeping for sale and gift, in any other place, would not be sufficient. *Shover v. State*, 10 Ark. 259; *State v. Anderson*, 30 Ark. 131.

Reversed and remanded.

MANSON v. STACKER.

(Court of Chancery Appeals of Tennessee.
Jan. 8, 1896.)

ATTORNEY'S FEE—LIEN.

In proceedings by a guardian for removal of funds of his ward to a foreign state,

a lien on the funds for his attorney's fees incurred in the proceeding cannot be declared in favor of the attorney.

Appeal from chancery court, Montgomery county; C. W. Tyler, Chancellor.

Action by W. A. Quarles against W. M. Williams, guardian of Katie T. Manson, and others, to enforce a judgment for attorney's fees. On plaintiff's death the action was revived in the name of Clay Stacker, his administrator. From a judgment for plaintiff, the defendant guardian appeals. Reversed.

H. N. Leach, for appellant. Y. L. Pitt, for appellee.

NEIL, J. In the above-styled cause in the chancery court of Montgomery county, W. A. Quarles filed his petition April 17, 1893, to collect a judgment claimed to have been rendered in his favor for \$250 in the county court of Montgomery county for his services as an attorney in the removal of the estate of Katie T. Manson, ward of W. M. Williams, to the state of Kentucky. This fund consisted of notes against the Franklin Bank and W. S. Poindexter and others. The estate of W. S. Poindexter was being wound up in the chancery court in the above-styled cause, and Williams, guardian, had filed the notes in said cause for satisfaction out of said estate. The petition of Quarles was filed in the cause for the purpose of obtaining satisfaction of his alleged judgment from what might be collected by Williams on what might be due the ward out of the Poindexter estate on said notes. Publication was made on said petition, by order of the court, August 16, 1894. October 3, 1894, Williams, guardian, filed his motion to dismiss the petition. Meantime, Gen. Quarles had died, December 26, 1893. The claim is now prosecuted by his administrator.

The motion to dismiss contained three grounds: "(1) Because the petition upon its face shows that it has not been sworn to as required by law; (2) because defendant is not properly before the court; (3) because said petition seeks to recover money by a method unwarranted and unknown to the law." The petition was in fact sworn to in proper form. But, in the view we take of this case, we need not further notice the motion. The chancellor overruled the motion to dismiss, and thereupon the guardian, M. W. Williams, answered the petition. This answer denies the existence of any such indebtedness as that claimed in the petition. In this state of the case the chancellor referred the matter of the petition to the master, directing as follows: "He will report whether W. A. Quarles is entitled to any sum from Katie Manson for services, and what amount, and whether same is a lien upon the fund in court or its control, and the amount thereof. And he will look to the record in the cause in the county court, and to any proof that may be taken," etc. In his report the master undertakes to state the

contents of the county court record, and both sides agree that he states it correctly. He then states the contents of that record: "As shown by a record of the county court, in a case styled 'M. W. Williams, Guardian for Katie T. Manson, v. Mrs. Nannie T. Johnson, Extrx. for Polk G. Johnson, Decd.,' it appears that W. A. Quarles represented M. W. Williams, guardian for Katie T. Manson in the commonwealth of Kentucky, in a proceeding begun and held in the county court of Montgomery county, in which it was sought to have said county court order and sanction the removal of a fund in the state of Tennessee belonging to said Katie T. Manson, her guardian in said state having died. The county court granted the prayer of said M. W. Williams, guardian of Katie T. Manson, the petitioner in said proceeding, and the fund was ordered removed. In said proceeding in said court an order of reference was made to the clerk to take proof and ascertain what would be a reasonable fee for said W. A. Quarles for services rendered the said ward of M. W. Williams, and in obedience to said order the clerk took the depositions of several prominent lawyers of the Clarksville bar, and from this proof he reported a fee of \$250 as a reasonable one, and said report was confirmed by the court, judgment was given for the amount of said fee on the 10th day of October, 1889, and the same declared a lien on said fund belonging to Katie T. Manson. Of this reference, so far as the record shows, the guardian of said ward had no notice to come in and defend, and said report was not excepted to. The fund in question was loaned to the Franklin Bank, with W. S. Poindexter, P. C. Hambough, and John H. Pettus as sureties on the note." The master's report then proceeds: "Before said note fell due, and said Williams, guardian, could collect the same, the Franklin Bank, and all the sureties on said note (except W. S. Poindexter, who had in the meantime died), failed, and became insolvent. The said M. W. Williams, guardian of Katie T. Manson, brought suit on said note against said bank and its securities on same in the chancery court at Clarksville, Tennessee, in the cause styled 'Katie T. Manson, by her Guardian, against Clay Stacker, Administrator of W. S. Poindexter, and Others,' seeking to recover said amount due from said bank and its securities, and did recover of the estate of said W. S. Poindexter a large part of said fund; and in this cause W. A. Quarles filed his petition asking that the lien given him in the county court on the fund involved in this cause be enforced. The facts being as above stated in regard to the petition of W. A. Quarles, and the record showing a judgment in the county court in favor of said Quarles for the amount of said fee declaring the same a lien on the fund, and that fund being the fund in this cause, or rather a part of same, I do not think I, as clerk and master of this court, could, in a report, set aside a

judgment rendered by the county court of Montgomery county, whether the guardian of Katie T. Manson, the said M. W. Williams, had notice or did not have notice of the proving of said fee. So I report that W. A. Quarles has a judgment rendered by the county court of Montgomery county, Tennessee, for the sum of \$250, of date 10th day of October, 1895 (1889), and the same was by said court declared a lien on said fund." The guardian excepted to the report "(1) because it was not a matter of reference at all to the master, the question involved being purely one of law, and not of fact; (2) because the master failed to set aside the judgment in the county court, and declare the same a nullity, whereas the master's report shows, and the records of the foregoing proceedings in the county court in the case of Williams, guardian of Katie Manson, v. N. L. Johnson et als. shows that said guardian had no notice of the proceedings and reference of Quarles against him, wherein said judgment of \$250 was obtained; (3) because the master failed to report that Quarles was not entitled to anything for his services rendered in said case in the county court, whereas the proof shows he was not." The court disallowed the exceptions, and confirmed the report, and decreed as follows: "Wherefore the court doth charge the judgment mentioned in said report as rendered on the 10th day of October, 1889, in behalf of W. A. Quarles, for the sum of two hundred and fifty dollars, together with interest from said date, of the fund in this cause, due from the estate of W. S. Poindexter, deceased, to M. W. Williams, as guardian of Katie T. Manson; and said sum will be paid to the executor of said Quarles out of said fund before any part of the amount due from said estate of Poindexter is paid over in this cause to the said guardian, and, if sufficient is not on hand, said guardian will make it good." No other proof was brought forward in support of Gen. Quarles' claim except the county court record, or, rather, the statement of its substance as contained in the master's report. We do not think this was sufficient; and while we yield our fullest sanction to the rule that we are bound by the concurrence of the master and the chancellor upon any fact reported by the master, where there is any proof to sustain it, yet we feel constrained to hold that the decree of the chancellor was erroneous. Taking every fact to be true as stated by the master, yet there is nothing to sustain the chancellor's decree. From what is stated in the master's report, it is clear that the action of the county court, both in declaring the lien and in rendering the judgment for the \$250, was void upon its face. No lien could be declared, because there was no recovery. It was not the character of case in which a lien can be declared for attorney's fees, being not a suit to recover money or property in any sense, but a proceeding to remove a

fund from the state of Tennessee to the state of Kentucky. The very act of the court in which the counsel's effort culminates is to remove and place beyond the court's jurisdiction the fund which is sought to be made the subject of the lien. To enter an order transferring the fund from the state of Tennessee to the state of Kentucky, and at the same time to declare a lien against it for counsel fees, is a contradiction in terms. It does not appear that any attempt was made to impound the fund, or in any way to retain it within the jurisdiction of the court. On the contrary, it was clearly inferable that the fund, consisting as it did of notes, was turned over into the hands of the Kentucky guardian, Williams, as the next we hear of the notes they are in his hands, and are by him placed in suit against Poindexter's estate. Then it is that the petitioner, Gen. Quarles, brings forward his claim to a lien on the notes, and seeks to enforce it by petition in the Poindexter case; that is, the lien was declared on the fund ordered to be removed to the foreign jurisdiction, and the actual removal made, notwithstanding the lien, and when the foreign guardian returns to Tennessee with the notes, and puts them in suit against the debtor, the attorney attempts to enforce the alleged lien in said last-mentioned suit. Meantime the attorney, notwithstanding the removal of the fund, had proceeded to take an order of reference as to the amount of his fee, and had brought witnesses before the clerk of the county court upon this subject, and the clerk thereupon reported that he was entitled to \$250, and the county court rendered judgment against the guardian for the said sum of \$250; and all this without any notice to the guardian. The proceedings in the county court, as to counsel fees, as we have already stated, and for the reasons already given, were simply void. The judgment was void, of course, for the want of notice.

The principle underlying the declaration of a lien for counsel fees is that there has been a recovery of money or property in behalf of a plaintiff litigant by the efforts of his counsel. *Garner v. Garner*, 1 Lea, 29-31; *Keith v. Fitzhugh*, 15 Lea, 49, 50; *Pierce v. Lawrence*, 16 Lea, 572, 575-577, 1 S. W. 204; *Blackburn v. Clarke*, 85 Tenn. 507, 511, 512, 3 S. W. 505; *Grant v. Mountain Co.*, 93 Tenn. 691, 700, 701, 28 S. W. 90; *Perkins v. Perkins*, 9 Heisk. 95; *Brown v. Bigley*, 3 Tenn. Ch. 621-627. It is apparent from all these authorities that there must be a recovery as a condition precedent to the declaration of the lien. An order to remove a fund from one jurisdiction to another cannot be justly called a recovery. We do not wish, however, to be understood as holding that, in order for a court to declare a lien in behalf of the attorney of a plaintiff litigant, there must be a technical judgment for so many dollars, or for such and such property; or as ignoring that class of cases in

which it is the everyday practice of courts of chancery to pay counsel fees out of trust funds in course of administration in the court. These latter stand on a somewhat different principle from the ordinary case of an attorney's lien, and in cases in which the ordinary attorney's lien may arise there are also recoveries that are not technical judgments for so many dollars, or for specific property, as where property is secured or protected by the active interposition of a plaintiff litigant through his counsel. What we do hold is, simply, that a proceeding to remove a fund from this state to a foreign state cannot be considered in any sense a recovery justifying the declaration of a lien in favor of the attorney of the plaintiff litigant. The very nature of the proceeding is such as to negative the idea. Upon the procedure as to the declaration and enforcement of the lien, the following is laid down in *Perkins v. Perkins*, 9 Heisk. 97, 98: "Where the client is sui juris, we think the court should, in the cause in which the services were rendered, do no more than declare the lien, and, if the amount be not settled between them by contract, leave the attorney to enforce his claim by an appropriate proceeding against his client, unless the amount be settled by contract, in which case the court may enforce the lien by decree. In the case referred to [*Hunt v. McClanahan*, 1 Heisk. 503] a reference to the clerk to ascertain the amount was sanctioned, and it may have been followed in other cases. In these cases, however, where the practice has been allowed, the question was not considered, and we think the better rule as we have stated. Where the parties are under disability, the reference may be allowed; but in cases where the reference is allowed, the attorney and client assume an antagonistic position. The attorney cannot, in this matter, represent his client, and the client should have actual notice. He has notice of all other proceedings in the cause by reason of the fact that he is present by his attorney or solicitor, but in this proceeding his solicitor does not represent him." In a subsequent case (*Bowling v. Scales*, 1 Tenn. Ch. 618) Judge Cooper uses the following language upon the same subject: "Where adults are concerned, even if they are acting in a fiduciary capacity,—as trustee, for example, or administrator, executor, or guardian,—there is a person competent to contract, with whom the amount of compensation can be settled in advance, or agreed upon after the services have been rendered. If the lawyer and client cannot agree, the courts are open for the adjustment of their respective rights. The remedy is ordinarily by action at law, but, if the lawyer has acquired a lien on the property of his client, he is entitled to come into this court to enforce that lien. *Hunt v. McClanahan*, 1 Heisk. 503. And this he may do by a petition in the cause in which the

lien has been acquired, or by an original bill, the client being, of course, entitled to his day in court for the purpose of asserting his rights, and to this end to the service of process as in other cases, or equivalent notice. The proceeding by petition is, in substance, a suit in invitum to ascertain the amount of the compensation justly due for the services rendered, and to enforce the lien secured for the payment of such compensation. In the case of infants and married women, where the former has no general guardian whose duty it is to protect the interests of his ward, and where the latter has no trustee of the specific property sought to be reached, it has been the practice in the courts of this state, upon motion in behalf of the solicitor having a lien, to make a reference to the master to ascertain and report what would be reasonable compensation for the services claimed. The idea upon which this practice has grown up was, doubtless, that it was the duty of the court to watch over the interests of the persons under disability, and that this duty would be rigidly performed. It is obvious that the practice is not consistent with the theory that such proceedings between attorney and client should be in the nature of a suit, for in that view the person under disability ought to be represented by a guardian ad litem. It is obvious, too, that the position of the judge, under the practice in question, is anomalous, being partly judicial, and partly, if he properly perform his implied duty of protecting the person under disability, that of an advocate. The supreme court have in a recent case, not yet reported (*Perkins v. Perkins*, Dec. Term, 1871 [9 Helsk. 95]), corrected this erroneous practice, and have held that the proceeding must be by reference or petition to which the person under disability is made a defendant, duly served with process or notice, and defended by a guardian ad litem. This mode of proceeding is correct in theory, and eminently wise and proper in practice. It changes what has heretofore been an *ex parte* proceeding into what it should be, a proceeding *inter partes*, each party being antagonistic, and each properly represented." In the case of *Steel v. Chester*, 1 Leg. Rep. (Tenn.) 211, the supreme court reaffirmed the doctrine of *Perkins v. Perkins*, 9 Helsk. 95. In *Steel v. Chester* the only question was whether a court in which a suit has been determined can, upon petition of the attorneys, declare a lien on land, and proceed in that case to enforce the lien by ordering a sale of the land in satisfaction of the fee, after ascertaining the amount by reference to the master, and report by him. The court, in deciding this question, refer to the case of *Perkins v. Perkins*, and say: "The court held in that case that the duty of the courts was to declare the lien when the amount of the fee was not fixed by contract, and the parties under no disability,

and leave the attorney to enforce the lien by appropriate proceedings in a court having jurisdiction of the question. We think this the sound rule, and feel bound to adhere to it. Questions may arise between the attorney and client in which there ought to be issues made, and where the client should have the means to make his defense fully. His attorney, in such proceedings as this, ceases to represent him, his interest being antagonistic on this question." From these authorities it is manifest that, even if we should concede the lien to have been properly declared in the county court, all the subsequent proceedings whereby the amount was ascertained and the judgment entered without notice were void; and, there being no other proof of the amount of the fee than appears from said county court record, the petitioner is here practically without proof as to the amount of his fee. So, in any view, the petition must be dismissed; but, inasmuch as we can see that service was performed, and it was with the knowledge and acquiescence of the guardian, although he claims it was not by his direct employment, we think that the dismissal should be without prejudice, and it is so ordered. The administrator of petitioner will pay the costs of this court and of the chancery court accrued in and about this matter.

WILSON and BARTON, JJ., concur.

Affirmed orally by supreme court March 6, 1896.

ODUM et al. v. J. I. CASE THRESHING-MACH. CO.

(Court of Chancery Appeals of Tennessee.
Dec. 23, 1895.)

CONTRACT OF AGENCY—CLAIM FOR COMMISSION—RETURN OF GOODS—PARTIAL PAYMENT—PRO RATA COMMISSION—RESALE OF GOODS RETURNED—NOTICE OF CLAIM FOR COMMISSIONS.

1. Under a contract of agency for the sale of machinery, where the agent brought to the notice of an intending purchaser the machinery manufactured by his principal, and introduced the purchaser to the general agent of the manufacturer,—sending him to such general agent to see samples, as instructed,—the agent was entitled to a commission on the sale.

2. A contract of agency provided that no commission should be paid when, for any cause, the machine was returned by the purchaser. It also provided that no commission should be allowed when the property so returned was resold, that commissions should be paid only on net profits of sales, and that no commission should be allowed on deferred payments, except as they were paid. Plaintiff, as agent, sold an engine, on which the purchaser paid one-third of the price. The purchaser afterwards refused to pay more, and returned the machine as not being as represented. Held, that the plaintiff was entitled to a commission on the amount paid by the purchaser.

3. Where a contract of agency provides that the principal should issue nonnegotiable certificates of commissions due on deferred installments, the principal cannot avoid payment of a commission on a sale by his agent by the

plea that no such certificate was ever issued on the sale.

4. Under a contract of agency providing that all orders for machinery should be taken on order blanks furnished by the principal and indorsed by the agent, the principal cannot avoid payment of a commission for the sale of an engine on the ground that plaintiff did not take the order as required by the contract, where it appeared that the agent sent the purchaser to the general agent, as he was instructed, to see samples, and the order was taken by such general agent.

5. In a contract of agency, the principal reserved the right to sell second-hand machinery in any territory, and that he should not be liable for commissions on such sales. It was also provided that no commissions should be paid on second-hand goods, except when sold by an agent other than the one who sold them in the first instance. *Held*, that upon the sale by plaintiff of a second-hand engine which had not been sold by plaintiff before, and which was represented by the general agent to be a new engine, plaintiff was entitled to a commission.

6. The general agent being cognizant of the part played by plaintiff in making the sale, plaintiff did not lose his right to a commission by failure to notify the principal that he claimed it, even though the commission was claimed by and paid to another agent.

7. In order to secure an opportunity to attach property of the defendant, the plaintiff wrote him, in the name of another, against whom defendant held a note, asking him to send the note for collection. *Held*, that such fact could be taken advantage of only by plea in abatement, and would not be considered when raised for the first time on appeal.

Appeal from chancery court, Wilson county; J. S. Gribble, Chancellor.

Action by Odum & Ward against the J. I. Case Threshing-Machine Company. There was a judgment for defendant, and complainants appeal. Reversed.

McClain & McKenzie, for appellants. H. F. Stratton, for appellee.

BARTON, J. This is a suit for commissions alleged to have been earned by the complainants as agents for the defendant on the sale of a traction engine. The facts are that on the 13th of April, 1892, the defendant, by a contract in writing signed in the name of the company by its secretary and by W. H. Newby, its general agent, appointed Odum & Ward agents for the sale of its machinery, castings, and repairs for the season of 1892,—ending October 31, 1892; as expressed in the contract, "in and for the following territory, to wit, Grant and vicinity," Grant being a small place in Wilson county. The terms and conditions of this contract necessary to recite, as applicable to this litigation, will be hereinafter noted. On the 13th of June, 1892, a traction engine was sold by the defendant to E. Rollins & Son, who lived near Grant, in the territory assigned Odum & Ward, for the price of \$750, which was evidenced by three notes,—one for \$250, due October 1, 1892; one for \$250, due October 1, 1893; and one for \$250, due October 1, 1894. The first of these notes was paid on the — day of —, 1892. The other two notes were not paid. The sale

was made under the following circumstances: Odum & Ward, ascertaining that Rollins & Son desired to buy some machinery and an engine, brought the matter of defendant's goods to their attention, and also brought to the attention of Mr. Newby, the agent of the company then at Nashville, the fact that these gentlemen desired to buy an engine. The company had an engine at Nashville which they desired to sell. Mr. Newby, at the instance of Odum & Ward, visited Grant, and met up with Rollins & Son, and invited them to come to Nashville with Mr. Odum to trade for the engine, the company having furnished Odum & Ward with no engines as samples. Shortly thereafter Messrs. Rollins & Son went to Nashville, but Mr. Odum, being sick, did not accompany them; but they went under his directions. On the train, they met up with Mr. W. P. Dale, who was a local agent of the company at Nashville, with whom they had some conversation in regard to the matter; the testimony of the Rollinses (father and son) being that Dale told them he had the engine Mr. Newby proposed to sell, at his place, and that he was charging the company storage on it, but that he had nothing to do with the engine or its sale. The parties came to Nashville, visited the store of Mr. Dale, where the engine was stored, saw the engine, and made a trade for it, as above stated, for \$750, and at this place signed up the order, on the usual blank of the company, for the engine. The testimony of Messrs. Dale and Newby is to the effect that Mr. Dale assisted in the sale of the engine. The testimony of Messrs. Rollins & Son is that Mr. Dale had nothing to do with the sale of it. We are satisfied, from the positive statements of the Messrs. Rollins (father and son) as to what Mr. Dale said, which is undenied by Mr. Dale, that they at least understood that he was not participating in the sale, and had no interest in it. This, however, may have been a device on the part of Mr. Dale in order to make his influence in the sale more effective, and doubtless was. The order was signed by Mr. Dale as agent, though both the Rollinses (father and son) say they did not so understand it at the time, but understood merely that he was witnessing their signatures. The Rollinses returned home. The notes and mortgage in regard to the engine were forwarded to Messrs. Odum & Ward, who procured the execution of them by Rollins & Son. The engine was delivered at Grant to Messrs. Rollins & Son; was used by them a while. One note was paid, as above stated. They afterwards claimed that they had been defrauded in the sale, by misrepresentations as to the engine; that it was sold to them as a new engine, whereas, as a matter of fact, it was a second-hand engine. And in consequence of the differences between them and the company, by a compromise completed after this suit was brought, and while it was pending, the last

two notes given were surrendered to Messrs. Rollins & Son, and the engine returned to defendant. We find as a fact that the engine was sold and delivered in the territory assigned to the complainants, Messrs. Odum & Ward, though the agreement to take the engine, as consummated by the order of the purchase, was made at Nashville, and the final closing up of the matter was done by the delivery of the engine at Grant, and the execution of the papers (mortgages and notes), through the instrumentality of Messrs. Odum & Ward, and the contract was then, and not till then, completed.

There are various defenses set up, based upon the provisions contained in the agency contract, which provisions, so far as applicable to this contest, are as follows: First, it is recited: "The contract witnesseth, that for and in consideration of the agreements hereinafter set forth, to be kept and performed by said party of the second part, the said first party doth hereby appoint the said Odum & Ward agent * * * for the sale of its machinery, castings, and repairs, for the season of 1892, unless sooner determined, in and for the following territory, to wit, Grant and vicinity, in the state of Tennessee, and neither to solicit, receive, accept, or fill any orders from any other place, places, or territory. The party of the first part shall not be held liable for any commissions on sales made by intruders on said territory, and no commission shall be earned or paid upon sales to parties living outside the above-described territory, nor upon sales to dealers, jobbers, or parties, within or without said territory, who buy for sale to others without the same. No commission shall be paid upon resale of goods taken back, or upon second-hand goods of any kind (except when sold by an agent other than the agent who sold the same in the first instance, or upon any goods sold to purchasers who seek to purchase at the shop. And the said first party hereby agrees to furnish the said machinery, castings, and repairs to the said party of the second part, as the same are ordered, to be sold by said second party on commission: provided, however, that if, from any cause whatsoever, the said party of the first part shall be unable to furnish said machinery, castings, and repairs as and when ordered, then and in such case said party of the first part shall not be held liable for any damages, expenses, or commissions whatsoever. And the said J. I. Case Threshing-Machine Company further agree that they will allow the said party of the second part the following commissions, to wit: For each sweep horse power, separator, trucks, stacker, or automatic swinging stacker, sold, delivered, and duly settled for, a commission of 20%; for each portable or traction engine or water tank sold, so delivered and settled for, 20%; and they also agree to allow for all castings and repairs sold, provided same are fully paid for in cash, on settlement, a commission of 20%; said commissions to be in full of all charges

connected with the sale and security of the same. This contract does not cover skid or stationary engines, nor sawmills, unless so specified in writing. But it is understood that no commission is earned or payable where, from any cause, a machine shall be returned by the purchaser, and that any machinery or other property taken on execution, foreclosure, or in settlement of any note or notes for machinery sold, shall be resold by the party of the second part without commission or compensation, if the party of the second part shall have received or been credited with commission on the original sale. Commissions shall only be calculated on the net proceeds, and not on any discounts made for cash or other cause. All commissions shall be prorated, and no commission on time sales shall be due or payable upon deferred installments, except as such installments are fully met. A nonnegotiable commission certificate, or equivalent instrument, shall be issued by the said party of the first part, representing the commission to accrue upon each such installment, payable upon settlement of the note or installment represented by such certificate. And the party of the second part shall not take or have any security or indemnity for the payment of any commission, except such as attaches to the notes taken for the same sale; and the party of the first part shall be deemed to own and possess all securities taken for any sale, or part of sale, whether taken in their names, or in the name of the party of the second part, whether taken before, at the time of, or after sale is made. Commission certificates are not issuable until all sales are fully accounted for. * * * Eighth. To take an order in every case on our order blank, properly filled, and signed by the purchaser, which in every case shall be sent to the company. Note shall be made payable at the bank or express office most convenient to the makers of the notes; and no deviation from this shall be made, except by written consent of the J. I. Case Threshing-Machine Company. * * * Eleventh. The party of the first part reserves the right to sell second-hand machinery of all kinds in any territory whatsoever, and such sales shall not, in any case, be subject to commissions." This contract contains these provisions, and a number of others not necessary to mention; there being in the body of the contract some 20-odd printed clauses and provisions, accompanied by about an equal number of instructions annexed to the contract. The following objections and defenses are urged as a bar to the complainants' recovery:

First. It is urged that complainants did not make a sale of the engine upon which they claim commission; and in support of this it is said that the complainants cannot recover commissions on a part performance by them, and, to say the most, they only assisted in the sale, and did not make the sale, for it was completed at Nashville by the general agent, Mr. Newby, and the local agent, Mr. Dale. We

have found, as a matter of fact, that this machinery was brought to the attention of the purchasers by Messrs. Odum & Ward; the purchasers were brought to the attention of the company by the same parties. We find that they did all they were allowed or required to do; they acted under the instructions of the general agent; sent the parties to Nashville, where the general agent assisted in bringing about the trade,—probably also assisted in this by Mr. Dale, though without the knowledge of the purchasers that he was acting as agent in the matter. There being no other difficulty in the way, we think this would entitle the complainants to recover, having done all that was required of them, in having brought the parties together.

Second. It is said that the engine sold was returned to the company, and that the contract expressly provides that no commission shall be earned or payable where, from any cause, the machine shall be returned by the purchaser. Construing the entire contract together, we are of opinion that the complainants would be entitled to commissions on any amount paid by the purchaser, as the contract contains the provision that where property has been taken back it shall be resold by the party of the second part without commission or compensation; that commissions shall only be calculated on the net proceeds; that all commissions shall be prorated, and no commissions on time sales shall be due or payable on deferred installments, except as such installments are fully met; that a nonnegotiable commission certificate shall be issued by the company to the agent, representing the commissions accruing upon such installments, payable upon the settlement of the note or installment represented by such certificate. Now, it is true, as will be hereinafter shown, that these certificates were not issued to the complainants, but were issued to Mr. Dale, the agent at Nashville, and a special commission agreed on was paid to him, he having agreed at the time to a reduction of the commission. So we think it was clearly apparent that the agents should receive commissions on all moneys received for the sale of machinery by the company.

Fourth. It is said that no nonnegotiable commission certificates, as provided for in the contract, were issued by the defendant company. This is true, but the defendant certainly cannot take advantage of its own wrong, if we shall find, as a matter of fact, that complainants were entitled to have them issued.

In the fifth place, it is alleged that the complainants failed to take an order for the machine, as they are required to do by the contract, and that the contract provides that they were to take the order, in every case, on the order blanks of the company, properly filled and signed, which, in every case, should be sent to the company. It is true that Messrs. Odum & Ward did not fill out such

an order blank, but the general agent to whom they sent the purchasers did, and we see no reason why this should affect the rights of the complainants.

Sixth. It is said that the engine sold was a second-hand engine, and the contract expressly provides, in the eleventh clause, that the defendant company reserves the right to sell second-hand machinery of all kinds in any territory whatever, and that such sales shall not, in any event, be subject to commissions. The contract does contain this exact clause, and there is but little doubt that this engine was a second-hand engine; but it is evident from the proof that it was not sold as such, but the representation was made by the agent to both the purchasers and Odum & Ward that it was not a second-hand engine, though it had been used for some time as a sample engine, and it was not sold as a second-hand engine. But we think it is clear, from the contract, that while the company has reserved the right itself, or by some agent appointed by it, to sell second-hand machinery in the territory assigned to complainant without being liable for a commission to the complainant, yet it was not intended by the contract to provide that, even in case of the sale of second-hand machinery, where the complainants were called on to render service, or where their services were rendered and accepted by the company, they should not be paid commissions for such services. The spirit of the contract, as we understand it, is that the company would not intentionally invade the territory assigned to the complainants for the sale of any machinery except second-hand machinery, and this it reserved the right to do through other agents. That there was to be no intentional invasion of the territory is taken from the obligation imposed in the regular printed contract of the company on Odum & Ward, in which it is said, "They are neither to solicit, receive, accept, or fill any orders from any other place, places, or territory." As a matter of precaution, however, it is added that "the company shall not be held liable for commissions on sales made by intruders on said territory." But that it was contemplated that commissions should be paid, even upon second-hand machinery, when sold by the agency of the complainants, is shown in the following provision: "No commission shall be paid upon resale of goods taken back, or upon second-hand goods of any kind, except when sold by an agent other than the agent who sold the same in the first instance." Now, it is not pretended that Messrs. Odum & Ward ever sold this engine before. The contract is, therefore, to pay them 20 per cent. commissions on all sales made by them, except resales on second-hand machinery which they had previously sold. Obviously the point intended to be guarded against is paying double commissions on the sale of the same property.

Seventh. It is said that the complainants

in no way notified the company that they had made the sale, or would claim commissions therefor, until long after the first note had been paid, and the defendant company had credited the sale to its Nashville agent. There was no necessity for the complainants to send in any notice to the company, when the sale itself was superintended by their general agent, and he knew the rights of the complainants in the matter. This is also the ground of the ninth objection raised in the defendants' argument, and it is alleged, therefore, that they had forfeited all their rights to a commission by their neglect to notify the company and claim their commission, and the company was thus allowed to pay another agent. The complainants had no means of knowing that the defendant would violate its contract, and pay what was due them to another agent. Their general agent knew the facts, and it was his duty to report them to the home office, and protect the rights of the complainants. This note, as we have seen, was paid on or about the 3d day of February, 1893; and claim was made on the 9th February, 1893, which was within a reasonable time thereafter.

The eighth objection set up is that the complainants resorted to strategy to get the defendant company to send its note into their own territory, in order to get jurisdiction and attach the same; that complainant Odum wrote a letter, in the name of Rollins & Son, asking that their second note be sent to the bank in Lebanon, when they would do something for them, and when this was done the complainants attached, and it was a conspiracy thus to get jurisdiction of the matter. While it seems that this may be true, it would appear that the agents of the defendant knew, or might have known, this before their answer was filed. In any event, this is a plea which can only be set up by plea in abatement. The defendant having answered, and contested the merits of the case, it is now too late to make any such defense.

So, upon the whole case, our conclusions are that the complainants rendered the services through and by reason of which the engine in question was sold; that it was sold and delivered in the territory assigned to the complainants; that it was a sale on which, under the contract, they were entitled to commissions; that \$250 of the purchase money was paid; that under the contract the complainants are entitled to the commission of 20 per cent. on this sum, with interest from February 3, 1893. The chancellor held otherwise, and dismissed complainants' bill, and the decree of the chancellor will be reversed, and a decree entered here in favor of the complainants for the amount above mentioned, and for all the costs of the cause.

NEIL and WILSON, JJ., concur.

Affirmed orally by the supreme court, March 13, 1896.

WALTON et ux. v. BLACKMAN et al.
(Court of Chancery Appeals of Tennessee.
Jan. 18, 1896.)

EQUITY—CANCELLATION OF DEED—FRAUD—CONVEYANCE MADE FOR FRAUDULENT PURPOSE.

1. To authorize a court to set aside a formal deed, duly executed, on the ground that it was procured by fraud or undue influence, requires proof of strong, clear, positive, and convincing character.

2. A conveyance of property, fully executed, and which was not in itself either illegal or fraudulent, though made for the purpose of assisting in the perpetration of a fraud by the grantee, will not be set aside by a court of equity at the suit of the grantor, and for his benefit.

Error to chancery court, Robertson county; George E. Seay, Chancellor.

Bill by J. M. Walton and wife, A. A. Walton, against A. L. Blackman and E. J. Wickware. Decree for defendants, and plaintiffs bring error. Affirmed.

W. G. Brien, H. C. True, A. E. Garner, and Perkins Baxter, for plaintiffs in error. Hamilton Park and Baxter Smith, for defendants in error.

BARTON, J. This case is before us on writ of error. This was a bill filed to rescind, set aside, cancel, and annul a deed made by the complainants to A. L. Blackman on the 8th of July, 1890. Said deed, with its recitals, etc., in full, is as follows:

"This indenture, made between Addie A. Walton, of Robertson county, state of Tennessee, and Albert L. Blackman, at present residing at the Maxwell House, Nashville, Tennessee, witnesseth: That heretofore, to wit, on the 20th day of October, 1883, the said Addie A. Walton entered into a contract with J. M. Eatherly and Milton Pitt for the purchase of the said Eatherly and Pitt's one undivided one-half interest in a certain parcel or tract of land known as 'Stonewall College,' lying and being situated in the 15th civil district of Robertson county, state of Tennessee, and bounded as follows: Beginning at a stake in the center of the Gallatin and Hopkinsville road, at a point due south from an apple tree in the line between Milton Pitt and the said college property, and runs in an easterly direction, with the center of said road, to the southeast corner of the said college property, J. M. Eatherly's corner to his lot lying north of said road; thence north, with Eatherly's line, to a stone, to M. Pitt's line; thence west, with his line, to a stone, Pitt's southwest corner; thence north, with Pitt's line, to a stone; thence west, with Pitt's line, to a stone; thence south, to the beginning,—containing eleven and one-half acres of land, together with all the college buildings, structures, and improvements, of every character, constructed thereon. The said J. M. Eatherly and said Milton Pitt being in their own right owners of one undivided one-half of all the above-

recited property, then known as 'Stonewall College,' and now called 'Neophegen College,' the price agreed to be paid by the said A. A. Walton to the said J. M. Eatherly and said Milton Pitt for said one undivided one-half interest in and of said property was sixteen hundred dollars, to be paid in several payments, therein set forth: \$500 (five hundred dollars) in cash by draft upon A. L. Blackman, then of the city of New York; \$108 in the note of G. H. and W. L. Butney; and a sum of about \$200 in cash,—making the balance of first payment of \$800 as one-half of the whole of said purchase money; and the remaining amount still to be paid was divided into (4) four notes, of two hundred dollars each, the said notes being the notes of A. A. Walton, made payable to the said Eatherly and said Pitt. And, at the time of the payment of the above-named sum of five hundred dollars by the said A. L. Blackman for the above-named purchase of said property, the said A. A. Walton promised and agreed that the said A. L. Blackman should have a vested interest in the property so purchased to the extent of all the money that said Blackman should pay, as a part of the purchase money for said property. And whereas, one James P. Jernigan and L. A. Payne were the owners in their own right of the other one undivided one-half interest in the above-named college property, and the said Jernigan and Payne, as owners of such said one undivided one-half interest in said college property, did, on the — day of —, 1886, file a bill in the court of chancery holden at the county site in the town of Springfield, Tennessee, petitioning and praying for a decree ordering the sale of all of said college property, for a partition of interests therein, which prayer of said petitioners was granted by the chancellor, and decree ordering the sale of said property was made; and said A. A. Walton, contesting said action, appealed said cause to the supreme court, which court affirmed the said decree, and remanded the case to the chancery court at Springfield, to enforce the said decree of sale. And whereas, on the 5th day of May, 1888, the said A. L. Blackman, at the request of A. A. Walton, caused to be transferred by cablegram the further sum of (\$300) three hundred dollars to be used by her in payment of the said property, and later on, in the year 1888, caused to be forwarded the further sum of three hundred dollars, amounting in all, up to this time, to eleven hundred dollars. And whereas, the clerk and master of the chancery court at Springfield, in pursuance of the above-mentioned decree of the court, did advertise the said property for public sale to be had on August 22nd, 1888, and at Cross Plains, Tennessee, on the premises; and the said A. L. Blackman, being informed of such intended sale, did, on August the 21st, 1888, cause to be transferred by cablegram \$1,015 to Charles

nessee, and did further cable instructions to said Charles A. Blackman to proceed to Cross Plains, and at such sale to purchase said property; and said Charles A. Blackman, acting upon these instructions, and at the request of said A. L. Blackman, then in London, England, proceeded to Cross Plains for the above-named purposes, and on the day of sale, and before the hour of sale, entered into an arrangement for the purchase of the one undivided one-half interest of the said Jernigan and Payne, and also for completing the past-due payments to said J. M. Eatherly and said Pitt for the money remaining still due for the purchase of the said Eatherly's and said Pitt's interest as per the agreement with A. A. Walton on October 20th, 1883. The amount agreed to be paid by the said C. A. Blackman to the said Jernigan, Payne, Eatherly, and Pitt for their respective interests, as defined by said decree, was fixed as \$2,800; and therefore an agreed basis of sale of said property and interests therein was thus arranged, by and between the said C. A. Blackman, Jernigan, Payne, Eatherly, and Pitt; the said C. A. Blackman paying the sum of \$934 as a first payment under the compromise agreement. Further, the said Blackman paid the premium for an insurance policy of \$2,500, issued by the Equitable Fire Insurance Company of Nashville, Tennessee, which policy, in case of loss by fire, was made payable to A. A. Walton, for the benefit of said Eatherly, Pitt, Jernigan, and Payne, as 'their interest might appear.' And all of said sums of money, with expenses incurred incident thereto, was paid by C. A. Blackman out of the said sum of money, \$1,015, furnished by A. L. Blackman for that purpose. And the said A. A. Walton executed her two notes for \$933 each, with C. A. Blackman as security, said notes being made payable to H. C. Crunk, clerk and master; and the title to said property was taken in the name of A. A. Walton, and at that time, namely, the 22nd day of August, 1888, she, the said A. A. Walton, expressly promised and agreed to sign the said title to said property to A. L. Blackman or his nominee, whenever so required to do by said A. L. Blackman. And whereas, on the night of the third of May, 1890, the said college buildings were totally destroyed by fire, and the said Equitable Fire Insurance Company has agreed to settle its loss under its policy for the sum of \$2,400, to be paid to H. C. Crunk, clerk and master; and out of this sum the said clerk and master will pay the two remaining notes of the said A. A. Walton and C. A. Blackman, aggregating, with interest, \$2,081, and will, by this means, pay in full the balance of the amounts due to J. M. Eatherly, Milton Pitt, James P. Jernigan, and L. A. Payne. The balance remaining of said \$2,400, being in amount \$319, will be paid to said A. A. Walton. These several amounts paid and provided by the means of A. L. Blackman amount to the total sum of

\$4,515: Now, therefore, in view of the aforementioned premises, and in compliance with the express promise and agreement made on the said 22nd day of August, 1883, by the said A. A. Walton to said Charles A. Blackman, acting in behalf of said A. L. Blackman, I, the said A. A. Walton, acknowledge and agree that I hold the legal title to the said property in trust for the said A. L. Blackman, for his use and benefit; and I hereby, and at his (said A. L. Blackman's) request, and for and in consideration of the aforementioned premises, the said A. L. Blackman having paid and provided all the purchase money paid upon said property, and as I have heretofore and at all times held myself ready and willing to make the proper transfer of said title to said property to said A. L. Blackman or his nominee, I hereby assign, transfer, and convey all my right, title, and interest in and to said above named and described property to said A. L. Blackman, his heirs and assigns, forever, to have and to hold, use, and enjoy the same in as perfect and full a manner as now held by me. In testimony whereof, I hereunto affix my signature, this, the 8th, day of July, 1890. J. M. Walton. A. A. Walton.

"Witnesses: —."

"State of Tennessee—Robertson County. Personally appeared before me, J. M. Ford, a notary public in and for said county and state, the within-named J. M. Walton, the bargainor, with whom I am personally acquainted, and who acknowledged the within instrument for the purposes therein contained. And A. A. Walton, wife of the said J. M. Walton, having personally appeared before me, privately and apart from her husband, the said J. M. Walton, acknowledged the execution of said deed and agreement to have been done by her freely, voluntarily, and understandingly, without compulsion or constraint, and for the purposes therein expressed. Witness my hand and official seal, at Cross Plains, Tennessee, this 8th day of July, 1890. J. M. Ford, Notary Public."

"State of Tennessee—Robertson County. Register's Office, October 13th, 1890. I, R. C. Anderson, register of Robertson county, do certify that the within instrument and certificates thereto attached were received the 13th day of October, 1890, at 2 o'clock p. m., and duly noted in Note Book No. 3, on page 248, and are duly recorded in my office, in Book No. 32, on page 151. Given under my hand, at office in Springfield. R. C. Anderson, Register for Robertson County."

The bill alleges that the complainant is a sister of the defendant Blackman, and that he (the said Blackman) had for years expressed the desire and intention of giving her a magnificent home; that she and her husband are, by occupation, teachers, and that having learned of a school situated on valuable lands at Cross Plains, in Robertson county, Tenn., that would serve them as a home and give them employment, she com-

municated these facts to her brother, who agreed to assist her in the purchase and payment of the property, which he did; that he was a man without family, traveling from this country to Europe, and that he sent her from there a cablegram for \$1,000, with instructions to his brother Charles A. Blackman to take and apply the same towards the purchase of said property; that he had also sent her, prior to this, \$500 from New York City, and \$300 at another time; that this was all the purchase money which he (the said Blackman) had contributed, and which he had repeatedly declared to be a gift to her, and that, besides this, the complainants had made an outlay on their part of some \$1,600 or \$2,000 on the property, and had devoted years to the building up of a school, at a loss to themselves of at least \$10,000; that the building upon the land had cost some \$12,000 or \$15,000, and the reason they were able to get it so cheaply was on account of the reputation of the complainants, J. M. Walton and his wife, as teachers. They allege that, subsequent to their purchase, there was a great deal of litigation in the chancery court at Springfield about the property, and that finally, under a decree of the chancery court at Springfield, the clerk and master, on the 22d day of August, 1883, sold said property to the said Mrs. A. A. Walton, and made her a deed to the same. They further charge: That on the 8th day of July, 1888, the defendant Wickware, as the agent of Blackman, came to them in Robertson county, and told complainant A. A. Walton that her brother, the said Blackman, had sent by him a paper writing, which she must sign, and ask no questions. That this she declined to do, but her husband told her that it was her brother, and that she should not hesitate to sign it; and that the defendant Wickware said that it was a mere form, and that "we [referring to himself and Mr. Blackman] will not probably use it at all, and it shall not be registered without your knowledge and consent"; and that her husband read a portion of it, enough to see that it related to this college property, and again expressed his unlimited confidence in her brother, and that it would be ingratitude in her to doubt his honor; and that she (the complainant A. A. Walton) never read the deed; and that it was never read over to her; its objects and purposes she did not understand, did not inquire into, and simply obeyed her brother's injunction to "ask no questions," as his agent and lawyer had stated that he requested. That, subsequent to this, she and her husband went to St. Louis, for the purpose of getting employment there, and during their absence the deed was registered. They say that they are advised that the acknowledgment to the deed is fatally defective, inasmuch as it fails to acknowledge the due execution of the same, or that the execution was done by her freely, voluntarily, etc.; but that, however this may be, her brother made

her an absolute gift of the money contributed to the purchase, and acquiesced in it as a gift for years, and induced her and her husband to lose years of labor, time, and large sums of money in building up and improving this school, and, at the end of the time, abused their confidence, by pretending a still further desire to benefit them, and, by this fraudulent means, sought to deprive them of all the property they had, without any consideration, and so induced them to part with the legal title to the same. It is further stated in the bill that the defendant A. L. Blackman had an insurance on the building on said property for \$3,000; and that on the night of the 3d of May, 1890, this building was entirely consumed by fire; and that they understand that said Blackman is endeavoring to collect the same, to which they have no objection. The prayer of the bill is for an injunction to enjoin the defendants from disposing of the property, and that the deed be decreed to be delivered up and canceled, and declared fraudulent and void, and removed as a cloud upon the title of said A. A. Walton, and for general relief.

Wickware, in the caption of the bill, is sued as agent of the said Blackman. No answer was filed on behalf of Wickware, and no decree or judgment and no pro confesso was taken against him. A. L. Blackman filed his answer on the 22d of October, 1890. He substantially denies all the allegations of the bill; alleges that he furnished all the money which went to buy the property, and that he bought it as an investment himself, and under an understanding with the complainants that he (the said Blackman) should have a vested interest in the property to the extent of all the money he had paid as part of the purchase money, and that, while the title was taken in the name of A. A. Walton, it was taken under an express agreement and understanding that, whenever he requested them to do so, they would convey the property to him; denies any fraud or misrepresentation in procuring the deed made to him; and says the deed was simply presented without any representations, and under express instructions from him to make no representations, agreements, or promises, and that, in accordance with a previous agreement and understanding, the complainants executed and delivered the deed to his agent. He denies that the complainants had made any substantial or material payments upon or for said property; avers that they had had the use of it for some time without charge; denies that they had any equity or interest in it at the time of the conveyance to him; and substantially denies all the equities set out in the complainants' bill; admits the destruction of the property by fire; and claims that it is now worth very little.

The undisputed facts are: That a one-half interest was purchased in the said property, in the first instance, about 1883, in the name of the complainant Mrs. Addie Walton, for

the consideration of \$1,600, of which there was paid about \$300 in cash, and notes of other parties raised by herself and husband, and \$500 was paid by a draft drawn on her brother, the defendant A. L. Blackman, who was then in New York, and who accepted and paid the draft. Her notes were given for the balance of the purchase money to the vendors of this one-half interest. From 1883, down to the destruction of the property by fire, the property which had been constructed for a college or school building was occupied and used for that purpose, and for a home by the complainants, they paying rent to the other part owners of the property. The defendant A. L. Blackman furnished part of the money to pay this rent. Subsequent to this purchase above mentioned of the one-half interest, proceedings were begun in the chancery court at Springfield for the purpose of selling the property for partition, by the other owners, and to collect the unpaid balance of the purchase money due to the parties who had sold their interest to Mrs. Walton. These proceedings, it seems, were taken to the supreme court; and the final result of this litigation was that the cause was remanded to the chancery court, and there was a decree for the sale of the entire property for the purpose of partition, and for the purpose of collecting the balance of the purchase money due for the sale of the one-half interest. The property was advertised to be sold by the clerk and master; but on the day of sale, by an agreement made between all the parties in interest, Mrs. Walton became the purchaser, or, at least, the purchase was made in her name, and so reported to the clerk and master, of the entire property, for the sum of \$2,800, of which the sum of \$934 was paid in cash, and the balance secured to be paid by notes signed by the complainant Mrs. A. A. Walton, with another brother, Charles Blackman, as security. The property was insured in the sum of \$2,500, in the name of Mrs. Walton, and for the use of the other parties in interest, those entitled to proceeds of deferred payments; and after the destruction of the property by fire, on the 3d of May, 1890, the insurance company settled the matter for \$2,400, which was applied, first, to the extinguishment of the balance of the purchase money on the property, some — dollars, and the balance of the insurance money was paid to Mrs. Walton, or applied to the debts of herself and husband. After this purchase, and before the destruction of the property by fire, defendant A. L. Blackman had also taken out in his own name a policy for \$3,000, and there was a suit brought to recover this insurance money on the last-named policy. Of the money paid on the property, the defendant A. L. Blackman furnished, for the first payment, \$500, which was paid by a draft paid and accepted by him. He subsequently cabled to his sister, from London, \$300, for the

same purpose, but which was not so used; and, at the time of the last sale and purchase of the property, he cabled to his brother Charles Blackman \$1,015, to be used, and which was used, to the amount of \$934, as cash payment on the property, and the balance was expended in taking out the insurance, which was taken in the name of Mrs. Walton on the property. The complainants furnished none of the money paid for the purchase of the property, except \$300 in the first payment made on the one-half interest bought. The balance of the purchase money was all paid out of moneys furnished by the defendant A. L. Blackman, and out of the money derived from the insurance policies taken out in the name of Mrs. Walton. The complainants remained on, used, and occupied the property as a school and college from the time the one-half interest was first bought, in 1883, till the destruction of the property by fire, in May, 1890, paying rent for the one-half interest to the other owners, part of which was paid with the money furnished by the defendant A. L. Blackman, up until the entire property was sold, in 1888. The foregoing facts are entirely undisputed.

As to the allegations in the complainants' bill that they had expended considerable sums (from \$1,600 to \$2,000) on the property and in its purchase, we find no proof in the record to sustain these charges, except J. M. Walton says they spent about \$600 or \$700 in repairs. As to the allegations that they were enabled to buy the property in the first instance for much less than it was worth—that it was worth \$10,000 or \$15,000—on account of their reputation and experience as teachers, that they had remained there and built up the reputation of the school at the loss of some \$10,000 to them, there is no proof. They had the use of the property during all these years without charge, and it is clear that they received their living from it, and that it was of great benefit to them. So far as we can see from the record, they were always poor and without means; probably worth less than \$1,000. As to why, under what circumstances, for what purpose, under what agreement and understanding, the means or money advanced by the defendant A. L. Blackman was furnished, is a matter in dispute, and by no means, to our minds, free from doubt. A considerable part of the negotiations in regard to the purchase was carried on by correspondence between complainants and the defendant Blackman, but it is evident that all of this correspondence (all of their letters) is not in evidence; and it is also evident that conversations had been had between the parties in regard thereto, in view of which some of the correspondence and letters were written, and much of the matter, as we think, is left for deduction and inference from that which does appear. The situation and character of the parties throw some light on the transaction. The com-

plainants, Walton and wife, were school teachers, and poor. The defendant Blackman, so far as we are enabled to see from the record, was a man traveling about from place to place, who undertook, or endeavored to undertake, vast schemes, and who seems to have been, or thought he was, an inventive genius, and a man of very sanguine temperament, of wild hopes and great expectations, but, so far as the record shows, never at any time possessed of any great amount of ready money or very substantial capital. It would appear from his correspondence, and the details of the conversations that are given between him and his sister, that he generally had in view, however, magnificent prospects, and expected at some time in the future to realize immense sums from his ventures. Up until the occurrence of this fire, and the taking of this deed from his sister, he certainly appears to have been a very kind, indulgent, and devoted brother, always willing and desirous to help his sisters, and especially his sister Mrs. Walton, in every way he could. It is in evidence that, when she was in need and sick, he had her taken, with another sister for her nurse and to look after her, to New York City, to receive treatment by the best physicians and surgeons, and took care of her, and paid all of her expenses. It further appears that he sent her, as a gift, at one time, \$25,000 in stock in his contracting company, which he thought, on account of a prospective contract with the Italian government, and another contract that he expected his company would make with the German government, for the construction of the canal from Kiel to Hamburg, would be worth, in a short time, \$50,000. That he expected and hoped to be immensely wealthy, and had the kindest and most benevolent disposition towards his sister, and desired to aid and help her in all ways, there could be no doubt. It is also equally clear to our minds that most of this was purely expectation, and that he never had any very large sum of ready money which he could command or use; at least not at the time he made these advancements on this property.

Now, as to the contested question as to under what circumstances and under what understanding the money furnished by the defendant was furnished: As above noticed, it is stated in the bill that it was purely as a gift to the complainant Mrs. Walton, by her brother, the defendant Blackman, and that he had no interest whatever in the property. In opposition to this, the answer states that the money was furnished under an understanding and agreement that the defendant was to have an interest in the property in proportion to the money he invested therein. Aside from the letters to be hereafter noticed, the only proof on this subject is as follows: Mrs. Walton, the complainant, states, in her deposition, that she received the money as a gift from her brother, and there was

never one word said or written by him to her in regard to paying it back, or investing it in any manner for him. This is her statement at page 58 of the transcript. In a subsequent part of her deposition, at page 67 of the transcript, in relation to the payment of the first \$500, in reply to whether or not she agreed with A. L. Blackman that he should have a vested interest in the property in proportion to the money he had furnished to pay for the same, she says, "We had no agreement about it." Complainant J. M. Walton, in his deposition, states that none of the money sent to his wife by A. L. Blackman was to be an incumbrance on the college property, and that no such thing was intended at the time, and that it was purely a gift on his part. None of these parties undertake to detail the exact statements of what occurred when the matter was first brought to defendant Blackman's attention, nor how it was brought to his attention. As opposed to this testimony on their part, we have the recitations of the deed, the statements in and the inferences to be drawn from the letters hereinafter mentioned, and the defendant Blackman's own testimony. His statement of the original agreement is as follows: He says that in about the year 1883 he received a letter from his sister, he then being in New York, in which she stated she had made a trade with J. M. Eatherly and Milton Pitt for the purchase of their one-half interest in the college property; that she stated the terms of the purchase to him, and informed him she had drawn a draft on him for \$500 as part of the first payment of the college property, which draft he accepted and paid; that this letter from Mrs. Walton informed him that he should have an interest in the property so purchased to the extent of all the money he should pay as a part of the purchase money therefore; that this letter he had lost or mislaid. According to him, this was the beginning of the transaction, and it was on these statements and agreements that the subsequent proceedings were had.

Referring to the correspondence on file, and taking them up in the order of their dates, we find, first, a letter from A. L. Blackman to complainant Walton, dated January 17, 1883, in which Blackman requests Walton to subscribe for \$100,000 of the stock of the New York & Boston Short-Line Railway, which Blackman was endeavoring to place "on its feet," and which letter also requests Walton to inclose a draft for \$10,000, and states that the subscription will be paid by work in his contract, and that he will not call on Walton for the money. Inasmuch as it appears that Walton was as "poor as a church mouse," this letter would seem to illustrate the character of Blackman's financial dealings and prospects. The next letter in this correspondence was from Blackman to his sister Mrs. Walton, dated April 19, 1886, in which he sends her \$25,000 of shares

of the capital stock of the National Dredging & Contract Company, which he thinks will soon pay \$200 per share, owing to the great profits he expects to make out of the prospective contracts hereinbefore referred to. He states that these shares are to be hers, to do with as she pleases, and advises her not to part with them. On March 2, 1888, Blackman writes to Prof. Walton that he is glad he has rented the college for the ensuing year, and that he will send a check for \$140 to pay the rent; says that he would have sent it sooner, but that he had had heavy losses, and did not have the money; also speaks of the money he expects to get, and the large profits he expects to make out of prospective contracts. On April 19th the defendant wrote to his sister Mrs. Walton from New York, inclosing his notes for \$2,500, payable in 12 and 24 months, which, he says, "I have drawn for the purpose of enabling you to buy the balance of the interest in the college property and grounds. I will myself pay the notes when they fall due. I would send you the cash to pay for the property now, but I am compelled to raise a very large amount of money for the execution of my contracts, and this will require more money than I have, and I am compelled to raise the money." "It will be no trouble for me to pay the notes for you when due, as I will have my contract with the Italian government completed by that time, and plenty of funds on hand. If you can make a trade for the purchase of the property on satisfactory terms, by giving your note and me as indorser, or my notes and your name on the back as indorser, I will take care of the payments for you; but do not fix the earliest payment under six months, or, better, say eighteen months, from date." He further says: "If the amount of \$2,500 I sent you is not enough to pay for the property, draw a draft upon me, payable six months after date at sight, and I will accept and pay it." He further says: "If the notes so drawn do not meet the conditions of the time and terms of payment, you can also draw upon me for such amount, the times of payment to be made at or about the times named, and I will accept and pay the same in lieu of the notes; but let the drafts be so drawn that they state in the body of the drafts what they are drawn for." On the 4th of May, 1888, Mrs. Walton cabled to her brother that she needed \$300. On May 5, 1888, he sent her, by cable, \$300. This, he states in his deposition, he supposed she wanted for the purpose of making payments on this property. On the same day, May 5, 1888, he wrote her, from London, a letter in which he acknowledges the receipt of her cablegram, and announces that he had sent the \$300 by cablegram, and states: "I do not know what purpose you require this amount for, and, if I could, would have sent you more, but I can't spare more than I send." Says: "I may be able to pay for the place—I mean the college—in a few weeks; but I am relying upon sell-

ing some shares I have, which I think I can do." On July 13, 1888, complainant Mrs. Walton writes to the defendant, at London, in which she acknowledges the receipt of the two letters from him, and states that he writes a little saucy about "raking around" to find the money to buy the college property, and does not think he will have "to rake around" much from the way he writes about his \$55,000,000; speaks of her husband's high regard for the defendant, and of the joy his letters gave them. She says: "I inclose a notice of the sale of the college, which came out last night. Of course, dear Bud, it would be the happiest day of my life for you to buy the college, but I do not want you to embarrass yourself or your business interests to do so. If you buy it, let's re-charter it, and call it, 'Walton & Blackman's College; J. M. Walton and A. M. Blackman, Presidents;'" speaks of telephone and daily mail, and of a dummy line they are preparing to run from Springfield to Cross Plains; and closes by hoping that his Nicaragua canal may come around all right, and by hoping that he can "rake around" and get the money to buy the college in August; and adds a postscript to the effect that "Prof. Walton and I think it best for you to have the deed to the college." The next letter is dated August 1, 1888, from Prof. J. M. Walton to A. L. Blackman. It expresses pleasure that Blackman is advised of the state of affairs there, and that his heart is with them. He says, "We have a grand chance for a great victory," evidently meaning in the purchase of the college. Refers to the people with whom they are having trouble, and the prospects of others bidding on the college, and wanting it. He says further: "As to who is best to bid is debatable. It will be best for Addie, as some would be ashamed to bid against her; afraid of public sentiment," etc. Further says: "If we can save the college, and thereby keep up a good front, I can get the state superintendent's office next year, if desired, which would aid greatly in getting the school up to a high point of success." He states that the very site on which the building stands is worth thousands of dollars, and adds: "If the buildings and grounds were mine, I would not even think of taking \$10,000. They cost \$14,000. We wrote you in our letters of the 11th and 14th of July that we thought it best for you to have the title to the property in your own name. Be prompt and act quickly. Be cautious in giving anybody a chance to know what you are doing. Cover your tracks well." On August 15, 1888, J. M. Walton writes to Blackman, at London, reciting his letter of August 2d, stating the advertisement of the property, the change in the day of sale, and says: "We are pretty hopeful that you will give relief, though it is too good to believe; we have been down so long. Addie wrote to Charlie to be in readiness to receive message from London 9th to 12th of

August. It will be a day long to be remembered by us if we win, and a day full of glory. I want to see the curs sneak. If you can't send enough money to buy it cash, send all you can, and it will be promptly returned in case we fail to purchase. If the property sells for \$3,000, then \$2,450 cash will give you a deed, because the other is already paid. If it sells for \$3,500, then \$2,650 will give you a deed. If it sells for \$4,000, then \$2,950 will give a deed to you." He then explains about the previous payments and interest. He writes about getting an injunction to prevent the sale of the property if they do not hear from Blackman in time, and says he is wide awake, and is watching all points, and advises Blackman to keep his tracks well covered. On August 11, 1888, the defendant Blackman, in London, telegraphed his brother Charles A. Blackman, at Nashville, Tenn., as follows: "Public sale Neophegen College, Tuesday morning next. Can you go out Monday? Buy college for me. Can provide part, maybe all, cash. Cable you Monday. Answer." On August 13, 1888, Charles Blackman, at Nashville, wired his brother, in London, as follows: "Absent two days. Can attend business. Money, to-morrow, will do." On August 21, 1888, defendant A. L. Blackman, in London, wired \$1,015 to his brother Charles A. Blackman, at Nashville, Tenn. This was for the purpose of buying this property. On August 23, 1888, Charles A. Blackman wrote his brother, acknowledging the receipt of the \$1,015 on Tuesday, and reports the disposition of it, and says: "I bought the college for \$2,800,— $\frac{1}{2}$ cash, balance one and two years; sister Addie's note, with my security. Lien retained on the property. I paid \$934, and have had the building insured for \$2,500 for three years,—cash, \$62.50. I made the purchase in sister Addie's name, which I think best. I got the advice of a good lawyer, who said no one could possibly touch it, or any portion, for anything that might possibly come up against her from any past liabilities. I had a distinct and positive understanding with sister Addie and Prof. Walton, should my course not meet with your approval, that they should make any change that you might desire towards making the deed." He adds a postscript to this effect: "I left all at Cross Plains in high states of enjoyable excitement. From all I could hear, the very large majority were highly pleased and gratified that we got the college." On the same day, August 23, 1888, Mrs. Walton writes her brother A. L. Blackman, saying: "The Dearest and Best of Brothers: Ere this Brother Charlie has cabled you of your purchase,—the prettiest and the most handsome home in all Robertson county. It is something to be proud of, and that you can always feel a pride in. To say that we are happy over it is expressing our feelings very feebly, indeed. The grass looks green, the sky blue; everything is more lovely. If dear ma could

look down and have seen and know what you have done, and what a handsome home we have, I think she could but feel happy." She further adds: "Brother Charlie made the best trade, and drew up the notes, etc., the way he thought best." And, further: "Now we can go to work with a heart, knowing it is permanent. There is but one thing to mar our joy; it is being fearful that it may have been at a great sacrifice that you sent the money, and a great strain on you to get it. I felt confident that you would move everything to get it that was in your power, and I feel that you will never regret it; and, when you get tired of the worry and cares of your busy life, you can fall back on a good, nice, comfortable home. We will go to work and improve it with every little spare money that we have, and you can send all of your little things that you want to take care of, and deposit them in your room and know that they are taken care of. Let's make it a great place. We can do it in time, and not be pushed about it either." There was also a letter from Prof. J. M. Walton to the defendant A. L. Blackman, dated July 11, 1888, which we had omitted to notice. This acknowledges the receipt of Blackman's letter of June 25th, and states: "You wished to know my views of purchasing the property,—college,—and as to the title," etc.; and he expresses the opinion that this would be good. He further says: "Have you any suggestions as to the placing of the title? There is not much difference, but it would probably be best for you to take an absolute deed yourself, and give us a title bond when the money is paid to you. If we buy at public sale, it will be bid off in your name, if you will send blanks signed. I do not know the form. They are to be used after the sale in case we can give any sort of security. I don't know how great the cash payment will be on the sale; neither do I know whom to apply to for security. I think it exceedingly doubtful, but nearly everything is possible. If we had this cursed question of ownership settled, we would soon be in a prosperous way, and everybody would be on our side, and money matters would become easy. I believe the property can be bought cheaper at public sale. * * * Stand prepared to do your best. The property costs \$14,000, and is very cheap at even \$5,000." He goes on to speak of matters which he thinks enhance the value of the property, and "is afraid something will occur to enhance the value of the property in a few days." On the 12th, he adds a few more lines to this letter, and acknowledges the receipt of another letter from Blackman, speaks of the notice of the sale, and says: "If you can carry us over this, we are safe, and we can make our fortune and more reputation than we need. But it is a serious hour. Give us all the quick information you can." This is all the correspondence in relation to the purchase of the property found in the record.

On May 4, 1890, the defendant wrote to Prof. Walton, in which he acknowledges the receipt of the telegram informing him of the burning of the college, and says: "This I regret to hear very much, and I fully sympathize with you in the loss of home and the break up of your school. I regret it for yours and sister's sake more than I can say." On May 15, 1890, defendant Blackman wrote to Mrs. Walton, acknowledging the receipt of the letters from her and her husband, and also a letter from her husband relating to the payment of the \$1,015 due on the Neophegen purchase, and reciting the statements in the letter as to the amounts that were due on the purchase-money notes, and of the levy on the property, and states that he supposed it had been sold; speaks of the burning of the college being probably by incendiaries, etc. He sends some clothes for the boys, and adds: "I have no advice to give at this distance that would be worth anything. I offered to sell the property at a great advance of the price before the college was burned, but Prof. Walton wrote me such a letter as to appear that he thought I was trying to do him a great wrong, and persecuting him, to suggest such a thing; and now the ground is not worth one thousand dollars, and I, personally, would not give fifty dollars for it." He then gives his sister his address. On July 6, 1890, complainant Mrs. Walton wrote the defendant A. L. Blackman, acknowledging the receipt of his letter in regard to insurance, and says: "Why do you think we will have trouble about the insurance? On what ground do they build, and which company will give us trouble? I will sign no more papers," etc. To this, her husband, J. M. Walton, added a postscript, to this effect: "The Royal paid their insurance on personal property in the college,—\$1,200; but it was all taken for the piano, and by garnishment, but a few dollars. The assessor of the Royal met us at Springfield, and asked if you had any legal right to the Neophegen property. You certainly had the clearest equitable right, and the legal right was put in your sister's name without your knowledge or consent, by your agent, C. A. Blackman, who said to me at the time, 'If this should not be satisfactory to A. L. Blackman, you pledge me it shall be changed and put in his name.'"

This is all the evidence in the case, so far as we can see, that throws any light upon the purchase of the property. To resume, we have, for the defendant, his positive and detailed statement of the agreement that he should have an interest in the property in proportion to amounts advanced by him. He tells how it was made in a letter, and when,—at date of first purchase, about 1883. We have the statements of the husband and wife in general terms that there was no such agreement. A general denial of such agreement might, for some purposes, be effectual, and all that would be necessary, but there was no effort made to unite the force and effect of

the testimony of the two complainants, by showing that both knew of this particular letter and its contents, and it was not as stated; so that, on this point, this single fact, that there would be two witnesses as against one, the greatest effect we can give to the general denial of the husband is that he knew of no such agreement. And, as to the specific letter, the testimony of the witnesses would seem to be near an equipoise, with the benefit to the defendant of a specific statement of terms, time, and place, against a general denial on the part of the wife. The complainants' theory is corroborated by the taking of the title in the complainant A. A. Walton's name, and some expressions in the letters, and by defendant's allowing the matter to remain in this shape for two years. The defendant's contention is corroborated by the natural equities of the situation; by the formal deed of the complainants, freely and understandingly executed and delivered by them, with its recitals in conformity to defendant's contention, and by the express admission of the complainant J. M. Walton, in his letter to defendant, that he had the clearest equitable right to the property. In the letters which passed between the parties there are to be found expressions favoring either view. Our own conclusions are that the most reasonable theory is this: It was the view, desire, and intention of defendant Blackman to aid and assist his sister, and, to do this, to procure this property either by himself or in connection with her, and that, in so doing, his principal motive was to secure a permanent home and school for her. But at the same time, while lending and extending his aid, he reserved his property rights and interests to the extent of the money advanced by him, as he contends, and thought, also, that he was making a good trade. Admitting his reserved interests and property rights, and at the same time his intention to have a home for his sister, or a joint home for himself and her and her family in this property owned by him, or by him and her jointly, in proportion to the money advanced by each, every letter, and every expression in any of them, and every act and transaction of the parties up to the filing of the bill in this case, seem to us to become harmonious, and on no other theory can they all be reconciled. In their letters, as above seen, complainants speak of "our home," and defendant speaks of "your home." Complainants also speak of the property as defendant's home, his room, his purchase, "something he can always be proud of and fall back on as a comfortable home." He is appealed to, to "let us make it," etc. Defendant wired: "Buy college for me." Complainants advised taking deed in his own name, title to be made to them when he was paid the money, etc. Then, when he was urged to send the money, it was promised, if it was not placed in this property, it would be immediately returned to him. This does not look like a gift, pure and simple. Without

further elaboration, we find that defendant's contention as to the original agreement under which the money was advanced by him is supported by the weight or preponderance of the evidence.

As to what occurred and what was said and done when the deed was signed, acknowledged, and delivered by the complainants to Wickware, as agent of the defendant, we find the following: The defendant says that he drew up the deed, and sent it to Wickware, with instructions to take it to the complainants, with the message that he had sent it to them to be signed, and directed the agent to make no representations or promises in regard to the matter. Wickware's deposition was not taken by either side, and we are not informed why it was not. A letter appears in the record from him, in which he simply states that when he went to Cross Plains, at the request of the defendant, he made no agreements or promises to Walton and his wife whatever, and says: "This is all I said to them: 'Mrs. Walton, Prof. Blackman requested me to bring this instrument to you and professor, to read it and sign it, and go before a notary public and sign it; and, if you are going to do it, do so, and don't ask me any questions.'" Mrs. Walton, in her deposition, says, at one place: "I consented to sign this deed after Wickware's assuring Prof. Walton and myself that he would not register this deed without our consent, and he said that he really did not think he would have to use it at all, and that it would assist A. L. Blackman in forcing the Royal Company to pay him his insurance." But she says in another place, "I signed the deed because my husband persuaded me to;" and, in another, "I gave the deed because my husband induced me to do so." Again, she says, speaking of Wickware, in answer to the question whether he said anything to her about signing it: "When he brought this paper out, he handed it to Prof. Walton, and Prof. Walton called me, and we three, Prof. Walton, Wickware, and myself, walked out in the yard. Prof. Walton sat down on a log, and read a portion of this paper to me aloud before Wickware. He got as far as the second \$300, when I said, 'I don't understand this \$300.' Prof. Walton nudged me, and said it was all right. I turned around, and walked off. When Wickware brought this paper, he said: 'Prof. Blackman has sent me out with this paper, for you two to sign it, and ask no questions.' Prof. Walton came to me after a while, and told me what the paper meant; that it was a deed to the college property for us to sign for A. L. Blackman. I told him at first I would not do it. After repeated urging of Prof. Walton, I consented to sign this deed, and after Wickware assuring Prof. Walton and myself that he would not register the deed," etc. Prof. Walton, in his account of the matter, states that Wickware brought the deed, and handed it

to him, with this statement: "That Prof. Blackman wanted him and his wife to sign it, and for them to take it, and read it, and, if they were going to sign it, to do so, but to ask him no questions about it;" thus fully corroborating Wickware's letter. And we take it, from Mrs. Walton's own statement, that she got whatever information she had about Wickware's statements about registering the deed from her husband, because it seems that she walked away before the deed was fully read over.

So, we find and hold that there were no promises or representations made by Wickware, as agent of the defendant, other than that he brought the deed with the request that they sign it, and ask him no questions. We are further satisfied, and find as a fact, that at the time of the purchase of the entire property, when it was to be sold under the proceedings of the chancery court, and when it was sold under negotiations conducted by Charles A. Blackman, as agent of the defendant, if the taking of the title in the name of the complainant Mrs. Walton was not satisfactory to A. L. Blackman, it was agreed that he would change it, and make a deed to him, or any one they might designate, whenever he requested it. It is further proved by Mrs. Johnson, the sister of the parties, that Mrs. Walton told her that she signed this deed in pursuance of this promise and agreement.

We feel bound to conclude that there is no sufficient proof that any false or fraudulent misrepresentations were made by or on behalf of the defendant by which the complainants were fraudulently deceived. They had promised to make it, and there were strong legal, equitable, and moral reasons why they should make it. The defendant may have mainly desired it for the supposed help it would give him in his insurance matter, and the complainants may have been largely controlled by this idea, that it was for that purpose, and so induced to make it; but there is an entire absence of all sufficient proof of any fraudulent representations made by or for him. We are satisfied that both complainants fully understood what they were doing, properly executed, acknowledged, and delivered this deed, and were under no undue influence. To authorize a court to set aside, cancel, or rescind a formal deed or contract of parties, requires proof of strong, clear, positive, and convincing character. *Baker v. Shy*, 9 Helsk. 88.

There is another ground on which we think the decision of this case may well be rested. The theory of the complainants' case is that the defendant had absolutely no interest, legal or equitable, in this property, and they deny in the most positive terms that he had, and assert that the property was wholly that of the complainant Mrs. Walton, and the only excuse for the making and delivery of the deed is that it was for the purpose of enabling the defendant Blackman to fraudulently

procure the payment of the insurance money, on a policy which he had taken out in his own name, although he had no interest in the property. If the contention of the complainants is correct, that he had no interest in the property, legal or equitable, then the transaction with the insurance company would be a fraud, to effectuate which this deed was intended; and the question is: Can the complainants, under such a state of facts, recover property conveyed by them with such intent, and for such purpose?

It is insisted on behalf of the complainants that while, as a usual rule, the courts will not aid parties who have been engaged in a fraudulent transaction, but will leave them where it finds them, yet that it is a settled exception to the rule that, when one of the parties to the transaction repents of his wrong before the fraudulent purpose for which the undertaking in the contract was entered into has been accomplished, a court of equity will afford the repenting party relief; and we are cited to a number of cases by the complainants' counsel in support of this contention, which they insist are applicable to this case. We have made a careful study of the cases to which we are referred, as well as numerous other cases in this country and England relating to this subject, and, as a result of our investigations, we think that the following will be found to be the principles applicable to such class of cases: (1) Moneys paid or property conveyed and delivered may be recovered back when done in contravention of law or public policy, as long as the contract remains executory, and something remains to be done to carry out the illegal scheme, and the recovery will prevent it, even though the recovery be for the benefit of a *particeps criminis*. *Spring Co. v. Knowlton*, 103 U. S. 53, 59; *Taylor v. Bowers*, 1 Q. B. Div. 291; *Lowry v. Bourdieu*, 2 Doug. 468; *Tappenden v. Randall*, 2 Bos. & P. 467; *Hastelow v. Jackson*, 8 Barn. & C. 221; *Bone v. Eckless*, 5 Hurl. & N. 925; *Lacausade v. White*, 7 Term R. 535; *Cotton v. Thurland*, 5 Term R. 405; *Munt v. Stokes*, 4 Term R. 501; *Smith v. Bickmore*, 4 Taunt. 474; *Morgan v. Groff*, 4 Barb. 524; *Insurance Co. v. Kip*, 8 Cow. 20; *Merritt v. Millard*, *43 N. Y. 208; *White v. Bank*, 22 Pick. 181; *Inhabitants of Lowell v. Boston & L. R. Corp.*, 23 Pick. 24; *Porter v. Jones*, 6 Cold. 314; *Yerger v. Rains*, 4 Humph. 259. (2) A recovery can be had where the illegality consists in the contract itself, such as usury contracts and gaming contracts, etc. Such contracts are usually those prohibited by positive statutes, and a recovery is frequently provided for either by the letter or the spirit of the statute itself; and, even where it is not, these are usually cases where the interests of the parties themselves are the only material interests affected by the transaction, and to allow the transaction to stand would be to

sanction the very contract prohibited, and carry out the very thing the law intended to prevent. Where relief will be carrying out the policy, intention, and spirit of the law, it will be granted, even though the contract be complete, but not otherwise. See *Thomas v. City of Richmond*, 12 Wall. 349; *Smith v. Bromley*, 2 Doug. 696; *Spring Co. v. Knowlton*, 103 U. S. 60; *Porter v. Jones*, 6 Cold. 314; *Rucker v. Wynne*, 2 Head, 618; *Williams v. Talliaferro*, 1 Cold. 38. Relief will not be given in such cases unless it will promote public policy. *Kelton v. Millikin*, 2 Cold. 413, 414. The principles are clearly stated in *Porter v. Jones*, 6 Cold. 320 et seq., where Judge Andrews says: "But will a court of equity, the parties to the note being particeps criminis and in pari delicto in the illegal transaction, afford its active interposition to set aside and cancel the illegal contract? That he who asks equity must do equity, and that those only shall receive the active aid of courts of justice who approach with clean hands, are maxims sound both in law and morals; and if judges were permitted to base their decisions upon the inevitable disgust produced by the conduct of a party who stretches forth miry hands towards the court, and, proclaiming his own criminality, bases upon it a claim for the active interposition of the court in his behalf, without regard to the dictates of natural justice, the course to be pursued would be clear. But while the rules of law which courts are bound to enforce in civil cases have reference, primarily, to the protection and enforcement of private rights, they are also subservient to the governing principle that the safety and best interests of the community are paramount to any private interest. Therefore it is that there are many cases in which, were the rights or interests of the parties only concerned, courts would absolutely refuse them aid; yet, as the public good demands a decision upon their claims, the courts will entertain the cause and make the decision. The decree is made upon the facts and the law of the private right; but the community is a quasi party to the cause, and, for the protection of the community, courts may overlook the individual turpitude which has forfeited the private right, and make such decision, consistent with the public interests, as they would have made had the party been innocent. From these principles, it follows, and thus it has been held, that the active interposition of equity to set aside and cancel an illegal contract is matter of sound discretion in the court, and not of absolute right in the party. The inquiry is: Has the complainant made such a case as would, were he innocent, entitle him to relief? And, if so, does the best interest of society require that relief shall be afforded, notwithstanding the guilt of the party? If not, then the court will refuse its aid, and

will leave the parties in whatever difficulties their conduct may have involved them. I do not deem it necessary to go into an extended analysis of authorities outside of our own state in regard to the general rule, which has been so often discussed by the courts of this country and England. The rule is limited so far as this: That courts will not generally, perhaps never, unless under statutory provisions, or where one of the guilty parties has been also the victim of outrageous fraud or oppression, interfere to set aside a sale or delivery of property or money which has been made and completely executed in the course of the illegal transaction. If one has freely parted with the title to or possession of property upon an illegal or immoral consideration, courts ordinarily consider the parties in equal guilt; and a guilty party being in pari delicto shall never invoke the aid of the courts to have it restored to him. Much as the community is interested to discountenance immoral and illegal contracts, its interests will not be subserved by setting aside executed contracts, and unsettling legal titles. 1 *Smith*, Lead. Cas. Eq. pt. 1, p. 638; *Yerger v. Rains*, 4 *Humph.* 259. But where the illegal contract is still executory, and the public interests will be promoted by setting it aside, then, in the exercise of their sound discretion, courts of equity will grant relief. Judge Story states the rule thus: 'In general (for it is not universally true), where parties are engaged in illegal agreements or other transactions, whether they are mala prohibita or mala in se, courts of equity, following the rule of law as to participants in a common crime, will not, at present, interpose to grant any relief; acting upon the known maxim, "In pari delicto potior est conditio defendentis et possidentis." But in cases where the agreements or other transactions are repudiated on account of their being against the public policy, the circumstance that the relief is asked by a party who is particeps criminis is not, in equity, material. The reason is, the public interest requires that relief should be given, and it is given to the public through the party.' 1 *Story*, Eq. Jur. § 298."

Applying these principles to the case at bar, we are of opinion that it does not come within any of the exceptions above named. In the first place, the contract was wholly executed; there was nothing left to be done by either side. In the second place, the contract itself being simply a conveyance of the land in the usual mode, and whether it be a deed of gift or for a valuable consideration, and in pursuance of a previous agreement, as recited in the deed, being immaterial, there is nothing in it that is illegal, contrary to any statute or public policy, such as arises in the case of gaming and usurious contracts. And applying the other tests given in the cases referred to, as to

whether to grant relief will be carrying out the policy, intention, and spirit of the law, we cannot see that this would by any means result. To allow contracts for usury or gaming to stand, and such like contracts, would be, as above stated, to remove the only material penalty provided for the enforcement of the law, and thereby prevent the punishment, and encourage such violations of the law, instead of preventing such transactions. But in this case it seems to us that parties would be most effectually deterred from such illegal transactions, and from schemes entered into for the purpose of perpetrating frauds upon others, if the party who thus devotes his own property to the purpose of perpetrating a fraud upon another is made to understand and know that he can only do so at the risk of great loss and damage to himself, and that he will not be allowed under any circumstances to come into the courts of the state to be relieved from the results of such a fraudulent transaction on his part. If such a policy be clearly established, parties will certainly be slow to place their own interests in jeopardy thus to help another; and, on the other hand, if the principle be established that they can be relieved in such cases, the most powerful motive for preventing such transactions will be removed. And, again, in this case it does not appear to us from the record that a case is presented where the parties have repented of their evil intent in time, and for the purpose of preventing the fraud; nor do we see that granting them relief would in any manner serve to prevent the perpetration of the fraud, as would be the result in case of restoring property fraudulently conveyed to parties, so that it might be reached by bona fide creditors. It can make no difference in this case to the insurance company whether this transaction be now annulled or ratified. The question can only be, as to it, "What was the real, legal, bona fide status of the parties at the time of the insurance and destruction of the property?" and not, "What rights or interests had become affected since by the execution of this deed?" And, as said, it does not appear from the record before us whether the supposed fraud attempted to be perpetrated upon the insurance company has been accomplished or defeated; nor does it in any manner appear from the record, so far as we can see, what effect, if any, the complainants' course in the filing of this bill has had upon the suit or transaction with the insurance company. It is true, we are furnished with a written opinion of the Honorable Howell E. Jackson, said to have been delivered in a suit in the federal court for this insurance; but it is no part of the record, and is only handed to us as a part of the brief or argument of the complainants' counsel. It is stated in the brief, too, that the case was decided upon the same evidence that appears in the record in this case; but how that may be, this record does not

show, nor, even if it had been, do we see that it would have materially affected the issue in that case. It would seem clear that the insurance company obtained their notice of the defense to be made, and of the alleged want of interest of the defendant Blackman in the property, by the inadvertent admission of the complainant J. M. Walton that Blackman had no interest in the property,—an admission which he sought in every way to controvert and to avoid the effect of,—in the first place, by a letter to Blackman modifying his admission, and stating that, while the legal title was in his sister, it had been placed there without the knowledge or consent of Blackman, and that he certainly had the clearest equitable right; and by afterwards executing this deed, as he says, for the same purpose. Now, it is very apparent that after the insurance company had thus been put upon notice, and enabled to make its defense, the filing of this bill and canceling this deed could in no effectual way very greatly facilitate the defense of the insurance company.

We think the case presented simply is, according to the complainants' own theory, that the complainants united in an effort with the defendant to defeat the insurance company, and after foreseeing a failure of this effort, or after finding that their own interests would be jeopardized, come into a court of chancery, asking to be relieved from the effects of their own turpitude. To deny such relief would certainly be the most effectual means of preventing the occurrence of like actions, and we doubt if any case will be found presenting like conditions where relief has been granted. But we think our conclusions of fact hereinbefore announced, as well as these reasons, present an effectual bar to the granting of any relief to the complainants in this case, and the decree of the chancellor will be affirmed, with costs.

NEIL, J., concurs.

Affirmed orally by supreme court, March 5, 1896.

STATE ex rel. KIRTLEY v. SCHELL et al.
(Supreme Court of Missouri, Division No. 2.
June 16, 1896.)

COUNTIES—PAYMENT OF WARRANTS—PAST INDEBTEDNESS.

1. A county warrant, duly issued for the legitimate expenses of the county, and which, together with prior warrants issued for the same purpose during the same year, does not exceed in amount the revenue provided for that year, is valid, though a sufficient amount may not be collected from such levy to pay all warrants so issued.

2. A valid warrant, unpaid because a sufficient amount to pay was not collected under the tax levy, may be paid from the excess of revenue remaining in any future year, after payment of the current expenses of such year, by the issuance of a new warrant therefor, as provided by act of March 31, 1893, or, if there be no excess, as provided in Rev. St. 1890, § 7654, by an order of the circuit court directing

the county court to make a special levy for that purpose.

3. In view of legislation making special provision for the payment of valid past indebtedness of a county, and of Const. art. 10, § 12, prohibiting counties from becoming indebted, Rev. St. § 3166, providing that all warrants that have been legally drawn shall, when presented for payment, be registered by the treasurer, and paid in the order of presentation, must be construed as applying only to warrants for current county expenditures, and a treasurer is not authorized to use the revenue provided for the expenses of any year for any other purpose until the warrants drawn for the expenses of such year have been fully paid. *Reynolds v. Norman*, 21 S. W. 845, 114 Mo. 509, distinguished.

Appeal from circuit court, Andrew county; William S. Herndon, Judge.

Action on the relation of Nicholas Kirtley against Jacob Schell, county treasurer, and others. Judgment for defendants, and plaintiff appeals. Affirmed.

D. Rea and P. Mercer, for appellant. Huston & Parrish and Simmons, Keller & Castle, for respondents.

BURGESS, J. This is an action against the defendant Schell as principal and his co-defendants as sureties on his bond as treasurer of Andrew county for the penalty prescribed by section 3203, Rev. St. 1889, for failing and refusing to pay, when presented to him by plaintiff for payment, certain county warrants issued by the county court of that county, of which plaintiff is the holder. From a judgment for defendants, plaintiff appealed.

There are seven counts in the petition, based on as many different warrants. The first count is on a county warrant issued December 31, 1890, for \$200; second count on a warrant issued December 2, 1889, for \$133.20; third count on a warrant issued November 6, 1889, for \$100; fourth count on a warrant issued December 2, 1889, for \$25; fifth count on a warrant issued January 7, 1890, for \$158.80. The warrants amount in the aggregate to \$861.50, without interest. The case was tried by the court on the following agreed statement of facts: "That the several warrants described in the petition were issued against the funds described in said petition and named in said warrants, respectively, for expenses incurred by said company during the several years in which issued. That the amount of the warrants drawn in each of said years prior to the time these warrants were severally issued, added to the warrants issued in previous years, and which were, at the time these warrants were severally issued, outstanding and unpaid, was in excess of all the revenues provided for said county from all sources for the years in which said warrants in suit were issued; but that the warrants issued by the county court of said county for the several fiscal years in which these warrants were issued were, if taken alone and separate from the unpaid warrants of previous years, not in

excess of the revenue for the several years when issued. That the relator, Nicholas Kirtley, was county treasurer of said Andrew county from the 9th day of July, 1889, to the 1st day of January, 1891. That during that time he paid county warrants in the order of their presentation, without regard to date of issue, and that during that time he paid off warrants drawn upon the several funds against which the warrants in suit are drawn more than a sum sufficient to pay the several warrants here in suit, and which warrants so paid by him were, when issued, within the revenue of the county for the respective year when issued; but when the outstanding and unpaid warrants of previous years were added to the warrants issued and unpaid during said several fiscal years there had been, at the time the warrants so paid by him were issued, more than enough to exhaust all the revenue provided for said fiscal year from all sources. That the warrants in suit were issued at the time they respectively bear date, and were severally presented for payment at the times stated in the petition, and that payment was refused for want of funds, and said warrants were then and there registered by the treasurer, as stated in plaintiff's petition, and that the relator is the legal owner and holder thereof. That on the 18th day of January, 1894, the said warrants were presented to the treasurer, Jacob Schell, of Andrew county, at his office, and payment demanded, which was refused. That for each year during which the defendant Jacob Schell has been treasurer of Andrew county the county court has in all things, according to law, by an order of said court, entered of record, apportioned all the revenue of said county for the ensuing fiscal year; and that the treasurer aforesaid, Jacob Schell, has, in accordance with and in obedience to such order of apportionment, set apart all funds coming into his hands belonging to the county revenue to the several funds, and has adopted and adhered to the rule of paying out of such several funds so apportioned the warrants drawn on said several funds by the county court during such fiscal year, and that he has so applied all money coming into his hands for each year until the warrants issued against said several funds for such year were all paid. That after such payment there was a surplus of about \$4,000 at the end of the fiscal year in the spring of 1893, which was applied to the old warrants issued in previous years in the order of their registered presentation, on new warrants issued therefor under the act of 1893. That at the end of the fiscal year terminating in the spring of 1894 there was a surplus, after paying all warrants issued during the prior fiscal year, of about \$5,000, which was applied as was the surplus in 1893. That when the warrants in suit were presented to the defendant Jacob Schell, as stated above, there was money enough in the several funds to pay the warrants, derived from the revenues of

the county for the fiscal year ending in 1894, but that the treasurer had no funds of any kind in his hands, and never did have, derived from the revenues of the county for any of the years in which any of the warrants were issued. That at the time these warrants were presented to defendant Jacob Schell for payment there was money enough in the several funds to have paid these warrants, and all unpaid warrants presented for payment prior to the time these warrants were first presented for payment, if they had been paid in the order of their presentation without regard to warrants drawn for the fiscal year in which such warrants were so presented to defendant Schell in January, 1894." The court, over the objection and exception of plaintiff, declared the law to be that: "Under the pleadings and agreed statement of facts, the plaintiff is not entitled to recover, and the finding should be for the defendants."

Plaintiff's contention is that, although the warrants described in the petition represent past indebtedness, they must be paid in the order of their presentation, out of a levy made, and which could only be made, for current county expenses, and which had been appropriated and set apart as a fund to pay warrants issued in payment of expenses of the current year. Upon the other hand, defendants contend: That under article 5, Rev. St. 1889, no levy can be made for other than current county expenses except by order of the circuit court, and that, when such levy is made, it creates a separate, distinct fund, sacred to that purpose only,—it becomes a distinct fund in the hands of the treasurer, applicable to that purpose alone. That taxes levied for current county expenses, appropriated and set apart to the several funds for current expenses as provided in article 5, are sacred to that purpose, and cannot be diverted by county court or treasurer to any other purpose until that purpose is fulfilled, and that the defendant treasurer did right in so applying such revenues. That the treasurer only pays out of funds provided, and, if no fund applicable to the payment of these warrants has been provided, then he is not at fault, even though the warrants be legal, and binding on the county. By section 12, art. 10, of the constitution of Missouri it is provided that: "No county * * * shall be allowed to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; nor in cases requiring such assent shall any indebtedness be allowed to be incurred to an amount including existing indebtedness, in the aggregate five per centum on the value of the taxable property therein," etc. In passing upon this section in *Book v. Earl*, 87 Mo. 246, it is said: "The evident purpose of the framers of the constitution and the peo-

ple who adopted it was to abolish, in the administration of county and municipal government, the credit system, and establish the cash system, by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury for that year. Section 12, supra, is clear and explicit on this point. Under this section the county court might anticipate the revenue collected and to be collected for any given year, and contract debts for ordinary current expenses, which would be binding on the county to the extent of the revenue provided for that year, but not in excess of it." In view of the agreement that the warrants involved in this controversy were issued against the proper funds for expenses incurred by said county during the various years in which they were issued, and that, when considered alone and separate from unpaid warrants of former years, they were not in excess of the revenues for the several years when issued, and especially in the absence of evidence as to how the county became in default in the payment of its warrants,—whether by drawing more warrants in some preceding year or years than its revenues, or by the loss or failure to collect some part of its revenues,—we are not inclined to hold these warrants void, as having been issued in excess of the revenues of the year in which they were respectively issued. It is indisputable, however, from the facts disclosed by the record, that the warrants are for past indebtedness, and not indebtedness for the current year in which they were presented for payment. A fund to pay such indebtedness can only be raised by compliance with section 7654, Rev. St., and in obedience to an order of the circuit court of the county as provided thereby, directing the county court of the county to make a levy for that special purpose; or, in case of an excess of funds in the treasury over and above a sufficient amount to pay the current expenses of the county for any given year, then such excess may be applied to the payment of valid warrants outstanding, in the order in which they may be presented for payment, as provided by section 3166, Rev. St. As sustaining this view, the general assembly, in 1893, passed an act entitled "An act to authorize county courts to provide for the payment of and to pay outstanding county warrants in certain cases," approved March 31, 1893. This act is in all of its important features like section 3166, only in that it provides that in all cases where warrants have been drawn for the purposes named in said act, and shall not have been paid out of the taxes assessed and collected for the year in which they were drawn, it shall be lawful for the county court of the various counties in this state having such outstanding warrants to take up such warrant or warrants during any subsequent

fiscal year, and issue a new warrant or warrants to the holders thereof for said old warrant or warrants, which shall be registered by the county treasurer, and paid in like manner as the current warrants for said fiscal year, provided said warrant or warrants shall be paid only out of the surplus revenue of such county. When such warrants can be paid out of the surplus revenues of the county, as provided by said act, there can be no occasion for resorting to the mode pointed out for their payment by section 7654, supra; but, in case there is not, then that may be done.

But plaintiff insists that Schell could not legally refuse to pay the warrants in question when there was sufficient money in the different funds on which they were drawn to pay them and all other outstanding unpaid warrants drawn on said funds, of prior presentation, or if he was authorized by law to postpone the payment of said warrants out of the revenues of any subsequent year till all the warrants issued in such year were fully paid. Section 3166, supra, provides that the county treasurer "shall procure and keep a well bound book, in which he shall make an entry of all warrants presented to him for payment, which shall have been legally drawn for money by the county court of the county of which he is the treasurer, stating correctly the date, amount, number, in whose favor drawn, by whom presented, and the date the same was presented; and all warrants so presented shall be paid out of the funds mentioned in such warrants, and in the order in which they shall be presented for payment: provided, however, that no warrant issued on account of any debt incurred by any county other than those issued on account of the ordinary and usual expenses of the county, shall be paid until all warrants issued for money due from the county on account of services that are usual and for all expenses necessary to maintain the county organization for one year, shall have been fully paid and liquidated." Section 3167, Rev. St., provides that: "No county treasurer shall refuse the payment of any warrant legally drawn upon him and presented for payment, for the reason that warrants of prior presentation have not been paid, when there shall be money in the treasury belonging to the fund drawn upon, sufficient to pay such prior warrants and any such warrant so presented." If we are to be governed by the letter of the law as indicated by sections 3166 and 3167, supra, there is no escape from plaintiff's contention; but even under such circumstances we may, in arriving at the true intent and meaning of the lawmakers, consider all statutory laws with respect to the same matter together, as well also as the condition of affairs which led to their enactment. If plaintiff's contention be the law, then all the revenue of any county for its current expenses for any given year may at any time be absorbed, as soon as paid into the treasury, by outstanding warrants, and thus deprive the county of the means provided for conducting

its ordinary affairs, which is not only unreasonable to suppose was the intention of the lawmakers, but seems to be in contrast with the true intent and spirit of the law. It was well said by Sherwood, J., in *Ex parte Marmaduke*, 91 Mo., loc. cit. 254, 4 S. W. 91: "The letter of a statute may be enlarged or restrained, according to the true intent of the framers of the law. *Whitney v. Whitney*, 14 Mass. 92; *State v. Emerson*, 39 Mo. 80; *State v. King*, 44 Mo. 283; *Riddick v. Walsh*, 15 Mo. 519. In such cases the reason of the law prevails over its letter." Sections 3166 and 3167 were on our statute as early as 1865, and it is matter of common knowledge, from that time on up to the adoption of our present constitution in 1875, that many counties incurred indebtedness largely in excess of their revenues, and imposed upon the citizens onerous burdens in the way of taxation; and to stay their hands in that direction, and the depletion of their treasuries, was part of the purpose of the framers of the constitution in incorporating therein section 12, art. 10, supra, by which counties are prohibited from becoming indebted in any manner or for any purpose for an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of those voting at an election held for that purpose.

It is a familiar rule of construction of different statutes bearing upon the same subject-matter that they shall be so construed as to give effect to all of them, and this, we think, can be done by construing section 3166 to mean for current county expenditures. Such seems to be the construction placed upon this section by the legislature from the fact that in 1879 it passed what is generally known as the "Cottley Law" (section 7654, art. 5, c. 138, Rev. St.), by which means are provided for the assessment, levy, and collection of taxes for the payment of past indebtedness of counties. The revenue thus collected becomes a special fund for that purpose, and cannot be diverted, under severe penalty, for any other purpose. In no other way can past indebtedness of a county for current expenses be paid except from the surplus, if there be any, of the amount paid into the county treasury for county expenditures. Section 7653, Rev. St., provides that: "The following named taxes shall hereafter be assessed, levied and collected in the several counties in this state, and only in the manner and not to exceed the rates prescribed by the constitution and laws of this state, viz.: The state tax and the tax necessary to pay the funded or bonded debt of the state, the tax for current county expenditures and for schools." The words "current county expenditures," do not mean current expenditures for former years. They are not retrospective. Hence no provision is made for the payment of outstanding warrants except as hereinbefore indicated; that is, under section 7654, supra, or out of the surplus revenues, as provided by the act of 1893.

It is, however, insisted by plaintiff that no order can be made by the circuit court on the

county court for the assessment, levy, and collection of taxes to pay outstanding county warrants drawn for past county indebtedness. This, we think, is a misconception of the statute; but, even if we be in error in regard to that matter, it is certainly true that suit can be brought by the holder of such warrants against the county, judgment obtained, and an assessment, levy, and collection of taxes to satisfy the judgment rendered, in the manner pointed out by said section 7654. *Wilson v. Knox Co.* (Mo. Sup.) 34 S. W. 477. In the case of *Reynolds v. Norman*, 114 Mo. 509, 21 S. W. 845, which is relied upon by plaintiff as sustaining his contention, it does not appear that there were any warrants issued for the year 1891 outstanding and remaining unpaid at the time the warrant for the previous year 1889 was tendered in payment of taxes for 1891, or that the revenues for 1891 were not more than sufficient to pay the current expenses of the county for the year last named; hence what has been said in this case is not necessarily in conflict with the rule announced in that. But in so far as what is said in that case is not in accord with our views as heretofore expressed in this, we must decline to follow it. The judgment is affirmed.

GANTT, P. J., and SHERWOOD, J., concur.

BENDER v. ZIMMERMAN.

(Supreme Court of Missouri, Division No. 2.
June 16, 1896.)

PLEADING—AMENDMENT TO PETITION—EXCEPTIONS—PLEA IN BAR—COSTS.

1. Where, upon the reversal of a former judgment in an action, plaintiff is allowed to amend his petition, exception must be taken at the time, or it will be considered waived, and defendant cannot, after answering the amended petition, object to the admission of testimony thereunder on the ground that it sets up a new cause of action.

2. Defects on the face of the petition, which are grounds of demurrer, cannot be raised by answer.

3. Where a part of the substantial issues in equity are found for plaintiff and a part for defendant, it is within the discretion of the court to tax the costs between the parties.

Appeal from circuit court, Buchanan county; A. M. Woodson, Judge.

Action by John C. Bender against E. C. Zimmerman. There was judgment for plaintiff, and defendant appeals, and from an order taxing a portion of the costs against plaintiff he appeals. Affirmed.

For former report, see 26 S. W. 973.

This case was before this court on a former occasion. 122 Mo. 104, 26 S. W. 973. The judgment was then reversed, and the cause remanded for further trial. On the trial in which the judgment was rendered from which the former appeal was taken objections were made by defendant and sustained by the court to the testimony offered by plaintiff as to rents received by

defendant on part of the property in question, on the ground of variance; the petition charging that defendant prevented plaintiff from receiving rents, while the proffered evidence tended to show that defendant had received the rents. After the case was remanded, plaintiff filed an amended petition, differing from the first only in that it charges defendant with the receipt of the rents. To the petition as amended defendant filed answer, to which plaintiff made a reply. The parties then proceeded to trial, which resulted in a judgment for plaintiff in the sum of \$260.39, that each party pay the costs of his own witnesses in the case, and that all other costs of the officers of the court and referee, not theretofore finally adjudged against either party, be equally divided between the parties, and that each of them pay one-half thereof. Both parties appealed.

H. S. Kelley and S. P. Huston, for plaintiff. Benj. Phillip, for defendant.

BURGESS, J. (after stating the facts). The first question to be considered is with respect to the action of the court in permitting plaintiff to amend his petition, charging defendant with rents received. Defendant insists that by the amendment a new and different cause of action was injected into the petition, and for this reason the judgment should be reversed. So far as disclosed by the record, no objection was made to the amendment at the time, nor was any motion made to strike it out because of a departure from the cause of action stated in the original petition, or for any other cause. The first time that any objection seems to have been taken to it was upon the trial, when plaintiff offered evidence tending to show that rents had been received by defendant, and the amount, when he objected to the evidence on the ground that the allegation was the statement of a new cause of action; and barred by the statute of limitations. The amendment of pleadings rests largely in the discretion of the court, and is always a matter of exception, which, if not taken at the proper time, as in this case, will be considered as waived. A party defendant cannot answer an amended petition, and, when evidence is offered to maintain its allegations, object for the first time on the ground that the amendment is a departure from the original. Nor can defects which appear upon the face of the petition, and which are grounds of demurrer, be raised by answer. The objection to the evidence on the ground that the cause of action was barred by the statute of limitations was not well taken, under the facts disclosed by the record, the action being an equitable one, for the adjustment of various business transactions between the same parties, in which the taxes against and the rents re-

ceived from the same property were involved. The case seems to have been tried in accordance with the ruling of this court on the former appeal.

Plaintiff insists that the court erred in adjudging any part of the costs against him, and cites in support of this contention *Hawkins v. Nowland*, 53 Mo. 328, in which it was held that where the plaintiff is the prevailing party in a suit in equity he is entitled to recover his costs; but the ruling in that case was very much modified, if not overruled, in *Turner v. Johnson*, 95 Mo. 431, 7 S. W. 570, in which it is held that, as a general rule, where the plaintiff is the prevailing party in a suit in equity, he should recover his costs, but, where substantial issues are found for one party and like issues found for another, the taxation of costs rests within the discretion of the court, and its ruling will not be disturbed unless there has been an abuse of that discretion. In the case at bar there were substantial issues ruled in favor of the respective parties, and the taxation of costs was a matter of discretion in the court. Finding no reversible error in the record, the judgment is in all things affirmed.

GANTT, P. J., and SHERWOOD, J., concur.

STATE ex rel. WHEAT v. ST. LOUIS & S. F. RY. CO.

(Supreme Court of Missouri, Division No. 2.
June 16, 1896.)

RAILROADS—TAXATION—CERTIFICATE OF ASSESSMENT AND RATE—EXTENSION OF TAX.

1. Rev. St. 1889, § 7730, declares that it shall be the duty of the authorities of each city wherein any railroad property is located "on or before the 10th day of May of each year" to certify to the county court a statement of the assessments and the rate of taxation. Section 7731 requires the county court, on receipt of the certificate, to levy a tax on the railroad property in such city for the ensuing year at the rate certified, and provides that, in case the county court omits to levy the tax for any year, then, at the time of making the regular levy on railroad property, it shall, in addition thereto, levy the taxes omitted. *Held* that, unless the certificate is made at the time and within the year required, the county court cannot levy the tax.

2. A sheet of paper folded up is not a book, within Rev. St. 1889, § 7733, requiring the clerk of the county court, within 10 days after such court levies the taxes on railroad property, to extend the same on a separate tax book, to be known as the "Railroad Tax Book."

Appeal from circuit court, Lawrence county; M. G. McGregor, Judge.

Action by the state, on the relation of A. R. Wheat, against the St. Louis & San Francisco Railway Company. Judgment for plaintiff. Defendant appeals. Reversed.

This is an action by the collector of the revenue of Lawrence county, Mo., to recover municipal taxes alleged to be due by defendant

to Pierce City, in that county, for the years 1884, 1885, 1886, 1887, 1888, and 1889. The petition contains six counts, and, leaving off the formal parts, is as follows: "The state of Missouri, suing at the relation and to the use of the collector of the revenue within and for Lawrence county, alleges: That A. R. Wheat is the legally elected, qualified, and acting collector of the revenue within and for the county of Lawrence, and state of Missouri, aforesaid. That the defendant is now, and was at all the times hereinafter mentioned, a corporation organized and existing according to law. That on or about the 1st day of January, 1884, defendant was the owner of the following railroad property, to wit: Seventy-four one hundredths miles of roadbed of the St. Louis and San Francisco Railway main line, with the superstructure, including the right of way, tracks, and appurtenances, double and side tracks, depots, water tanks, and turntables of said railway, in the city of Pierce City, in said Lawrence county, and all the buildings thereon; the proportional and pro rata share of the rolling stock of said St. Louis and San Francisco Railway Company used to operate said seventy-four one hundredths miles of roadbed, including engines, and cars of every kind and description, including all palace and sleeping cars, passenger and freight cars, and other movable property, owned, used, or leased, on said line,—which was then and there subject to taxation, for state, county, city, and incorporated town and village purposes. That the city of Pierce City is a municipal corporation formed under the general laws of the state of Missouri incorporating cities of the fourth class, and as such possessed all the powers therein given. That the board of aldermen of the city of Pierce City, under and by virtue of the authority in them vested under the provision of section 4952 of the Revised Statutes of 1870 of Missouri, as amended on July 9, 1884, duly passed an ordinance entitled 'An ordinance for the levying of a tax on the real and personal property within the corporate limits of the city of Pierce City,' which provides for the levying of a tax of five mills on the dollar on all property within the city of Pierce City for the year 1884. That the board of aldermen of said city of Pierce City caused to be certified to the county court of Lawrence county a copy of said ordinance as aforesaid, and also the rate of taxation for municipal purposes on all property within the corporate limits of the said city of Pierce City for the year 1884. That the county court as aforesaid failed and omitted to levy the tax for the municipal purposes of the city of Pierce City on the railroad and property of said St. Louis and San Francisco Railway Company within the corporate limits of said city of Pierce City for the year 1884. That the county court of Lawrence county, at its August term, 1891, legally levied and assessed against such property within the corporate limits of the city of Pierce City as aforesaid, for the year 1884, omitted as afore-

said, taxes for municipal purposes the city of Pierce City as aforesaid, at the rate of five mills on the dollar of the assessed valuation of such property, the rate levied and assessed on all property then for the year 1884, aggregating the sum of \$8,665 for the municipal corporation of the city of Pierce City. That the taxes so assessed as aforesaid were due and unpaid as required by law. That plaintiff is entitled to recover of defendant a penalty of one per cent. per month on the amount so due and unpaid from the 1st day of January, 1892, until the same shall be paid. Plaintiff further states that the taxes so assessed and levied are, by virtue of the laws and state of Missouri, a prior lien on said roadbed and real estate and other property. Wherefore plaintiff prays judgment for the said sum of forty-three and thirty-three one hundredths dollars, and the penalty thereon until the same shall be paid, and for a reasonable attorney's fee and costs of suit; that the same be declared a lien in favor of the state of Missouri, and that said real estate, roadbed, rolling stock, and other property, or so much thereof as may be necessary, be sold to satisfy said judgment and costs, and that a special fieri facias be issued against said property." The answer was a general denial. There was judgment for plaintiff for the amount sued for. Defendant brings the case to this court by appeal.

E. D. Kenna, L. F. Parker, and H. S. Abbott, for appellant. R. H. Davis and J. N. Davies, for respondent.

BURGESS, J. (after stating the facts). When the cause came on for trial, defendant objected to the introduction of any evidence, for the reason that the petition fails to state facts sufficient to constitute a cause of action. The objection was overruled, and defendant saved its exceptions. At the close of the evidence on part of plaintiff, defendant asked an instruction in the nature of a demurrer to the evidence, which was refused, and exceptions saved. No evidence was offered by defendant. The grounds relied upon for a reversal of the judgment are: First, that the county had no authority to levy the tax sued for; second, the tax levied was never extended on a railroad tax book, as required by law.

First, as to the authority of the county court to levy the tax. Rev. St. 1889, § 7730, reads as follows: "It shall be the duty of each city or town council, board of aldermen or board of trustees, as the case may be, of every city or incorporated town or village wherein any railroad property is located, on or before the 10th day of May of each year, to certify to the county courts of their respective counties a statement of the assessments made in pursuance of section 7728, and also the rate per cent. levied by such city or incorporated town or village on all property therein for municipal purposes for that year." By the following section (7731)

the county court is required, upon receipt from the auditor of the certificate of the action of said board of assessment and equalization, the returns of the county assessor, and the certificate of the cities, towns, and villages made under the preceding section, at the regular term of said court, if in session at the time; if not, at an adjourned term, or at a special term of said court called for that purpose,—to ascertain and levy the taxes for state, county, municipal, township, city, incorporated town and village, and to levy a tax on the railroad property in such city for the ensuing year at the rate thus certified. At the August term, 1891, the county court, without any certificate from the authorities of Pierce City of the statement of an assessment made and the rate per cent. levied by said city on all property therein for the municipal purposes for the respective years aforesaid, as required by section 7730, supra, made an order containing the following recital: "Now, at this day coming on to be heard the matter of levying taxes on the St. Louis and San Francisco Railroad Company for municipal purposes for the city of Pierce City, and it appearing to the satisfaction of the court by the proper certificate by the proper city officers of the city of Pierce City, and by ordinances of the city of Pierce City duly passed and certified, that taxes were levied and assessed upon the property within the city of Pierce City as follows: For the year of 1884 the sum of five mills, for the year 1885 the sum of five mills, for the year 1886 the sum of five mills, for the year 1887 the sum of five mills, for the year 1888 the sum of five mills, for the year 1889 the sum of five mills upon each and every dollar of the valuation of all property within said city of Pierce City subject to taxation within said city for each and every one of said years aforesaid; * * * and further appearing to the satisfaction of the court that the proper authorities of said city of Pierce City had failed to certify and return the rate of taxation so fixed for each and every one of the years aforesaid, and that from these causes there had been no taxes levied or collected from said St. Louis and San Francisco Railroad Company for the said years of 1884, 1885, 1886, 1887, 1888, and 1889, although the assessment and valuation as set forth above had been duly certified by the state auditor to the county clerk of Lawrence county, Missouri, for each and every one of the years above mentioned,—it is therefore ordered and adjudged by the court as follows: That there be, and is hereby, assessed and levied against the St. Louis and San Francisco Railroad Company and its property, for and on account of the city of Pierce City, as follows: For the year 1884, five mills on each dollar of the sum of \$8,665, amounting to \$43.33; for the year of 1885, five mills on each dollar of the sum of \$9,182, amounting to \$45.91; for the year 1886, five mills on said sum of \$9,162,

amounting to \$45.31; for the year 1887, five mills on each dollar of said sum of \$9,628, amounting to \$48.14; for the year 1888, five mills on each dollar of said sum of \$9,731, amounting to \$48.65; for the year 1889, five mills on each dollar of said sum of \$9,795, amounting to \$48.98; and amounting to a total tax of \$280.82. And it is further ordered that the sum be extended by the clerk hereof on a railroad tax book, and that the said book be delivered to the county collector for collection as other railroad taxes." Plaintiff's action is bottomed solely upon said order. While this order recites, "It appearing to the satisfaction of the court by the proper certificate by the proper city officers of the city of Pierce City, and by ordinances of said city, duly passed and certified, that taxes were levied and assessed upon the property within the city duly passed and certified, that taxes were levied and assessed upon the property of defendant within said city," etc., it also recites, "And it further appearing to the satisfaction of the court that the proper authorities of said city of Pierce City had failed to certify and return the rate of taxation so fixed for each and every one of the years aforesaid, and from these causes there had been no taxes levied or collected from said St. Louis and San Francisco Railroad Company for the years," etc., from which it clearly appears that the officers of said city whose duty it was to so do failed and neglected to certify to said court, on or before the 10th day of May for each year, as required by section 7730, supra, a statement of the assessments and rate per cent. levied by said city on the property of defendant for municipal purposes for that year. In the absence of such certificate the county court was without authority to make the levy, for it is made one of the prerequisites of its power to do so by section 7731, supra. The power to tax is one of the prerogative rights of the state, and when the legislature grants that power to another tribunal on specific terms and conditions it can only be exercised in strict compliance therewith. Granting that the order is prima facie evidence of the recitals therein contained, it shows too much,—that is, that the city authorities failed to certify, on or before the 10th day of May for each year, a statement of the assessment and rate per cent. levied by said city on the property of defendant,—and the order is therefore void, unless such neglect or omission by the city authorities is cured by section 7731, supra. By this section it is provided that: "In case the county court has failed or omitted, or may hereafter fail or omit, from any cause whatever, to levy the taxes or any portion of the taxes for any year or years, then said court, at the time of making the regular levy upon railroad property as herein provided, shall, in addition thereto, ascertain and levy the taxes * * * which may have been or may be hereafter omitted." It is argued by defendant that this statute presupposes an

omission of duty on the part of the county court, and that there is no provision in it, or any other statute, which authorizes said court, or any other body, to take any action to correct an omission on the part of the city authorities. It is quite clear that the failure by the county court to make an annual levy for city taxes was because of the neglect of the city authorities to certify to said court, on or before the 10th day of May in each year, the assessment and rate per cent levied by it for municipal purposes, and not because of any failure on its part to discharge the duties imposed by law upon that body. It must, therefore, follow that, unless the city had the power to make such certificates after the time in which it is provided by statute they shall be made, they were invalid, and the county court without authority to make the levy, for the different years set forth in the order. If the assessments and levy could be certified by the city one year after made, they could, for like reason, be certified at any time within which an action for the taxes might be brought which, in the absence of statutory enactment authorizing it, we are not inclined to hold can be done. Our attention has not been called to any statute authorizing this course, in the absence of which the statute requiring the certificate to be made must be regarded as mandatory, and if it is not made within the time prescribed it will be of no force or effect. On or before the 10th day of May of each year does not mean any subsequent year, or any year thereafter, but means the year in which such certificate is required to be made. Our conclusion is that the certificates, having been made out of time, conferred on the county court no authority to make said order.

We had occasion to pass upon section 7731, Rev. St., in *State v. Davis*, 33 S. W. 22, and it was held that a compliance with said section, which makes it the duty of the county clerk, as soon as the back-tax book is completed, to make out and certify to the secretary or chief managing officer in this state of the proper railroad company a statement of taxes levied on the property of such railroad company in his county, including its total valuation, as shown by the returns of local assessors, including, etc., was not to be a condition precedent to the collection of taxes by the proper collector, or the institution of suit therefor by the proper authority, and is only directory, being for the convenience and information of officers of railroad companies. The right to collect the taxes as provided by law in no way depends upon its provisions, and a noncompliance with them is no legal excuse or justification for the nonpayment of taxes by railroad companies. We have no reason to depart from that ruling, and are satisfied that it is the proper construction to be placed upon that section. By section 7733, Rev. St., the clerk of the county court is required, within 10 days after the county court shall have levied

the taxes on railroad property, to extend the same on a separate tax book, to be known as the "Railroad Tax Book," in which he shall place a description of each tract of land, town lot, or other real estate, etc.

While it is not expressly decided, it is plainly intimated, in *State v. St. Louis & S. F. Ry. Co.*, 117 Mo. 1, 22 S. W. 910, that the extension of these taxes on a book to be known as the "Railroad Back-Tax Book," is a prerequisite to their collection. The evidence showed that what is called in this case the "Railroad Tax Book" was a large sheet of paper, ruled for the purpose of making statements to railroads, etc., of their taxes for each year, upon which the taxes were extended. It was folded up so that it made a fold about nine inches long and four inches wide, and was indorsed "Railroad Tax Book. Back taxes of Pierce City for 1884, 1885, 1886, 1887, 1888, and 1889."

2. It was in this condition when received by the collector, who "pigeonholed" it, and never saw it but once afterwards. It is very evident that the sheet of paper called a "Back-Tax Book," is not the kind of book contemplated by statute, nor as generally understood by the use of that word. The taxes were not extended on a separate book, known as the "Railroad Tax Book," which should have been done. The judgment is reversed.

GANTT, P. J., and SHERWOOD, J., concur.

GARDNER v. ST. LOUIS & S. F. RY. CO.
(Supreme Court of Missouri, Division No. 2,
June 16, 1896.)

INJURY TO LOCOMOTIVE FIREMAN—DEFECTIVE APPARATUS—WITNESS—IMPEACHING EVIDENCE
—WAIVING ERROR—HARMLESS ERROR.

1. Evidence that a witness has been convicted of a misdemeanor is not admissible to impeach him.

2. Error in admitting evidence of plaintiff's conviction of a misdemeanor to impeach him is not waived by plaintiff's introducing like evidence with reference to a witness of defendant.

3. Judgment will not be reversed for error in admitting evidence of a misdemeanor to impeach plaintiff, where the questions of defendant's negligence were properly submitted, and it appears that such admission did not materially affect the merits of the action, and that judgment was manifestly for the right party.

4. In an action against a railroad by a fireman injured in its employ, by the separation of the engine and tender, the kingbolt which fastened the couplings between them having broken, and the safety chains having parted, there is no error in refusing to submit to the jury the question of the sufficiency of the safety chains, it appearing that they were not for the purpose of holding the engine and tender together.

Appeal from circuit court, Lawrence county; Henry Brumback, Special Judge.

Action by Robert A. Gardner against the St. Louis & San Francisco Railway Com-

pany. Judgment for defendant. Plaintiff appeals. Affirmed.

John W. Leake, Cloud & Davies, Jos. French, and W. B. Skinner, for appellant. L. F. Parker, for respondent.

BURGESS, J. Action instituted in the circuit court of Barry county, for damages for personal injuries sustained by plaintiff, while in the employ of defendant in the capacity of fireman, on one of its locomotives on its railroad. The venue was changed to the circuit court of Lawrence county, where a trial was had, resulting in a verdict and judgment for defendant, and plaintiff appealed.

At the time of the accident, plaintiff was standing upon the apron which covered the opening between the engine and tender, attending to his duties. They separated, and he fell beneath the tender, which passed partially over him, bruising and injuring him on and about the head, body, shoulders, spine, and loins, permanently disabling him, and rendering him unable to work. With respect to the negligence of defendant, the petition alleges "that said injuries were caused by the carelessness and negligence of defendant company, its agents and servants, in failing and neglecting to keep its roadbed properly ballasted, tied, lined, and leveled, and by allowing and permitting the ends of the rails on said railway where the same connected to get out of level, by reason of which, at the point of connection, one rail would stand several inches higher than the other, thereby jolting and jerking the engines and trains moving on said road when they would strike said joint so elevated above the level of the connecting rail, and tearing the coupling, which united said cars, apart; and also by the negligence and carelessness of the defendant company, its agents and servants, in using insufficient safety chains and eyebolts to connect said chains to engine and tender, and insufficient drawbar and kingbolt to connect said engine, upon which plaintiff was firing, with the tender thereof, which drawbolt had upon the kingbolt passing through the same too much play by several inches, thereby weakening said kingbolt and coupling, and making it more liable to break." The answer was a general denial. The separation of the tender from the engine was caused by the breaking in two of the kingbolt which fastened the coupling between them. The evidence was conflicting as to whether this bolt was cracked before the accident, and, by reason thereof, defective, or whether it was in perfect condition. The evidence was also conflicting as to the condition of the track at the place of the accident, plaintiff's witnesses testifying that it was in very bad condition, while defendant's witnesses testified to the contrary. The safety chains also parted, and there was some evidence tending to show that they were insufficient.

Plaintiff asked the court to instruct the

jury as follows: "It was the duty of the defendant to furnish and supply to its employes, or those engaged in running and operating its train of cars, machinery and appliances, such as locomotive engines and tenders, and the various appliances thereto belonging, that were reasonably safe, secure, and sufficient for the transaction of its business, and that it was the duty of defendant to keep its track in a reasonably safe condition for the passage of its trains, at the point where the accident in evidence occurred; and, in the absence of notice to the contrary, the employes of defendant had the right to assume that the locomotive engines and tenders and appliances furnished to them with which to work were so safe, secure, and sufficient, and that said track was in a reasonably safe condition. If you find, therefore, that defendant neglected its duty as above defined; and that, on the day specified in the petition, plaintiff, Robert A. Gardner, was in the employ of defendant as a fireman, and was at said time engaged in the prudent and careful discharge of his duties under such employment; and that there was a defective or insufficient or cracked coupling pin or kingbolt in the engine through the drawbar connecting the engine and tender on which he was working, or that the drawbar or safety chains or coupling apparatus of said engine and tender were defective or insufficient, and not reasonably safe, or if the track, at the point where the accident occurred, was not in a reasonably safe condition, or if the track was so rough, or the joints so uneven, or the ties broken or rotten, or the track was swinging, so as to render the same not reasonably safe; and that the defendant knew, or by the exercise of ordinary care and diligence might have known, of such defects, and by reason or in consequence of such defective or insufficient kingbolt or coupling pin, or insufficient drawbar, safety chains, or coupling apparatus, or by reason or in consequence of such defective, rough, or uneven track, said engine and tender separated, and plaintiff, while engaged in the prudent and careful discharge of his duty, was thrown or fell from said engine and tender, and was run over and injured by said tender,—then the verdict of the jury must be for the plaintiff." This instruction was refused, and, instead thereof, the court gave the following instructions: "It was the duty of defendant to furnish and supply to its employes, or those engaged in running and operating its trains of cars, machinery and appliances, such as locomotive engines and tenders, and the various appliances thereto belonging, that were reasonably safe, secure, and sufficient for the transaction of its business (so far as the same could be secured by the exercise of reasonable care and diligence), and that it was the duty of defendant to keep its track in a reasonably safe condition for the passage of its engines and trains at the point where the

accident in evidence occurred; and, in the absence of evidence to the contrary, the employes of defendant had a right to presume that the locomotive engines and tenders and appliances furnished to them with which to work were reasonably safe, secure, and sufficient, and that said track was in a reasonably safe condition. The court instructs you that if you believe from the evidence that the plaintiff was in the employ of the defendant as fireman on one of its trains; and that such train broke apart by the breaking of the kingbolt, and defendant was thrown from such train, and run over by the tender, and injured thereby; and that there was a crack or fracture in such kingbolt; and that the same was rendered unsafe and insufficient thereby; and that such unsafe and insufficient condition of the kingbolt could have been discovered by the defendant by the exercise of reasonable care and diligence; and that such breaking apart of the train was caused by such insufficiency of the kingbolt; or if you believe from the evidence that the track of the defendant, at the point where the accident occurred, was in an unsafe condition at that time, and that such breaking of the kingbolt was caused by such unsafe condition of the track,—then your verdict should be for the plaintiff."

On the trial, Asa Baxler testified as a witness on behalf of plaintiff; and, for the purpose of discrediting him, defendant was permitted, over the objection of plaintiff, to introduce in evidence the docket of the mayor of the city of Garfield, Ark., showing that said witness had been fined in August, 1890, for disturbing the peace, and again in 1893, for some other misdemeanor. It is insisted that this evidence was incompetent for the purpose of impeachment, the offense not being infamous, and that the court committed error in admitting it. It has been uniformly held by this court that such evidence is not permissible for the purpose of impeachment. The conviction of a penal offense not infamous is not inconsistent with that of good character for truth and veracity, while conviction of an infamous crime tends to show a bad general moral character. In *State v. Smith*, 125 Mo. 2, 28 S. W. 181, it was said: "At common law, a witness was incapacitated by conviction of an infamous crime. His competency was not affected by conviction of a mere misdemeanor. With us the conviction of a felony affects his credibility, but does not render him incompetent as a witness, but conviction of a mere assault and battery is not admissible to impeach a witness. It does not affect his general moral character." The same question was again before this court in *State v. Donnelly*, 32 S. W. 1124, and it was then held that such evidence was not permissible for the purpose of impeaching a witness. See, also, *State v. Taylor*, 98 Mo. 240, 11 S. W. 570; *State v. Warren*, 57 Mo. App. 502.

But defendant contends that, even if the

court erred in admitting the mayor's docket showing the conviction of Baxler of a misdemeanor, the error was waived by the introduction by plaintiff of evidence of like character with reference to a witness of defendant. Whatever the ruling may have been elsewhere with regard to this matter, we must say that we are not impressed with the logic of such a doctrine. We are unwilling to say that one error may be offset against, waived or justified by, another, although they both be of the same character. It seems illogical to say that one error is waived by the commission of another, where timely objection is made, and exception duly saved. That an error of such a character may be waived by failure to make timely objection, and to save the exception if the objection be overruled, there is no question, but it is not waived by the commission of another error of like or any other kind. "The rule of general average does not obtain in such matters." *Redman v. Peirsol*, 39 Mo. App. 173.

Plaintiff contends that there was evidence tending to show that the insufficiency of the safety chains contributed to the accident; and that the purpose of said chains, in part, was to hold the engine and tender together in case the drawbar or kingbolt should break; and that the question of the sufficiency of said safety chains should have been submitted to the jury, and the instruction asked by plaintiff covering that point should have been given, and that given by the court of its own motion, eliminating that question from the consideration of the jury, refused. There was no material difference between the instruction asked by plaintiff and refused by the court, and that given by the court of its own motion, with respect to the defendant's duty to its employes in furnishing machinery and appliances for their use in and about their work, and the condition in which its track was required to be kept over which they were necessarily compelled to travel. The jury were told by both instructions that it was defendant's duty to keep its track in reasonably safe repair, and to furnish its employes with reasonably safe machinery and appliances. The only real difference was that, by the refused instruction, the question as to the insufficiency of the safety chains was submitted to the jury, while, by the instruction given, that question was ignored. It may be conceded that instructions should be predicated upon all the testimony bearing upon the issues involved in the case on trial upon which there could be a recovery; but if there be an issue, among others, and the evidence with respect thereto be inconsistent with the physical facts in the case, as in the case at bar, where the breaking of the safety chains could have had no possible connection with the injury to plaintiff, no error is committed by eliminating such an issue from the case, or in ignoring it in the instructions. The evidence clearly showed that the safety chains were not for

the purpose of holding the engine and tender together, but, in case there be a defect in the drawbar, the chain, when properly handled by the engineer, may be used to haul the tender, or, if the tank is derailed, they hold the tender in line, and prevent the trucks from running crosswise or off to one side; that they are used as a precaution to prevent the tender from leaving the rails and shooting off to one side. There was no error, we think, in omitting that issue from the instruction. The questions as to the condition of the track and the kingbolt were submitted to the jury.

While it was the duty of defendant to keep and maintain its roadway, cars, and tenders in a reasonably safe condition, and to furnish its employes reasonably safe machinery and appliances with which to work, it was not an insurer of plaintiff's safety. Nor was it required to furnish cars, tenders, or appliances which were absolutely safe, or of the most approved kind; it discharged its duty to its servants when it employed such as were reasonably safe. These questions were submitted to the jury, under instructions which seem to be fair to both parties, and free from objection. Under these circumstances, should the judgment be reversed, and the cause remanded for further trial, because of the error of the court in admitting in evidence the mayor's docket, showing that plaintiff's witness Asa Baxler had been convicted and fined for violating the city ordinances of Garfield city, Ark.? The judgment was manifestly for the right party, and, where such is the case, the judgment will not be reversed because some incompetent testimony was admitted. *Seabee v. Patterson*, 92 Mo. 451, 5 S. W. 31; *Deal v. Cooper*, 94 Mo. 62, 6 S. W. 707. Moreover, we do not think that the admission of this evidence materially affected the merits of the action, and, under such circumstances (Rev. St. 1889, § 2203), prohibits us from reversing the judgment. This seems to have been one of those unfortunate accidents where no one was to blame, without culpable negligence on the part of the master, and for which the law furnishes no relief. Finding no reversible error in the record, the judgment is affirmed.

GANTT, P. J., and SHERWOOD, J., concur.

CLEVELAND & A. MINERAL LAND CO.
v. ROSS et al.

(Supreme Court of Missouri, Division No. 2.
June 16, 1896.)

MINING LANDS—RIGHTS OF OCCUPANT—FORFEITURE—CONFLICTING TESTIMONY—QUESTION FOR JURY.

1. Where all of the testimony produced by plaintiff is parol, it is error to direct a verdict.
2. Where the right of the owner of mining lands to recover the same of persons in pos-

session, under Rev. St. 1889, §§ 7034, 7035, depends on whether they had forfeited their rights by failing for ten days in one month to work the mine or to pay royalty on demand, and the testimony is conflicting as to whether, instead of demand for immediate payment, there was not an agreement for payment when the amount of certain other royalty was determined, and as to whether the cleaning of "chats" did not constitute working the mine, it is error to direct a verdict.

Appeal from circuit court, Lawrence county; W. H. Robinson, Judge.

Action by the Cleveland & Aurora Mineral Land Company against J. B. Ross and others. Judgment on a verdict directed for plaintiff. Defendants appeal. Reversed.

Wm. B. Skinner, H. H. Bloss, and Cloud & Davies, for appellants. Carr McNatt and Henry Brumback, for respondent.

BURGESS, J. Ejectment for possession of a mining lot, numbered 28, of the "Bonanza Tract," being 200 feet east and west, by 223 feet on the west end north and south, and 210 feet on the east end, in Lawrence county. Ouster is laid March 25, 1893. The answer, after a general denial, avers that in September, 1891, with the knowledge, permission, and consent of the then owners, defendants entered the premises to dig for lead and other ore, and in good faith dug and opened shafts, extended and operated drifts, therefrom, and have ever since been in possession for the purpose of mining, under and in accordance with the provisions of section 7035, Rev. St. 1889, and have erected buildings and machinery on the surface, and have made no other claim than such as was necessary to carry on such mining operations. Plaintiff, in its reply to defendants' answer, alleges that, after defendants entered and commenced work, they failed and neglected to work, or cause to be worked, their shaft, mine, drift, or deposit of mineral for 10 days, not including Sundays, in the calendar month of March, 1893, viz.: from March 1st to March 18th, without such failure and neglect having been caused by unavoidable circumstances, or by the act of plaintiff, and without plaintiff having consented thereto, and thereby defendants have forfeited all right to work or hold the premises; and, second, that defendants have failed and refused, when demanded by plaintiff, to pay royalty to the plaintiff on the ores and mineral by them mined from the premises, and thereby they have forfeited their right. The trial was before a jury, and after the evidence was all in, under peremptory instruction by the court directing them so to do, they returned a verdict for plaintiff, upon which judgment was rendered, and defendants appealed.

It was stipulated between the parties at the trial that they claim title through the same common source, to wit, John S. Wilson, Carr McNatt, the Brinkenhoff Mining Company, Warren Vertrees, R. R. Lyon,

and J. R. Simmons, and that in September, 1891, A. Y. Ross, J. B. Ross, and E. H. Williams went into the ground, at which time said McNatt was acting as the agent, and representing said Lyon and Simmons with respect thereto. Plaintiffs showed legal title to the land described in the petition. The evidence on the part of defendants tended to show that prior to September, 1891, Wilson, McNatt, the Brinkenhoff Mining Company, Vertrees, Lyon, and Simmons had staked a tract of land of 9 acres off into mining lots 200 feet square, for mining purposes, and that the lot in question is one of those lots. They had no written or printed rules, but permitted miners to enter upon the lots, and prospect for mineral, under the statutes of the state, reserving to themselves a royalty of 20 per cent. on the mineral mined. In the fall of 1890, at which time said Vertrees was one of the owners, and superintendent of the land, and before McNatt took charge of it, one Connett went on the land, with the permission of Vertrees, and, in connection with one Adams, commenced to sink a shaft. In March, 1891, they sold a one-third interest of their claim to E. H. Williams, and the three continued to work the shaft until September, 1891. In the early part of September, 1891, Vertrees ceased to be superintendent; and, after that, McNatt was superintendent, and gave permission for persons to mine on the lots. In the same month, E. H. Williams, A. Y. Ross, and J. B. Ross purchased the mining property, and succeeded to the rights, of Connett, Adams, and E. H. Williams. E. H. Williams and J. B. Ross went to see McNatt, who was then agent for the land, to arrange about it, and made an arrangement with him to mine the lot, by which he agreed to reduce the royalty to 15 per cent., and in pursuance of this arrangement they went on mining. After the arrangement with McNatt, defendants claim to have acquired from one Drake the lot immediately east of and adjoining the lot in question, and the right to mine the same through the drifts and shaft upon the lot in question, by and with the consent of McNatt, the agent and representative of plaintiffs. There was no proof, however, that McNatt ever consented to this arrangement, or that plaintiffs ever did, except as hereinafter stated. Defendants had erected a number of sheds, buildings, and machinery, such as are usually used in the kind of mining in which they were engaged on lot 28, and were operating the same at the time plaintiff was incorporated, and became the owner of both of said lots; and when H. J. Baldwin, one of said corporators, and its representative and agent, was thereafter looking over said premises, and getting the names and claims of the miners operating the lands acquired by plaintiff, J. B. Ross showed him the boundaries of the claim of defendants; and they thereafter paid to him the royalty, and

continued to do so, and mine the ground, until about the 1st of February, 1893, when Baldwin suggested that they give up their lease, and pay him 20 per cent. royalty, instead of 15, which they had been paying under their contract with McNatt, stating at the time if they did not then surrender the old lease, and enter into a new contract with plaintiff, and pay 20 per cent. royalty, when their lease was out he would not let them have it for another term. They declined to accede to this proposition, and on February 5, 1893, plaintiff served on defendants the following notice: "Aurora, Mo., Feby. 5th, 1893. To A. J. Ross, J. B. Ross, S. H. Horine, and Pat. H. Oliver—Gentlemen: You are hereby notified that we are informed that where you are now mining is on the east lot, where you have no right to mine on. You are requested to stop mining, and, if you do not, you will be held for damages. You are further notified that your right to mine on the west lot will terminate the 25th of March, 1893, at which time you will be required to cease mining on that lot, and remove your buildings, machinery, etc., therefrom. Cleveland & Aurora Mineral Land Co., by C. F. Johnson, Supt." On February 25, 1893, defendants stopped digging ore, running their engine, hoister, crusher, discharged their superintendent and hands, except that between that date and March 4th they had two of their hands (Stone and Bell) to wash up the rock on top of the ground which had been previously crushed. This part of the mining ceased on either the last day of February or first day of March. When this washing of crushed rock ceased, nothing further was done between that date and March 18th, except that one of the defendants and Pat. Oliver were hauling to another plant, and there cleaning up the "chats." On March 18th, Wooliver and Barker went into the drifts, but through the Monarch shaft, on other ground than the shaft on the lot in question, and did drilling and shoveling for two or three weeks, and during this time the pump, hoister, and other departments of mining were none of them operated.

Defendants' first contention is that the court committed error in taking the case from the jury, and in directing them to find a verdict for plaintiff. In *Wolff v. Campbell*, 110 Mo. 114, 19 S. W. 622, the trial court directed a verdict for plaintiff, and refused all the instructions asked by the defendant; and, in passing upon the action of the court in this regard, it is said. "There are cases where such an instruction may properly be given; as where the plaintiff's case, under the pleadings, turns wholly on the construction of a contract the construction of which is simply a question of law, or where the answer admits the plaintiff's cause of action, and sets up new matter as a defense, and the evidence fails to make out a prima facie defense. Ordinarily, where the plain-

tiff produces parol evidence to support his action, the issue of facts should be submitted to the jury. The evidence may be all one way; yet it is for the jury to say whether they believe the witnesses or not. The court has no right to tell the jury they must believe the witnesses. It was so held and ruled at an early day by this court. *Bryan v. Wear*, 4 Mo. 106, approved in *Vaulx v. Campbell*, 8 Mo. 224, and in *Gregory v. Chambers*, 78 Mo. 294." In the case in hand no question is involved as to any writing, nor is there anything in the pleadings which takes the case out of the general rule announced in that case; and, under that ruling, the judgment must be reversed, and the cause remanded for further trial.

But there are additional reasons why the judgment must be reversed. The issues presented are: First. Did the defendants forfeit their right to mine and to hold possession of the lot named in the petition by first failing or neglecting to work, or cause to be worked, their shaft, mine, prospect, or deposit of mineral for 10 days, not including Sundays, in the calendar month of March, 1893, and, if they did so fail, was such failure or neglect caused by the act of the owner? Second. Did they forfeit their right by failing to pay royalty on their ores when demanded by plaintiff?

Section 7034, Rev. St. 1889, is as follows: "When any person owning real estate in this state, or any person having a leasehold interest in such real estate for mining purposes by lease from the owner thereof, duly acknowledged and recorded in the county wherein the land lies, shall permit any person or persons, other than their servants, agents or employes, to enter and dig or mine thereon for lead, ore or other minerals, with the consent of such owner or owners or lessee, he or they shall keep a printed statement of the terms, conditions and requirements upon which such lands may be mined or prospected, and the time during which the right to mine or prospect thereunder shall continue, posted or hung up in a conspicuous place, in plain, legible characters, in the principal office or place of business of such person or company in the county in which said lands are situated, or in a county contiguous thereto, and shall deliver to any person mining or prospecting, or about to mine or prospect on said lands, and requesting it, a printed copy of such statement; all persons digging or mining on said lands, after the posting up of such statement, shall be deemed to have agreed to and accepted the terms thereof, and shall, together with such owner or lessee, be bound thereby, and upon failure or refusal to comply with the terms, conditions and requirements of such statement, he or they shall forfeit all right thereunder, and the owner or lessee, as aforesaid, of such lands, may re-enter thereon and take possession of the same, nor shall the receipt of any ore or mineral by any such own-

er or lessee, after any such forfeiture has been incurred, be deemed or taken as a waiver of such forfeiture." Section 7035, Id., provides that any "person or persons mining as aforesaid who shall fail or neglect to work or cause to be worked such shaft, mine, quarry, prospect or deposit of mineral for ten days, not including Sundays, in any one calendar month, after commencing said work, shall forfeit all rights to work mine or hold the same as against such owner or lessee, unless such failure or neglect was caused by unavoidable circumstances, or by the act of such owner or lessee or his agent, or unless such owner or lessee consent thereto. Or if any person so mining, shall fail to pay the owner or lessee of the lands, the royalty for mining thereon, at least once every month, if demanded by such owner or lessee, by delivering the same to him at or near the mouth or opening of such mine, shaft or quarry, or at the usual place of business of such owner or lessee, or at any other place that may be agreed upon by such miner and owner or lessee, or the value of such royalty in cash, such lessee shall forfeit all right to mine the land, and the owner or lessee may enter and take possession of the land."

Plaintiff insists that there were eleven days in March, 1893, between the 4th and 18th days of that month, not including Sundays, during which the defendants failed and neglected to work said mine, and that, by reason of such failure, they forfeited their rights, which at once entitled it to possession, unless the mere hauling away and cleaning up "chat" during that time was working the shaft, mine, quarry, prospect, or deposit of mineral, within the meaning of section 7035, supra, which provides for a forfeiture of the rights to mine for failure to cause to be worked the shaft, mine, quarry, prospect, or deposit of mineral for ten days, not including Sundays, in any one calendar month after commencing work. With respect to the "chats," Louis Hubbell, a witness for defendants, testified as follows: "Chats are not cleaned up. Chats are mineral and rocks all mixed up. It has to be crushed and cleaned before it is sold as mineral. After it is crushed and run through the jigs, the product is sold as mineral. When 'chats' are spoken of, it is the mineral and rock combined. It is not the same as tailings. It is the portion not separated, and thrown aside for future milling or handling." According to this evidence, it seems to us that cleaning chat is a part of the process of mining and preparing the mineral in which defendants were engaged in mining for market. It does not seem to be marketable without, and, in order to cleanse it, it must be crushed and run through a jig, in order to separate the mineral from the rock, dirt, and other foreign substances. After having gone through

these processes, it is sold, and upon the proceeds arising from such sale plaintiff is entitled to its royalty. We are not inclined to give to the words of the statute that rigid construction for which plaintiff insists; but in any event, under the state of the evidence, defendants were entitled to have the case go to the jury, and to have them say whether or not hauling and cleaning chats come within the meaning of the words of the statute quoted.

Another contention on the part of plaintiff is that as the evidence showed that C. W. Westcott bought of defendants in the latter part of February, 1893, 2,120 pounds of lead taken from this lot, and paid for it, the royalty on which was something over six dollars, and that defendant J. B. Ross failed to pay it to plaintiff, on demand of its superintendent, made between the 1st and 10th of March, 1893, they forfeited their rights as miners, which also entitled plaintiff to possession. With regard to the failure to pay the royalty by defendant, J. B. Ross, one of the defendants, testified as follows: "I was up at the Bonanza ground one day, and Mr. Johnson [plaintiff's superintendent] came along. We talked about the Independent. He says, 'I see you are not running over there.' We talked about the matter, and I went on and explained why we were not actively and fully engaged. He either spoke to me, or I to him,—I don't know which brought it up, but I rather believe Mr. Johnson did,—with regard to the lot. He said he believed there had been a little lead turned in on which there had been no royalty paid. I said, 'Yes,' there has been a little lead turned in, but from some cause I had failed to send a check for the royalty then; and I said, 'I am ready to give you a check for it any minute, for the money is in the bank.' It was some six dollars and something. But I said, 'I am having some chats cleaned up from the Independent, and, if you let the matter run till we get the chats cleaned up, I will pay it all.' He said, 'I didn't know you had any.' He said, 'I thought you cleaned your own chats.' And then he said, 'All right; any time you find out how much there is after you get your chats cleaned up, you send me a check for the money.' I mailed him a check for the royalty on some chats and this lead and some other stuff; mailed it to Mr. Johnson; and he returned it to me, and I deposited it in the Miners' & Mechanics' Bank to their credit." According to this evidence, plaintiff waived any forfeiture by reason of defendants' failure to pay the royalty due up to the time the conversation is said to have occurred between the defendant Ross and Johnson, plaintiff's superintendent, in respect to which Ross testified that Johnson said, "Any time you find out how much there is after you get your chats cleaned up, you send me a check for the

money." It is true, Johnson's evidence seems to be in conflict with that of Ross'; but the weight of the evidence was for the jury, and not for the court. They may have preferred to believe Ross to Johnson, and in that event could but have found for defendants upon that issue.

Under the facts disclosed by the record, plaintiff was not entitled to recover possession of the premises sued for upon any other ground than that of forfeiture of their rights by defendants, for one of the causes alleged by plaintiff in its replication, which, under the evidence, should have been submitted to the jury. The judgment is reversed, and the cause remanded.

GANTT, P. J., and SHERWOOD, J., concur.

HUGGART v. MISSOURI PAC. RY. CO.
(Supreme Court of Missouri, Division No. 2.
June 16, 1896.)

RAILROAD COMPANIES—ACCIDENT AT CROSSING—
DEMURRER TO EVIDENCE.

In an action for the death of plaintiff's intestate, it appeared that decedent was driving along a country road; that, when he came to a point within 30 or 40 feet of a railroad crossing, where he was free from all danger of collision with trains on the road, he could have seen up the track to the west a distance of 600 to 1,000 feet; that a train was then approaching in full sight from that direction; and that he did not look at the train, or else deliberately attempted to cross in front of it. *Held*, that a demurrer to the evidence should have been sustained.

Appeal from circuit court, Jackson county; Jas. H. Slover, Judge.

Accident by Lizzie F. Huggart against the Missouri Pacific Railway Company for the death of plaintiff's husband. From a judgment in favor of plaintiff, defendant appeals. Reversed.

On the 30th day of October, 1893, plaintiff's husband, Porter S. Huggart, was struck and killed by an engine on defendant's railway, at a public crossing about five miles south of the city of Independence. From Independence to the place of the accident, the public county road and the railroad run in the same general direction, at times approaching within a half mile of each other, but cross each other at right angles at the crossing on which plaintiff's husband was killed. The county road leads over a high rocky hill just before crossing the railroad, but immediately on the crossing they are both at about the same grade. On the west side of the crossing, the railroad passes through a cut, so that a person approaching the crossing on the county road could not see a train on the railroad to the west until he should get to a point about 35 or 40 feet from the railroad track. From this point (35 or 40 feet from the track) a traveler could see

up the railroad to the west a distance of from 600 to 1,000 feet, as variously established by the different witnesses, and the nearer he approached the track the further he could see. About 20 feet from the track on the side of the county road there was a large sign, upon a post, containing the words, "Railroad Crossing. Look Out for the Cars!" The county road contained a cut through the right of way, so that the view of a traveler was cut off on the west until he reached a point from 30 to 35 or 40 feet from the railroad track. On the 30th day of October, 1893, Porter Huggart borrowed a team, and started from Independence to get a load of wood. He was not seen until he emerged from the cut in the county road at a point 30 to 40 feet from the track, moving on south to the crossing. No person witnessed the accident except the engineer, the fireman, and one brakeman. According to their evidence, Mr. Huggart did not stop after coming into view, or look for a train, until his horses were on the crossing. He then looked in the direction of the train, and began whipping his horses with his lines. His team and the front wheels of the wagon passed over the track safely, and a freight train on defendant's railroad, moving from the west, struck the hind wheels, and threw him from the wagon, and killed him. There is, as usual, much conflict in the evidence as to whether the whistle was sounded or the bell rung, as required by the statute. Two witnesses on the part of the plaintiff testified that they were in a barn about 175 yards from the place of the accident, doctoring a sick horse, and that they did not hear any bell rung or whistle blown for crossing. Indeed, the burden of the testimony tended, we think, quite strongly to prove the bell was not rung at a distance of 80 rods from the crossing, and was not kept ringing until the train crossed the road. As to the whistle, it appears to have been sounded at or near the whistling post, but not at intervals, as required by the statute, until within 600 feet of the crossing, when the alarm whistles were sounded, according to plaintiff's evidence. The engineer testified that he reversed his engine, and applied the brakes, and did all he could to prevent injury to plaintiff's husband, after discovering him. The verdict was for plaintiff for \$5,000, and defendant appeals.

Elijah Robinson and L. B. Ewing, for appellant. Flournoy & Flournoy and Cunningham & Dryden, for respondent.

GANTT, P. J. (after stating the facts). The substantial point in this record is the propriety of refusing the demurrer to the evidence. Conceding that the defendant failed to have its bell rung and its whistle sounded, as required by the statute, did not the plaintiff's evidence and the whole evidence in the case demonstrate that plaintiff's hus-

band's own negligence was the immediate contributing cause of his death? As he approached the crossing, he was warned by the sign that he was about to cross a railroad, and was warned to look out for the cars. It is an uncontradicted and conceded fact that, when he reached a point from 30 to 40 feet from the track,—a point where he was free from all danger of collision with trains upon the road,—he could have seen up the track to the west a distance of 600, and possibly 1,000, feet. As a physical fact, that train was then in sight. One of two conclusions is inevitable,—he either did not look, and heedlessly rode upon the track, and was killed, or he looked, and saw the approaching train, and attempted to cross ahead of it. In either case he was guilty of such contributory negligence as bars a recovery by his widow. Porter Huggart is dead. We have no explanation of his conduct in attempting to cross the track in the face of a rapidly approaching train; but, in view of the physical impossibility of his failing to see the train had he looked to the west, as it was his clear duty to have done, while yet out of danger, the law denominates his conduct in going upon the track, and attempting to cross, as "contributory negligence." There can be no presumption of ordinary care in the face of such facts to the contrary, and without explanation. *Hayden v. Railway Co.*, 124 Mo. 566, 28 S. W. 74; *Kelsay v. Railway Co.*, 129 Mo. 362, 30 S. W. 339; *Lane v. Railway Co.*, 33 S. W. 645. The learned counsel for plaintiff, while conceding the force of these cases as precedents, yet attempts to draw a distinction between those cases and the one at bar, because he thinks plaintiff's husband was not in a place of safety when 30 to 35 feet from the track, when he first saw the train; that he could not stop his team; that he was a stranger, and driving a borrowed team. Neither of these circumstances, nor all of them combined, change the complexion of the deceased's conduct. There is not a particle of evidence that the team was unmanageable, or that the deceased was ignorant of their characteristics. The fact that he had never crossed at this point prior to this occasion, instead of lessening his care, should have incited him to greater vigilance. That a man of mature years, in possession of his mental and physical faculties, driving a team to an ordinary farm wagon up grade, at an ordinary gait, and seeing a train approaching while yet 30 or 40 feet from a railroad crossing, could not safely stop without going upon the track, is contrary to reason and common experience. In our opinion, the facts bring the case clearly within the rule announced in *Hayden v. Railway Co.*, supra; and the court should have sustained the demurrer to the evidence. The judgment is reversed.

SHERWOOD and BURGESS, JJ., concur.

MACK v. WURMSER.

(Supreme Court of Missouri, Division No. 2
June 16, 1896.)

APPEAL—REVIEW—CONTRACTS—INTERPRETATION.

1. On appeal by defendant alone, plaintiff cannot attack a finding by the court against him on a claim asserted by him, and denied by defendant.

2. Plaintiff, who was the manager of defendant's business, agreed to "contribute" \$5,000 to the business in consideration of one-eighth of the profits, which were guaranteed by defendant to amount to \$4,000 annually. Held, that the agreement did not constitute a loan, so as to entitle plaintiff to recover the same on severance of his connections with the business.

Appeal from circuit court, Jackson county; John W. Henry, Judge.

Action by Julius S. Mack against Albert C. Wurmser. There was a judgment for plaintiff, and defendant appeals. Reversed in part.

R. H. Field and Leon Block, for appellant. Henry Wollman, Jas. S. Botsford, and Alexander New, for respondent.

GANTT, P. J. The original petition in this case was a suit to dissolve a partnership between plaintiff and defendant in an extensive furniture stock and business in Kansas City, Mo., and prayed for an accounting and the appointment of a receiver. The partnership was denied by the defendant in his answer. The claim that there was a partnership and the right of recovery in this action grows out of the following instrument: "Kansas City, Mo., Jan. 10th, 1888. It is hereby agreed between the undersigned that, in consideration of Julius S. Mack contributing \$5,000 to the firm of A. C. Wurmser & Co., he is to receive one-eighth of the annual profits of said firm, and said firm furthermore guaranty that his share shall amount to the sum of \$4,000 annually. A. C. Wurmser & Co. Julius S. Mack." It was averred in the petition that, at the end of each year, defendant notified plaintiff as to the amount of plaintiff's one-eighth of the profits, and plaintiff drew the same, as follows: For the year 1888, \$4,651; for the year 1889, \$4,000; for the year 1890, \$4,000; for the year 1891, \$2,500. On January 1, 1892, plaintiff voluntarily quit the service of defendant. Plaintiff construed the contract as constituting him a partner, whereas defendant construed it simply as a contract for a share of the profits. The circuit court found there was no partnership, and gave judgment accordingly. From that judgment, plaintiff did not appeal. Upon the development of the facts, however, the plaintiff, upon an intimation from the circuit court, added a new count to his petition, in substance as follows: "That on January 1, 1888, Mack loaned Wurmser, who was carrying on a furniture business in Kansas City, the sum of \$5,000, and it was agreed between Mack and Wurmser that as annual

compensation for the use of the same, and for the services of Mack in and about the business of Wurmser & Co., Mack should annually receive from Wurmser one-eighth of the profits of said business, and which Wurmser agreed should in no year be less than \$4,000, and guaranteed that in each year the same should be, at least, \$4,000; that Mack performed the agreement on his part, and performed such services as were required during 1888, 1889, 1890, and 1891; that on January 1, 1892, Mack quit the service of Wurmser; that Mack had received the amounts hereinbefore set forth, but there were a large amount of profits not accounted for, and, although often demanded by Mack, Wurmser refuses to account therefor; that Mack has demanded return of the \$5,000 so loaned to Wurmser, but Wurmser refuses to repay it; and concluding with a prayer requiring Wurmser to account, and for judgment for the \$5,000, with interest from January 1, 1892. In his reply, Wurmser denied the loan altogether; averred the \$5,000 was part of the consideration for purchase of part of the profits. The reply also set up that Wurmser, in order to enable Mack to get the \$5,000 to purchase said interest in the profits, indorsed Mack's note for that sum to Mack's intended father-in-law; that Mack had only paid \$2,000 on said note, and Wurmser was still liable thereon for \$3,000. Upon the evidence, the court rendered the following judgment and finding: The court found that Mack and Wurmser were not partners, as charged in the first count of the petition, but that Mack advanced said \$5,000 to Wurmser by way of a loan for use in the said business, and that as compensation for the use of said \$5,000, so advanced and loaned to Wurmser by Mack, and by way of compensation to Mack for his services as head salesman and general manager in charge of the sales department, Wurmser was to pay annually to Mack one-eighth of the annual profits of said business. And the court found that Wurmser was indebted to Mack for said \$5,000, and that Wurmser was also indebted to Mack in the sum of \$1,650, on account of profits not accounted for or paid over by Wurmser to Mack. That portion of the judgment which was for Mack reads as follows: "The court finds the issues for the plaintiff on the second count of the petition, and the court finds the issue for the defendant on the first count of the petition; that defendant has failed to account to plaintiff for plaintiff's one-eighth of the profits of A. C. Wurmser & Co. for each of the years of 1888 and 1889, which was the duty of defendant to do, and defendant is indebted to plaintiff for such profits not accounted for or paid to plaintiff; and that plaintiff is entitled to a decree against defendant therefor. The court further finds that one-eighth of the profits of the firm of A. C. Wurmser & Co., mentioned in the pleadings, was paid

by defendant to plaintiff as compensation for plaintiff's services as an employé of said firm, and for the use by the defendant of the five thousand dollars (\$5,000) mentioned in the petition and in the contract dated January 10, 1888, set out therein, which sum of five thousand dollars (\$5,000) the court finds was advanced by plaintiff to defendant by way of a loan, to be repaid to plaintiff by defendant; and that defendant is indebted to plaintiff in said last amount thereof; and that plaintiff is entitled to a further decree against defendant therefor. The court further finds that plaintiff ought to recover from defendant the sum of six thousand six hundred and fifty dollars (\$6,650), the amount owing by the defendant to plaintiff for said loan and profits not accounted for or paid over by defendant to plaintiff. It is further considered, adjudged, and decreed by the court that plaintiff recover from defendant the sum of \$6,650, with interest from this date at 6 per cent. per annum, together with the costs of this suit, and that execution issue therefor." Wurmser appealed from this judgment on second count.

1. The learned counsel for respondent, Mack, has devoted much space in his brief and argument to show that Mack was a partner in the firm of Wurmser & Co., but the circuit court found against this claim of Mack, and rendered judgment accordingly. From that finding and judgment, plaintiff has not appealed, and his failure to do so precludes all inquiry by this court into the correctness of that action. *Ingraham v. Dyer*, 125 Mo. 491, 28 S. W. 840.

2. Can the decree for plaintiff on the second count be sustained upon the conceded facts of the case? Is there any evidence that plaintiff loaned defendant the \$5,000? Excluding from consideration the evidence of plaintiff that it was a partnership, because that fact was found against him by the circuit court, and he did not appeal, is the language of the agreement fairly susceptible of the construction given it by the learned circuit court? If we give the word "contribute" the meaning of subscribing to the capital of the partnership, it is inconsistent with the idea of a "loan." By contributing in that way, the partnership or corporation becomes the absolute owner of the money so "contributed"; and the party so paying it in becomes the owner of an interest in the business or shares in the corporation. In other words, he buys an interest in the business, but in no sense can it be called a "loan." Of course, respondent is correct in saying that it would be a most unnatural construction to say this \$5,000 was a "gift," in the ordinary sense of that word. The writing is indefinite only as to time. Had Wurmser agreed to guaranty the \$4,000 annually for a definite number of years, the claim now so eloquently urged in regard to the possible hardship that might have resulted to Mack had he died

in one year or been discharged at the end of the first year would have been unavailable. But we do not think that such considerations can alter the meaning of the language used, and the case now presents no hardship, as it is plain that Mack did reap the benefit of an agreement exceedingly favorable to him for four years, and finally quit the service of his own accord. Both parties gave the contract a practical construction. Wurmser made good his guaranty for three years, and there was a mutual agreement to the reduction of \$2,500 the fourth year. Considering Mack's services were only worth \$1,500 a year, and that the money was worth 10 per cent., he does not appear to have lost anything. Had it been a loan, the result would have been:

Loan	\$ 5,000
Interest, 10 per cent., four years.....	2,000
Salary, four years.....	6,000
	<hr/> \$13,000

As a matter of fact, he received for the four years:

For 1888	\$ 4,651
For 1889	4,000
For 1890	4,000
For 1891	2,500
	<hr/> \$15,151
	13,000

A gain of..... \$ 2,151

So that it seems idle to speculate what injustice might have flowed from Mack's neglect to specify the number of years the guaranty should continue. It did continue four years, and none of the possible hardships happened, and he himself put an end to the agreement. The omission to state how long the guaranty should last did not affect the contract. Plaintiff took that risk. It is not the duty nor is it in the power of the courts to make contracts for parties, or supply their oversights or omissions. No sound principle of law requires us to reach back now, and ascribe an unnatural meaning to an ordinary word, because a loosely-drawn agreement was made by plaintiff. We are bound to ascribe to words their ordinary signification, and we do not think "contribute," in this contract, meant "loan." It is inconsistent with the other terms of the instrument, and the parties practically construed it otherwise, and we think properly. It follows that the circuit court erred in so construing the contract, and for this error the judgment must be reversed.

3. The only remaining point is whether the balance of the judgment is erroneous. This being a suit in equity, it was entirely competent for the circuit court to pass upon the various items of the referee's finding and account, and allow or reject it as good conscience and equity required. We have gone through the various items, and we think the court correctly refused to charge Mack with moneys disbursed by Wurmser to his

father. This was no just part of the expense account. We think the business on which Mack was to have one-eighth was the business of Wurmser and Louis when Louis retired. Mack received no salary after January 1, 1888, and the business began as it existed that day. Without burdening this opinion with a discussion of each item, we find no error in the adjustment of the court, which resulted in a finding for Mack, on the profits of the business not accounted for, of \$1,650. We also agree with the circuit court that Mack should not be allowed to recover this until he adjusts the liability of Wurmser to Mack's father-in-law on the note on which Wurmser indorsed for Mack. It follows that so much of the judgment as awarded Mack the \$5,000 paid into the firm, and interest thereon, is reversed, and that the balance of the judgment, for \$1,650, with interest, is affirmed.

SHERWOOD and BURGESS, JJ., concur.

STATE v. HILL.

(Supreme Court of Missouri, Division No. 2.
June 18, 1896.)

CRIMINAL LAW—EVIDENCE—CONDUCT OF ACCUSED
—DEFILEMENT OF GIRL—STATUTE.

1. The demeanor of a person, not under restraint, when accused of a crime, as well as what he says, or his silence, may be shown as inculpatory facts, their weight as evidence being for the jury.

2. An orphan girl under 18 years of age, who, by arrangement between herself and defendant's wife, in which he concurred, became a member of his family, working for her support, was "confided" to his "care and protection," within the meaning of Rev. St. 1889, § 3487, and he is subject to prosecution thereunder for her defilement. Sherwood, J., dissenting.

Appeal from circuit court, Morgan county; Dorsey W. Shackelford, Judge.

Robert J. Hill was convicted of a crime, and appeals. Affirmed.

The defendant appeals to this court because of his conviction and sentence under provisions of section 3487, Rev. St. 1889: "If any guardian of any female under the age of eighteen years, or any other person to whose care or protection any such female shall have been confided, shall defile her, by carnally knowing her, while she remains in his care, custody or employment, he shall, in cases not otherwise provided for, be punished by imprisonment in the penitentiary not exceeding five years, or by imprisonment in the county jail not exceeding one year and a fine not less than one hundred dollars." The evidence tends to show that Emma Pierce, who was the sister of the brother-in-law of defendant's wife, went to defendant's house on a visit, and after remaining there for a week she had a conversation with Mrs. Hill, the wife of defendant, when the latter told her that she liked her better than the girl that she had;

that is, a girl Mrs. Hill kept to work for her, for her board and clothes. Emma Pierce, the prosecutrix, did not speak to defendant about remaining at defendant's house, but only to his wife, and his wife said, "If it was all right with him [her husband], it was all right with her." So it seems that defendant, though not spoken to by prosecutrix, was in some way apprised of this arrangement, though there is no direct testimony on the subject. At any rate, prosecutrix's little brother, Bluford Pierce, was sent for, and also prosecutrix's organ, and they were then domiciled at defendant's house; and he told a party that they were members of his family, and had a right to attend school in the district. He also attempted to buy a carriage, and told another party that his purpose in doing so was that his family, including these children, could attend church together. In various ways, defendant exercised control over the girl and her brother, and they obeyed him. He chose her associates, and proscribed those of them whom he did not like. Within a few weeks after her arrival at her new home, prosecutrix testified, defendant had sexual intercourse with her out at his barn, and frequently thereafter at his house, in the same room where his wife was sleeping in another bed, some six feet distant, the result of which was her pregnancy, and the birth of an infant of which defendant seemed quite fond and proud (carrying it in his arms and exhibiting it to visitors within an hour or two after its birth), and assisted very assiduously in taking care of it and its mother, and seemed to feel, and so expressed himself, as quite gratified at the thought that in consequence of the child's birth all ground for the belief that he "wouldn't breed" had been entirely removed. Before the birth of the child, —about a month,—defendant (so prosecutrix testified) bought material for the child's clothing, and concealed it down at the barn, and prosecutrix made it up. Defendant denied that he had any intercourse with prosecutrix, or knew of her pregnancy, but does not deny that he bought materials for its clothing, nor that he concealed it at the barn. Nor does he deny that he went with prosecutrix to Kansas City, paid her way there, and while there bought clothes for herself and child, and gave her some money. Nor does he deny that they (prosecutrix, child, and defendant) stopped at his brother's at that place. He does deny, however, what prosecutrix testifies to, that while in Kansas City he proposed to her that, if she would swear the child was not his, he would leave his wife and go off and marry her. Defendant made statements to parties who were witnesses for the state which seem strongly to imply his paternity of the child. To one witness he said, speaking on this point: "There isn't any one knows anything about it but her [referring to prosecutrix] and me." Of another witness for the state (Lee Pierce) he asked the question (as that witness testified) whether he had

ever seen the child, and whether it looked like him; and, this witness replying that "it favored him," thereupon defendant asked witness who he thought the father of the child was, and witness told him, "I think it is yours." To this response defendant made no reply, but "kinder laughed." These statements just referred to were not denied by defendant when on the witness stand. It also appears in evidence that defendant dictated two statements for prosecutrix to sign, and she wrote them, in which she stated that defendant was not the father of her child; and she acknowledged to several witnesses that it was her own (the statement), and that she was not influenced by any one in making it. The above is the substance of the evidence.

The court, of its own motion, gave the following instruction: "Gentlemen of the Jury: You are instructed that if you shall find from the evidence that in the county of Moniteau and state of Missouri, at any time within three years before the 9th day of March, 1894, the defendant was a person to whose care and protection Emma Pierce was confided, and that she was a female under the age of eighteen years, and that in said county and state, within said three years before the 9th day of March, 1894, and while she was still in his care, custody, and employment, and while she was still under the age of eighteen years, the defendant did defile the said Emma Pierce, by having sexual intercourse with her, then you should find the defendant guilty. If you find that the said Emma Pierce lived with the defendant and his wife as one of the defendant's family, performing domestic labor for her support, and that the defendant exercised care or custody over her as a member of his family, then she was in his care, within the meaning of the indictment. It is not necessary that she should have been confided to him by any particular person, or by any legal proceeding, in order to constitute her within his care. It is sufficient, for the purposes of this prosecution, if he exercised care or custody over her. Before you can find the defendant guilty, every material allegation of the indictment must be proved beyond a reasonable doubt,—that is to say, that Emma Pierce was a female under the age of eighteen years; that she was in the care, custody, or employment of the defendant; that while she remained in his care, custody, or employment, and while she was still under the age of eighteen years, in the county of Moniteau and state of Missouri, he defiled her by having sexual intercourse with her; and that such sexual intercourse was within three years next before the 9th day of March, 1894. The law presumes the defendant innocent until his guilt is proved, and this presumption follows him throughout the trial, and before he can be convicted you must find him guilty beyond a reasonable doubt; but such doubt, to warrant an acquittal, must be a substantial doubt, arising from a consideration of all the evidence in the

case, and not a mere possibility of his innocence. You are the sole judges of the weight of the evidence and of the credibility of the witnesses; and, in this connection, you are instructed that the defendant is a competent witness in his own behalf, but, in determining what weight should be given his testimony, you should consider that he is the party on trial, and his interest in the result of the case. The jury are instructed that they are the sole judges of the weight of the evidence and the credibility of the witnesses, and, in determining the credit that should be given to the testimony of any witness, they may consider the conduct and demeanor of such witness upon the stand, the probability or improbability of his or her statements, and the reasonableness or unreasonableness of the matters testified to by him or her, and will give to such testimony such weight as the jury may believe, from all the facts and circumstances in evidence, the same is entitled to receive. The court instructs the jury that, in considering the weight of the evidence given by defendant's wife, they may take into consideration the fact that she is defendant's wife; and you may consider her interest in the case, and the marital relation, in passing on the credibility of her testimony. The court instructs the jury that, if they believe any witness has willfully sworn falsely as to any material fact, they may disregard the whole or any part of such witness' testimony. The readiness or frequency with which Emma Pierce may have consented to have sexual intercourse with the defendant would constitute no defense to this indictment. If you should find the defendant guilty, you will assess his punishment at imprisonment in the penitentiary for a term not exceeding five years, or less than two years, or by imprisonment in the county jail not more than one year, and by a fine of not less than one hundred dollars. The jury are instructed that the indictment in this case against the defendant is a mere formal charge against him, and raises no presumption of his guilt, and the jury should not permit themselves to be influenced in any manner against defendant by reason of the finding of said indictment." Exceptions were saved by defendant to the foregoing instruction. Defendant, on his part, asked, and the court refused to give, the following instruction: "The jury are instructed that, before they can find the defendant guilty, they must believe from the evidence that the witness Emma Pierce was actually and affirmatively confided to the care and protection of defendant; and although the jury may believe from the evidence that the defendant had sexual intercourse with her, and that she was under eighteen years of age, yet if she was simply employed by his wife to do domestic work about defendant's house and place, and was there under such an arrangement, working for her board and clothes, this was not such a confiding of her to defendant's care or pro-

tection as would authorize his conviction of the offense charged in the indictment, and they must find him not guilty. The jury are instructed that unless they believe from the evidence, beyond a reasonable doubt, as defined in these instructions, that Emma Pierce was under the age of eighteen years, and that she was confided to the care or protection of defendant, and that defendant did defile her by having sexual intercourse with her while she remained in his care, custody, or employment, they must find him not guilty. The jury are instructed that it devolves upon the state to prove defendant's guilt to the satisfaction of the jury, beyond a reasonable doubt, before he can be convicted, and unless this has been done the jury must find him not guilty. A 'reasonable doubt,' as used in this instruction, means a substantial doubt of defendant's guilt, and not a mere possibility of his innocence." To which refusal defendant excepted. The jury brought in a verdict of guilty, with imprisonment for two years, etc.

L. F. Wood and W. M. Williams, for appellant. R. F. Walker, Atty. Gen., Morton Jordan, Asst. Atty. Gen., and Jos. W. Hunter, for the State.

SHERWOOD, J. (after stating the facts).

1. Taking all of the testimony of Lee Pierce together, I am unable to discover any serious objection to it; certainly, not any reversible error in its admission. Defendant was not under arrest, or laboring under restraint. He introduced the conversation himself, and seemed eager to have his fondest wishes confirmed,—that he was indeed father of the child. Laboring under no restraint, he was at perfect liberty to have denied that he was the child's father. Instead, however, of denying the charge that he evidently had sought should be made, he interposed no denial, but only "kinder laughed." The manner, the demeanor, of a party when accused of crime, as well as his silence in such circumstances, when, if not guilty, truth born of indignant innocence would naturally impel him to speak, are always fit subjects to be brought before the jury as inculpatory circumstances, of whose probative force the triors of the fact must judge. Rice, Cr. Ev. § 318; 1 Bish. New Cr. Proc. § 1254; Whart. Cr. Ev. (9th Ed.) § 679; 1 Greenl. Ev. (14th Ed.) §§ 197, 215; Burr. Circ. Ev. (3d Ed.) 482, 483; Pierce v. Goldsberry, 35 Ind. 317; Puett v. Beard, 80 Ind. 104.

2. The evidence abundantly establishes, and in a variety of ways, as heretofore seen, the fact that defendant was the father of the child. It is true, he denies that its paternity should be cast upon him, but of this to the jury belonged the exclusive determination. Now, if the paternity of the child be established as that of defendant, his guilt becomes obvious, and a simple corollary of such paternity, provided the prosecutrix were confided to his care as contemplated by the statute.

In order for the jury correctly to determine this fact, the manner in which it was instructed becomes all-important. So that the question whether defendant was rightly convicted, depends on the correctness of the action of that court in giving and refusing an instruction. The correctness of the action of the trial court in this regard is, however, settled by the rulings of this court in the cases of *State v. Sibley* (Mo. Sup.) 33 S. W. 167; *State v. Kavanaugh*, Id. 33. Therefore, judgment affirmed, in which affirmance, so far as concerns the last paragraph of the opinion, I do not concur.

GANTT, P. J., and BURGESS, J., concur.

MOECKEL v. HEIM et al.

(Supreme Court of Missouri. June 15, 1896.)

WITNESS—HUSBAND AND WIFE—FRAUD—RULINGS ON EVIDENCE—SAVING EXCEPTIONS.

1. Where a husband, in furtherance of the fraud of others, prevails upon his wife to sign a note and incumber her property, equity will, in the absence of other evidence, in order to expose the fraud in all its details, permit both husband and wife to testify as to the conversations had between them in regard to the transaction. *Henry v. Sneed*, 12 S. W. 663, 99 Mo. 407, followed.

2. Where the court withheld its ruling on the admissibility of certain testimony, and then, for the first time, in the decree excluded it, the only remedy of the party complaining was to move for a new trial, since he could not have excepted to the ruling before it was announced.

Barclay, J., dissenting.

In banc. Appeal from circuit court, Jackson county; E. L. Scarritt, Judge.

Action by Emilie Moeckel against Joseph J. Heim and others to cancel a note, and for other relief. Ther was a judgment for defendants, and plaintiff appealed to the Kansas City court of appeals, which transferred the case to the supreme court. Reversed.

W. C. Stewart and Kagy & Bremermann, for appellant. Warner, Dean & McLeod, for respondents.

SHERWOOD, J. This cause has been transferred to this court by the Kansas city court of appeals. We adhere to the ruling announced in *Henry v. Sneed*, 99 Mo. 407, 12 S. W. 663, that where a husband is made the conduit and mouthpiece of the fraud of others, and, in furtherance of that fraud, prevails upon his wife to sign a note and incumber her property, there a court of equity, in the absence of other evidence, in order to unearth that fraud, and to expose it in all of its details, will, ex necessitate rei, and upon a familiar common-law principle respecting evidence of fraud, permit both husband and wife to testify as to the conversations had between them in regard to the transaction. In this case the judge of the lower court heard the testimony

aforesaid, saying he would pass upon its admissibility at the conclusion of the case. But he did not do so. On the contrary, he made no ruling on the admissibility of the evidence until he set forth his findings of fact in the decree he rendered in favor of defendants, when he, for the first time, excluded all evidence of conversations between plaintiff and her husband. Plaintiff, in her motion for new trial, called attention to this point, and, the motion being overruled, she saved her exception; and this was all she could do, for it must be vexatiously obvious that, until the court announced its ruling on the evidence, there was nothing to except to, and not until the decree was announced was plaintiff informed as to what ruling was made. To require plaintiff to except in advance in anticipation that the ruling might be against her would seem a trifle exacting and somewhat unreasonable; and every lawyer knows that no one can except to a judgment or decree, and that the only course to pursue when a judgment or decree is rendered is for the party against whom it is rendered to file a motion for new trial. This is what plaintiff did, and this was all she could do. "Who does the best his circumstances allows, does well; * * * angels could do no more." In the quite recent case of *Utassy v. Gledinghagen* (Mo. Sup.) 33 S. W. 444, on a like point of practice, Burgess, J., speaking for the court, holds similar views. Inasmuch as we hold that the evidence was admissible, and that plaintiff excepted as soon as opportunity offered, we reverse the decree, and remand the cause. All concur, except BARCLAY, J., who dissents.

STATE ex rel. HOSPES et al. v. BRANCH et al.

(Supreme Court of Missouri. June 15, 1896.)

GUARDIAN—SETTLEMENT WITH SELF AS TRUSTEE—SURETIES ON GUARDIAN'S BOND—RELEASE—LIABILITY—ESTOPPEL OF CESTUI QUE TRUST—RES JUDICATA.

1. The sureties on a guardian's bond are not relieved from liability for a conversion of the trust funds by him while guardian by the facts that, on his final accounting as guardian, he became trustee of the balance of the funds shown by the final account to be in his hands, and gave a receipt as trustee to himself, as guardian, for the funds, though he was at the time solvent, and possessed of sufficient property subject to execution to satisfy the balance due, unless at the time he gave such receipt the money was actually in hand, or thereafter withdrawn from his business, and taken in charge in his capacity as trustee. 28 S. W. 739, followed.

2. Where one, on final accounting as guardian, was appointed trustee of the funds remaining in his hands, and, as trustee, receipted for them, a subsequent judgment for his removal as trustee, and requiring him to pay over the funds to his successor, based on a finding that he had received the funds as trustee, and, as trustee, converted them, is not, as to himself, conclusive of his receipt of the funds from him-

self as guardian, in an action on his bond as guardian for conversion of the funds while guardian.

3. Where the probate records show that a guardian, after final accounting, of which his ward had notice, was, on petition of the ward (which declared that he had the funds on hand ready for transfer), appointed trustee of the balance of the funds shown on hand by his final account; that he was ordered to transfer the funds to himself as trustee; and that he filed a receipt from himself as trustee for them; and it appears that his trusteeship continued for two years, during which the cestui que trust receipted for moneys received from him as trustee,—the cestui que trust is estopped, as against the sureties on his guardian's bond, from claiming that he never in fact transferred the funds to himself as trustee, but converted them while guardian, if he at the time of transfer was possessed of property out of which the balance found due on his final accounting as guardian could have been collected.

In banc. Appeal from St. Louis circuit court; Daniel Dillon, Judge.

Action by Richard Hospes, as trustee of Alice Crookes, and Alice Crookes, against Joseph W. Branch, former guardian of Alice Crookes, and his securities upon his curator's bond, for breach of the bond. From a judgment for plaintiffs, defendants appeal. Reversed.

Alice Crookes, while yet a minor, received a legacy under her father's will. Defendant Joseph W. Branch was duly appointed her guardian, gave bond as such, and received the legacy, in April, 1873. The said Alice attained her majority February 25, 1882. Branch made final settlement of his curatorship in the probate court on July 19, 1884, in which there was found to be due his ward the sum of \$19,832.15, which was ordered paid to the trustee of the said ward when appointed. In January, 1885, the said Alice Crookes filed her petition in the circuit court, reciting the foregoing facts, and stating that Branch then held in his hands, ready to be paid over, the said sum, and praying an order appointing the said Branch her trustee to receive and hold said sum for her use. The court found the facts as stated, and ordered that "Joseph W. Branch be, and he is hereby, appointed trustee, with all the powers and authority in and by said will vested in her, the said Alice Crookes; and the said Joseph Branch here, in open court, accepts said trust, and files his bond in the sum of \$40,000, with Charles P. Chouteau and R. M. Parks as securities, and conditioned for the faithful discharge of the trust, which bond the court now approves." On June 16, 1885, Branch presented to the probate court a copy of the order, and submitted his receipt, as follows: "St. Louis, Mo., June 1st, 1885. Received this day of Joseph W. Branch, curator of the estate of Alice Crookes, the sum of nineteen thousand eight hundred and thirty-two and $\frac{15}{100}$ dollars, in full payment of the balance found due from him at the final settlement of her estate in the probate court of St. Louis city, July 18th, 1884. Evidence of my appointment as trustee by the circuit court of St. Louis city is herewith

submitted. Joseph W. Branch, Trustee." Thereupon the court made this order: "Now comes Alice Crookes, late a minor, by Joseph W. Branch, her trustee, and acknowledges in open court full and entire payment and satisfaction of the balance ordered to be paid and delivered to her upon the final settlement of said Joseph W. Branch, curator of her estate heretofore made herein. It is thereupon ordered by the court that said Joseph W. Branch be, and he is hereby, finally discharged as such curator. 'Receipt filed.' This suit is against Branch and his securities upon his curator's bond, and charges a conversion of the funds prior to his appointment as trustee. This is the third appeal. The opinion of the court in the two former appeals will be found reported, respectively, in 112 Mo. 661, 20 S. W. 693, and 126 Mo. 448, 28 S. W. 739, to which reference is made for a more specific statement of the facts.

The original answer stated all the foregoing facts, and it was claimed that thereunder the judgments and orders of the probate court were conclusive on Miss Crookes that the funds had been transferred from Branch as guardian to Branch in his capacity of trustee. After the second appeal, defendant filed an amended answer, in which he stated all the foregoing facts and the following additional new matter: On the 7th of March, 1888, the said plaintiff Alice Crookes commenced her suit in the circuit court of the city of St. Louis against Branch, in which she charged that, as trustee, he had received the trust funds, and had afterwards misapplied and converted them to his own use, and neglected and refused to apply them in her support and maintenance, as required by the terms of the will. She prayed that Branch be removed from the trusteeship; that a successor be appointed; that an account be taken; and that he be required to pay over to his successor the amount found to be due. To said suit, Branch entered his appearance, and, upon a hearing, the court found that Branch, "as such trustee, received into his possession the sum of \$19,832.15 of the estate belonging to the plaintiff, and that said defendant has * * * misapplied said trust funds, and appropriated the same to his own use." On a hearing of that case, the court found a balance due Alice Crookes from Branch, as trustee, of \$20,689.69, and ordered that the same be paid over to his successor. Richard Hospes was thereupon appointed trustee, and gave bond as such. Afterwards, in August, 1888, the said Hospes, as trustee, commenced a suit against Branch and his securities on his bond as trustee, charging a misappropriation of the funds while acting in that capacity, which suit is still pending. This suit was commenced in March, 1889. An agreement was afterwards entered into between the plaintiffs herein and the sureties of the bond of Branch as trustee, to the effect that plaintiffs would prosecute this suit to final judgment, and, if unsuccessful in it, the said securities agreed to pay the

amount found due as trustee. Under this agreement, a sum was paid to plaintiffs, which was to be credited as a payment, if they should afterwards be adjudged liable; if not, then it should be refunded.

Upon the trial, the foregoing facts were shown by the records of the court, and other evidence. Plaintiffs offered evidence in rebuttal, tending to prove that the information upon which the former proceedings were prosecuted was obtained from Branch himself, by which they were misled and deceived into making the declarations and admissions therein contained. It was further shown on the trial that, prior to his settlement as curator, Branch had used the funds of his ward in his private business, and that they were being so used at the time the settlement was made, and, as a matter of fact, the money was not in his hands, and never was transferred, but was continued in his private business as before. The evidence also tended to prove that at the time Branch, as trustee, filed in the probate court the receipt from himself as curator, he was possessed of sufficient property, subject to execution, out of which the balance due his ward could have been collected by process of law.

At the request of the plaintiffs, the court gave the jury this instruction: "The court instructs the jury that the burden rests upon defendant to show that Branch, as curator of Alice, paid over to himself, as her trustee, the sum ascertained upon his final settlement to be due from him as curator. And the court further instructs the jury that, in order to show such payment, it must appear from the evidence, to the satisfaction of the jury, that Branch, as curator, at the time of his qualification as trustee, had said sum of money actually in hand. It is not sufficient to show that Branch at such time had property of his own upon the credit of which he could have raised the money had he so desired. The jury are instructed that if Branch, as curator, and prior to his qualification as trustee, had appropriated to his own use the funds received by him as curator to said Alice, and at the time of his appointment as trustee did not have in hand the money belonging to said Alice Crookes, then even though at the date of his qualification as trustee said Branch may have had property of his own subject to execution, of sufficient value to have enabled the claim in behalf of said Alice against him to have been collected by due process of law, yet such fact is immaterial, and does not relieve his bond as curator from liability in this action." Defendants, the sureties on the curator's bond, asked, and the court refused to give, these instructions: "(1) If the jury believe from the evidence that the defendant Joseph W. Branch was appointed trustee of Alice Crookes, as recited in the answer of the defendant Tittman, and that, after such appointment, he executed the receipt dated the 1st day of June, 1885, and read in evidence

by defendants, he thereby elected to hold from that time forward the fund recited in said receipt as trustee, and not as curator of Alice Crookes; and, if at that time he actually had her estate in his hands, then such election transferred the fund from himself as curator to himself as trustee, and the jury will find the issues herein for the defendant Eugene C. Tittman, administrator of the estate of Basil W. Alexander." "(4) If the jury believe from the evidence that Joseph W. Branch was appointed trustee of Alice Crookes, as recited in the answer of defendant Tittman, it became and was his duty upon such appointment to collect, in his capacity as trustee, from himself as curator, the balance which, upon final settlement of the curatorship of said Alice Crookes, he was ordered by the probate court to pay to said Alice Crookes' trustee; and if the jury believe from the evidence that, at the time said Branch was so appointed trustee, he was possessed of property sufficient, subject to execution, out of which such balance could have been collected by process of law if some person other than himself had been appointed such trustee, then the sureties on the trustee's bond read in evidence are liable for said balance, and the sureties on his curator's bond are exonerated, and the jury will find for the defendant Tittman." Instructions were also asked by said defendants, and refused by the court, to the effect that plaintiff Alice Crookes was, by her proceedings in the cases prosecuted by her, her declarations and admissions therein, and the findings and judgments of the court, estopped to deny that Branch held the funds as trustee, and that said defendants were released as sureties on his bond as curator. The judgment was for plaintiffs, and defendants appealed.

R. S. MacDonald and Edw. C. Kehr, for appellants. B. Schnurmacher, Jos. S. Laurie, and Valle Reyburn, for respondents.

MACFARLANE, J. (after stating the facts). 1. In the latter of the two previous appeals in this case, which was heard by court in banc, it was distinctly held that the use by Branch, as curator, of the funds of his ward in his own private business, was a misapplication, which created a breach of his bond for which his sureties were liable, unless the money was actually in hand when he was appointed trustee, or the amount was thereafter withdrawn from his business, and taken in charge in his capacity of trustee. The fact that he was at the time solvent, and that he was possessed of property subject to execution out of which the balance due his ward could have been collected by process of law, did not relieve his sureties on his bond as curator. We feel ourselves bound on this appeal by this ruling. This judgment must therefore be taken as settling the law on this branch of this case, and

justified the circuit court in giving to plaintiffs the instruction complained of, and in refusing the first instruction asked by defendants.

In *Tittman v. Green*, 106 Mo. 22, 18 S. W. 885 (which is identical with this one in its facts), the suit was against Branch and his securities as trustee; and division 2 of this court held that if Branch had assets in his hands as curator, or was possessed of property, out of which the funds could have been collected by process of law, elected, by some unequivocal act, to hold the funds as trustee, he would thereby shift the liability from his bondsmen as curator upon his bondsmen as trustee. It is evident that this ruling is inconsistent with the judgment of the court in banc on the second appeal in this case, in holding that a mere election on the part of Branch would relieve the securities on his bond as curator from liability for a misappropriation of the funds committed while acting in the capacity of curator. When Branch was appointed trustee, he assumed the duty of withdrawing the trust funds from his private business, and of holding and administering it as trustee, and for the performance of this duty his securities bound themselves as well and as fully as for its proper management after it came into his hands. But it does not follow that a neglect on the part of Branch to take into his hands, as trustee, the trust funds, would relieve the securities from a liability that existed when the settlement as curator was made. If a third person had been appointed trustee, it would have been his duty to have collected the amount due from the curator or his securities. While a neglect to do so would create a liability on the part of the securities on his bond as trustee for the losses thereby incurred, it would not alone relieve his securities as guardian from their liability for the original default. These principles are necessarily drawn from the former decisions in this case. The second instruction asked by defendants, and refused by the court, was therefore erroneous in declaring, under the facts stated, that the sureties on the curator's bond were exonerated from liability. We find no error, therefore, in the proceedings upon any of the questions heretofore considered.

2. It is now insisted that the proceedings prosecuted by plaintiffs in the circuit court, and the finding and judgment thereon, estop them to deny that Branch took the trust funds into his hands as trustee. This question was not involved in the former appeals. In the proceedings instituted by Miss Crookes to have Branch appointed her trustee, and in the subsequent proceedings to have him removed, she states unequivocally that he has the funds in hand, and the court so finds, and enters judgment accordingly. It is first insisted that the fact thus became *res adjudicata*, and is conclusive upon plaintiffs. The law at this day is well settled that the con-

clusiveness of a judgment, as between the parties to it, is not confined to the entire matter litigated, but includes the finding of any facts which were in issue and were necessarily decided. *Cromwell v. County of Sac*, 94 U. S. 351; *Freem. Judgm.* § 249. In a suit for an installment of interest on a promissory note, the defendant pleaded an alteration of the note which avoided it. This issue was found against him. In a subsequent suit on the note itself, the question as to the alteration was held to be *res adjudicata*. *Edgell v. Sigerson*, 26 Mo. 583. In *Young v. Byrd*, 124 Mo. 590, 28 S. W. 83, it was held that, where the effect of a judgment is to decide a particular issue of fact, that issue must be held *res adjudicata* as to the parties then before the court; and it is immaterial in what form the issue was raised if it was decided between the adversary parties, on its merits. Nor is it regarded as being essential to the conclusiveness of a former recovery that the parties are identically the same as those to a suit in which an attempt is made to litigate the same issue. Only parties to the former judgment and those in privity with them are concluded, but they may be bound thereby in a subsequent proceeding to which they are parties, and which involves the identical issue, though the adversary parties are not the same. *Young v. Byrd*, *supra*; *Nave v. Adams*, 107 Mo. 420, 17 S. W. 958. But the former proceeding was against Branch as trustee, and he is now sued in his capacity of curator. The party concluded by a former judgment must not only have been a party to both actions, but he must have been before the court in the same capacity in each. "It is not only necessary that the party sought to be bound by the former judgment should have been a party to both actions, but he must have appeared in both in the same capacity or character. This rule is one of the fundamentals of the jurisprudence on the subject." *Black, Judg.* § 536; *Bigelow, Estop.* 130; *Freem. Judgm.* § 156; *Herm. Estop.* § 94; *Collins v. Hydorn*, 135 N. Y. 320, 32 N. E. 60. A finding and judgment, therefore, that Branch held the funds as trustee, will no more conclusively protect him as curator from a charge of misapplying the trust funds while acting in the latter capacity than a finding in his favor in the former suit would be conclusive against him in this one. If the judgment was not conclusive upon Branch, it did not conclude plaintiffs, though their interests be identical. Estoppels must be mutual. Miss Crookes cannot be bound unless Branch would have been bound had the judgment gone the other way. *Henry v. Woods*, 77 Mo. 281; *Collins v. Hydorn*, *supra*; *Freem. Judgm.* § 159. Plaintiffs are not, therefore, concluded by the former judgments.

3. But it is insisted that plaintiff Alice, by her conduct and declarations, is now, in equity, estopped, as against the sureties on the guardian's bond, to deny that Branch re-

ceived the funds as trustee. It stands established by the records and judgments of the circuit court in the former proceedings that the said plaintiff, in the most solemn manner, declared that Branch had taken the funds into his hands as trustee. The records of the probate court show that she was duly notified that Branch, as curator, would make his final settlement. The records of said court also show that the funds were transferred to Branch, as trustee. Branch was appointed trustee upon the petition of said plaintiff, in which it was solemnly stated that he held the funds in his hands ready to be transferred. The order was made appointing Branch trustee, and he was ordered to transfer the funds to himself as trustee. A receipt was duly filed in the probate court showing that the transfer had been made, and Branch, as curator, was, so far as the probate court could act, discharged as curator. Every act was done by plaintiff that it was possible for her to do in ratification of the acts of her curator, and in affirmation of the records of the probate court. The matter was allowed to stand in that condition for about two years, said plaintiff continuing to reaffirm the truth of the records by receipting for money from Branch in his capacity of trustee. Under all principles of equity and good conscience, plaintiff should not be allowed to deny the truth of what the record shows, if, by doing so, others will suffer loss or injury. The sureties on Branch's bond as guardian obligated themselves to answer for any default of their principal. They had the right to protect or secure themselves against liability in case the misconduct of their principal became manifest. Upon the settlement of the curator in the probate court, they became prima facie responsible for the amount found due, if it was not properly accounted for, and paid over according to the orders of the court. They had the right to see that the orders of the court were obeyed, and, if not, to take steps to relieve themselves of their obligations, or to secure themselves against loss. The orders of the probate court were only evidence of their discharge. How could they determine the absolute truth except by inquiry of the trustee and the cestui qui trust? An examination of the records will show that both these, unequivocally and in the most solemn manner, affirm their truth. The securities had a right to rely in absolute confidence on the record and the judicial declarations of plaintiff affirming its truth. *Greenl. Ev. § 527a; Cosgrove v. Railway Co.*, 54 Mo. 499. It will not do to say that Miss Crookes was misled and deceived by Branch as to the facts, and that the declarations were made in ignorance of the true facts. She was of age, and was represented by counsel. If she were ignorant of the facts, it was on account of her own inexcusable negligence, which she cannot allege. *Herm. Estop. 882*, and cases cited. If, there-

fore, Branch, when he made his statement as curator, was possessed of property out of which, by proper diligence, he could have transferred the trust funds to himself as trustee, then plaintiffs, by their conduct, admissions, and declarations, are estopped to deny that he did his duty. The judgment is reversed, and the cause remanded.

BRACE, C. J., absent. BARCLAY, J., did not sit. The other judges concur.

EVANS. Public Adm'r, v. FULTON.

(Supreme Court of Missouri, Division No. 2.
June 16, 1896.)

COVENANT—SEISIN—BURDEN OF PROOF—MEASURE OF DAMAGES.

1. In an action for breach of a covenant for seisin, it is sufficient for plaintiff to negative the words of the covenant, and the burden of proof rests on a defendant who alleges seisin; but, to be entitled to substantial damages, plaintiff must show that defendant was not seised of an indefeasible estate.

2. Where, by reason of the adverse possession of another than the grantor at the time of a conveyance, the purchaser is actually deprived of his purchase, he is entitled to recover the consideration paid; and, in case of its payment in property upon which no value was fixed, the measure of damages for breach of the covenant is the market value of such property with interest.

Appeal from circuit court, Platte county; W. L. Herndon, Judge.

Action by J. B. Evans, public administrator, against William L. Fulton. Judgment for plaintiff for nominal damages, and he appeals. Reversed.

This is an action by plaintiff, public administrator of Platte County, Mo., in charge of the estate of Caroline Milotte, deceased, on the covenants for seisin and for title contained in a deed dated March 31, 1886, and executed by the defendant to her, purporting to convey to said Caroline the south half of lot 4 in block 18 in the city of Wyandotte, Kan. The petition is in two counts. The first count is for breach of the covenant for seisin, and the second count for breach of the covenant for title. The petition alleges that defendant was not seised of the premises in question at the time of the execution of the deed, to wit, March 31, 1886. This allegation is denied in the answer, which then avers that on that date "he [defendant] was the owner and seised in fee, and in the possession, of the lot described in plaintiff's petition." The cause was tried by the court, a jury being waived, and resulted in a finding and judgment for plaintiff on the first count, assessing his damages at one dollar, and for defendant on the second count. Plaintiff appealed.

L. T. Collier, for appellant. A. D. Burnes and J. W. Cohern, for respondent.

BURGESS, J. (after stating the facts). It appears from the evidence that at the time

of the execution of said deed, and prior thereto, the lot in question was in the actual possession and occupancy of one Mary J. Fulton, who claimed to own the same, and who refused to surrender the possession of it to said Caroline Milotte; that said Caroline brought suit in the district court at Wyandotte, Kan., against said Mary J. Fulton, for the possession of said lot, and that said Caroline died pending said suit; that thereafter, on the 19th day of April, 1883, Alphonse Milotte, the husband, and the children and only heirs at law of said Caroline brought suit in said district court against said Mary J. Fulton for the possession of said lot, and on final hearing of said suit it was adjudged and decreed by said court that said Mary J. Fulton was the owner of said lot, and entitled to its possession. John W. Gibson, a witness for plaintiff in this case, testified that he was present at the trial of that case, and that Mrs. Fulton put up the claim that it was her money that bought the property,—money that came to her from her father before she was married to the defendant in this case; that defendant Fulton was not present at that trial, but he heard his deposition read there, but could not say what his testimony was. Defendant proved by one Garrard Chesnut that he purchased the property in question from defendant Fulton in 1883, and that he paid him \$700 or \$750 for it, but that Fulton never made him a deed; that Mrs. Milotte swapped him for the property a piece of land in Jackson county, incumbered for \$1,650, and gave him a note for \$300, secured by this property, and that he signed a contract for the sale of the property in question to her; that the note was due two years from date with 8 per cent.; that he had been handling the lot for Fulton,—kind of agent,—and offered it to her. Her land was then worth about \$20 per acre. There were in the tract 120 acres, upon which there were incumbrances amounting to between \$1,600 and \$1,700. On cross-examination the witness testified as follows: "At present, reside in Platte county. I purchased this property, I think, in March, 1886,—about the last of March,—from Mr. Fulton, one night. I went up from Kansas City on the train; bought it; paid him in a note that night, and he was to give me the deed, and he brought the deed down the next morning. I had a note for \$900, I considered cash, on some parties in Platte county,—Smith and Ryan. He took the note, and gave me the difference,—\$75 or \$100. This note was not due for 10 months after I swapped it to him, not bearing any interest until maturity. There was no writing or contract at that time. I testified on the trial of the case in the Wyandotte district court. For three or four months before I purchased this property,—house and lot,—I had acted as Fulton's agent, and rented that property from August, 1884, until I purchased it, and I had been attending to the improvements and the renting of it. On the trial at Wyandotte I set up no title or claim to that property, but assisted to bring the suit, advancing the costs, \$15. Mr. Fulton did not

authorize or request me to do it. Think I had not seen him since the trade. The \$300 note given me has not been paid, nor the note for \$100 given to Darnall & Co. I disposed of my note to Mrs. Wilson, in Kansas City." Defendant read in evidence the mortgage securing the payment of said notes. Other evidence was then introduced by plaintiff tending to show that the Jackson county land was worth \$50 per acre on March 30, 1886, at the time of the execution of the deed (which was read in evidence) from Caroline Milotte conveying said land to Chesnut.

Plaintiff prayed five declarations of law, which are as follows: "(1) The defendant having failed to show that he was the owner, seised in fee and in possession, of the south half of lot 4, block 18, in the city of Wyandotte, Wyandotte county, and state of Kansas, at the date of the execution and delivery of his warranty deed to Caroline Milotte, dated March 30, 1886, and if one Mary J. Fulton was at that date, and ever since has been, in possession of said premises under claim of title, then there was a breach of the covenant of seisin contained in the deed aforesaid, and the finding must be for the plaintiff. (2) If the court shall find from the evidence that one Mary J. Fulton was on the 30th day of March, 1886, and ever since has been, in the possession of the property described in the deed from defendant Fulton to Caroline Milotte, dated March 30, 1886, and read in evidence, and claiming title thereto, and if the court shall further find from the evidence that the said Caroline Milotte in her lifetime instituted her suit in the said county of Wyandotte, Kansas; that said suit was pending and undetermined at the time of her death, and that after her death her heirs at law instituted their suit in the district court in and for the county of Wyandotte, and state of Kansas, to recover the said premises; and that on the final hearing thereof the said district court adjudged and decreed that the said Mary J. Fulton was the owner and entitled to the possession of the same,—then the law is that said judgment of the district court aforesaid is binding and conclusive upon defendant Fulton, and the finding must be for the plaintiff. (3) Defendant herein having shown no title to the said premises in the city of Wyandotte, Kansas, nor any right to the possession of the same, no notice in writing or otherwise to said defendant, of the commencement of said suit to recover possession, was necessary to make the judgment rendered therein binding upon defendant Fulton. (4) If the court finds from the evidence that defendant was not the owner in fee and entitled to the possession of the premises in question, and that on suit brought by the heirs of Caroline Milotte in the district court of Wyandotte county, Kansas, against Mary J. Fulton, to recover said premises, judgment was rendered that she, the said Mary J.

Fulton, was the owner of said premises, and barring said heirs from asserting any claim, right, or title thereto, then there was an eviction, as to said heirs, under the covenant for title, as contained in the said deed of defendant Fulton to Caroline Milotte, and the finding should be for plaintiff on the second count of the petition. (5) The measure of damages in this case is the amount of the consideration paid by Caroline Milotte for the said Wyandotte property, and if the court should find from the evidence that such consideration was not paid in money by the said Caroline Milotte, but by the conveyance of her farm in Jackson county, Missouri, then the reasonable market value of said farm at the date of the deed conveying the same, less the incumbrances thereon, with 6 per cent. interest on the balance, will constitute the measure of damages in this case." All of said declarations of law were refused, and exceptions duly saved.

A preliminary question is raised by defendant as to the right of counsel who represents the plaintiff to prosecute this appeal in the name of, and as attorney for, plaintiff. There was filed in the trial court, pending the application for appeal, a paper called a "motion," signed, "J. B. Evans, Public Admr., by W. H. Roney, His Attorney," disclaiming any intention on his part of taking an appeal, and denying any authority by counsel to so do, which was overruled, and an appeal granted; but the motion is not copied in the bill of exceptions, nor is the action of the court with respect thereto set out in the bill, and being a matter of exception, if a subject of review under any circumstances, is not part of the record proper, and is not before this court for consideration. The motion has not been renewed in this court.

During the trial defendant was permitted to amend his answer, over the objection of plaintiff, so as to make it conform to the proof. This was a matter of discretion on the part of the court, and, as it does not appear that in so doing it committed an abuse of its discretion, the judgment should not be reversed on that ground. Moreover, the amendment was not material.

The breach assigned is of the express covenant for seisin contained in the deed, and the vital question involved is with respect to the measure of damages. Under the pleadings and evidence, the court correctly found for plaintiff on the first count in the petition; but it is insisted that error was committed in its refusal to declare the law as prayed by plaintiff, and in assessing his damages at a mere nominal sum, when there was a substantial breach of the covenant. Defendant alleged seisin in himself at the time of the execution of the deed by him to Caroline Milotte, and the burden of proof was on him, in the first place, to show that he was in fact so seised; and in the

absence of such proof there was, in law, a technical breach of the covenant. The evidence clearly showed that the lot was at that time in the actual occupancy of another person, viz. Mary J. Fulton, who was holding and claiming the same adversely to defendant. The covenant for seisin is broken as soon as made, and in an action on that covenant the breach is well assigned by negating the words of the covenant; and when the answer avers seisin in the covenantor, pursuing the words of the covenant, and nothing more appears, the plaintiff is entitled to recover nominal damages only, and to entitle the plaintiff to substantial damages, or the purchase money, with interest, he must show that the defendant was not seised of an indefeasible estate. *Bircher v. Watkins*, 13 Mo. 522. It does not appear from the facts in that case that the land was occupied adversely to the grantor at the time of the execution of the deed, and in that very important particular it differs from the case at bar. Here the evidence showed that the lot conveyed by defendant was at the time in the adverse possession of one Mrs. Fulton, and that defendant was not seised of said lot. It is a matter of some doubt, in such case, whether plaintiff is entitled to recover the full amount of the purchase money, or only nominal damages. The rule, however, seems to be that if, by reason of such adverse possession, the purchaser is actually deprived of the whole subject of his bargain, as we think Mrs. Milotte was in this case, plaintiff, as her legal representative, in the absence of express agreement as to the value of the land, is entitled to recover its value at the time of the exchange, with interest. *Thomas v. Perry*, 1 Pet. C. C. 52, Fed. Cas. No. 13,908; *Wheeler v. Hatch*, 12 Me. 88; *Fitzhugh v. Croghan*, 2 J. J. Marsh. 430. It was not, therefore, necessary to plaintiff's recovery of substantial damages that he show that Mrs. Fulton's possession of the lot was under a paramount title to that of Mrs. Milotte. The weight of authority is that the evidence should correspond to the general rule in pleading, which requires that the party who alleges shall prove the affirmative of any proposition; and where, in an action of this character, the defendant alleges seisin in himself, he is bound, in the first instance, to maintain the affirmative of his covenant. *Swafford v. Whipple*, 3 G. Greene, 264; *Ayer v. Austin*, 6 Pick. 225; *Marston v. Hobbs*, 2 Mass. 437; *Abbott v. Allen*, 14 Johns. 253. From what has been said, it logically follows that plaintiff is entitled to recover as damages the value of the land, less incumbrances, deeded by Mrs. Milotte in consideration for the lot described in the deed by defendant to her, with 6 per cent. interest thereon from the date of said deed. And it makes no difference that the land was deeded by her to Gibson. It was for defendant's benefit

that the deed was thus made. In 2 Suth. Dam. § 606, it is said: "If the amount of the consideration is not expressly agreed upon, and has been paid in property, it would follow that the value of that property should be adopted as the basis of damages, on a breach of the covenant of warranty, if the consideration paid is adopted as the criterion, as we have seen in the case, in assessing damages for breach of the covenant of seisin and power to convey, but in some cases the value of the land to which the covenant refers is adopted as the standard." The same rule is announced in *Byrnes v. Rich*, 5 Gray, 518; *Hodges v. Thayer*, 110 Mass. 286; *Rawle, Cov.* (3d Ed.) 69.

These considerations render it unnecessary to pass upon the effect of the judgment rendered in the district court of Wyandotte county, Kan., wherein the heirs of Mrs. Milotte were plaintiffs and Mary J. Fulton was defendant, for possession of the lot. For error in refusing the first and fifth declarations of law as prayed by plaintiff, and in refusing to render judgment in accordance therewith, the judgment is reversed, and the cause remanded.

GANTT, P. J., and SHERWOOD, J., concur.

HAHN v. DAWSON et al.

(Supreme Court of Missouri. June 15, 1896.)

RIPARIAN RIGHTS — ACCRETION — ACTION TO RECOVER — INSTRUCTIONS.

1. In ejectment to recover land claimed by plaintiff as an accretion to land owned by her and bounded by the Missouri river, it was not error to refuse to charge that, if the land was originally formed in the Missouri river as an island, with the channel between it and the mainland belonging to plaintiff, and by accretions to said bar or island it finally extended to plaintiff's land on the bank, or if, by the recession of the river from the intervening channel after the formation of the bar or island, the bar and the mainland became connected, plaintiff became the owner thereof as an accretion, since such charge ignored the idea that accretions must be the imperceptible or gradual accretions to plaintiff's land, or a gradual receding of the river therefrom.

2. An instruction that plaintiff was the owner of all lands made and formed between her shore line and the main channel, whether such lands consisted of gradual accretions, or islands formed in the river, provided they became attached to plaintiff's shore line, was erroneous.

3. It was not error to charge that before the jury could find for plaintiff they must find that she was, when the suit was begun, the owner of the land bounded by the river; that the land sued for, or some part of it, was accretion thereto, formed onto and against the lands owned by plaintiff by the deposit of sand and mud from the washings of the Missouri river.

4. If all the land occupied and in defendant's possession was an island, and formed in the Missouri river, and said river, or channel thereof, ran permanently between said island and plaintiff's land as it was originally survey-

ed by the government, and afterwards said channel was filled up by overflow and deposit of sand and mud therein, so that the mainland and said island became united, the island would not be an accretion to plaintiff's land.

In banc. Appeal from circuit court, Holt county; C. A. Anthony, Judge.

Ejectment by Catharine Hahn against George Dawson and others. From a judgment for defendants, plaintiff appeals. Affirmed.

This is an action for certain lands formed in the original lines of the Missouri river opposite to lot 2 of the N. W. $\frac{1}{4}$ of section 20, township 59, range 38, in Holt county, Mo., and alleged by plaintiff to be accretions to her land. The answer is an admission of possession, but otherwise a general denial. The evidence on the part of plaintiff tended to prove that the land sued for was an accretion to her land, and on the part of defendants that it was an island or bar formed in the Missouri river, running between it and the mainland for many years, until the river finally abandoned this south channel altogether, and by its recession plaintiff's land on the south bank became connected with this bar or island, which defendants were occupying as squatters. Without incumbering this opinion with a detailed statement of this evidence, it is sufficient to say there was evidence tending to prove either theory. For the plaintiff the court gave these three instructions: "No. 1. If the jury believe, from the evidence, that the plaintiff was the owner of the said lot two of the northwest quarter of section twenty, in township fifty-nine, of range thirty-eight, and that she held the same under the said deed, offered in evidence, from said Rhinehart Kleber and wife to her, and that the said Rhinehart Kleber and the said Catharine Hahn, and those under whom they claim, had occupied and claimed the same openly, continuously, notoriously for a period of ten years or more, before the defendants entered into possession of said land under color of title or claim of right, then said plaintiff is the owner of same; and the court further instructs the jury that said deed offered in evidence would be and is sufficient to convey the title of Kleber and wife to said land, and all accretions and additions thereto made and formed, to the center of the main channel of the said Missouri river; and it makes no difference whether said accretions or additions were formed in sand bars, provided the same are between said shore line of said land described, as surveyed, and the center line of the Missouri river. No. 2. The court instructs the jury that defendants admit that they are in possession of said lands sued for; that the said deed offered in evidence by plaintiff from Rhinehart Kleber and wife to said plaintiff, Catharine Hahn, dated the 31st day of July, A. D. 1886, for the land described therein, is sufficient to pass the title to lot two of the northwest quarter of sec-

tion twenty, in township fifty-nine, of range thirty-eight, in Holt county, Missouri, together with all lands accreted or made thereto, to said Catharine Hahn; and if the jury find from the evidence that the said land sued for in plaintiff's petition was formed by the receding of the said Missouri river, or by deposit of debris and sand against the shore line of said land described in said deed, then the jury should find for the plaintiff for the recovery of said land as described in plaintiff's petition, and should find for plaintiff such sum as damages as they believe, from the evidence, plaintiff has sustained, not exceeding three hundred dollars; and they should further find the monthly value of the rents and profits thereof, not exceeding ten dollars. No. 3. The court instructs the jury that if they believe from the evidence that the lot two, section twenty, township fifty-nine, of range thirty-eight, described in plaintiff's petition, as surveyed by the United States government, was bounded on the south by the Missouri river, and they further find and believe that at the time of the commencement of this suit the plaintiff owned and was entitled to the possession of lot two, and that the lands occupied by the defendants are the products of accretion to said lot two, they will find for the plaintiff. The word 'accretion,' as used in these instructions, means the process of adding to land by the washings of the Missouri river, and the results of such process are termed 'alluvion,' or 'made lands.'" And for the defendant the court gave the following instructions: "No. 1. The court instructs the jury that this is a suit in ejectment, and that in such cases the plaintiff must recover, if at all, upon the strength of her own title, and not by the weakness of the title of the defendants. Therefore, unless they believe from the evidence that the plaintiff has shown her right to the possession of the lands in controversy by a preponderance of the testimony, they will find for the defendants. No. 2. Before the jury can find for the plaintiff in this action, they must find from a preponderance of the evidence that the plaintiff was, at the time of the commencement of this suit, the owner of lot two of the northwest quarter of section twenty (20), township fifty-nine (59), range thirty-eight (38), in Holt county, Missouri, as described in plaintiff's petition; and they must further find that the land sued for, or some part thereof, was alluvion, or accretion thereto,—that is, land made and formed onto and against the said lands owned by the plaintiff by the deposit of sand and soil from the washings of the Missouri river; and, unless the jury so find, they must find for the defendants. No. 3. If the jury believe from the evidence that all the land occupied and in the possession of the defendants was an island, formed in the Missouri river, and that the said river, or channel thereof, ran permanently between said island and the said

plaintiff's land as it was originally surveyed by the government, thereby separating said island from plaintiff's land, and that afterwards said channel of said Missouri river was filled up by overflow and deposit of sand and mud therein, so that the mainland and said island became united, such island would not be an accretion to plaintiff's land, and they must find for the defendants." Of its own motion the court also gave the following: "To constitute an island, within the meaning of this instruction, the same must be of a permanent character, situate in the Missouri river; not merely surrounded by water when the river was high, but permanently surrounded by a channel of the river; and not a sand bar, subject to overflow by the rise of the Missouri river, and connected with the mainland when the river was low." To the giving of which instructions of defendants, as well as the one by the court modifying and explaining No. 3 of defendants, the plaintiff then and there excepted. The court refused the following instructions prayed by plaintiff: "No. 4. The court instructs the jury that if you believe from the evidence that the land in controversy was formed in the Missouri river on the north side of the main channel in front of plaintiff's deeded land mentioned in the evidence by a sand bar forming in the river there by additions thereto by sand, dirt, and sediment on either side thereto, and by the space between said bar or land then formed and plaintiff's deeded land filling up, or by the water of the river receding therefrom, until said land then formed and plaintiff's deeded land became one continuous body of land, your finding must be for the plaintiff, provided you believe and find from the evidence that the plaintiff was then owner of the deeded land at the commencement of this suit, to wit, lot two, section twenty, township fifty-nine, of range thirty-eight, in this county. No. 5. Although the jury may find that the land in controversy was a sand bar or formation of land in the Missouri river, and that a slough or channel existed, in which a considerable portion of the Missouri river ran, between the said land and the shore of said original Missouri river, and that said sand bar or said formations afterwards, by the washing of said Missouri river, filled up said channel, and attached thereby the said sand bar or formed land to said shore land of said plaintiff or her grantors, yet the jury will find that the said land so formed and attached to said mainland was the property of said plaintiff, unless they find that said land so formed and attached lay beyond the center of the main channel of the Missouri river as it originally ran." The jury found for defendants.

T. C. Dungan, for appellant. H. T. Alkire and S. F. O'Fallon, for respondents.

GANTT, J. (after stating the facts). 1. As the rights of the parties depend upon the

facts found by the jury, our inquiry must be directed first to the instructions given for their guide. Beginning first with the instructions asked by plaintiff and refused, it will be noted that refused instructions 4 and 5 announce the proposition that, if the land in controversy was originally formed in the Missouri river as an island or sand bar with a channel between it and the mainland belonging to plaintiff, and that by accretions to said bar or island on the south side it finally extended to plaintiff's land on the south bank, or if by the recession of the river from this intervening channel after the formation of the bar or island the bar and the mainland became connected, then plaintiff became the owner thereof as an accretion. This instruction was clearly erroneous, in that it ignores the fundamental idea upon which the title to accretions is based, namely, that they must be the imperceptible or gradual accretions to the plaintiff's lands, or the gradual receding of the river therefrom. If the accretions were to the island on the south side and to the mainland on its north side, and by a change of the river they were thus brought together, such a union of the two tracts did not make the island an accretion to the mainland. *Rees v. McDaniel*, 115 Mo. 145, 21 S. W. 913; *Perkins v. Adams* (Mo. Sup.) 33 S. W. 778; *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100.

2. The plaintiff's first instruction was also erroneous in this: that it announces the doctrine that plaintiff was the owner of all lands made and formed between her shore line and the center of the main channel, whether such lands consisted of gradual accretions or islands formed in the river, provided they became attached to plaintiff's shore line. This is an assertion of the right of a riparian owner to all lands, whether bars or islands, from his shore line to the center line of the main channel of the river. Whatever may be the law in other jurisdictions, this is not the law of Missouri. In Missouri the riparian owner only owns to the water's edge. He has no claim whatever to soil under the river, and consequently has no title to islands which spring up in our navigable rivers, whether on one side or the other of the center line. This theory, carried to its logical conclusion, would forever preclude the idea of the state's ownership in islands formed in our navigable streams, as the several riparian owners would own all the lands from either shore to the center line of the river. Moreover, it conflicts with the law of accretions, which is not restrained by the original center line of the river. *Rees v. McDaniel*, 115 Mo. 145, 21 S. W. 913; *Cooley v. Golden*, 117 Mo. 33, 23 S. W. 100; *Naylor v. Cox*, 114 Mo. 232, 21 S. W. 589. This instruction was erroneous, and by far too favorable to plaintiff; and, while it was in conflict with the third instruction given for defendants, plaintiff cannot complain of an error committed in her favor and of her own

making. *Reardon v. Railway Co.*, 114 Mo. 384, 21 S. W. 731; *Baker v. Railroad Co.* (Mo. Sup.) 26 S. W. 20 (dissenting opinion, Sherwood, J.). Defendants' instructions above set forth correctly declared the law, and, as there was ample evidence from which the jury could find the facts upon which they were predicated, the verdict of the jury will not be disturbed, and the judgment of the circuit court is affirmed.

BRACE, C. J., and BARCLAY, SHERWOOD, MACFARLANE, BURGESS, and ROBINSON, JJ., concur.

SLY et ux. v. UNION DEPOT RY. CO.
(Supreme Court of Missouri, Division No. 2.
June 16, 1896.)

CARRIERS—NEGLECTANCE OF MINOR—INSTRUCTIONS
—NEW TRIAL—PERJURY.

1. In an action for the death of plaintiff's son at about the age of 14 years, it appeared that while attempting, as a passenger, to board one of defendant's cars while in motion, he was swung in front of one coupled to it, and sustained fatal injuries. At defendant's request instructions were given which required only, to free deceased from negligence, that he must have exercised that care and caution which might have been reasonably expected from one of his age, experience, and intelligence. *Held*, that they were properly given.

2. The granting of a new trial on the ground of mistake or perjury of a witness (authorized by Rev. St. 1889, § 2240) rests very largely in the discretion of the trial court; and, unless it be made to appear that such discretion has been abused, the appellate court will not interfere.

3. Affidavits that witnesses have given testimony in other cases of a similar character contrary to that given on the trial in question tend only to impeach their credit or character, and not to sustain a charge of perjury.

Appeal from St. Louis circuit court; D. D. Fisher, Judge.

Action by George Henry Sly and Elizabeth N. Sly against the Union Depot Railway Company for the death of their minor son. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

C. P. & J. D. Johnson and Geo. S. Grover, for appellants. Judson & Taussig, for respondent.

BURGESS, J. Plaintiffs, who were on the 11th day of July, 1893, husband and wife, and the parents of Percy G. Sly, then about 14 years of age, sue for damages on account of the death of their son, caused by the alleged negligence of the servants and employes of defendant then in charge of its cars. The accident occurred in the city of St. Louis, where the case was tried. From a verdict and judgment in favor of defendant, plaintiffs appealed.

The defendant company operates an electric line of cars from the center of the city to Tower Grove Park, and on the evening of the accident deceased boarded car No.

151, down in the city, to go to his home, near said park. While on the way, this car, for some cause, not material, became disabled, and had to be pushed on by the next car (No. 153) to the power house, where it was switched off, and the passengers transferred to the one last named. By the disablement of said car the one next succeeding it, No. 153, and others still back of it, were delayed to such an extent as to cause a blockade, so that when No. 153 arrived at Gravois and Arsenal street station and switch, where a part of defendant's cars usually stop to switch and return to the city, it was ordered to discharge its remaining through passengers and return down town. The passengers for Tower Grove were instructed to take another through car. Deceased was one of the passengers for Tower Grove Park, and when through car No. 157 came along he undertook to jump on ahead of others who were endeavoring to take the car before it had reached its regular stopping place. This car had an open car, called a "trailer," attached to it in the rear. Deceased had a basket on his right arm, and endeavored to jump on the front car as it passed along, by catching hold of the rear dashboard with his left hand, whereby he immediately swung between the front and rear car, and the rear car passed over him, and injured him, from the effects of which he died within a few hours thereafter. Witnesses on behalf of plaintiffs testified that just as deceased took hold of the dashboard the car gave a sudden movement or jerk forward. There was evidence on the part of defendant to the contrary. The witnesses also differed as to the speed of the train, which varied from three to seven miles per hour. At the time of the accident the conductor was on the front platform of the trailer. When he saw deceased approaching the train, he called to him to keep back, and motioned to him to do so, but he paid no attention to either. As soon as the conductor saw the danger the boy was in, he gave the danger signal, and the train was at once brought to a standstill, but it was too late. At the time of and prior to the accident the boy was in the employ of the Samuel C. Davis Dry Goods Company, and passed to and from his home to his work daily on the electric street cars over the same line of road.

The court, in behalf of plaintiff, instructed the jury as follows: "The jurors are instructed that if they believe and find from the evidence that plaintiffs are husband and wife; that the deceased, Percy G. Sly, was, at the time of his death, the minor son of plaintiffs; that on or about the 11th day of July, 1893, at the city of St. Louis, he was on one of the cars of defendant as a passenger for hire, for the purpose of being carried to a point on said defendant's road on Arsenal street beyond its intersection with Gravois avenue; that when said

car upon which he was such passenger reached said Arsenal street at its intersection with Gravois avenue the defendant's employes in charge of said car directed the said Percy G. Sly and other passengers to leave the same, and take passage on the next car following the said car, for the purpose of being carried to his said destination; that in pursuance of said direction the said Percy G. Sly left said car at or near the intersection of said Arsenal street with said Gravois avenue, for the purpose of taking another car for his said destination; that while waiting at said point on Arsenal street two cars of the defendant passed without stopping, and that the agent of defendant, in charge of the second car which so passed, directed the said Percy G. Sly and the other passengers then and there standing with him on said street, to take the next car following; that the next car following, when it got near or opposite to where the said Percy G. Sly stood upon said Arsenal street, had its speed slackened to a slow rate, as if it was going to be stopped, for the purpose of permitting the said Percy G. Sly and the other said passengers to get upon the same; that the said Percy G. Sly thereupon got upon the running board of said car; that the motorman in charge of and running said car knew, or by the exercise of reasonable care might have known, that the said Percy G. Sly had got upon the said car, and was then and there standing upon the running board thereof, but, notwithstanding, suddenly started the car forward with sufficient force to throw the said Percy G. Sly off his balance; that by reason of such sudden starting of the car the said Percy G. Sly was thrown from his balance off of said car, and under the wheels thereof, and thereby received injuries causing his death; that the said Percy G. Sly was then and there in the exercise of the same care as is customarily exercised by persons of ordinary prudence under like circumstances,—that then the jurors, if they so find the facts to be, should find a verdict for plaintiff; and if they so find they will assess their damages at the sum of five thousand dollars."

Over the objection and exception of plaintiffs the following instructions were given for defendant: "(1) The court hereby instructs you that the ground of plaintiffs' suit against the defendant is an alleged negligence on defendant's part, and that such negligence cannot be presumed, but must be established by plaintiffs to your satisfaction by proof. Therefore, although you find that Percy G. Sly was injured while endeavoring to get on one of defendant's railway trains, yet that fact alone does not entitle plaintiffs to recover in the present suit, but, before plaintiffs can recover any damages in this suit, they are bound to prove to your satisfaction that the injury complained of was occasioned by the negligence of defendant's

employés; and, unless plaintiffs have so proven, your verdict should be for the defendant. (2) If you believe from the evidence that the deceased, Percy G. Sly, did not exercise the care and caution which might reasonably be expected from a person of the age, experience, and intelligence that the evidence shows him to have been at the time of the accident complained of, but that he himself, by his own negligent conduct, caused or contributed to cause the injuries which resulted in his death, and that defendant's servants in charge of the car by which he was injured could not, by the exercise of a high degree of care, have avoided the accident after they became aware, or by reasonable care would have become aware, of the danger to which the deceased exposed himself, then you should find a verdict for the defendant. (3) In determining whether Percy G. Sly was guilty of negligence directly contributing to the accident which resulted in his death, you may take into consideration not only his age, but also his previous experience in getting on and off street cars, as the same appear from the evidence, and the confidence reposed in him by his parents as to his ability to take care of himself; and you are instructed that it was the duty of the deceased to exercise the care and caution which might be expected from a person of his age, discretion, and experience, as the same is shown by the evidence. (4) If you find from the evidence that the deceased's conduct in boarding a moving train was the sole cause of the accident, and that defendant's servants in charge of the cars by which he was injured were free from negligence in the premises, both before and after danger became apparent, then your verdict should be for the defendant, without reference to deceased's age or capacity. (5) If you believe from the evidence that the direct cause of Percy G. Sly's death was not negligence on the part of defendant's employés, but negligence of his own in trying to board an electric railway train while the same was in motion, then you should find a verdict for the defendant. (6) If you believe from all the evidence in this case that the injuries which caused the death of Percy G. Sly were the result of a mere accident or misadventure, and that the same were not caused by the negligence of either the deceased or the defendant, then you should return a verdict for the defendant."

After the rendition of the verdict in favor of defendant, plaintiffs filed their motion for a new trial, alleging, among other grounds, that "perjury or mistake was committed by witnesses for defendant." In support of this ground for a new trial plaintiff introduced a large number of affidavits, which relate entirely to the alleged attempted illegal procurement of the testimony of one James O'Connell by Thomas C. Barron, claim agent for defendant. O'Connell did not testify at the trial. A number of affidavits were also filed

by plaintiffs tending to show that John Low, who testified in behalf of defendant, was a professional witness for defendant in personal injury cases, and that he was not on the cars at the time of the accident, and that he could not have seen it. Counter affidavits were filed by defendant, tending to disprove the charge made in the motion.

The first point made by plaintiffs is that the court gave improper and erroneous instructions on the part of defendant. This contention is based on the assumption that, according to defendant's instructions, the attempt of deceased to board the car while in motion was negligence per se. We do not think any such deduction can be drawn from a fair and impartial reading of the instructions. Whether or not deceased was guilty of contributory negligence in trying to board the car while in motion depended to some extent upon his experience, intelligence, and the rate of speed at which it was then moving. That he was not wholly absolved from the exercise of care in boarding the car while it was moving at a rate of speed of from three to seven miles per hour is, we think, too clear to admit of dispute. In *Ridenhour v. Railway Co.*, 102 Mo. 270, 13 S. W. 889, and 14 S. W. 760, it was held that the court could not, as a matter of law, declare a child nine years of age to be incapable of negligence, and that the standard of care required of a child is such reasonable care and diligence as characterize one of its experience and intelligence. This is the rule universally announced by text writers and courts. And when defendant's instructions are considered together, they simply required of deceased the exercise of that care and caution which might be reasonably expected from one of his age, experience, and intelligence, and nothing more. The jury found that he did not exercise such care and caution, and that by his own negligence in trying to board the train while it was moving at the rate of speed that it was moving at that time he was guilty of negligence which contributed directly to his injury. He was familiar with the movement of the cars,—rode on them every business day in going to his work and returning therefrom to his home. The instructions were warranted by the evidence, and presented the case with seeming absolute fairness to the jury. What has been said in no way conflicts with *Schepers v. Railway Co.*, 126 Mo. 665, 29 S. W. 712, but is in perfect harmony with that case.

We come now to that ground for a new trial in which it is alleged in the motion therefor that "perjury or mistake was committed by witnesses for the defendant." Section 2240, Rev. St. 1889, provides that: "In every case where * * * the court is satisfied that perjury or mistake has been committed by a witness, and is also satisfied that an improper verdict or finding was occasioned by any such matters, and that the party has a just cause of action or defense,

it shall on motion of the proper party grant a new trial," etc. Before a motion to set aside the verdict of a jury and grant a new trial on the ground that perjury has been committed, the court in which the motion is made must be satisfied of the truthfulness of the charge, and that an improper verdict was occasioned thereby. But, if the court is not satisfied of both of these things, then it logically follows that the motion should be denied. The granting of a new trial on such ground rests very largely in the discretion of the trial court, and, unless it be made to appear that such discretion has been abused, this court will not interfere. It is inconceivable how any one can read the conflicting affidavits filed in this case, and, without more, become satisfied therefrom that perjury was committed by any witness for the defendant. The affidavit of James O'Connell goes further, perhaps, towards sustaining the charge (and that is only indirectly), than any other; and he is shown, not only by the affidavits of others, but by his own, to be unworthy of belief from any standpoint. The affidavits tend equally as strong, if not stronger, to sustain the witnesses for defendant than they do to show that any of them committed perjury. That the court was not satisfied that perjury had been committed is very evident from its denial of the motion. It has been held that a verdict obtained by perjury will not be set aside unless the witness has been convicted of perjury, or has died since the trial, and his conviction thus rendered impossible. *Dyche v. Patton*, 3 Jones, Eq. 332; *Hill. New Trial* (2d Ed.) 503. There is no pretense that any witness who testified for defendant has been convicted of perjury, or died since the trial of this cause. Whatever witnesses in this case may have testified to in others, although of a similar character, has no tendency to sustain the charge of perjury in this. At most, such affidavits only tend to impeach the credit or character of the witness against whom made, and a new trial is rarely ever granted upon that ground. *Mayor of Liberty v. Burns*, 114 Mo. 426, 19 S. W. 1107, and 21 S. W. 728, and authorities cited. Finding no error in the record, the judgment is affirmed.

GANTT, P. J., and SHERWOOD, J., concur.

STATE ex rel. WALKER, Attorney General,
v. DOBSON, Judge.

(Supreme Court of Missouri, Division No. 2.
June 16, 1896.)

HABEAS CORPUS—PETITION—SUFFICIENCY—CERTIORARI—WHEN LIES.

1. Rev. St. 1889, § 5346, requires a petition for a writ of habeas corpus to state the facts concerning the imprisonment and true cause thereof. Id. § 5347, requires a copy of the warrant to accompany the petition, or an excuse for its absence to be given. Id. § 5379,

provides that no court shall have power in habeas corpus proceedings to review the legality of a judgment of any court legally constituted. *Held*, that a writ of habeas corpus cannot issue where the petition fails to state the facts concerning the imprisonment, or to excuse the absence of a copy of the warrant, and also shows that the petitioners are held by virtue of judgment of conviction of murder rendered by a court legally constituted, and having jurisdiction of the offense, and all under sentence of death.

2. Under Const. art. 6, § 3, giving the supreme court superintending control of all inferior courts with power to issue writs of certiorari in maintaining such control, certiorari will issue, on application of the attorney general, to review an order of a lower court directing the issuance of a writ of habeas corpus to prisoners held under sentence of death, where the petition for the writ of habeas corpus shows that the lower court was without jurisdiction.

Certiorari, on the relation of the attorney general, against Charles L. Dobson, circuit judge, to review an order directing the issuance of a writ of habeas corpus. Writ quashed.

R. F. Walker, Atty. Gen., in pro. per.
Roberts & Roberts, for respondent.

SHERWOOD, J. One of the judges of this division, at the instance of the attorney general, issued a writ of certiorari directed to respondent, commanding that he certify to this division of this court a certain petition for a writ of habeas corpus, filed before him by Foster Pollard and Frank Harris, together with all such other papers which were on file in said proceeding, or of record therein. Complying with our said writ, in obedience thereto, the respondent certified to this court the petition aforesaid, and all accompanying papers, etc., on inspection whereof we entered a judgment and order quashing said habeas corpus proceedings, and now, as is proper, we proceed to give the reasons which dictated our said action.

The petition presented to the circuit court praying for the writ of habeas corpus, after stating that petitioners are unlawfully deprived of their liberty by Keshlear, marshal of the criminal court of Kansas City, Mo., proceeds to state, in substance and effect, the following matters, to wit: That petitioners are unlawfully deprived of their liberty, etc.; that said imprisonment is illegal, because petitioners were held by Walls, justice of the peace, to answer to the grand jury for the crime of manslaughter, and required to give bail in the sum of \$1,500, to answer to that charge, when, without any dismissal of the charge of manslaughter, petitioners were indicted for the crime of murder in the first degree; that the grand jury which found the indictment was not selected and summoned according to law; that the indictment was insufficient in law, because it does not charge that petitioners were guilty of murder in any degree, the indictment consisting of allegations necessary to prove the crime of murder in the first degree; that the names of all the wit-

nesses before the grand jury were not indorsed upon the indictment; that petitioners were not able at the time of the trial to procure the evidence they desired; that they were convicted on perjured testimony, and have recently discovered the means of proving this; that petitioners are not guilty of the crime charged against them, and can prove it; that they are under sentence of death to be executed May 15, 1896; that the court had no jurisdiction of the persons of petitioners, nor of the offense charged against them, etc. The following is the return to the writ of certiorari: "In obedience to the within writ, I herewith return, and cause to be transmitted to the clerk of the supreme court, the original petition, and all the papers in and pertaining to the matter of the habeas corpus referred to in said writ; also, a certified copy of the order of the Jackson county circuit court, entered of record in said cause, as fully as the record and files remain before me. I further return and certify that the writ of habeas corpus referred to was issued by me about seven o'clock of the morning of May 14th, after a conference with my associates on the circuit bench of the 16th judicial circuit, and with their consent and approval, both as to the time fixed for the return of said writ, as well as the issuance of the same. My associates referred to are Judge Edward L. Scarritt, presiding in division No. 1, Judge Jas. H. Slover, presiding in division 2, and Judge John W. Henry, presiding in division 3 of said circuit court at Kansas City, and each and all of said judges were invited and expected to sit at the hearing upon the return of said writ. I further return and certify that it was distinctly understood between myself and the attorney for the petitioners that, if they were not remanded into custody, they would under no circumstances be discharged until the supreme court of Missouri should pass upon the questions the circuit court might find to be involved. Given under my hand, this May 16th, 1896. Charles L. Dobson, Judge 16th Judicial Circuit."

The first question for determination is the sufficiency of the petition for the issuance of the writ prayed for by petitioners, and granted by the circuit judge. It is to be remarked of the petition that it signally fails to conform to any known rule of pleading applicable to cases of this sort. Portions of it consist of mere legal conclusions; the residue of inconsequential statements, which do not in any manner tend to affect or impair the jurisdiction of the trial court. As is observed by an author of acknowledged merit: "The application for a writ of habeas corpus should put before the court or judge facts enough to permit an intelligent judgment to be formed of the case. The rules of good pleading should be followed. Conclusions of law should be avoided. The petition should show in what the illegality consists, and this should be done by stating the facts

showing it, as contradistinguished from a mere statement of a conclusion from the facts. Upon his petition for a habeas corpus, the relator must state in his petition the cause of his detention, or for what offense he was arrested, if any, and set out a copy of the warrant of commitment, or make affidavit that the jailer refused to give him a copy." Church, Hab. Corp. (2d Ed.) § 91, and cases cited. Section 5346 of the habeas corpus act makes similar requirements, because it declares that the petition for the writ "must state * * * all the facts concerning the imprisonment or restraint, and the true cause thereof; * * * and, if the imprisonment be alleged to be illegal, the petition must allege in what the illegality consists." Here the petition states the fact of the imprisonment, but not the cause thereof. And section 5347 requires that a copy of the warrant accompany the petition, or an excuse be given for its absence; and there is no such averment nor excuse. Elsewhere it has been ruled, under a section identical with the one just quoted, that by that portion of it which recites that "if the imprisonment is illegal," etc., the statute contemplates that the facts showing wherein the alleged illegality consists should be stated. *Ex parte Deny*, 10 Nev. 212. In the case before us, the petition does not state, nor pretend to state, "all the facts concerning the imprisonment and the true cause thereof." There is not even an allusion to those facts, or to the cause of detention, contained in the petition. And, where the statute requires a certain allegation in an application of this kind, the absence of such allegation is a fatal defect. *People v. Cowles*, 59 How. Prac. 287. And with regard to the alleged insufficiency of the indictment, the original accompanies the papers herein, and presumably was filed with the petition for habeas corpus. It shows an instrument valid in every respect on its face. This amply refutes the allegations made as to its invalidity. But, for reasons to be now stated, we need not pause to inquire whether the indictment was valid or not, whether the grand jury which presented it was properly summoned or not, whether the names of all the witnesses were indorsed on the indictment, whether defendants therein were able to procure the evidence they desired, whether they were convicted on perjured testimony, nor whether they were guilty of the crime charged against them, nor whether they can prove this. All these things are, however, urged to show, and as a means of showing, that the court (what court is not stated) had no jurisdiction of the subject-matter or of the persons of the petitioners, or the offense charged against them, which latter matters are simply the statement of legal conclusions. It is, however, stated that the petitioners are under sentence of death. From this it must be presumed that judgment had been rendered against them by the criminal court of Jack-

son county, Mo., inasmuch as they are said to be in the custody of the marshal of that court. And as pleadings are to be taken most strongly against the pleader, as courts of this state take judicial notice of the existence and jurisdiction of all courts in this state, and as sentence of death is the customary accompaniment and result of a judgment of a court possessed of criminal jurisdiction, the petition for habeas corpus, in effect, alleges that petitioners have had rendered against them for the crime of murder in the first degree a judgment and sentence of death by the criminal court of Jackson county (a court of competent jurisdiction); and this is the basis on which they ask to be discharged on habeas corpus, because they claim that that court had no jurisdiction of the subject-matter, etc., for the reasons stated in the petition as already set forth. Section 5379, however, of the habeas corpus act, declares: "But no court, under the provisions of this chapter, shall * * * have power to inquire into the legality or justice of any * * * judgment * * * of any court legally constituted." That the criminal court of Jackson county is a court of general jurisdiction as to all criminal prosecutions, and therefore "legally constituted," is a matter of judicial notice. Now, all the authorities hold that a petition asking the relief petitioners seek must on its face show "probable cause"; and, when it appears from the party's own showing that there is no ground *prima facie* for his discharge, the court will not issue the writ. In short, the writ of habeas corpus is a writ of right, but not a writ of course. That cause must be shown is apparent as well from the authorities as from the language of section 5346, requiring that the petition "must state all the facts concerning the imprisonment or restraint, and the true cause thereof"; apparent, also, from the language of section 5348, requiring that the writ be granted without delay, "unless it appear from the petition itself or the documents annexed that the party can neither be discharged nor admitted to bail, nor in any other manner relieved under the provisions of this chapter." The issuance of the writ is not a mere perfunctory operation. It is not to be "had for the asking." It is intended as a relief alone against unlawful imprisonment; and no imprisonment is unlawful when the process is a justification of the officer. *Com. v. Lecky*, 1 Watts, 67. Judicial discretion is as necessary in the issuance of the writ as in the issuance of any other writ whatsoever. It can only properly issue to one entitled to it either under the common law or under the statute. Were this otherwise, the writ would descend from its high plane, and its issuance become a mere ministerial act, which could be performed by the clerk of a court as well as by the judge. Prior to the year 1820, an erroneous opinion was prevalent that the court was bound to issue the writ

as a matter of course, and at all events, without using its discretion in determining the sufficiency of the grounds on which the writ was prayed. Since then, however, all the later rulings, both in England and America, establish that a statement of facts showing probable cause must precede the obtaining of the writ, whether it be granted at common law or under the statute. Sometimes, the court, to avoid the vain and nugatory issuance of the writ, will grant a rule nisi at the outset, to show cause why the writ should not issue, and will not go through the barren formality of issuing the writ, when the inevitable result would be the remanding of the prisoner. These views, it scarcely needs saying, are supported by abundant authority. *Sims' Case*, 7 Cush. 285; *Watkins' Case*, 3 Pet. 201; *Church, Hab. Corp.* (2d Ed.) § 92, and other cases there cited.

In the case at bar, not only is there an entire failure to show probable cause why the writ should issue, but, on the contrary thereof, it is to be inferentially, but substantially, gathered from the petition, that the petitioners are held by virtue of a judgment rendered against them, sentence of death pronounced against them, and a warrant for their execution issued, and in the hands of the marshal. With some of these facts actually, the residue virtually, apparent on the face of the petition, a *prima facie* case was made out against petitioners, and probable cause that they were lawfully restrained of their liberty; and that, too, by the judgment of a "court legally constituted," since the circuit judge who granted the writ was bound to take judicial notice that the court rendering the judgment was legally constituted, organized, and established, and had general jurisdiction over all criminal cases, and was therefore bound to presume the correctness of its action in the given case. Section 5370, already quoted, is only declaratory of the familiar principle that a judgment of a court of competent jurisdiction cannot be defeated or overthrown by a collateral attack; and the same rule prevails regarding a judgment assailed by the issuance of a writ of habeas corpus rendered in a criminal cause, by a court of general criminal jurisdiction, as in the case of an attack collaterally made upon a judgment rendered in similar circumstances in a civil action. Now, nothing is better established than that the writ of habeas corpus possesses none of the attributes or performs any of the functions of a writ of error or an appeal or certiorari. *Brown, Jur.* § 104; *Church, Hab. Corp.* § 196. By it, no mere error occurring at or prior to the trial can be reviewed, retried, or relitigated. Mere errors or irregularities which occur antecedent to or during the progress of the trial cannot abate the force and effect of the judgment of a court of competent jurisdiction, nor be investigated by habeas corpus. Thus, after conviction and judgment, the courts,

on habeas corpus, will not inquire into the legality of the grand jury, how it was summoned, etc.; nor can the sufficiency of the evidence on which the prisoner was convicted be investigated, nor the facts thereof retried, or the evidence reviewed; nor will the prisoner be permitted to disprove the charge on which he was found guilty; nor can a defective indictment, one which would be held bad on demurrer, be investigated, nor made the subject of further inquiry or review. The writ of habeas corpus is not framed to retry issues of fact, or review the proceedings of a legal trial, however irregular or erroneous. *Church, Hab. Corp.* (2d Ed.) §§ 367a, 348, 350, 362, 297, 196, 246, 87, 236, 363, 73, and cases cited; *Brown, Jur.* § 104. If a criminal charge is colorable, or "sufficient to set the judicial mind in motion," or to call upon it to act, or makes some approach towards charging a criminal offense, or intimates the facts necessary to constitute the offense and a purpose to declare thereon, or tends to show a criminal offense, no matter how informal or defective, or has a legal tendency to prove each requirement of the statute, it will shield the proceedings from collateral attack. *Van Fleet, Coll. Attack*, § 304. In a word, no errors or irregularities not going to the question of jurisdiction are reviewable on habeas corpus. *Id.* And, as to jurisdiction, every court in this state is bound to take judicial notice of the fact that the criminal court of Jackson county has a general jurisdiction to deal with criminal causes; so that, when a judgment of that court is brought in question respecting any given case of that class, it will be presumed that it had jurisdiction of the person tried, as well as jurisdiction of the subject-matter, to wit, over that class of cases; the latter, a jurisdiction conferred by law, and therefore a matter of judicial notice. Judge Coolsey says: "It is not to be assumed that a court of general jurisdiction has in any case proceeded to adjudge upon any matters over which it has no authority; and its jurisdiction is to be presumed, whether there are recitals in its records to show it or not." *Const. Lim.* (6th Ed.) 500. Speaking of the difference between courts of general and those of limited jurisdiction, and of the conclusive presumptions attendant on the acts and adjudications of the former, Mr. Justice Baldwin says: "A court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth their proceedings, the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description. There can be no judicial inspection behind the judgment save by appellate power." *Grignon v. Astor*, 2 How. 319. In *Ex parte Watkins*, 3 Pet. 123, Chief Justice Marshall, when speaking of the conclusive effect of judgments of courts of general jurisdiction, said: "An im-

prisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous. The circuit court for the District of Columbia is a court of record, having general jurisdiction over criminal cases. An offense cognizable in any court is cognizable in that court. If the offense be punishable by law, that court is competent to inflict the punishment. The judgment of such a tribunal has all the obligation which the judgment of any tribunal can have. To determine whether the offense charged in the indictment be legally punishable or not is among the most unquestionable of its powers and duties. The decision of this question is the exercise of jurisdiction, whether the judgment be for or against the prisoner. The judgment is equally binding in the one case and in the other, and must remain in full force, unless reversed regularly by a superior court capable of reversing it. * * * The question whether any offense was or was not committed—that is, whether the indictment did or did not show that an offense had been committed—was a question which that court was competent to decide. If its judgment was erroneous, * * * still it is a judgment, and, until reversed, cannot be disregarded." 3 Pet. 193. On this subject of attacking a judgment collaterally on habeas corpus, it has been ruled in Georgia that, after a judgment of conviction for felony has been affirmed by the supreme court on writ of error brought by the convict, the legality of his conviction cannot be drawn in question by a writ of habeas corpus sued out by him, or by another person in his behalf, save for want of jurisdiction appearing on the face of the record as brought from the court below to the supreme court. Such affirmance implies that he was tried by a court of competent jurisdiction legally constituted, and nothing to the contrary can be shown otherwise than by inspection of the record. *Daniels v. Towers*, 79 Ga. 785, 7 S. E. 120.

It will be noted that the petition for the writ herein makes no pretense that the criminal court did not have jurisdiction in murder cases or over the persons of defendants, but claims that it did not have such jurisdiction because of defects in the indictment, defective summoning of the grand jury, perjured testimony, etc., all of which, as already seen, do not abate, in any respect, the jurisdiction of the court over the subject-matter, to wit, its right and authority to try criminal cases, nor its jurisdiction over the persons of petitioners. But it is unnecessary to extend this discussion further, nor to multiply authorities which declare a very familiar principle. This record, then, presents the case of a petition which fails to comply with statutory provisions and requirements the most obvious, which fails to state probable cause, which does not make out a prima facie case, which

Indubitably and by inevitable inference shows that a judgment has been rendered against the petitioners in a court legally constituted, and where the indictment plainly charges murder in the first degree, where the petition expressly states that they are under sentence of death; and yet on this petition thus drawn, and in disregard of an express statutory declaration that "no court shall have power to inquire into the legality or justice of any judgment of any court legally constituted," and in disregard of familiar principles enunciated by all the authorities, the writ of habeas corpus has been granted, and the petitioners brought before the court which caused it to issue. What was the object and purpose of its issuance? Was it to go through with the idle ceremony of bringing the petitioners before the respondent, and then remanding them, or was it in order to have witnesses summoned, reopen and try anew the issues of fact and of law already adjudged and determined by the solemn adjudication of a court of competent jurisdiction,—a judgment afterwards affirmed by this court? Or did the writ issue merely to have witnesses summoned, take their testimony, and thus show that the wrong result had been reached on the trial had and the adjudication made, and then remand the prisoners? It matters not what the purpose was or the object in view. In any event, the issuance of the writ was in disregard of the plainest statutory provisions and prohibitions, and was the establishment of a precedent most dangerous in its tendencies and innovations, and one not to be contemplated without the gravest apprehensions. Just look at it! If such a proceeding as this is to be tolerated, after a man has been duly tried and convicted of murder, and judgment rendered, and that judgment affirmed in this court, and the day of his execution set, any probate or county judge in the state may, if the trial has happened in his county, interpose with a habeas corpus, retry the case on the merits, impeach the judgment of the trial court, and discharge the prisoner, if, in his opinion, this be the correct thing to do. The fact that in this instance the writ has been issued by the judge of a circuit court, a court of general jurisdiction, does not alter the complexion of the case in the least, because, after all, the sole question to be answered is: Does the power exist anywhere in this state thus collaterally to impeach the judgments of courts of competent jurisdiction, and thus to thwart the judgments and mandates of this court? We are not of opinion that any such power or jurisdiction exists or has any foundation either in statutory law or in legitimate precedents. Besides, granting the existence of a general jurisdiction in respondent to issue writs of habeas corpus, still that jurisdiction never attached in this particular case,—was not put in motion by reason of the fact that such allegations as the statute requires to be made in the petition as the basis for the issuance of the writ in sections 5346

and 5347 were not made; the rule being that, when "the law conferring the power on the court to act in the matter requires the allegation of a particular fact to exist as a condition to its exercising its power, such fact must be averred, for this refers to and circumscribes the power of the court to act except upon the existence of such fact." Brown, Jur. § 1. And such general jurisdiction was never set in motion, because, further, it is apparent on the face of the petition that the parties could neither be discharged nor admitted to bail, nor in any manner relieved. Section 5348. But it may perhaps be said that section 5402 of the habeas corpus act provides a penalty of not exceeding \$1,000, in favor of any party aggrieved, where a court or magistrate refuses the writ. This is a grievous misapprehension of that section, because, by the very terms of that section, the penalty can be exacted only when the writ "may lawfully issue," and when it may lawfully issue is determined by prior sections of the same chapter. Moreover, it is proper to say just here that the penalty provision has its original in the statute of 31 Car. II. Possibly, parliament had the power to provide and enforce a penalty in the circumstances mentioned; but, under the express provisions of article 3 of our state constitution, which divides the powers of government into three distinct departments,—the legislative, executive, and judicial,—and forbids either of those departments to exercise any power properly belonging to either of the others, "except in the instances in this constitution expressly directed or permitted," the legislature of this state has, in our opinion, no power to provide a penalty for a judge or court simply because a writ of habeas corpus is denied, which denial is based upon an honest endeavor to discharge what is believed to be the demands of recognized and imperative judicial duty. If the legislature may go further than this, then it can destroy the independence of the judiciary, and punish a judge because he, after due deliberation, denies any other writ, or honestly enters or renders any merely erroneous order or judgment. On this point it is very forcibly said by Mr. Justice Brewer: "Nothing is more important in any country than an independent judiciary; and nowhere is it more important, so absolutely essential, as under a popular government. No man can be a good judge who does not feel perfectly free to follow the dictates of his own judgment, wheresoever it may lead him; and, in a country where popular clamor is apt to sway the multitude, nothing is more important than that the judges should be kept as independent as possible; and it is the universal experience, and the single voice of the law books, that the one thing essential to their independence is that they should not be exposed to private action for damages for anything they may do as judges." *Cooke v. Bangs*, 31 Fed. 640. See, also, 1 Hagg. Torts, pp. 120, 121; *Bradley v. Fisher*, 13 Wall. 335.

Having said thus much regarding the proceeding had before the learned respondent in respect to the issuance of the writ of habeas corpus, we come now to consider the issuance of our writ of certiorari herein to bring the proceedings aforesaid before us. This writ was issuable at common law before the proceedings instituted had culminated in a trial, order, or judgment, and was based on the absence or the excess or usurpation of jurisdiction on the part of the tribunal from which the proceedings were removed. 2 Spell. Extr. Rel. §§ 1926, 1928, 1921. 1930; 1 Tidd, Prac. (4th Am. Ed.) 398; Goodright v. Dring, 2 Dowl. & R. 407; Cross v. Smith, 2 Ld. Raym. 836; Com. Dig. (4th Ed.) tit. "Certiorari"; Harris, Cert. § 8. And, though the issuance of the writ at the instance of an individual will not go except in the exercise of a sound judicial discretion (Inhabitants of Cushing v. Gay, 23 Me. 9; 4 Enc. Pl. & Prac. 33, 34, and cases cited), yet where the writ is applied for, as here, by the attorney general, it goes as a matter of course and of right (4 Enc. Pl. & Prac. 37). And it seems that, where an individual applies for the writ, he must show special cause therefor, but that, where the writ is granted on the application of the state, the reasons for the allowance need not appear; they will be presumed to exist. State v. New Jersey Jockey Club (N. J. Sup.) 19 Atl. 976. Here, however, the petition filed on behalf of the state sets forth the usual grounds. The object and purpose of the writ at common law, as shown by the authorities, was to keep inferior judicatories within the bounds of their jurisdiction. 4 Enc. Pl. & Prac. 91, and cases cited. Under the constitution of this state, this court has a general superintending control over all inferior courts; and, as a means of maintaining that superintending control, it has power to issue writs of habeas corpus, quo warranto, certiorari, and other original remedial writs, and to hear and determine the same. Article 6, § 3. The power of this court is as comprehensive in this respect over inferior courts in this state as was the court of king's bench in England in a similar way; and on many occasions has this superintending control been exercised by this court from the earliest days of its history down to the present time, in keeping circuit and other courts within the compass of their legitimate jurisdiction, and in preventing them from transcending the confines of their lawful authority. And, as is aptly said in *People v. Judges*, 24 Wend. 253: "The writ here is in the nature of a special quo warranto, to ascertain by what authority a particular judicial act is done." Such an occasion is the present one. Our inquiries, however, are limited, under the common-law practice which prevails in this state, to such errors as are of record and jurisdictional in their character. *State v. Smith*, 101 Mo. 174, 14 S. W. 108, and cases cited. The existence of such jurisdictional errors has been pointed out, and, because of them, we were moved to

quash the proceedings in habeas corpus, as heretofore stated. Proceedings quashed. All concur.

MISSOURI, K. & T. RY. CO. OF TEXAS v. RODGERS.

(Supreme Court of Texas. June 15, 1896.)

PERSONAL INJURIES—COMPARATIVE NEGLIGENCE— INSTRUCTIONS—ERROR.

1. Where the facts stated in the charge would unquestionably constitute contributory negligence on the part of plaintiff, it is error to charge that, if the jury "further believe that he was injured by (defendant's) gross negligence, if any, as hereinbefore explained; that such negligence, if any, was the immediate, proximate cause of said injury,—then you will find for plaintiff," since the charge involves the repudiated doctrine of comparative negligence.

2. Error in the general charge is not cured by giving a requested charge which contradicts it, but the erroneous charge should be withdrawn.

Error to court of civil appeals of Fourth supreme judicial district.

Action by Sam H. Rodgers, by next friend, against the Missouri, Kansas & Texas Railway Company of Texas. From a judgment of the court of civil appeals (35 S. W. 412) affirming a judgment in favor of plaintiff, defendant brings error. Reversed.

Stanley, Spoons & Thompson, for plaintiff in error. Smith & Wear, for defendant in error.

BROWN, J. Sam H. Rodgers, by his next friend, sued the railway company to recover damages for personal injuries inflicted upon him by the alleged negligence of its servants in operating one of its hand or push cars. Upon a trial before a jury he recovered the sum of \$5,000, from which the railway company appealed, and which judgment was affirmed by the court of civil appeals. The conclusions of fact, as found by the court of civil appeals, are as follows: "The appellee, at the time of the accident, a boy between twelve and thirteen years old, of immature judgment and discretion, was negligently permitted by appellant's servants, while operating on its road one of its hand cars, to board said hand car while in motion, which was dangerous to a child of appellee's immature discretion, which danger was known to appellant's servants in charge of and operating the car; and afterwards, through the careless and negligent acts of appellant's servants in operating the car, the appellee was, without any contributory negligence on his part, thrown upon the track, and run over by the car, whereby he sustained serious and permanent injuries, to his damage in the sum of \$5,000." The trial court charged the jury as follows: "If you believe that said plaintiff was ordered to keep off of said car, but that he failed to heed said order, and did enter said car, and was thereby injured

as alleged in the petition, and that he had sufficient intelligence to comprehend the dangers incident to his boarding the car; or shall further believe that he was injured by the gross negligence, if any, as hereinbefore explained; that such negligence, if any, was the immediate proximate cause of said injury,—then you will find for the plaintiff." The plaintiff in error assigned error upon this charge in the court of civil appeals, which was overruled, and the action of the court in giving the charge and of the court of civil appeals in refusing to sustain the assignment of error is presented in the petition of the plaintiff in error as a ground for a reversal of the judgments of said courts. The trial court, in its charge, defined gross negligence as follows: "Gross negligence, as the words are used in this charge, means the omission of that care which even inattentive and thoughtless men never fail to take of their own property." The effect of the charge of the court first copied above is to tell the jury that, if the plaintiff was guilty of negligence which proximately contributed to his injury, yet, if the employees of the defendant were guilty of gross negligence, which caused the injury, the plaintiff would be entitled to recover judgment for such injury. The facts stated in the charge would unquestionably constitute contributory negligence on the part of plaintiff, and, unless the doctrine of comparative negligence obtains, this charge must be held incorrect. Our courts have expressly repudiated the doctrine of comparative negligence whereby a party who is guilty of negligence himself is permitted to recover of another party because the defendant is guilty of a greater degree of negligence. *McDonald v. Railway Co.*, 86 Tex. 1, 22 S. W. 939. In the case last cited this identical question was before the court, and it was then said: "The question, then, is whether the ordinary negligence of the plaintiff will defeat a recovery if the negligence of the defendant contributing to the injury is gross. In *Railway Co. v. Garcia*, 75 Tex. 591, 13 S. W. 223, it is said: 'The effect of contributory negligence on plaintiff's right to recover has been recognized in all cases passed upon by this court in which it was involved, and the rule fixing liability or denying it on the basis of comparative negligence has been condemned; but it seems to us that the doctrine here invoked on behalf of the plaintiff is the rule of comparative negligence in its simplest form.' That rule is defined by *Sherman & Redfield* as follows: 'The true rule of comparative negligence must be that, if the defendant has been guilty of gross negligence, and the plaintiff guilty only of such ordinary negligence as, when compared with the negligence of the defendant, might be called slight, though not slight when considered by itself alone, the plaintiff may recover.' * * * The doctrine that any de-

gree of negligence which may be gross on the part of the defendant will enable a plaintiff to recover, notwithstanding his own negligence, is unsound in principle." The doctrine here laid down is clearly and fully applicable to the charge under consideration. It is the statement of comparative negligence in its simplest form, and is, therefore, contrary to the rules of law established by the decisions of this court.

It is urged on the part of the defendant in error that if the foregoing charge be considered erroneous, it was corrected by the giving of the following charge, asked by the defendant: "You are instructed that, even though you should, under other instructions given herein, find that the defendant was negligent, still, if you believe from the evidence that the plaintiff was also negligent, and that his negligence contributed so proximately and directly to the production of his injuries that but for it he would not have been hurt, you will find for the defendant, unless you believe from the evidence that plaintiff was at the time a youth of immature judgment and discretion, and that on account of such immaturity of judgment and discretion he was unable to understand the nature and extent of the peril to which he was exposed; in which event, in order to prevent a recovery by him on the ground of his contributory negligence, you must believe from the evidence that he failed to exercise that degree of care that persons of his age and maturity of judgment and discretion would ordinarily use under such circumstances." The special charge given does not embrace the same proposition as that given by the court hereinbefore quoted, and it could not have been understood by the jury as intended to correct that charge. This is made more evident by other portions of the charge of the court, but, if it were true that the special charge asked by the defendant and given by the court asserted a proposition diametrically opposed to that stated in the charge complained of, this would not have cured the error. The giving of a contradictory charge does not correct the error which the court may have committed in the general charge given. The proper way to effect such correction would be to withdraw the erroneous charge, and substitute that which was correct. When the two charges given are in direct conflict, the jury is certainly left without proper direction upon the issue. How could a jury determine as to which of the charges should govern them in finding their verdict? *Railway Co. v. Robinson*, 73 Tex. 277, 11 S. W. 327; *Railway Co. v. Welch*, 86 Tex. 203, 24 S. W. 390. For the error committed by the court in the charge given by it as quoted above, this case must be reversed.

Other errors are assigned in the application for writ of error based upon the ruling of the district court in sustaining exceptions, excluding evidence, and refusing spe-

cial charges, asked by the defendant, which raised these questions: (1) That it devolved upon the plaintiff in this case to prove that the employés of the defendant had authority to invite or to permit him to ride upon the push car; (2) that, if the rules prescribed by the railway company forbade its employés to permit persons to ride upon such cars, then the plaintiff could not recover, although he was ignorant of such rules, unless the permission was given by some officer or employé who had the right to direct the use of the car for that purpose. We do not deem it necessary in this case to discuss particularly the assignments of error upon which these propositions are based, but, in view of another trial, we think it proper that we should express our views of the law which ought to govern the court in reference to this case as developed by the facts. Whether or not the plaintiff was of immature years, and so wanting in intelligence that he could not appreciate the danger of getting upon the car, is a question of fact to be found by the jury under the evidence that may be adduced on another trial. *Cook v. Navigation Co.*, 76 Tex. 353, 13 S. W. 475; *Evansich v. Railway Co.*, 57 Tex. 128. Upon this issue of fact the defendant has the right to have the law given to the jury as applicable to both phases of the case. If the jury should find that the plaintiff, by reason of his age and want of intelligence, was not capable of appreciating the danger of getting upon the car, and that the employés of the railway company invited or permitted him to get upon it, and if it should appear that to ride upon such a car was dangerous for a child of his age, and, further, that the act of getting upon the same under the circumstances was such as might have been done by a child of his age and intelligence, the defendant would be liable to him for the injuries inflicted, although its employés may have been forbidden to permit any one to ride upon said car. Disobedience of orders by its servants in such case would not be available to the defendant as a defense to the action. *Cook v. Navigation Co.*, cited above. If, however, the jury should find that the plaintiff had such a degree of intelligence that he could and should have appreciated the danger of his act, then the burden would be upon him to prove that the person or persons who invited or permitted him to ride upon the car had authority so to do; and the rules of the company forbidding employés to permit persons to ride upon such cars would be admissible upon this issue, whether the plaintiff knew of their existence or not. If the proof should show that the employés had such authority, this would only affect the degree of care due to plaintiff under the circumstances, but would not relieve him of the consequences of his own negligence, if any, in boarding the car. If the employés had no such authority, then the defendant

cannot be held liable for the injuries received by the plaintiff, although such employés may have been guilty of negligence. *Railway Co. v. Cock*, 68 Tex. 713, 5 S. W. 635; *Railway Co. v. Dawkins*, 77 Tex. 228, 13 S. W. 982. For the error of the district court in giving the charge complained of and before quoted, and the error of the court of civil appeals in not sustaining the assignment of errors predicated thereon, the judgments of the district court and court of civil appeals are reversed, and this cause is remanded.

BARRETT v. FEATHERSTONE et al.

(Supreme Court of Texas. May 25, 1906.)

EVIDENCE—ADMISSIONS IN PLEADINGS—FRAUDULENT REPRESENTATIONS.

1. A pleading which the law requires to be, and which is, verified by the party filing it, and which has been superseded by amendment, is admissible in evidence against him. 35 S. W. 11, affirmed.

2. Where the evidence makes an issue of false representations, it is not error to charge that "by false or fraudulent misrepresentations," as used in the main charge, is meant the false or fraudulent misrepresentation of a material ascertainable fact, and not merely a statement of opinion, judgment, probability, or expectancy." 35 S. W. 11, affirmed.

Certificate of dissent from court of civil appeals of Second supreme judicial district.

Action by W. H. Featherstone and others against L. C. Barrett. There was a judgment of the court of civil appeals affirming a judgment for plaintiffs (35 S. W. 11), and the case was transferred to the supreme court on certificate of dissent. Affirmed.

Stine, Chesnutt & Hurt and Hogsett & Orrick, for appellant. Templeton & Patton, for appellees.

GAINES, C. J. W. H. Featherstone and others recovered a judgment in the district court against L. C. Barrett upon a promissory note, and obtained a decree directing a sale of a tract of land which had been mortgaged by defendant to secure the payment of the debt. The defendant appealed to the court of civil appeals of the Second district, where the judgment was affirmed (35 S. W. 11). One of the justices of that court having dissented, the points of dissent have been certified to this court for our determination. With the aid of the opinion of the court and of the dissenting opinion, which ably present the two sides of the controversy, we have carefully considered the case, and have arrived at the result that we concur in the conclusions of the majority of the court upon the questions presented by the certificate of dissent, and are of opinion that the judgment should stand affirmed. The opinion of the court is exhaustive and satisfactory, and renders any additional remarks from us unnecessary. Our conclusions will be certified to the court of civil appeals of the Second district.

WALKER et al. v. LORING.

(Supreme Court of Texas. June 11, 1896.)

FRAUDULENT CONVEYANCES—WHAT CONSTITUTES—
SOLVENCY OF GRANTOR.

1. Under Rev. St. 1895, art. 2545, providing that all voluntary conveyances not based on a valuable consideration shall be void as to existing creditors of the grantor, unless it appears that such grantor was possessed of property within the state, subject to exemption, sufficient to pay his existing debts, a voluntary conveyance is void, though the grantor has sufficient property to pay his debts, where such property is concealed in the name of third persons.

2. In determining whether a grantor at the time of a voluntary conveyance had sufficient property subject to execution to pay his debts, the equity of redemption in property "heavily incumbered" may be considered at the value it would probably bring if subject to forced sale.

3. It is not necessary that the property of the grantor be "so circumstanced that neither delay, difficulty, nor expense need be incurred before it can be made available to creditors," to enable it to be considered in determining the grantor's solvency.

34 S. W. 405, reversed.

Error to court of civil appeals of Fourth supreme judicial district.

Action by Walker & Lybrook against J. W. Collier and another. There was a judgment of the court of civil appeals (34 S. W. 405) affirming a judgment for defendant Anna C. Loring, and plaintiffs and P. J. Willis & Bro., interveners, bring error. Reversed.

Rudolph Runge and R. C. Walker, for plaintiffs in error. A. W. Moursund and Geo. C. Altgelt, for defendant in error.

GAINES, C. J. Walker & Lybrook brought this suit against J. W. Collier, as administrator of the estate of James E. Ranck, deceased, to establish a claim against the estate, and also to fix a judgment lien upon certain lands, once the property of the intestate, claimed by the defendant in error, Anna C. Loring. They also alleged that after their debt accrued Ranck conveyed the lands in controversy to the defendant in error in fraud of his creditors. P. J. Willis & Bro. intervened in the suit, alleging that they held an established claim against the estate, that the conveyances to the defendant in error were fraudulent, but denied that the plaintiffs had secured a lien upon the lands in controversy. There was another intervener, but, since the judgment of the trial court in regard to her claim has not been appealed from, it need not be noticed. The case having been submitted to a jury, a verdict was rendered establishing the claim of the plaintiffs as an ordinary debt against the estate, and finding that the conveyances to Anna C. Loring were valid. A judgment was rendered in accordance with the verdict. The plaintiffs and interveners P. J. Willis & Bro. appealed to the court of civil appeals, where the judgment was affirmed. To reverse the judgment of the trial court and that of the court

of civil appeals the appellants have sought and obtained a writ of error from this court.

The conveyances which were sought to be set aside were made on the — day of August, 1887, and the defendant in error, in her testimony, admitted that they were voluntary; that is, that she paid no consideration therefor. On the 19th day of November, 1885, the plaintiffs recovered a judgment against Ranck for \$1,349.13 in the district court of Calhoun county. Soon thereafter execution issued upon this judgment to that county, but was returned "No property found." It appears, however, that Ranck lived in Mason county, and that most of his property was within the latter county. No part of this judgment was ever paid. At the time of the conveyances in question, Ranck also owed interveners P. J. Willis & Bro. about the sum of \$12,000. Neither was this debt paid. It had been established as a claim against his estate, and then amounted to about \$20,000. At the time of the trial the administrator, from the proceeds of the sale of certain property which had been mortgaged by Ranck to secure the debt, had reduced the claim to \$8,000 or \$9,000. The estate then owned assets not exceeding in value \$4,000. There was testimony tending to show that at the time of the conveyances to the defendant in error, Ranck had assets amounting in value to \$75,000 or more. Some of these were very largely incumbered. On the other hand, there was testimony tending to prove that none of the property owned by him was held in his own name. This is strongly corroborated by the fact that the plaintiffs had a judgment against him, no part of which had been satisfied at the time of his death, in 1892. Such being the state of the evidence, the court charged the jury as follows: "You are instructed that any gift or conveyance of property made by a debtor would be void as to prior creditors unless it appears that such debtor was at the time possessed of property within this state, subject to execution, sufficient to pay his existing debts. The main question for you to determine is, was James E. Ranck solvent or insolvent on August 13, 1887? That is, was Ranck, at said time, possessed of property in this state (other than the four tracts of land mentioned), subject to execution, sufficient to pay his then existing debts? If he owned other property at said time within this state, subject to execution, sufficient to pay his then existing debts, then he had the right to have said lands conveyed to defendant Anna C. Loring; and if, from a preponderance of the evidence, you find said Ranck on August 13, 1887, was possessed of property in this state subject to execution sufficient to pay his debts, then you should find for defendant Anna C. Loring. But if you find that on said August 13, 1887, said Ranck was not possessed of property within this state subject to execution, sufficient to pay his then existing debts, you should find for plaintiffs and interveners." The plaintiffs and interveners, on the other hand, requested the court to give the following special instruc-

tion, which was refused: "The plaintiffs allege in their petition that since 1870 James E. Ranck, up to the time of his death, held no property within this state, subject to execution, out of which to make their debt; but that, if he had any property during said time, he kept it concealed, and caused the legal title to be made and held by other persons, for the purpose of defrauding plaintiffs, and to evade the payment of their just claim; and you are instructed that a gift is void when the donor has not sufficient property, subject to execution, in his own name, unconcealed, to pay his existing debts." Errors have been assigned in the court of civil appeals and in this court both upon the giving of so much of the charge quoted as states the question to be determined and upon the refusal to give the special instruction requested.

We are of the opinion, that the court erred in both particulars. Our statute upon this subject reads as follows: "Every gift, conveyance, assignment, transfer or charge made by a debtor, which is not upon consideration deemed valuable in law, shall be void as to prior creditors unless it appears that such debtor was then possessed of property within this state subject to execution sufficient to pay his existing debts; but such gift, conveyance, assignment, transfer or charge shall not on that account merely be void as to a prior creditor, because voluntary it shall not for that cause be decreed to be void as to subsequent creditors or purchasers." Rev. St. 1895, art. 2545. The court's ruling can only be sustained by strict adherence to the letter of the statute. In our state, property which had been fraudulently conveyed may be sold under execution without first bringing a suit to set aside the conveyance. So an equitable title is subject to be levied upon and sold by the sheriff. It follows that if the statute is to receive a literal interpretation a debtor who reserves property not exempt from forced sale of sufficient value to pay his debts, although the apparent title may be in the name of another, may convey the remainder for a consideration not deemed valuable in law and pass the title thereto. A moment's reflection is sufficient to suggest the consequences to which such a construction would lead. The purpose of the statute is the protection of creditors against voluntary conveyances by their debtors. It is based upon the maxim that a man must be just before he is generous. It denounces a voluntary conveyance as fraudulent and void against existing creditors with one exception, and that is that he still retains sufficient property from which the creditors may make their debts by due process of law. It does not mean that the conveyance is valid if the property, at a fair market value, is sufficient to cover the debts. Nor does it mean that it is enough merely that the property, if discovered, is subject to levy and sale. But it means that he must retain property of which he has the open and visible ownership of such value that when subjected to forced sale it will yield a sufficient sum to pay

all the existing debts as well as the taxable costs of their collection. What protection is the statute to a creditor if the debtor may conceal a part of his property and give away the remainder? What advantage accrues to him from his debtor's ownership of property, if he is unable to discover it? We think, therefore, that the words "subject to execution" mean not only that the property should be such as may be legally levied upon and sold by the sheriff, but that it should also be such as is actually capable of being levied upon. It follows from what we have said that, in our opinion, the test of solvency or insolvency of the grantor was not that by which the defendant in error's title was to be determined; and that, in so far as Ranck owned property at the time of the conveyances in controversy, his title to which was concealed from the creditors, it cannot be taken into the account in determining whether he retained a sufficiency of assets to meet the just demands of his creditors. The decisions of other courts accord with these views. In *Blake v. Sawin*, 10 Allen, 340, the court holds that a debtor who has concealed his property in order to defraud his creditors is to be regarded as insolvent, although he may have sufficient assets to pay his debts. See, also, *Eddy v. Baldwin*, 32 Mo. 369; *Church v. Chapin*, 35 Vt. 223; *Worthington v. Bullitt*, 6 Md. 172; *Levering v. Norvell*, 9 Baxt. 176. The charge, the refusal of which is complained of in the second assignment in the court of civil appeals, should not have been given. It was not proper to instruct the jury that the debtor's property, which was to be estimated in determining his solvency, "must not be heavily incumbered." Property may be heavily incumbered, and yet the equity of redemption may be valuable even at a forced sale. It would have been proper to tell the jury that the property subject to mortgage was only to be estimated at what the equity of redemption would probably yield when subjected to forced sale.

Special charge No. 2 was also properly refused. It was not proper to tell the jury that such property must be "so circumstanced that neither delay nor difficulty nor expense need be incurred before it can be made available to creditors." Delay and expense are necessary incidents of every effort to enforce the collection of a debt by process of law.

The other assignments presented in this court are upon matters of fact, and will not be discussed. The judgment is reversed, and the cause remanded.

CHOATE v. SAN ANTONIO & A. P. RY. CO.

(Supreme Court of Texas. June 11, 1896.)

CARRIERS—INJURIES TO PASSENGERS—EVIDENCE—SUFFICIENCY.

Plaintiff, a passenger upon defendant's train, was injured while passing from one coach to another as the train was, as he believed, about to stop for a station other than that of his destination, by being thrown from the platform of the coach by a sudden jerking motion.

There was no evidence that the jerk was not such as is usual in stopping and starting trains under ordinary circumstances. *Held*, that the evidence was, as a matter of law, insufficient to warrant a recovery. 35 S. W. 180, affirmed.

Error to court of civil appeals, Fourth supreme judicial district.

Action by F. B. Choate against the San Antonio & Aransas Pass Railway Company. There was a judgment of the court of civil appeals (35 S. W. 180) reversing a judgment for plaintiff, and plaintiff brings error. Affirmed.

Mayfield, Ball & Burney, for plaintiff in error. Proctors, for defendant in error.

BROWN, J. The conclusions of fact, as found by the court of civil appeals, are as follows: "Plaintiff testified upon this trial, as to how the accident happened, as follows: 'I got on the San Antonio & Aransas Pass Railroad on March 15th at Runge, to go to San Antonio. I paid my passage. I first got on the ladies' car, then I changed to the smoker. I was crippled at the time. I went back into the smoker, and left my crutch in the ladies' car. It is called the "ladies' car." It was the first-class car. It was at Elmendorf that I got hurt. I was sitting with Jim Gilleland and Davis Wade. I think that Davis Wade and I were sitting on the same seat, and Jim Gilleland was in front. I told them, when the train stopped long enough I was going to get my crutch. It didn't hardly stop when I undertook to go back and was thrown off. The train just run up and stopped with a jerk, and started with a jerk. I was on the platform, trying to go through to the other car. Just about when the train stopped I started from where I was seated in the smoker to go back to the ladies' car. The train started with a jerk, and threw me off. I was caught under the car wheels, and it cut off my toes on one foot. I don't know what did occur after that, positively. It all seemed like a dream. I cannot say anything positively about it. I do not remember being at a hotel, store, or anything. I really do not know what I did. I know what they told me afterwards. My first recollection was, I was in San Antonio, at the hotel, and Dr. Graves was working on me, on my left foot, and asked me if I didn't want a toddy, and I told him, "Yes." Some one objected, but he said to let me have it. That was the first I remembered after I got hurt. Runge is in Karnes county. There is where I got on the railroad. The railroad runs to San Antonio from there. From Runge to San Antonio it passes through the counties of Wilson, Bexar, and Karnes. I paid \$2.15 fare going from Runge to San Antonio. It is 72 miles. I paid my full fare and Mr. Gilleland's full fare. When I was thrown from the car, I was on the platform. The jerk is what threw me off the platform. The train had not stopped. They were just ready to stop, and they did not hardly stop, and started with a jerk again. It was a sudden jerk. I

lost my balance at that jerk, and fell off the platform. I tried to catch myself when that sudden jerk came, of course, but could not. I don't know what prevented me from catching on. I was crippled at the time, and was going back for my crutch. The reason I went back was, I told these boys whenever the train stopped I was going back for my crutch, and did not want to go until it did stop. At the time of this jerk I was thrown off the platform. The train should have stopped, and I thought it had stopped; and just about the time I got to the door it started with a jerk, and threw me off.' A deposition of the plaintiff that had been taken in the cause was read by defendant. In this plaintiff stated that when the train arrived at Elmendorf he was in the smoking car, and went out on the platform with the intention of getting off, but did not do so, as the train stopped with a jerk, throwing him against the hand rail, and, stopping only an instant, started again with equal suddenness, throwing him off, and that the draught created by the moving train threw him under it. In this deposition plaintiff testified to matters that occurred while at Elmendorf, and before he went to San Antonio, which deposition is irreconcilable with his not knowing what took place at Elmendorf. Defendant read the depositions of several witnesses who reside in Bexar county, and who were unimpeached, who testified that at Elmendorf, after the accident, and before he went to San Antonio for treatment, plaintiff stated to them, respectively, that he had stepped off the train when it stopped at the depot, and that when he went to step back he missed his step, or slipped, and the wheel caught his foot. One of his own witnesses testified to a similar statement made by plaintiff to him at the same time. These witnesses are not contradicted in any way. It was shown, and not contradicted, that the wheel of the car was two feet inside of the outer edge of the lower step on the platform, and that the platform had iron railings thirty inches high, and the space between the cars, when moving, did not exceed seven inches, and the height of the step was two feet. There was no evidence that plaintiff was bruised or hurt in any way, except the injury to his foot. The testimony was conflicting as to plaintiff being drunk on that occasion." The court of civil appeals announced its conclusions of law upon the facts stated in this language: "We are of opinion from what has been said, and especially when the undisputed admissions of plaintiff as to the manner of the accident, and plaintiff's inconsistent statements as a witness, are considered, that a jury is not warranted in finding plaintiff's injury came about as alleged. The testimony, in our judgment, is clearly opposed to such a finding. We are therefore unable to sanction the verdict. In the event of another trial the court should, upon the same testimony, direct a verdict for the defendant. Reversed and remanded."

F. B. Choate has applied to this court for a writ of error upon the ground that the decision of the court of civil appeals practically settles his case, and under the direction given by that court to the district court that upon another trial, with the same evidence before it, the district judge will instruct a verdict for the defendant, the jurisdiction of this court attaches, because such instruction practically settles the case upon the facts as shown in the record. If we find that the court of civil appeals is correct in this conclusion, it will then be our duty to enter judgment against the plaintiff, F. B. Choate.

The only question presented by this writ of error is, did the court of civil appeals commit an error in directing the district court as follows: "In the event of another trial, the court should, upon the same testimony, direct a verdict for the defendant"? Neither the conflict in the evidence nor the contradictions in the plaintiff's statement would justify such a direction on the part of the court of civil appeals, nor would it authorize the trial court, without such direction, to so direct the jury. If, however, the evidence introduced, as shown by the record, when considered in the most favorable light to the plaintiff, would not be sufficient to authorize the jury to find a verdict for the plaintiff, then the direction of the court of civil appeals must be sustained. *Grinnan v. Dean*, 62 Tex. 220; *Williams v. Davidson*, 43 Tex. 39; *Supreme Council v. Anderson*, 61 Tex. 296. While, under some circumstances, the happening of an accident to a passenger from an unexplained cause would be sufficient to authorize the jury to infer that the defendant was guilty of negligence, this is not a case in which that rule applies. *Railway Co. v. Overall*, 82 Tex. 247, 18 S. W. 142. In the case cited the plaintiff was a passenger upon defendant's train, standing upon the platform with his hand resting upon the jamb of the door. The door was in some unexplained way shut, and caught his hand, injuring it. The door was securely fastened, but capable of being suddenly closed, and was likely to be closed by either passengers or employes of the company. It was claimed on the part of the plaintiff that a brakeman closed the door upon his hand, which, however, the brakeman denied. It was held in that case that the proof of the fact of injury in the manner stated was not sufficient to establish the negligence of the defendant. The plaintiff in this case was a passenger upon the defendant's train, and had the legal right, if necessary for his convenience, or for any purpose, to pass from one car to the other while the train was in motion; but in doing so he assumed the risk of all accidents not arising from any negligence of the defendant. *Stewart v. Railroad Co.*, 146 Mass. 605, 16 N. E. 466. In the case last cited the plaintiff was a passenger upon

the defendant's train, and, by direction of the conductor, was passing from one coach to another, when he met a woman coming towards him. He turned to let her pass, when the train gave a lurch, and threw him off his balance, whereby he was thrown from the platform and hurt. The court said: "In going from one car to another upon a rapidly moving train, merely for his own convenience, plaintiff took upon himself the risk of all accidents not arising from any negligence of the defendant. While crossing over one of the platforms between the cars, plaintiff came in collision with another passenger crossing the platform in an opposite direction, and he was thrown from the platform. There is nothing to show that the lurch was extraordinary, or anything more than a usual and inevitable incident of a swiftly-moving train. The evidence fails to show any negligence of the defendant which caused the accident, and the superior court therefore rightly directed a verdict for the defendant." The most favorable view of the facts in this case for the plaintiff is that, being upon the train as a passenger, and believing that the train was about to stop at a station, he undertook to pass from the coach in which he was seated to another, for the purpose of procuring his crutch. He reached the door of the coach that he was leaving just as the train stopped, and then it started with a jerk as he got upon the platform, by which he was thrown off his balance and fell to the ground, thereby in some manner getting his foot crushed under the wheels of the car. Another witness who was seated in the same coach with him stated that he at the same time started to alight from the coach at the opposite end, when there was such a jerk given in starting the train as came near throwing him from the steps. The place at which the plaintiff was injured was not the point of destination for him as a passenger, and the railroad company had no reason to anticipate that he would attempt to get off the train there. Nor did it have any notice that he would attempt at that place, or at any time, to pass from one coach to another. It was under no obligation to him to stop at that station for any given time. As said in the case of *Stewart v. Railroad Co.*, supra, there is no evidence to show that the "jerk," as it is called by the witnesses, was anything unusual in stopping and starting a train under ordinary circumstances; and the evidence wholly fails to show that the defendant was guilty of any negligence, either in stopping or starting its train, on the occasion of plaintiff's injury. The plaintiff's right of recovery depended upon the fact that the motion of the train which caused the injury was not such as is ordinarily incident to the movement of the train on stopping and starting. We therefore conclude that the evidence, viewed in its

most favorable light in favor of the plaintiff, would not justify a jury in finding that the defendant was, upon the occasion, guilty of any negligence, and that, therefore, the court of civil appeals rightly held that under the same evidence the trial court ought to instruct the jury for the defendant. It is therefore ordered that the plaintiff take nothing by his suit, and that the defendant go hence without day, and recover of the plaintiff and his sureties upon his writ of error bond all costs in this behalf expended, and that this judgment be certified to the district court of Karnes county for observance.

LEACHMAN v. CAPPS et al.

(Supreme Court of Texas. June 15, 1896.)

EXECUTION—INJUNCTION TO STAY PROCEEDINGS—
JURISDICTION—LEVY ON HOMESTEAD
PROPERTY.

1. Sayles' Civ. St. art. 2880, providing that writs of injunction to stay proceedings on execution shall be returnable to and triable in the court where the judgment was rendered, does not apply where the injunction is asked on the ground that the property levied on was the homestead of the execution debtor. 35 S. W. 397, reversed.

2. The jurisdiction of a court other than the one in which a judgment was rendered to grant an injunction to stay proceedings on execution, on the ground that the property levied on was the homestead of the debtor, is not avoided by the allegation, as a second cause of action, that the execution was void for irregularities on its face, though the court has no jurisdiction to grant an injunction on such second ground, under Sayles' Civ. St. art. 2880.

Error to court of civil appeals of Fourth supreme judicial district.

Application by George S. Leachman for writ of injunction to restrain the sale of property belonging to the applicant, under an execution on the judgment in favor of Capps & Cantey. An order granting perpetual injunction having been reversed by the court of civil appeals, plaintiff brings error. Reversed.

For former report, see 35 S. W. 397.

John Bookhout, for plaintiff in error. Harris & Knight, for defendants in error.

GAINES, C. J. This suit was filed by plaintiff in error in the district court of Dallas county against the defendants in error and the sheriff of that county, to enjoin the sale of certain property of the plaintiff under an execution issued out of the district court of Tarrant county upon a judgment rendered in that court in favor of the defendants in error against the plaintiff in error. It was claimed in the petition that the execution was void, because the party whose property the officer was commanded to seize and sell was not named in the writ, and it was also alleged that the real estate levied upon was the homestead of the plaintiff in error, and that he was the head of a family, and that, therefore, it was not subject to

forced sale. Two exceptions were filed to the petition. The first was as to so much thereof as sought to restrain the sale of the real estate, for the reason, as alleged, that it was the homestead of the plaintiff. It was claimed in the exception that, as to that matter, the plaintiff had "an ample remedy at law." The second was upon the ground that the attack upon the execution was collateral, and that it could only be made in the court from which the writ issued. The court, as appears from its judgment, overruled the first exception, but did not pass upon the second, and upon the trial entered a decree enjoining the plaintiffs in execution and the sheriff from selling the property claimed as a homestead. It is shown, however, by the statement of facts, that during the progress of the trial, and after the execution was offered in evidence, the court held it absolutely void, and refused to proceed further with the case, although the plaintiff insisted upon his right to show that the real estate levied upon was his homestead. Neither the execution nor the sale of any other property was enjoined. The defendants appealed to the court of civil appeals, where, of its own motion, that court held that the district court of Dallas county was without jurisdiction to try the cause, and therefore reversed the judgment and dismissed the suit.

We are of the opinion that the court of civil appeals erred in its ruling. If it be conceded that, by reason of the statute which declares that "writs of injunction granted to stay proceedings in a suit, or execution on a judgment, shall be returnable to and tried in the court where such suit is pending, or such judgment was rendered," the district court of Dallas county was deprived of jurisdiction to hear and determine the subject-matter of the controversy in so far as the plaintiff sought to enjoin the execution of the writ, we still think that it would have been error to dismiss the suit. In so far as the plaintiff sought to restrain the sale of the property claimed by him to be the homestead of himself and family, we think the district court of Dallas county had jurisdiction. *Van Ratcliff v. Call*, 72 Tex. 491, 10 S. W. 578; *Seligson v. Collins*, 64 Tex. 314; *Winnie v. Grayson*, 3 Tex. 429. Therefore, the court had jurisdiction to try the issue of homestead, or not, and hence was not without power to proceed to judgment in the case. If without power to restrain the execution, because issued from another court, then an exception to so much of the petition as sought that relief should have been sustained, or the court should of its own motion have declined to try the issue as to the validity of the writ, and should have dismissed so much of the cause. But, when a petition states two causes of action, the court is not deprived of jurisdiction over one, because it may have no jurisdiction over the other. We conclude, therefore, that the court

of civil appeals should have determined the appeal upon its merits; and that, when they decided that the trial court was without jurisdiction to try the issue upon which the statement of facts shows it was determined, the proper course, under their view of the law, was to reverse the judgment, and remand the cause. We do not wish, however, to be understood as holding that the district court was without jurisdiction over the subject-matter of the validity of the execution, and that the defendants, by going to trial without insisting upon a ruling upon their exception to the jurisdiction of the court, did not waive their right to have the suit brought in Tarrant county. We do not find it necessary to pass upon that question upon this writ of error. The judgment of the court of civil appeals is reversed, and, since the merits of the appeal have not been passed upon, the cause will be remanded to that court for the determination of the questions there presented.

HOUSE et al. v. ROBERTSON.

(Supreme Court of Texas. June 15, 1896.)

EXECUTION—IRREGULARITIES IN SALE—INADEQUACY OF PRICE—PURCHASER'S RIGHT TO REIMBURSEMENT—RENTS AND PROFITS.

1. Where the purchaser at execution sale purchased for \$25 lands admitted to be worth at least \$800, there is such a gross inadequacy of price as to warrant setting aside the sale for irregularity, when it appears that the execution was prematurely issued, and the description of the property levied on was insufficient. 34 S. W. 640, reversed.

2. Upon setting aside a sale under execution, the purchaser, if he demands reimbursement, should account for the rents and profits of the land while the same was in his possession and control.

Error to court of civil appeals, Fourth supreme judicial district.

Action of trespass to try title, brought by T. W. House and others against J. M. Robertson. A judgment for defendant having been affirmed by the court of civil appeals, plaintiffs bring error. Reversed.

For former report, see 34 S. W. 640.

Z. T. Fulmore and S. R. Caruth, for plaintiffs in error. James A. Gillette and James M. Robertson, for defendant in error.

BROWN, J. The plaintiffs in error brought an action in the district court of Bosque county against J. M. Robertson and others to recover a tract of land situated in that county, being one-third of a league, but in which there is an excess, making the real amount embraced in the survey 1,600 acres. The petition first sets out the cause of action as in an ordinary action of trespass to try title, and then proceeds to set up the title of plaintiffs to the land, and the claim of title under which the defendants hold, asking that the sale under execution as hereafter stated be set aside. A severance between J.

M. Robertson and the other defendants was granted, and Robertson disclaimed title to 1,000 acres of the land. The facts found by the court of civil appeals are as follows: It was admitted that appellants had a perfect title to the land in controversy up to the time of the execution sale on October 7, 1884, and that whatsoever title Robertson had was by virtue of the sheriff's sale of the land that took place on the above date. On the 22d day of May, 1884, the supreme court of Texas rendered a judgment dismissing a writ of error in a case,—House v. Whitworth,—and against the plaintiffs in error for all costs of the suit; and on the 19th day of June, before the adjournment of that term of the court, the clerk of the supreme court issued an execution, accompanied with a bill of costs, addressed to the sheriff of Bosque county, who executed it by levying upon a tract of land in the said county, the levy being indorsed upon the execution as follows: "Came to hand on the 23rd day of June, 1884, and executed on the 20th day of August, 1884, by seizing and levying upon a certain tract of land in Bosque county, Texas, one-third of a league, beginning at the N. E. corner of a survey in name of Urley Hunter from which a Spanish oak bears south 20 degrees west 19 varas marked J. another bears 67 west 15 varas marked Y. thence north 60 east 2834 vrs to corner of an elm bears north 37 W. P vrs marked T. a walnut bears S. 70 E. 20 vrs marked N. thence south 30 E. 2940 vrs to corner from which a live oak bears bars S. 75 east 24 vrs marked T. another bears south 77 vrs marked K., thence south 60 west 2834 vrs to corner from which a Spanish oak bears S. 80 degrees east 19 vrs marked H. Another bears south 34 E. 21 vrs marked L, thence N. 80 W. 130 vrs branches 320 vrs a creek 2940 vrs to the place of beginning." Upon the execution was indorsed a return that the land was advertised for sale as required by law, and that on the 7th day of October, 1884,—being the first Tuesday of that month,—the land was sold at public sale at the courthouse door in Meridian to J. M. Robertson for the sum of \$25, which he paid. The sheriff executed to Robertson a deed in which the land was described as beginning at the northeast corner of a survey in the name of Wiley Hunter, otherwise describing the land as in the levy. In addition to the findings made by the court of civil appeals, we find in the record the undisputed evidence of the defendant Robertson to be that the land, at the time of the sale, was worth to him about 50 cents an acre, and that the survey actually contained something over 1,600 acres; that in 1884 or 1885 he leased the land to one Kingsbery, who built some sheep sheds and pens on it, which remained there until about three or four years before the trial, which was in 1895, when one Goodwin, the tenant of J. M. Robertson, took possession of the land for Robertson, and held it until the trial. There was no offer in the pleadings, nor shown in

the testimony, on the part of the plaintiffs in the court below, to refund to the defendant the money that he had paid in purchasing the land, and there is no proof showing what was the value of the use and occupation of the land during the time that Robertson had possession of it. There was a trial before a jury in the district court, which resulted in a verdict for the defendants, and judgment entered accordingly, which judgment was affirmed by the court of civil appeals.

The plaintiffs in error claim that the sale under which defendant Robertson seeks to hold the land is void because (1) the execution under which the sale was made, having been issued before the adjournment of the court for the term at which the judgment was rendered, is absolutely void; (2) because the levy of the execution upon the land, as indorsed upon it, was void for uncertainty in the description of the land, and for other reasons. They also claim that, if the sale is not void, it is voidable in this proceeding, and that the deed should be set aside because of the irregularities which occurred in issuing and levying the execution, and the inadequacy of the price at which the land was sold to the defendant.

The court of civil appeals rightly held that the execution, although prematurely issued, was not void, but that the issuance before the adjournment of the court at that term was an irregularity, and also that the levy, as indorsed upon the execution, although defective, was not void, and that for these reasons the sale made by virtue of the execution and levy was not void as claimed by the plaintiffs. It is unnecessary for us to discuss these questions, since they are properly disposed of by the court of civil appeals in an able opinion, well supported by authorities.

The plaintiffs in the court below asked that special instructions be given to the jury, which would have submitted to them the issue as to whether the irregularities of the issuance and levy of the execution, taken in connection with the inadequacy of price, would justify the setting aside of the sheriff's sale, and the deed under which Robertson claimed, which instructions were refused by the court, and the issue was not presented in any form in the general charge of the court. This ruling is sustained by the court of civil appeals. It is true that inadequacy of price alone is not, as a rule, a sufficient reason for avoiding the sheriff's sale made under a valid judgment and execution; but, when the price paid for the land at such sale is enormously inadequate and disproportioned to the value of the land sold, slight irregularities will be sufficient to justify setting the sale aside by a direct proceeding for that purpose. *Allen v. Stephanes*, 18 Tex. 372; *Taul v. Wright*, 45 Tex. 395. In the former case the price paid by the purchaser at the sheriff's sale was one-twentieth part of the value of the property sold, and the

court said, "When the disproportion is so enormous as in this case, but slight additional circumstances will justify the inference that the sale was fraudulent." In *Taul v. Wright* the price paid by the purchaser was more inadequate than in the former case, and in that case the court used this language: "And if the judgment is valid, though it may be impossible to determine the precise limit at which mere inadequacy of price alone will authorize the setting aside a judicial sale, still it cannot be denied that there may be cases in which the price paid is so utterly insignificant, and shockingly disproportionate to the value of the property, that a court of equity cannot regard it as, in conscience, any consideration whatever, and the mere fact of attempting to hold the property so purchased will be held conclusive evidence of fraud. Certainly, when there is an enormous inadequacy of price at a sheriff's sale, if there are but slight irregularities or other circumstances attending it calculated to prevent the property from bringing something like its reasonable value, it is regarded as unconscientious in the purchaser to hold the property so purchased, and his deed will be canceled." In the case now before the court the price paid by Robertson for the land—1,600 acres—was \$25. The land was by Robertson valued at \$800; certainly not overvalued. Thus it will be seen that the price paid was the one thirty-second part of the value of the land, as estimated by the purchaser himself. It needs no argument to show that such a consideration for this property was enormously inadequate, and while not sufficient of itself, perhaps, to authorize the court to set the sale aside, when taken in connection with the irregularities committed by the officers in issuing and executing the process it must be held sufficiently inadequate to call upon a court of equity to interfere and protect the rights of the plaintiffs therein. In this case the execution was issued before the expiration of the term of the court at which the judgment was rendered, and, so far as we know, without any reason therefor. The levy indorsed upon the execution so defectively described the land as to make it difficult for a purchaser to ascertain its locality, and it did not state that the land was levied upon as the property of one or all of the defendants in execution, nor did it appear from the levy whose title or right to the land was to be sold under that process. A person desiring to purchase the land thus levied upon could not ascertain from the levy what title he would acquire by his purchase, and we think that this was a gross irregularity in making the levy, and such as would affect the price for which the land would sell.

Defendant in error insists that the plaintiff's claim is a stale demand, that the undisputed evidence shows this fact, and also that the plaintiff failed to refund or offer to refund to the defendant the money paid by

him for the land purchased at the sheriff's sale, which went to discharge the judgment against the plaintiffs. Stale demand does not apply to this case, and it is unnecessary for us to discuss the question. It is true that ordinarily a plaintiff who seeks to set aside a sale which is voidable, when the purchase price paid at such sale has gone to discharge a debt justly due by him, must refund, or offer to refund, the purchase money paid by the purchaser at such sale. Whether or not the plaintiff must make this offer in order to entitle him to the relief depends upon the circumstances of the particular case. It is not an unvarying rule, but courts of equity will protect the defendant, under ordinary circumstances, in the possession of the property, until he is reimbursed for the amount of money that he has expended in discharge of a debt due by the plaintiff; but this may be done either by requiring the party seeking the relief to pay the money in order to maintain the action, or the court may, in its decree, suspend the writ of possession until the money is paid. *Bailey v. White*, 13 Tex. 114. In this case it appears from the evidence that the defendant Robertson had possession of 600 acres of the land for at least five or six years. There is no proof as to the value of the rents, but the price paid was but \$25. The possession was taken the next year after the purchase, and the plaintiffs had a right to have the money which they owed to the defendant on account of the purchase of the land offset by the rents of the land itself, and the value of the use thereof. *Burns v. Ledbetter*, 54 Tex. 387. In the last case cited the court said: "It appears from the record that Ledbetter has held the possession of the property, and enjoyed the fruits and revenues thereof, for several years. Burns and wife are certainly entitled to recover from him the rental value of the property during that time. We think that the case is somewhat analogous to that of a mortgagee in possession, who, by the rules of equity, is required to account for the benefits derived from the use of the property, which must be placed by him to the satisfaction of the mortgage." Under the facts of this case, we think that the defendant should himself, if he desired to be reimbursed for the small amount that he had paid for the land, have accounted for the rents and profits during the time that he had possession, if he thought that they were of less value than the \$25 that he paid for the 1,600 acres of land.

It was admitted in this case that the plaintiffs had the title to the land in controversy, and were therefore entitled to recover, unless the testimony was such as to show that the defendant acquired a title under the sale made by the sheriff by virtue of the execution before referred to. The evidence upon which defendant relies as a defense is without any conflict in any material point, and in fact, so far as affects his title, wholly without any

conflict. But one conclusion can be drawn from the evidence, and there remains nothing to submit to a jury. There is no question of fact in the case. The consideration is so disproportioned to the value of the land that, as a matter of law, it must be held by the court as being "enormously" inadequate, as expressed in the decisions; and the irregularities in issuing and executing the process, especially in the entry of the levy upon the execution, are so gross that, as matter of law, it must be held that they would affect the price for which the land would sell. It is not a question as to whether it did really affect the price in this instance or not, but the small sum for which 1,600 acres of land sold appeals strongly to a court of equity as evidence of the fact that the sale was made under such circumstances as would deter persons desiring to purchase from bidding at that sale. There is no room for difference of opinion as to the effect in this instance. The evidence discloses a sufficient cause for the small price bid for the land, and this cause must be held to have produced the result of sacrificing the property. The district court, upon the evidence before it, should have directed the jury to find a verdict for the plaintiffs; and the court of civil appeals ought to have reversed the judgment of the district court, and have rendered a judgment for the plaintiffs. It therefore becomes the duty of this court to enter the judgment which the court of civil appeals should have rendered. It is ordered that the judgments of the district court and the court of civil appeals be reversed, and that the sale made by the sheriff under the execution before stated, and the deed of the sheriff made to the defendant Robertson, be, and the same are hereby, set aside, canceled, and held for naught, and that the plaintiffs in this case have and recover of the defendant Robertson the lands claimed by him and described in his answer, and for all costs in this behalf expended.

WHITAKER v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

PERJURY—MATERIALITY OF STATEMENT—CORROBORATION—INSTRUCTION.

1. On the trial of G., who was indicted with M. for theft, a witness testified that he saw M., and not G., in possession of the property stolen. Afterwards, on the trial of M., said witness testified that he saw G., and not M., in possession of the stolen goods, and denied that he testified to the contrary on the former trial. *Held*, on a trial for perjury in testifying that he did not make such statement on the first trial, that it was immaterial which of the statements as to the possession of the stolen property was false.

2. Code Cr. Proc. 1895, art. 786, provides that in trials for perjury no person shall be convicted except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly, as to the falsity of defendant's statement under oath. *Held*, that it

was error to charge that the case of the state must be supported by one witness and circumstances equal to another witness, or by two witnesses.

Appeal from district court, Dallas county; Charles F. Clint, Judge.

Richard Whitaker was convicted of perjury, and appeals. Reversed.

Stillwell H. Russell, for appellant. Mann Trice, for the State.

HURT, P. J. Appellant was convicted of perjury, and given five years in the penitentiary, and appeals. Counsel for appellant is mistaken as to the nature and basis of this prosecution. Perjury is not assigned upon one of two conflicting statements made by the appellant. When this is the case, the pleader should select a statement, assign it for perjury, and prove that it was false. Such proof cannot be made alone by a statement in conflict with that assigned for perjury. This doctrine is well settled. See 2 Bish. Cr. Law, art. 1044. It appears from the record: That two persons were indicted, to wit, John Gilbert and Lewis McDuff, for the theft of certain property alleged to belong to Sam Goldsmith. That the McDuff case was tried first, and appellant was a witness in said case, and testified that, on the night that the theft was committed, John Gilbert had come to him, and asked him to go with him,—that he had something "on ice, down the street"; that he (appellant) refused to go with him; that after awhile John Gilbert came back, and took him and showed him where he had a lot of clothing (pants, coats, and vests) hid under Hamilton Hall; and that said Lewis McDuff had said nothing, except that he had bad luck and had been run. This clothing shown to the appellant by John Gilbert was the fruits of the crime for the theft of which Gilbert and McDuff were indicted. Now, when John Gilbert was upon trial for the same theft, appellant was again a witness, and upon the trial he swore that it was Lewis McDuff who came to him on the night that the theft was committed, and had said to him that he had something on ice down the street; that he (Whitaker) refused to go with him; that after awhile Lewis McDuff came back, and took him and showed him where he had a lot of clothing (pants, coats, and vests) hid under Hamilton Hall. When appellant testified that it was McDuff who had done these things (Gilbert being on trial), counsel for the state called his attention to his testimony in the McDuff case, and asked him if he had not stated in that trial that it was John Gilbert who had done these things. He denied making that statement in the McDuff trial, swearing that he had made the same statement in the McDuff trial that he was then making in the Gilbert trial. Now, perjury was assigned upon the statement that he had made the same statement in the McDuff trial, in regard to this matter, that he then

made in the Gilbert trial. The indictment in this case sets up particularly what the statements were, assigning perjury upon the statement that he had never said that it was Gilbert who had taken him and shown him the clothes, etc. The indictment charges the truth to be that he made such a statement. Now, upon this state of case the prosecution for perjury is based. It is altogether immaterial as to which statement was true. When appellant swore in the Gilbert case that he was not the man who had shown him the clothes, etc., this was beneficial to Gilbert, and, if true, it tended to acquit Gilbert, and fasten the guilt upon McDuff; and whether appellant was a witness for the state, or for the defendant Gilbert, is immaterial. If for the state, his testimony was injurious to the state, and the prosecuting attorney had a right to impeach him by showing that he had made contradictory statements in regard to very material facts in the Gilbert case. And when he denied making the statement charged in the trial of McDuff, when in fact he had made it, it being material to his credibility, it could be assigned for perjury, and, upon proper proof, conviction legally sustained.

The court submitted to the jury the following charge: "In a case of perjury, the case of the state, in order to be sustained, must be supported by one witness and circumstances equal to another witness, or two witnesses." Counsel for appellant, in motion for a new trial, complained of this charge, contending that it is not the law. The court overruled the motion. The statute upon this subject provides: "In trials for perjury, no person shall be convicted, except upon the testimony of two credible witnesses, or of one credible witness, corroborated strongly by other evidence as to the falsity of the defendant's statement under oath; or upon his own confession in open court." Now, the court instructs the jury, in effect, that if the prosecution is sustained by the testimony of one witness, whether credible or not, and circumstances equal to another witness, or two witnesses, whether this last witness be credible or not, the jury would be authorized to convict. Again, this charge permits a conviction, if the case of perjury is sustained by the testimony of such witnesses. The statute expressly provides that the falsity of the statement assigned for perjury must be established by two credible witnesses, or one credible witness corroborated strongly by other evidence. The statement assigned for perjury in this case is that the appellant had denied that he had sworn in the McDuff case that it was Gilbert who had shown him the clothing, etc., whereas in truth he had sworn that it was McDuff, instead of Gilbert. Now, the state was bound to prove by two credible witnesses, or one credible witness strongly corroborated by other evidence, that he had sworn that it was Gilbert, and not McDuff, who had taken him and shown

him the clothing, etc. The charge submitted to the jury was wrong, and not the law upon this subject. In *Washington v. State*, 22 Tex. App. 26, 3 S. W. 228, it was held fundamental error not to give the statutory provisions pertaining to the character of proof necessary to establish the falsity of the statement assigned for perjury. The judgment is reversed, and the cause remanded.

MYERS v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

CRIMINAL LAW—OBSTRUCTING PUBLIC ROAD—SUFFICIENCY OF EVIDENCE.

In a prosecution for willfully obstructing a public road, there was evidence that the road passed through defendant's lands, that it had never been formally opened by the commissioners' court, and that it had merely been used by travelers, but had been practically abandoned before defendant built his fence across it. Defendant testified that he believed that he had a right to fence the land, and that the fence was built without intent to violate the law. *Held* insufficient to support a conviction.

Appeal from Bell county court; John M. Furman, Judge.

C. W. Myers was convicted of willfully obstructing a public road, and appeals. Reversed.

Geo. W. Tyler and Harris & Saunders, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of willfully obstructing a public road. There are several questions suggested for our consideration in the record, but, under the view we take of the testimony, we deem it unnecessary to consider but one of those questions, to wit, the alleged insufficiency of the evidence to support the conviction. It would seem, from the record, that there has been a road running from Waco through Belton and Georgetown to Austin. This road has been known by the names of the "Waco and Austin Road," the "Belton and Georgetown Road," and the "Belton and Austin Road." This road was traveled at some time prior to the time that the town of Belton had an existence. So far as the record discloses, this road was never laid out by metes and bounds by order of the commissioners' court of Bell county. The record shows that what was known as the "Belton and Austin Road" in 1858 was declared to be a public road, and overseers appointed. At the time indicated the country was open, and people traveled along this road as their own inclination or caprice dictated. The road alleged to have been obstructed is on the Connell survey. Subsequent to 1858, as the country began to be settled and inclosed, by order of the commissioners' court of Bell county the road on the surveys north of the Connell survey was changed, and the lands inclosed, pushing the road to the eastward. As these roads were

changed on the north, the point of entrance on the Connell survey would be changed by public travel to meet the changes made by order of the commissioners' court on the surveys north of said Connell survey. So far as the record discloses, no changes were made or any action had with reference to the road across the Connell survey, but it would seem, from the changes made by the commissioners' court on the surveys north of said road, that the point of entrance on the Connell survey was changed from 600 to 700 yards eastward. The record shows that no action was ever taken in regard to the Connell survey by the commissioners' court with reference to these changes, but shows the contrary. The parties living in the vicinity and along this road indicate that there was never but one road laid out across said survey, which occurred in 1846 or 1847, by military authority, which road was traveled for some years, and was closed up, north of the Connell survey, by the changes made by the commissioners' court as to the location of the road above its point of entrance in said Connell survey. As these changes would occur north, and in some instances, perhaps, south, of the Connell survey, the overseers appointed by the commissioners' court to work said road would work along the line extending from the point of entrance on the north of the Connell survey to some point of exit on the south, and this road across said survey, as traveled, would correspond with the changes made on the north of said survey by the commissioners' court. These roads—for there were seven of them across the Connell survey, at different times—would be changed from west to east on said survey, by inclosing portions of said survey by parties who owned or controlled it. The appellant, who owned and controlled a large portion of said survey, had owned his interest for 18 years, during which time several of these changes had been made, and one of which he himself made in 1892; the change under investigation having been made in 1893. The owner himself testified that he believed, under all of these circumstances, that he had a right to change that road, that the commissioners' court had never laid out any road, had never paid him for it, and that he believed that a man who owned land in this country had a right to control and fence it, and that he had no intention of violating any law of his country in inclosing his own land; that he had applied to the commissioners' court for a change of the road to the point to which he did change it, and they refused it, because he, in the petition, called it the "Georgetown and Belton Road," instead of the "Belton and Austin Road." Under this state of case, we are of opinion that the testimony fails to show a willful obstruction of a public road, if, in fact, it shows that a public road really had an existence at the point of obstruction. Before a party can be convicted in this state for obstructing a public road, two things are absolutely necessary: First, there must be a pub-

the road obstructed; and, second, a willful obstruction thereof. In point, see *Laroe v. State*, 30 Tex. App. 374, 17 S. W. 934; *Railroad Co. v. Parker*, 41 N. J. Eq. 489, 5 Atl. 641; *Owens v. Crossett*, 105 Ill. 354; 9 Am. & Eng. Enc. Law, p. 368.

The judgment is reversed, and the cause remanded.

HURT, P. J., concurs.

HENDERSON, J. While I agree with the majority of the court as to the disposition of the case, I believe the facts required a submission of the case to the jury. The question in the case was as to whether or not there was a dedication of a road through the lands of the appellant, in connection with prescription. The court's charge upon this subject, in my opinion, was not full enough, and the charges asked by appellant should have been given.

SIMS v. STATE.

(Court of Criminal Appeals of Texas. June 3, 1896.)

CRIMINAL LAW—CHANGE OF VENUE—NECESSITY FOR SUMMONING SPECIAL VENIRE—ARRAIGNMENT—HOMICIDE—EVIDENCE—TESTIMONY AT INQUEST—DYING DECLARATIONS—TRIAL—READING THE INDICTMENT TO JURY—HOMICIDE IN DEFENSE OF PROPERTY—INSTRUCTIONS.

1. Under Code Cr. Proc. 1895, art. 613 et seq., regulating the method of changing the venue in criminal cases, and article 616 et seq., relating to arraignment in capital cases, it is not necessary to summon a special venire before a change of venue can be granted.

2. It was proper to overrule defendant's objection to a change of venue on the ground that he was not given time to present any motion, demurrer, or exception to the indictment, where it does not appear that he desired to present any such motion or exceptions, or that such desire was made known to the court.

3. In a murder case, where there was evidence that a witness for the state had made statements out of court contrary to his testimony, it was proper to admit, in rebuttal, extracts from his testimony at the inquest which corresponded with his testimony on the trial.

4. In a murder case, where it appeared that deceased was shot at about 9 o'clock in the morning, and lived until about 2 o'clock the next morning; that he had suffered great pain, and at no time expressed a hope of recovery; that his physician informed him that there was no such hope,—evidence of dying declarations was admissible.

5. On trial for murder, where there was an issue as to whether deceased was doing any act or making any demonstration against defendant, and as to whether deceased could have anticipated that defendant would shoot him, dying declarations that "Sims ought not to have shot me," and that "I didn't think that Sims was going to shoot," were admissible.

6. Where the prisoner has been arraigned, and has pleaded to the indictment, before the venue is changed, a second arraignment and plea in the second county are not necessary.

7. On trial for murder, it appeared that the indictment was read to the jury, and that the venue was subsequently changed, and that on the trial in the second county the indictment was not read to the jury until after the close of defendant's direct evidence; but it appeared that the trial in the second county pro-

ceeded on the issue already made on a plea of not guilty, entered before the change of venue. *Held*, that the failure to again introduce the witnesses, and have them reiterate their testimony after the reading of the indictment, was not ground for reversal.

8. On trial for murder, it appeared that deceased was shot by defendant while he was attempting to remove a fence onto land which he claimed, but which was in defendant's possession; and the court charged that, if defendant was "rightfully in possession" of the land, he had a right to use all lawful means to protect his possession, and could not be convicted if, before shooting, he had used every other means in his power to prevent deceased from interfering with the fence, and if the killing took place while deceased was in the act of unlawfully disturbing the fence. *Held*, that the charge was erroneous, in view of Pen. Code 1895, art. 680, subd. 2, relating to justifiable homicide in defense of property, and providing that "the possession must be legal, though the right of the property may not be in the possessor."

9. On trial for murder, where it appeared that deceased claimed land occupied by defendant, and had threatened to remove a fence to what he considered the proper boundary; that, on the day of the homicide, he sent a crew of men to remove the fence, and came out armed with a shotgun, to assist them, and stated that he intended to move the fence at all hazards; and that defendant, after using all other means to prevent the removal of the fence, shot deceased while he was in the act of attempting to tear it down,—the homicide was justifiable.

Appeal from district court, Victoria county; S. F. Grimes, Judge.

J. R. Sims was convicted of murder in the second degree, and appeals. Reversed.

Kearby & Muse, Harris & Knight, and A. B. & W. M. Peticolas, for appellant. A. B. Davidson, Dist. Atty., and Mann Trice, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and his punishment assessed at five years in the penitentiary, and he prosecutes this appeal.

1. Appellant's first bill of exceptions relates to the action of the court in changing the venue. It appears that the indictment in this case was presented in Calhoun county, and that a motion was made for a change of venue by the district attorney. Appellant claims that the court erred in changing the venue when it did, because at the time no special venire had been summoned in the case, and said case could not be legally called up, the criminal docket not being on call at that time. He alleges that the indictment in this case was presented on the 13th of November, 1894; and that, on the 14th day of November, application for writ of habeas corpus was made, and the hearing of the same was continued until the 16th of November, at 9 o'clock; and that on the 17th of November, at night, after the action of the court on the habeas corpus proceedings, the court granted the motion of the state, and changed the venue, and appellant alleges that he did not have reasonable time within which to examine the indictment and the other proceedings in

the case, so as to prepare and have acted on such exceptions or demurrers to the indictment as he might desire to present in the case. The grounds of the motion for a change of venue, and on which the venue was changed, as stated, are because in the county of Calhoun, where the offense of which the defendant is charged was committed, on account of existing combinations and influences in favor of the accused, a trial alike fair and impartial to the state and to the accused could not be safely and speedily had in said county, and because the facts and the evidence in connection with the killing were widely known and had been thoroughly discussed among the citizens and jurors of Calhoun county, and it would be impossible to procure a jury in said Calhoun county, with any reasonable effort, to try said case; that the relations of the deceased and of the defendant were so numerous that, on account of such relationship, it would be improbable that a jury could be procured to try the said case. As a reason for the change of venue, it is further stated that in the county of Calhoun, where the offense was committed, only one week's term of court was authorized by law. The contention of the appellant is not that the grounds do not exist for the change of venue, but because of the irregularity or informality of the proceedings; and he insists that, before a change of venue could be made in the case, it was necessary to summon a special venire. Article 613 et seq., Code Cr. Proc. 1895, regulate the method of changing the venue in criminal cases. It is contended that article 617 requires that, before a change of venue can be heard and determined, all motions to set aside the indictment, and all special pleas and exceptions which are to be determined by the judge, and which have been filed, shall be disposed of by the court, and, if overruled, a plea of "Not guilty" entered. It is contended that this article, properly construed, means that the jury should be present and ready to try the case before the plea of not guilty could be entered. In a capital case, as this was, the statute provides for the arraignment of the defendant in a case of this character, and that the arraignment takes place for the purpose of reading to the defendant the indictment against him, and hearing his plea thereto, and that no arraignment shall take place until the expiration of at least two entire days after the day on which a copy of the indictment was served on the defendant, unless the right to such copy or to such delay be waived, or unless the defendant is on bail. See Code Cr. Proc. 1895, art. 544 et seq. These articles do not seem to require that, before a defendant can be arraigned in a capital case, it is necessary to have the jury present. It does require that he shall not be arraigned until the expiration of at least two entire days after the day on

which he has been served with a copy of the indictment, but in this case no claim of this character is presented. We take it that he was properly served with a copy of the indictment two entire days before his arraignment. The fact that a party charged with a capital felony cannot be arraigned until the expiration of two entire days after the service of a copy of the indictment on him would appear to be, among other things, for the purpose of giving him an opportunity to present all necessary exceptions and demurrers to said indictment; and it has been held by this court that he cannot be deprived of said two days. See *Lockwood v. State*, 32 Tex. Cr. 137, 22 S. W. 413; *Reed v. State*, 31 Tex. Cr. 35, 19 S. W. 678. It is not shown by the bill of exceptions that any motions, demurrers, or exceptions were presented to the indictment, nor was it made known to the court that it was desired to present any; and, in our opinion, the court did not err in overruling appellant's objections to the change of venue under the circumstances of this case. Where a change of venue is contemplated, it would appear to be an idle ceremony to wait until the special venire has been drawn and summoned; and, besides, this would be a procedure that would entail a useless expense and trouble. The statute authorizes a change of venue to be heard and determined before either party has announced ready for trial, but requires all motions, exceptions, special pleas, etc., to be determined by the judge,—that is, such as have been filed,—and then requires the plea of not guilty to be entered, which apprehends that the arraignment takes place; and, as this arraignment may take place before the parties have announced ready for trial, it follows that the attendance of a jury is not required under such circumstances.

2. Appellant complains that the court erred in allowing the state to read, as a part of its rebutting evidence, excerpts from the testimony of Peter Barnes, taken by deposition upon the inquest trial, and upon the examining trial in this case. In our opinion, this testimony was admissible. As we understand it, it was shown by defendant that Peter Barnes had made statements with reference to how the killing occurred, in conflict with the testimony delivered by him on the stand at the trial; and it was competent to show that he had made the same statements or statements similar in substance to those made by him at the trial shortly after the occurrence. In our opinion, it makes no difference whether these statements were made under oath in the previous examinations of the witness, or to persons on the outside. The rule in this respect is the same.

3. Appellant urges that the court erred in admitting, over his objections, the dying declarations of Louis Foster. The grounds of his objections are that it does not appear that the deceased was at the time conscious

of approaching death, and that his declarations were made in response to questions calculated to elicit his answers, and that the statements of the deceased were not of any fact, but merely opinions or conclusions. Unquestionably, it must appear, before declarations of a deceased person are admissible in evidence, that he was conscious of approaching death. According to Mr. Starkie, "the principle which this exception stands upon is clear and obvious. It is presumed that a person who knows that his dissolution is fast approaching, that he stands on the verge of eternity, and that he is to be called to an immediate account for all that he has done amiss, before a Judge from whom no secrets are hid, will feel as strong a motive to declare the truth, and to abstain from deception, as any person who acts under the obligation of an oath." 1 Starkie, Ev. 32. And Shakespeare seems to have entertained the same view when he puts the sentiment into the mouth of the wounded Merun, who, finding himself disbelieved while announcing the intended treachery of King Louis, exclaims:

"Have I not hideous death within my view,
Retaining but a quantity of life;
Which bleeds away, even as a form of wax
Resolveth from his figure 'gainst the fire?
What in the world should make me now deceive,
Since I must lose the use of all deceit?
Why should I then be false; since it is true,
That I must die here, and live hence by truth?"
—King John, Act V., Sc. 4.

And all of the authorities teach that it must be shown in some way that, at the time declarations were made, the declarant no longer entertained any hope of life. This condition of the mind must always satisfactorily appear from the evidence in the case. In the case before us, the deceased was shot at 8 or 9 o'clock in the morning, and lived until 1 or 2 that evening, and was suffering greatly during that time, and at no time did he express any hope of recovery. Shortly before the declarations were made, the physician informed him that there was no chance for him to recover. His daughter, who was present, threw her arms around her father, and began crying. He remarked to her, "All is well." We gather from his condition, what was said to him by the physician, and his response to his child, the fact that, from the time he was shot until his death, there was no evidence or indication on his part of any hope of life, establishing that he was conscious of approaching death, and entertained no hope of recovery.

So far as any questions which may have been asked to elicit statements or declarations of the declarant, we think there is nothing in the contention of the appellant. The statements elicited from him were that "Sims ought not to have shot me," and "I didn't think that Sims was going to shoot." If this witness (the declarant) had been on

the stand, we believe he would have been permitted to make these statements in evidence. While they do not appear in one sense to be a statement of any fact, but rather in the nature of a shorthand rendering of the facts, it was an issue in the case as to whether the deceased was doing any act or making any demonstration towards the defendant, or that deceased could have anticipated that the defendant would have shot him; and, in our opinion, the statement of the witness as a dying declaration was admissible in testimony.

Another objection insisted on by the appellant in this connection is that the jury were not permitted to hear the testimony as to the predicate laid. While the predicate is always primarily a question for the court, still it is the better practice to have the jury hear all of the testimony in this connection. Even in cases where no issue is made as to the admissibility of the dying declarations, the jury should be placed in possession of the surroundings or "settings" of the declaration, so they may be fully advised of the circumstances under which it was made.

4. It appears that on the trial of this case, by some oversight, as we take it, after the impanelment of the jury, the indictment was not read to them, and no formal plea was made to the indictment by the defendant. Subsequently, after the state had elicited its testimony in chief, and the defendant had introduced his testimony, and rested, and before the state began to put on its rebutting testimony, the omission was discovered, and the indictment then read to the jury; and, the defendant declining to plead, a plea of not guilty was entered for him. The witnesses who had previously been placed upon the stand were not reintroduced, nor was there any formal waiver of such reintroduction on the part of the appellant, and appellant assigns this action of the court as error. The record in this case further discloses the fact, which has already been stated, that the venue in this case was changed from Calhoun to Victoria county, and that, before the change of venue was had, the defendant was arraigned, and on his arraignment he refused to plead to said indictment, which was read to him, and a plea of "Not guilty" was ordered to be entered by the court, which was accordingly done; and such arraignment and plea constitute a part of the record of this case, and will be considered by us in connection with this question. As stated before, our statute provides for and requires an arraignment of a defendant in every capital felony, which arraignment requires the indictment to be read to the prisoner, and that he enter his formal plea thereto. This constitutes the issue joined between the state and the defendant, and is made a matter of record, and, before a change of venue, it is imperatively required that this arraignment

take place, and, as we have seen, it was done in this case. Mr. Bishop says: "If the prisoner has been arraigned, and has pleaded to the indictment before the venue is changed, there is no need of a second arraignment and plea in the second county." See 1 Blsh. Cr. Proc. § 74, citing authorities, as follows: Vance v. Com., 2 Va. Cas. 162; Price v. State, 8 Gill, 295; Davis v. State, 39 Md. 355. We have examined said authorities, and they each support the text. We also refer to Bohannon v. State, 14 Tex. App. 271, in which the question is incidentally involved. Mr. Bishop further says: "Yet, if in the second county he is arraigned and pleads again, this cannot be assigned for error. It has been said to be a safe and judicious practice to require the plea of not guilty to be given in before the change is awarded." And it has been held by our court that it is no error to rearraign a defendant. See Shaw v. State, 32 Tex. Cr. 169, 22 S. W. 588.

It is contended, however, that because article 697, Code Cr. Proc. 1895, which states the method of the trial before a jury, requires the indictment or information to be read to the jury by the district or county attorney, and to the reading of said indictment the defendant shall plead, it is in every case mandatory and imperative. We construe this statute as applicable to criminal trials in general, and, of course, in every criminal trial it is absolutely necessary that the plea shall be entered in the case; that is, that the issue be joined between the state and the defendant. But, in a case where this plea has been entered and the issue joined, can we consider that the last-mentioned article is mandatory to the extent that, where this has already been done in a given case, it must be done over again? Construing the statutes regulating the arraignment in capital cases (see article 544 et seq., including article 522, Code Cr. Proc. 1895) and article 697 in *pari materia*, it occurs to us that said statute is only mandatory to the extent that in every criminal case the plea of not guilty, where that is relied upon, must be made. Where no arraignment has previously taken place in a capital case, and in an ordinary case where the party is brought to trial, the indictment is then read, and the plea of defendant made and entered; but in a capital case, where the arraignment has already transpired, and the plea has been made, it would seem to be sufficient merely to state these matters to the jury, as involving the issue joined in the case. Of course, it would be the better practice in all cases where the party has been previously arraigned that the indictment be read to the jury; and, while no arraignment takes place, yet that it be stated to the jury that the defendant had previously been arraigned, and entered his plea of not guilty. However, in this case the issue was already joined between the par-

ties, was a matter of record, and was a part of the case; and, in the presentation of the case, the evidence was all addressed to this issue, and the jury did not misunderstand it; and, entertaining this view, we hold that, under the circumstances of this case, it was not necessary to again introduce the witnesses after the reading of the indictment, and have them reiterate their testimony. The arraignment having already taken place, and the defendant's plea of "Not guilty" having been entered thereto, this was a part of the record of the case, and a matter of which the court was bound to take notice, and, when the trial began before the jury, the issue was already joined between the state and the defendant.

5. The facts of this case show that the homicide occurred in regard to a dispute as to some 200 or 300 acres of land. Said land was situated in Calhoun county, Tex., and was in the pasture of one H. C. Clark, who resided at Dallas, Tex. The defendant, J. R. Sims, was his manager on his ranch in Calhoun county. It appears that the pasture of said Clark and of the deceased, Foster, joined, being separated by a line of fencing between the two; said fence line having been placed there by Clark, or those from whom he purchased, some years before the homicide. The deceased claimed that the fence was not on the correct line, and that there were some 200 or 300 acres of land belonging to him in Clark's pasture. This question as to boundaries seems to have arisen in the spring of the year 1894, and the homicide occurred on the 2d of October of that year. The deceased claimed the land, and insisted on moving the fence on the true line, as claimed by him. This Clark declined to agree to, but it seems, however, that at one time he was willing to surrender the 300 acres on that side of the pasture, provided the deceased would give him 50 acres adjoining his pasture at another place, so that he could straighten his line of fencing. The deceased refused to agree to this. The deceased, on several occasions, urged the removal of the fence, and said, a month or two before the homicide, that he was going to move it at all hazards. He was told that, if it was his land, he ought to sue for it, but he insisted that it was his, and he would move the fence and take his land anyhow. Clark, shortly before the homicide, wrote the defendant, his manager, a letter, dated from Dallas, in which he told him substantially not to permit Foster to move the fence or get possession of the land, and directed him "to hold the same in a mild but as firm a manner as possible." A few days before the homicide, the deceased sent some hands over into the pasture of Clark, to dig post holes. They dug a number, preparatory to moving the fence up on that line. The defendant saw them, and forbade their digging any more holes, and required them to get out of the pasture. On the morning of the 2d of Octo-

ber, 1894, about 8 or 9 o'clock, deceased, with some three or four hands, came to the line of fence in question, for the purpose of taking it down, and moving it on the line in Clark's pasture, as claimed by him. The hands preceded the deceased there in a wagon. He came on a little while afterwards, riding horseback, accompanied by one Peter Barnes, and was carrying his double-barrel, breach-loading shotgun. About the time he arrived, the defendant also came up to the line of fence, and they spoke to each other. As to the facts immediately attending the homicide, the state's witnesses, some three or four in number, give substantially the same account, while the defendant alone, in his testimony, gives a different account of the matter. We quote from the testimony of Peter Barnes, and the account given by the other state's witnesses substantially agrees with his statement: "Directly after the deceased rode up, he said to the hands: 'Why ain't you all at work?' They replied: 'We are waiting for you and Peter Barnes.' Deceased said: 'All right, then; we will go to work. Get down, Pete, and pull down the fence.' Peter replied: 'I can't cross that fence. The question is to be decided between you and Mr. Sims.' Foster said: 'You are hired to me, and in my possession, and I give you permission to tear down the fence.' Barnes replied that he didn't want to get into any trouble, and he said to Sims: 'You hear what Foster says about my tearing down the fence.' Sims said: 'Don't you touch that fence.' Barnes replied that he would not touch it. At that Foster said to Sims: 'I want no trouble. I didn't come out here for any. You have had possession of my land long enough, and I want to move the fence, and build it on my line.' Sims said: 'Foster, you can't cross that fence. If I don't do what I am instructed to do, some one else will get my place, and I am a poor man, and have to make a living, and can't let you move this fence.' Foster said: 'Will you get into trouble for another man? If you want to keep me from building my fence, you can go to the courts, and stop me, and I can't build my fence; otherwise, I will build.' Sims said: 'Go ahead, and build it. I don't care nothing about it. As soon as you build it, I will cut it down.' Foster then walked up to a fence post, and Sims looked at him right hard, and said: 'Mr. Foster, if you was not so old a man, I would show you what I would do.' Foster said, 'Oh, pshaw! Mr. Sims, you wouldn't fight a fly.' Sims, who was close by the fence on his horse, turned around, and put his hand on the post that Foster was at, and on Foster's hand. Foster was pulling the first staple. When he was pulling the second staple, and was in a stooping posture, the wind blew his hat over his face, and, just about this time, Sims drew his pistol, threw himself back, and shot him, and Foster fell. That he (witness) immediately

looked, and Sims was off of his horse, but how he got off he didn't know. His horse ran for some distance, and Sims pursued him, failed to catch him, then started back towards them, stopped before he got to them, then turned, and that is the last he saw of him that day. That he turned his attention to Foster, who said, while he was lying there on the ground, 'I didn't think Sims would shoot me.' He then states that they got the deceased into the wagon, and carried him on home." The defendant's account of the homicide is as follows: "That he had told the hands a few days before, when he found them digging the post holes, to get out of the pasture; that he wouldn't allow them in the pasture to move the fence. That he was down near the fence line early on the morning of the second of October, about eight o'clock. That he saw a wagon drive up with some hands in it, in Foster's pasture, and they drove to within fifty yards of the fence, and stopped. He asked them what they were going to do, and they said they had come to work on the fence. That Peter Barnes had gone to Mr. Foster's house to get him, and start to work. In a short time, Foster and Peter Barnes rode up. Foster had a shotgun, and said, 'Good morning, boys [talking to the darkies].' Defendant said, 'Good morning, Mr. Foster;' and then he said, 'Good morning, Sims.' Defendant asked him what he was going to do. He said he was going to move the fence on the line. Defendant told him he was instructed by Mr. Clark not to let any one move the fence. He said it was not Mr. Clark's fence, and that he would do what he pleased with it. He then turned to Peter, and told him to pull the fence down. The defendant told Peter not to do it. Peter told Foster that he would not do it. Foster then took the pinchers, and started to the fence, and defendant told him again not to pull the fence down. The deceased said it didn't matter; it was his fence, and he would do what he pleased with it. He had his gun in his hand,—a double-barrel shotgun. He walked up to the fence with his gun in his hands, and with the pinchers he caught hold of the wire, and pulled a staple out of the post. When he pulled the first staple, the defendant turned his horse around, and started to catch Foster's hand, to stop him from pulling the staple. Foster lifted the gun up, and cocked it in the defendant's face. Defendant then pulled his pistol, and shot him. Deceased at the time had the breach of the gun between his legs. Defendant also said to the deceased, during the colloquy before the shooting, that he didn't want any trouble, and that he had a family to look after, and that he had to do what he was instructed to do. Deceased replied with a sneer, 'And, if Clark would tell you to steal one of my steers, you would do that.' In that connection he stated that there was trouble between him and the deceased about a steer that he

had branded for Clark some time before that, and that the steer was the deceased's; that he branded it by mistake; and that he told the deceased about it himself; and that the deceased had afterwards complained to Clark about it. Defendant also stated that the deceased told him to get out an injunction, and stop him from moving the fence; and he told the deceased to bring suit, and, if he gained the land, the law would put him in possession. Witness also explained that, when the deceased drew the gun on him, he (defendant) immediately jumped off of his horse, and shot the deceased from the ground, and his horse ran off some distance, and after the shooting he tried to catch him, but failed; that he started back to where the shooting occurred, but changed his mind, and went to Port Lavaca, and surrendered. He also stated it was his impression at the time he shot that the deceased also fired, and he so stated to one Williams before he got to Port Lavaca."

From this relation of the facts in the case, two theories of self-defense are presented, to wit: (1) Self-defense against an unlawful attack then being made on the defendant by the deceased, which caused him to reasonably believe that his life was in danger, or his person in danger of serious bodily injury; and (2) an unlawful and violent attack on the property of the defendant, under article 677, Code Cr. Proc. 1895. The court gave both of these theories in charge to the jury; but the appellant contends that the court's charge upon the second theory was not the law of the case, but was an erroneous charge, and was calculated to impair the rights of appellant. That part of the charge of the court in this regard which is especially complained of is as follows, to wit: "Subd. 6. If the defendant, Sims, represented H. C. Clark, and was rightfully in possession of the land inside of the fence inclosing H. C. Clark's pasture, and of the fence inclosing it, he had a right to use all lawful means to protect such possession and repel a trespass upon it by the deceased. Every effort in his power other than killing the trespasser must have been resorted to by the defendant before he would be justified in killing the trespasser; but if you believe from the evidence in this case that the defendant, Sims, did resort to every effort in his power except killing him before he shot (if he did shoot), and the killing took place while the deceased was in the very act of making an unlawful and violent attack upon the property of the defendant, you should acquit him." The principal ground of objection urged to the charge is that it makes the possession of the defendant depend on his "rightful possession." It will be noted that the statute (Pen. Code 1895, art. 680, subd. 2) with reference to the possession of property, and self-defense predicated thereon, uses the expression, "The possession must be legal, though the right of the property may not be in the possessor." The ex-

pressions "rightful possession" and "legal possession" do not mean the same thing in this connection, and are not interchangeable. A possession may be strictly legal, but not a rightful possession, that is, a person may have such possession as the law would protect him in; such would be legal possession, yet it might not be a possession that was rightful, that is, founded in right; and a suit at law might demonstrate that he was a wrongful possessor, though at the same time a legal possessor. And under the peculiar circumstances of this case, when there was some question about the ulterior right to the property, as to who was in fact the owner, and had the right to the possession thereof as the ultimate owner, we cannot say that the charge as given was not calculated to prejudice the rights of the appellant, in that it made his possession depend upon the rightfulness thereof. Attention was called to this error of the court at the time, and a charge on this subject was presented, and the court refused to give the same.

In this connection, we would call attention to another matter. The court correctly charged the jury that they "must believe from the evidence in the case that the defendant, Sims, resorted to every effort in his power, except killing the deceased," before he could rely on this right of self-defense, where property was involved. As far as it went, this announced a correct legal proposition; but, inasmuch as there was some testimony in the case suggesting that the defendant could have resorted to an injunction to prevent the deceased from moving the fence, the court should have eliminated this matter, and have told the jury that the defendant need not have resorted to such measures. Furthermore, we believe that the charge of the court in regard to the defendant's right of self-defense in protecting his property should have been framed more explicitly with reference to the particular facts in this case. There was in this case no question as to the possession of said land and fence. It was in the defendant, but held for his employer, Clark, and there was no question, either, that the deceased had determined to remove said fence. Under such circumstances, we think the correct principle is enunciated in *Payne's Case*, 8 Cal. 341, reported in *Hor. & T. Cas.* p. 863. The learned judge said in that case: "Under the circumstances of this case, the jury had to inquire whether Stone and Vaughn manifestly intended or endeavored by violence to commit a felony, and, if so, whether the act of Payne was in necessary defense of himself or property. Stone and Vaughn knew that that property belonged to Payne, and the evidence goes clearly to show that they went with the determination to remove it to the premises of Stone, peaceably if they could, and forcibly if they must. The removal was determined upon, and their subsequent conduct depended upon contingencies. If the owner of the property resisted, they

were prepared to use force to accomplish the trespass. It was not the intention or endeavor of Stone and Vaughn to commit a felony in respect of the property, for they did not intend to steal it; nor was it their intention to commit a robbery, for the felonious intent as to the property was wanting; but the felony they intended to commit was the killing of Payne, if necessary to accomplish the removal of the posts. Payne being the owner of the property, and in possession of the same, had a right to use such force as was necessary to prevent a forcible trespass; and if, in doing so, he was compelled to kill Vaughn, he was justifiable. If Vaughn had not been armed, and had simply attempted the trespass without force of arms, and neither intended nor endeavored to commit a felony himself, then Payne would not have been justified in killing him. But when the trespasser goes with the intent and with the means to commit a felony, if necessary to accomplish the end intended, the owner of the property may repel force by force." See *Woodring v. State*, 33 Tex. Cr. 26, 24 S. W. 203; *Lilly v. State*, 20 Tex. App. 1. In this case, from all that has gone before, it appears that the deceased had threatened to remove the fence at all hazards, had refused to appeal to the law, and had persisted in his purpose to take the matter in his own hands and make the removal; that he had hired hands previously, and sent them into Clark's pasture to dig holes on the line where he proposed to move said fence, and that they had been driven out by the defendant, and on the morning in question, when he came with the hands, armed with a shotgun, manifesting in unmistakable terms his determination to remove said fence. This he had no right to do, and the defendant could resist his attempt in that direction, and to that end repel force by force. He was not bound to retreat, and was only bound to take such other means as he could at that time resort to in order to prevent the removal of the fence. But he had a right to prevent this removal; and if he did resort to such other means as were then within his power, in order to prevent the deceased from removing said fence, and the deceased persisted in the endeavor, and was in the very act of making an unlawful and violent attack upon said fence, in order to remove it, and the defendant killed him while making such unlawful and violent attack, he could not be convicted. In this case a charge on this subject more clearly and fully presenting the rights of the defendant under the facts of this case should have been given to the jury. Of course, if the jury believed the testimony of the defendant as to the assault being made on him by the deceased at the time he shot him, the question of self-defense as to the protection of his person against an assault threatening death or serious bodily injury was involved, and the charge in this regard sufficiently presents this phase of the case;

but the charge in this regard would have been better if the rights of the defendant with reference to the fence itself had been presented, and the jury ought to have been told that, if they believed from the evidence that the defendant was in possession of said fence, then he had a right to protect such possession, and to prevent its removal, and if he did no more than was reasonably necessary in that connection, and the deceased then made an assault upon him with a gun, which caused him to reasonably believe that his life was in danger or his person in danger of serious bodily injury from such assault, then, under such circumstances, he would have had the right to slay the deceased, and we would suggest that on another trial of this case this matter be presented in some such manner as suggested.

For the errors pointed out, the judgment is reversed, and the cause remanded.

HURT, P. J., and DAVIDSON, J. In reference to the necessity of reading the indictment to the jury, and stating the plea of the defendant thereto to the jury, we deem it unnecessary to express an opinion as to whether this procedure was correct or incorrect, or, in other words, whether the failure to read the indictment to the jury, and have the plea of the appellant stated to the jury, is reversible error or not, because this question will not arise upon another trial. We concur in the opinion of Judge HENDERSON in all other respects. We do not wish to be understood as dissenting, but merely express no opinion upon the question.

Ex parte DALLMUS.

(Court of Criminal Appeals of Texas. June 3, 1896.)

On rehearing. Denied.

For prior report, see 35 S. W. 648.

Beaty & Culver, for applicant. Mann Trice, for the State.

HENDERSON, J. This was an appeal from the judgment of the lower court in a habeas corpus proceeding, and is now before us on motion for rehearing. The case was dismissed because the record was not made up and certified as the law requires. The action of the court was based on the decision in *Ex parte Malone* (decided at the Tyler term) 33 S. W. 360. Counsel for applicant makes a very strong argument to this court, insisting that the decision in said case is not applicable to this case. We differ with counsel as to this. While the writer dissented from the majority of the court in the *Malone* Case, yet that case has become the law of this court, and in accordance with the rule there laid down the rehearing in this case is refused.

HURT, P. J., absent.

HARRIS v. STATE.

(Court of Criminal Appeals of Texas. June 3, 1896.)

AGGRAVATED ASSAULT—SELF-DEFENSE—INSTRUCTIONS.

Defendant was called out of a house by the prosecutor on a dark night, to state to N. what he had heard the prosecutor say concerning a scandal relating to N. After defendant stated what he remembered, he said he did not remember another statement which the prosecutor claimed he had made, and the latter then called defendant a liar. Defendant said he was another, and the prosecutor rushed on defendant, knocked him down, and inflicted severe wounds on his forehead. None of the eyewitnesses could see whether either of the parties had anything in his hand. Defendant severely stabbed the prosecutor with a knife just before or after he was knocked down. Held that, whether the prosecutor was armed with a deadly weapon or not, defendant had a right to act on the danger as it appeared to him, and it was error to refuse to charge on apparent danger, and in the charge predicate defendant's right of self-defense on actual danger.

Appeal from Hamilton county court; J. C. Main, Judge.

Obe Harris was convicted of an aggravated assault, and appeals. Reversed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of an aggravated assault, and his punishment assessed at a fine of \$25, and prosecutes this appeal. Briefly, the facts show that there was some difference pending between Will Baxter, the assaulted party, and B. Nanny and his son, Jim Nanny, in regard to a scandal charged to have been circulated by Will Baxter in regard to Jim Nanny. On the night when the difficulty occurred it appears that the Baxter boys (four or five brothers) and the Harris boys (three or four brothers) and the two Nannys were attending a dance in the neighborhood. The Nannys met Will Baxter, and wanted an explanation in regard to the alleged slanderous words which appeared to be with reference to the parentage of some illegitimate child in the neighborhood. During the altercation Will Baxter proposed to prove what he had said about the matter by the defendant, Obe Harris. (This altercation occurred outside in the yard, and at that time Obe Harris was in the house, engaged in the dance.) Will Baxter stepped to the house, and called him out. He came out, and it then appears that Will Baxter asked appellant to tell B. Nanny what he had heard him (witness) say about that scandal. Defendant replied, "Well, I heard you say that any man that said you were the father of that child was a damned liar." Baxter said, "Well, go on, and tell the balance of it." Defendant said he did not remember anything else, but told Baxter that he might refresh his memory by stating what it was. Baxter asked him, if he did not remember that he had told him that he (Baxter) did not believe that Jim Nanny was

guilty of being the father of the child. Defendant said, "No," he didn't remember anything about that; and said that he had never heard of that until about a week before. Baxter then said it was strange some people could not recollect anything. Defendant asked him if he thought he had "stumped" up something and told it. Baxter said, "No," but asked defendant if he meant to say that he had never heard of that until about a week ago. Defendant said he did. Baxter then called him a damned liar. Appellant called him another. Baxter made for him. This is substantially the testimony of all of the witnesses up to the very time of the rencounter. At this juncture all agree that appellant stepped back a step or two, and that Will Baxter made for him,—some say rushed at him, and struck him. The first blow was about the head or face. They agree that this blow either knocked the defendant completely or partially down against a wire fence. The witness Will Baxter, as to the time when he was cut by the defendant, appears to put it after this rencounter. His language in this regard is as follows: "He fell into the wire fence, and got out, and went around to my left. He struck me with something sharp, and cut me on my side." On this same point, on cross-examination, he says: "I picked up something immediately after he got up. I don't know whether it was a rock or not. I told the boys that the damned scoundrel had cut me; to kill him." There were eight or nine other witnesses who testified to the facts attending the difficulty, and the testimony of each of the witnesses indicates that the cutting occurred in the rencounter, when the prosecutor, Baxter, rushed at the defendant, and before he knocked the defendant down, and did not occur afterwards. Some of the witnesses for the defense speak of the lick of the prosecutor in which he knocked the defendant down as having been made by something other than the hand or fist from the sound of the same. All of them concur in stating that it was a dark night, and that they did not see anything in the prosecutor's hand, nor did they see anything in the hand of the defendant. It is also shown that as soon as defendant got up he said to Baxter, "If you come on me again, I will hurt you bad." Appellant, after the difficulty, was found to be severely wounded about the forehead, and witnesses testify that the wounds indicated that they were not inflicted with the hands or fists, and that it could not have been done with the wire fence. The prosecutor, Will Baxter, was found to have been severely cut between the sixth and seventh ribs, the knife having penetrated three inches from the heart; and he was confined to his bed for several weeks. This is a substantial summary of the material facts in the case.

If it be true, as the evidence of the prosecutor, Will Baxter, appears to indicate, that the defendant stabbed him after the prose-

cutor had knocked him down, then, at the most, appellant was only guilty of an aggravated assault. If, however, the stabbing occurred in the rencounter between the parties, appellant may have been guilty of an aggravated assault or he may have acted in self-defense. In this connection complaint is made of the charge of the court and of the failure of the court to instruct the jury as requested by the appellant. This being a misdemeanor case, the court was not bound to instruct the jury until requested in writing, and the case could only be revised, as to the charges of the court given, if said charges misdirected the jury upon some material point, containing some erroneous legal proposition that might prejudice the appellant. If, however, appellant requested a charge upon a material issue in the case, and the same was not given, and he reserved his exception thereto, it will be the duty of this court to reverse the case. It occurs to us that, inasmuch as all the witnesses concur in stating that the prosecutor, Will Baxter, was the aggressor, and himself committed the first assault, the appellant could be held liable only upon one theory; that is, that he used more force than was reasonably necessary in his self-defense, either against an attack indicating actual danger or an attack indicating apparent danger. If Baxter attacked defendant only with his hands and fists, and there was no actual danger and no apparent danger to his life or of serious bodily injury, then he would not have had the right in self-defense to have used a deadly weapon upon Baxter. But if, on the other hand, Baxter was attacking the defendant with some deadly weapon, or was apparently so attacking him, which caused him to reasonably believe that his life was in danger, or his person in danger of serious bodily injury, then he would have the right in self-defense to use a deadly weapon for his protection. Now, what were the peculiar circumstances attending this assault by Baxter on the defendant? It will be borne in mind that it was a dark night; that none of the witnesses could see what either of the parties had; that the appellant had been invited from the house out into the yard by Baxter, and that he requested him to make a statement as to the alleged scandal he (Baxter) was charged with having uttered as against Jim Nanny; that the defendant stated what he remembered Baxter had said about it. Baxter insisted that that was not all that he remembered, and should state what else he said about the matter. Defendant did not remember it. Baxter told him that he had a bad memory, and defendant wanted to know if he accused him of "stumping" up something against him? Defendant said he had never heard what Baxter said until about a week before that. Baxter thereupon called him a damned liar. Defendant called him another, and Baxter immediately rushed upon him. Judging of the attack from the ap-

pellant's standpoint, what were the appearances to him? According to his own testimony, defendant says that when Baxter called him a damned liar he then opened his knife. As Baxter rushed upon him, he stepped back a step or two, and, to use his own language: "It was very dark, and I was excited and scared, and could not tell what he was going to strike me with; but I only wanted to defend myself, and I thought a man had the right to do that. I don't know what he struck me with, but it made a terrible noise, and knocked me down, and cut three places on my face, and made a large blue and black place on my face that was there for several days." Could he have reasonably apprehended that the defendant was only attacking him with his hands and fists, or was it his duty, under the circumstances of the assault, to await his attack in the darkness, in order to ascertain with what he was being assaulted, or did he have the right to draw his knife in order to protect himself against any assault made by his assailant? Was it not a duty he owed himself, under the circumstances, to be prepared against a deadly assault, or was it his duty to wait and see if the assault being made was of a deadly character, before he was authorized to begin to act in order to repel it? In our opinion, whether the prosecutor, Baxter, was armed with a deadly weapon or not, defendant had a right to act on the danger as it appeared to him at the time, and be prepared to shield himself against any assault which might be made. And in this connection it was the duty of the court, when asked by appellant, to give him the benefit of a charge on apparent danger, and not confine this case, as was done in the charge, to limit his self-defense predicated alone on actual danger. For the refusal of the court to give the charge asked by appellant on apparent danger, this case must be reversed and remanded, and it is accordingly so ordered.

HURT, P. J., absent.

GRANT et al. v. STATE.

(Court of Criminal Appeals of Texas. June 3, 1896.)

THEFT—UNKNOWN OWNERSHIP—INDICTMENT AND PROOF.

Where the allegation is that the animal alleged to have been stolen is the property of some person to the grand jurors unknown, the proof must show that fact; and if the evidence suggests that, by the use of reasonable diligence, the ownership might have been ascertained, the allegation in the indictment will not be supported.

Appeal from district court, Navarro county; Rufus Hardy, Judge.

Bob Grant and Chance Williams were convicted of theft, and appeal. Reversed.

H. E. Traylor, for appellants. Mann Trice, for the State.

HENDERSON, J. Appellants were convicted of the theft of a hog, and given two years each in the penitentiary, and from the judgment and sentence of the lower court they prosecute this appeal.

1. The indictment charges that the alleged stolen hog was the property of some person to the grand jurors unknown. The proof on the trial does not show the owner to be unknown. In fact, it does not show that any hog of a known or unknown owner was missed in that neighborhood. We have held that where the allegation of an indictment was that the ownership was unknown, and the proof on the trial showed the existence of an animal in the community that had no known owner, and there was no proof suggesting ownership on the trial, or that the ownership might have been known by the use of reasonable diligence, it would not be necessary to go further, and make proof that diligent inquiry was had by the grand jury in order to ascertain the ownership. See *McCarty v. State* (decided at Austin term, 1896) 35 S. W. 904. In this case, however, no proof was had of any diligence used in the grand-jury room to ascertain the ownership of the alleged stolen hog; and the record here discloses that, while the want of ownership might have been established with some degree of certainty on the final trial, no effort was made to establish this material allegation of the indictment. The evidence showed, at least, by the confessions of one of the defendants, that the hog in question was marked with a slit in the left ear, but no proof was offered to show that said mark was not given in the neighborhood, or that it was a fictitious mark, and, for aught that appears, the hog may have been in the mark of some person in the community, and ownership might have been thus established. The allegation of ownership or nonownership in the indictment is a material one, and, where the allegation is that the animal alleged to have been stolen is the property of some person to the grand jurors unknown, the proof must show this fact, and if the evidence suggests, on the final trial, that by the use of reasonable diligence the ownership might have been ascertained, the allegation in the indictment will not be supported.

2. Appellants also contend that a charge on circumstantial evidence should have been given. We think, under the peculiar circumstances of this case, that such a charge was necessary.

3. Appellants also insist that the evidence does not support the verdict. The conviction mainly, if not entirely, depends on the testimony of the two accomplices, Della McGriff and her husband, G. W. McGriff. There is some slight testimony, coming from the witness Coates, that perhaps tends to connect Bob Grant with the killing of same hog,

as the witness Coates testified to seeing the entrails, hair, and feet of a freshly-killed hog on the same occasion as testified about by the two witnesses McGriff. And we would further state, as connecting the other defendant with the alleged theft, that according to the testimony of McConnico, who presided at the examining trial, he confessed that he and Bob Grant killed a hog marked with a slit in the left ear. These facts may be considered as tending to connect the appellants with the slaughter of a hog at the time alleged in the indictment, and if the proof showed that said hog was stolen, and was the property of an unknown owner, it might be sufficient to sustain their conviction. For the errors above pointed out the judgment is reversed, and the case remanded.

HURT, P. J., absent.

THOMPSON v. STATE.

(Court of Criminal Appeals of Texas. June 3, 1896.)

ASSAULT WITH INTENT TO MURDER—WHAT CONSTITUTES.

As defendant was being taken back to his cell in jail, another prisoner, who occupied the cell with him, assaulted the jailer with a razor. During the struggle with his assailant, the jailer's pistol was dropped. Defendant grabbed the pistol, and presented it at the jailer, who was compelled by defendant and the other prisoner to go into the cell and be locked in. *Held*, that defendant was guilty of assault with intent to murder.

Appeal from district court, Navarro county; Rufus Hardy, Judge.

Lee Thompson was convicted of assault with intent to murder, and appeals. *Affirmed*.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to murder, and given two years in the penitentiary, and from the judgment of the lower court he prosecutes this appeal.

There is no bill of exceptions in the record. It appears, from the evidence in the case, that appellant was a prisoner confined in the jail of Navarro county, and the sheriff had taken him out for a bath, and in the meantime left one Ras Hardy in the cell, who occupied the same cell with the appellant. McAfee, the jailer, went in with the appellant, and opened the cell to let him in, when Ras Hardy rushed out of the cell, and made an assault on him with a razor, and cut him four or five times about the neck. Said McAfee struggled with him, and his pistol fell out of his scabbard, and appellant grabbed it, and presented the pistol at said McAfee, and they compelled him to go into the cell. The parties acted together in the assault. They made no attempt to injure the jailer after he went into the cell, but locked him in. There could be no question that the appellant and his co-defendant, Hardy, in

making the assault on the jailer, intended to make their escape. They did not intend to kill him if they could make their escape without taking his life, but they did intend to kill him if they had to do so in order to make their escape. They had no lawful right to resist the jailer, or to use force upon him in order to make their escape; and if, at any time during the struggle, they entertained the intent to kill him in order to effect that escape, and they used means calculated to accomplish that purpose, then appellant is guilty of an assault with intent to murder. Undoubtedly, when Ras Hardy, the co-defendant of the appellant, was cutting and slashing the jailer about the neck with the razor, he had the intent and purpose to take his life, in order to overpower him and effect his escape. Appellant was a party to this assault, and participated in this purpose, and was as much guilty of an assault with intent to murder as the said Ras Hardy. Moreover, there can be no question of the intent to kill the said McAfee, when he drew the pistol on him and commanded him to go into the cell, if the said McAfee had refused to do so. The defendant had no right to make this demand of the said McAfee, and, if he had refused to comply, and had shot him and killed him, he would have been guilty of murder; and, as he intended to kill, or make him comply with the unlawful demand, he was guilty of an assault with intent to murder. The court's charge presented this issue in the case. There is no error in the record, and the judgment is affirmed.

HURT, P. J., absent.

CUMMINGS v. STATE.

(Court of Criminal Appeals of Texas. June 3, 1896.)

FALSE PRETENSES—INDICTMENT.

An indictment alleged that defendant did falsely, etc., represent to C. that he was the owner of, and had the right to sell to C. for \$75, a diamond stud, and by reason, etc., said C. was induced to part with the possession and ownership of said money; defendant knowing such pretenses and representations to be false, in that he did not own the stud, and had no right to sell it to C. Held, that the indictment did not charge a sale and delivery of the stud, and was bad.

Appeal from district court, Bexar county; Robert B. Green, Judge.

W. E. Cummings was convicted of swindling, and appeals. Reversed.

Ed Haltom, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of swindling, and given four years in the penitentiary, and prosecutes this appeal. A number of errors are assigned, but we will only notice one, as that disposes of the case. The indictment is as follows: The said W. E. Cummings, "by means of false pretenses and devices and fraudulent representations

then and there knowingly and fraudulently made by him to Adolph Cohen, and which false pretenses and devices and fraudulent representations were then and there relied upon by the said Adolph Cohen, did induce the said Adolph Cohen to deliver to him, the said W. E. Cummings, seventy-five dollars, in lawful money of the United States of America, and the said W. E. Cummings did then and there, and by the means aforesaid, acquire from the said Adolph Cohen seventy-five dollars, in lawful money of the United States of America, of the value of seventy-five dollars, the same being the personal and movable property of the said Adolph Cohen, with the intent to appropriate the same to the use of him, the said W. E. Cummings, in this, to wit, the said W. E. Cummings did then and there falsely pretend and fraudulently represent to the said Adolph Cohen that he, the said W. E. Cummings, was on the said 11th day of January, 1896, the owner of a diamond stud, and that he, the said W. E. Cummings, had the right to sell said diamond stud to the said Adolph Cohen for the said sum of seventy-five dollars, and by reason of the false and fraudulent representations aforesaid the said Adolph Cohen was induced to part with the possession and ownership of said money; and the said W. E. Cummings then and there knew that said pretenses, devices, and representations so made by him to the said Adolph Cohen were false in this, to wit, that in fact and in truth he, the said W. E. Cummings, was not on said 11th day of January, 1896, or at any time previous or subsequent thereto, the owner of said diamond stud, and that he, the said W. E. Cummings, had no right or authority to sell said diamond stud to the said Adolph Cohen for the sum of seventy-five dollars, or any other sum of money, and the said W. E. Cummings then and there knew that said pretenses and representations so made by him to the said Adolph Cohen were false,—against the peace and dignity of the state." No motion was made to quash the indictment, but an objection was made to evidence offered by the state, on the ground that there was no allegation in the indictment that the defendant sold to said Cohen, or any one else, the diamond stud. The court overruled the objection, and defendant reserved his bill of exceptions. The admission of this evidence involves the question as to the validity of the indictment, and so we will consider whether or not the indictment charges any offense. Swindling is defined to be the "acquisition of any personal or movable property, money or instrument of writing, conveying or securing a valuable right, by means of some false or deceitful pretense, device or fraudulent representation, with intent to appropriate the same to the use of the party so acquiring, or of destroying or impairing the rights of the party justly entitled to the same." See Pen. Code, 1895, art. 943. The swindle attempted to

be charged in this case would come under subdivision 1 of the succeeding article, to wit, "the exchange of property upon the false pretense that the party is the owner or has the right to dispose of the property given in exchange." In other words, the pretense upon which the swindle is attempted to be predicated is that W. E. Cummings falsely represented that he had the right to sell said diamond stud to the said Adolph Cohen for the sum of \$75, and that he actually sold and delivered said diamond stud in consideration of said \$75, but in our opinion the sale and delivery are not alleged. It is stated in the indictment that Cummings represented that he had the right to sell said diamond stud, and that he was the owner of it, and that said representations were false, and that by means thereof he induced the said Cohen to part with the possession and ownership of the said money; but we have searched in vain for an allegation that Cummings, as a part of the transaction, sold and delivered to said Cohen said diamond stud. Unless this actual sale and delivery are alleged, we fail to see how the transaction was completed in such shape as to afford the basis of an indictment for swindling. If A. represents to B. that he is the owner of a certain horse, and has the right to dispose of the same, and that he will sell said horse for \$100, and B. gives him \$100 merely on the faith of his representations that he is the owner and has the right to dispose of said horse, he would simply part with his money on the faith of the bare representations, and not on any alleged sale of the horse as the consideration for his parting with the money; and in such case there would be no sale or exchange, and no basis in law for the assumed swindle. Because the indictment fails to allege the sale and delivery by defendant to Cohen of said diamond stud in consideration of said \$75, the court should have sustained the objection of the defendant. No sale having been alleged, none could be proved. The indictment being defective in said respect, the judgment is reversed, and the cause dismissed.

HURT, P. J., absent.

SHIRLEY v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

HOMICIDE—INSANITY AS A DEFENSE—EXPERT EVIDENCE—ADMISSIONS OF DEFENDANT—CONTINUANCE—SUFFICIENCY OF AFFIDAVIT.

1. On trial for homicide, when the case was called, affidavit was made suggesting the insanity of the defendant. The state took the burden of proving sanity, and introduced its evidence, after which the counsel for defendant introduced evidence to show insanity. *Held*, that it was not error for the court to rule that the counsel for defendant should open and close the argument in the case.

2. On trial for homicide, where, in re-

sponse to a hypothetical question, physicians testified that, in their opinion, defendant was not insane, but was feigning insanity, an objection, based on the ground that the hypothetical question did not contain the full testimony in defendant's favor, will not be considered, the defendant's remedy having been to propose such question as would contain the facts alleged to have been omitted.

3. The admission of testimony to the effect that the sheriff had warned defendant that any statement he might make would be used against him, but could not be used in his favor, whereupon defendant said that, if such was the case, he would not make a statement, was not error, as being prejudicial to the defendant; the remark, if a confession, being admissible against him, and if not in the nature of confession, being clearly immaterial, and therefore not prejudicial.

4. On trial for homicide, when the case was called, defendant applied for a continuance on account of the absence of witnesses, including several physicians. The affidavit stated that defendant expected to prove by the physicians that his mental condition was greatly impaired, that in a few years he would be unable to transact business, and that, when the disease from which he was suffering, struck the brain, he would be deranged; that by another witness the defendant expected to show certain acts and words leading to insanity, and which occurred before the killing. *Held*, that the affidavit was insufficient, in that it stated conclusions, and not the specific facts which the witnesses were expected to prove.

Appeal from district court, Coleman county; J. O. Woodward, Judge.

W. H. Shirley was convicted of murder in the first degree, and appeals. Affirmed.

W. E. Smith, for appellant. Mann Trice, and Sims & Snodgrass, for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, the death penalty being assessed against him, and he prosecutes this appeal.

1. When the case was called for trial, appellant filed his first application for a continuance on account of the absence of Mrs. John Cupps, Dr. Hartman, Dr. Wood, and Dr. March. By Drs. Hartman and Wood he expected to prove that they "each attended W. H. Shirley [the defendant], and that the defendant was then diseased in his head, and that the mental condition of the defendant was greatly impaired. By the witness Dr. March, that he was the family physician of defendant, and that he had specially examined the defendant, and that he believed the defendant was bordering on insanity, and that in a few years he would not be able to attend to business, and that when the disease with which he was suffering struck his brain, he would be deranged. By Mrs. John Cupps, the defendant's acts, words, and deeds, which words, acts, and deeds are and were leading to insanity, and which occurred before the killing." The facts expected to be proved are too generally stated. They are simply conclusions, and the matters and things upon which the physicians are supposed to base their conclusions as to their belief that the defendant was bordering on insanity are not stated. Nor are the "acts,

words, and deeds" expected to be shown by Mrs. Cupps stated, nor how long they occurred before the killing. Even if the doctors had stated the facts upon which they based their belief, it would be insufficient, because the application for continuance states, while it indicates the defendant was bordering on insanity, that it was a few years in the future before he would be unable to attend to business, and before the disease with which he was suffering would strike his brain. That would be too late for this case, because the homicide had already been committed.

2. When the case was called for trial, affidavit was made, under the statute, suggesting that the defendant was then insane, and should not be tried. A jury was impaneled, the state took the burden of establishing sanity, and introduced its evidence, and counsel for the defendant then introduced evidence for the purpose of establishing insanity. When the evidence had closed, the court ruled that counsel for appellant should open and close the argument in the case. In this there was no possible injury to the appellant, for, whether the burden of proof was upon the appellant to make good the suggestion of insanity, or whether the state showed sanity, certainly appellant could not complain, when he was awarded the right to open and conclude the argument.

3. Bills of exception Nos. 3, 5, and 6 all present the same matter. Upon the trial, counsel for the state submitted to the two physicians, G. B. Beaumont and C. M. Alexander, a hypothetical case. The physicians gave as their opinion that the appellant was not only sane, but that he was feigning insanity. Counsel for appellant objected to this opinion, because the hypothetical case was not full, and did not introduce the testimony introduced by the appellant tending to show insanity. This objection was not well taken. If not satisfied with the hypothetical case submitted to the doctors by counsel for state, it was the duty of the counsel for appellant to submit a case made up of all the testimony. Again, the opinion of the doctors was not based upon the testimony that they had heard alone; but they had made examinations of the appellant, had observed his conduct, and the opinion was based upon the evidence delivered by the witnesses and their personal observation of the conduct of the appellant.

4. It appears that the defendant was warned by Sheriff Bell, after his arrest on this charge. The sheriff stated to him "that it was his duty as an officer to tell him that any statement he might make to him might be used against him, but could not be used in his favor. After this the defendant replied that, if that was the case, he would not make any statement." Appellant objects to this on the ground that the answer of appellant was calculated to mislead the jury and prejudice him. If this was a confession,

the defendant having been duly warned, certainly it could be used against him, and the contention of the appellant would signify that it was of that character. The view we place upon it, however, is, not that, if defendant made a statement, it would be prejudicial to him, but that, when he learned from the sheriff that what he said could not be used in his favor, he then declined to make any statement at all. This, it occurs to us, is the obvious construction of the reply of the appellant. It occurs to us that the testimony was not calculated to prejudice the appellant, and that the exception is rather frivolous than otherwise.

We have thoroughly examined the record, and in our opinion the evidence in this case amply justified the jury in finding the defendant guilty of murder in the first degree. The judgment of the lower court is affirmed.

RIOJAS v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

HOMICIDE—EVIDENCE—CORROBORATED TESTIMONY
— NEW TRIAL—CUMULATIVE EVIDENCE —
APPEAL—BILL OF EXCEPTIONS.

1. On trial for homicide it was error to admit, as original evidence, testimony tending to show that the state's witness had told the same story the morning after the homicide as he told on the trial, such testimony being admissible only in rebuttal of an attempt to show that the witness had fabricated his testimony, or had been induced so to testify from some improper motive.

2. On trial for homicide, where the only eyewitness was a boy about 10 years old, who testified that the deceased had been choked to death by defendant, the defense, claiming that the deceased died in a fit, attempted to sustain that theory by circumstantial evidence. It was shown that on a former occasion deceased had been seized with a fit. After conviction, defendant made application for new trial on the ground of newly-discovered evidence, and produced affidavits of certain witnesses to the effect that deceased had been afflicted with fits, and that it was hereditary in his family. *Held*, that such evidence was not merely cumulative, and a new trial should have been granted.

3. Where the bill of exceptions was signed and approved by the judge and filed after the expiration of the term, the defect was not cured by a certificate from the judge stating that the exceptions had been duly taken at the proper time on the trial, and the bill handed to him for signature, but had been misplaced.

Appeal from district court, Atascosa county; M. F. Lowe, Judge.

Jose Ma. Riojas was convicted of murder in the second degree, and appeals. Reversed.

J. W. Preston, J. T. Bivens, and J. M. Eckford, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and given 10 years in the penitentiary, and prosecutes this appeal.

1. Appellant presents to this court a bill of exceptions to the admission of certain evidence, signed and approved by the judge and

filed after the expiration of the term. Accompanying the bill is the following explanation by the judge: "This bill of exceptions was handed me within the time prescribed by law, and during the term of court at which the case was tried, but was in some manner misplaced, and it is a fact that the exception to the admission of the testimony was reserved by the defendant, through his counsel, at the time of the admission of the same; and the clerk of the district court of Atascosa county is here now ordered to file the same as part of the record in this case, and transcribe same, making a certified copy of same, and all indorsements hereon, and forward same to Austin as a part of the transcript in said cause." This bill cannot be considered. While it seemingly was neglect on the part of the judge not to approve and file the bill of exceptions, it was the duty of counsel to follow up his bill, and see that it was approved by the judge during the term, and filed with the clerk. This is statutory. See *George v. State*, 23 Tex. App. 229, 8 S. W. 25; *Exon v. State*, 33 Tex. Cr. R. 461, 26 S. W. 1088. However, if we could consider this bill of exceptions, we are of opinion that the objection to the admission of the testimony of Mrs. Reed that the state's witness Miguel Rios told her how the homicide occurred on the next morning thereafter, should have been sustained. This evidence to support the state's witness by proving that he had made the same statement the next morning after it occurred was introduced as original testimony. In no case can this be done, except in cases of rape and assault with intent to rape. If, however, the defendant attempted to show, upon cross-examination or otherwise, that his testimony on the trial was recently fabricated, or that he was induced to so testify from some motive or improper influence, then he could be supported by proof that he made the same statement before the influences were brought to bear, or soon after the transaction, and such testimony would go to solve the issue as to whether his testimony was recently fabricated, or whether it was the result of these improper influences and motives. See *Robb v. Hackley*, 23 Wend. 56; *People v. Doyell*, 48 Cal. 85; *Hotchkiss v. Insurance Co.*, 5 Hun, 90. Such supporting testimony is never admissible as evidence in chief, nor when the witness is attacked by proof of bad reputation for truth and veracity can he be supported in this way. To be more explicit: The defense introduced evidence for the purpose of showing that the witness for the appellant, or vice versa, has a bad reputation for truth and veracity. The party introducing the witness cannot support him by proof that he told the same tale soon after the transaction, or at any other time, as that sworn to on the trial. See *Russell v. Coffin*, 8 Pick. 143; *Rogers v. Moore*, 10 Conn. 13; *Webb v. State*, 29 Ohio St. 351. The rule is: "When the witness is charged with giving his testimony under the influence of some motive prompting him to

make a false or colored statement, it may be shown that he made similar declarations at a time when the imputed motive did not exist. So, in contradiction of evidence tending to show that the account of the transaction given by the witness is a fabrication of late date, it may be shown that the same account was given by him before its ultimate effect and operation, arising from a change of circumstances, could have been foreseen." Mr. Roscoe and Mr. Wharton and other text authors lay down the rule that, where the adverse party undertakes to show that the witness has made conflicting statements about the same matter, the party introducing the witness cannot support him by proving that soon after the transaction he made a similar statement as that sworn to on the trial. There is a line of authorities holding that you may support the witness upon such an attack. We have followed this line of authorities.

2. Appellant was convicted of the murder of one Roberto San Miguel, alleged to have been committed in the year 1896. The indictment was presented on the 1st day of April, 1896. The only eyewitness in the case was one Miguel Rios. At the time of the commission of the homicide said witness was a small boy, from 10 to 13 years of age. He testified that deceased was choked to death by means of a sash around his neck, and that the defendant and one Augustin Hernandez committed the homicide. His evidence as to the particulars of the homicide is exceedingly meager, and the circumstances supporting his testimony as to the cause of the death, taken on the inquest trial, was also meager. The theory of the defense was that he came to his death on account of a fit. This was attempted to be shown by circumstantial testimony, and the defendant showed that on a former occasion the deceased was seized with a fit. In view of the character of testimony offered by the state as to the cause of the death, and the theory presented by the defendant that he died in a fit, any testimony that the defendant could offer on that point became exceedingly important and material. After his conviction the defendant made an application for a new trial on the ground of newly-discovered evidence, and produced the affidavits of certain witnesses to the effect that the deceased had formerly been afflicted with fits, and that it was hereditary in his family; and also affidavits were presented that this testimony by the use of reasonable diligence was not discovered before the trial. It may be that the learned judge overruled the application for a new trial because such testimony was cumulative. If it be true that the testimony was cumulative, the court acted correctly in refusing to grant a new trial upon this ground. The question, therefore, for our decision is, what is cumulative testimony? Some courts have held that if the testimony goes to support the same theory or advances the same grounds of action for a recovery, that it is cumulative. It has been repeatedly decided

by the supreme court of New York that a new trial will not be granted merely for the discovery of cumulative facts and circumstances relating to the same matter which was proven on the former trial. However, subsequent decisions to the leading case of *Guyot v. Butts*, 4 Wend. 579, have defined cumulative evidence very clearly and satisfactorily. The opinion of Chief Justice Church in *Waller v. Graves*, 20 Conn. 305, contains the best definition we have found of the meaning of cumulative evidence. It was an action for libel brought by A. against B. The ground of defense was that the libelous writing, after it was signed by B., and before publication, was altered by the insertion therein of material words, without the knowledge or approbation of B., the defendant. To support this defense, B. introduced C., who drew up the writing. C. testified that the writing as published was not like the paper written by him and signed by B., in that it did not contain the words in question. Now, it was afterwards discovered that D., without the knowledge or consent of either B. or C., inserted these words. On application for a new trial on the part of B. it was held that the testimony of D., showing this fact, was not objectionable as cumulative evidence, notwithstanding that one of the witnesses (C.) swore on the trial that the obnoxious words were not in the paper signed by B., and the testimony of other witnesses tended strongly to show that they were. Chief Justice Church, in delivering the opinion, says: "There are often various distinct and independent facts going to establish the same ground on the same issue. Evidence is cumulative which merely multiplies witnesses to any one or more of those facts before investigated, or only adds other circumstances of the same general character. But that evidence which brings to light some new and independent truth of a different character, although it tend to prove the same proposition or ground of claim before insisted on, is not cumulative, within the true meaning of the rule on this subject. Suppose a question on trial to be whether the note of a deceased person has been paid, and witnesses have been introduced testifying to various facts conducing to prove such payment, and after a verdict for the plaintiff the executor should discover a receipt or discharge in full, or had discovered that he could prove the deliberate confession of the plaintiff of the payment of the note. There could be no question, in such a case, but a new trial should be granted, although the new facts go to prove the former ground of defense." In an action on a bill of exchange purporting to be drawn by the defendant proof was introduced by the defendant tending to establish the fact that the defendant had never signed or authorized the signing of the said bill, that he was not present when it was signed, that it was signed by some other person without the knowledge or consent of the defendant. After a

verdict for the plaintiff, the defendant moved for a new trial upon the affidavit of a witness who stated that he was present at the time the bill of exchange was drawn, and that the defendant was not present; that the defendant's name was signed by a third party, who was now dead, without the knowledge or consent of the defendant. Held, that this newly-discovered evidence could not be regarded as cumulative; that, as none of the witnesses who testified on the trial were present when the bill of exchange was drawn, their evidence was not of the same kind with that sought to be introduced. The motion was therefore granted. *Varde-man v. Byrne*, 7 How. (Miss.) 365. See 3 *Grah. & W. New Trials*, pp. 1048-1055. Applying these rules to this case, defendant had introduced evidence that the deceased had one fit at a certain time and place. This was for the purpose of showing the probability that he died from a convulsion or fit, and was not murdered; and in support of this theory, after the verdict of the jury, he brings forward the affidavits of a number of witnesses for the purpose of showing that the deceased was in the habit of having fits, and that fits were hereditary in his family. Now, this testimony was not cumulative, although it tended and was sought to serve the same purpose of the evidence introduced, to wit, that he had had one fit. Proof that he had one fit would tend very slightly to show that probably he died from fits, but when proof was made that he was in the habit of having fits, and that it was hereditary in his family, it would strengthen the presumption very cogently. The judgment is reversed, and the case remanded.

EDMONSON v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

CRIMINAL LAW—CONTINUANCE—ABSENCE OF WITNESS—MATERIALITY OF TESTIMONY.

In a prosecution for rape, where the defense is that the intercourse was had with the consent of prosecutrix, a continuance should have been granted to obtain the testimony of a witness who was absent at the trial, that a deceased sister of prosecutrix had stated in her presence that it was the fault of prosecutrix, which was not denied by prosecutrix, who was present.

Appeal from district court, San Saba county; W. M. Allison, Judge.

George W. Edmonson was convicted of a crime, and appeals. Reversed.

J. J. Cox and Burleson & Meek, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of rape, and given 14 years and 2 months in the penitentiary, and prosecutes this appeal. The only question in this case that requires to be considered is the action of the court in overruling the appellant's motion for a continuance,

which was a second application. The application was based on the absence of three witnesses, to wit, Mrs. Dave Hall, a resident of San Saba county; Mrs. John Hardman, a resident of Leon county; and Mrs. Crad Gober, who resides in McCulloch county. We will only treat the application as based on the absence of the two nonresident witnesses as the testimony of Mrs. Hardman appears simply to be cumulative. Both Mrs. Hall and Mrs. Gober were under process of attachment, and had given bonds for their attendance on the court. The court met on the 20th day of April, and this case was tried on the 29th of April, 1896. Some questions may be raised as to the diligence used, as on the 20th of April neither of said witnesses was present, and no forfeiture was taken on their bonds, and no new process asked for them. As to Mrs. Gober, however, appellant makes an affidavit that she was not able to attend court, and that she had forwarded a physician's certificate to that effect. Appellant "expected to prove by Mrs. Gober that she was present, on Tuesday after the alleged offense (which is alleged to have been committed on Sunday night), at the house of the mother of the prosecutrix, where the prosecutrix lived, and that Minnie Core said in the presence and hearing of Alice that it was Alice's fault that it occurred, and that Alice made no reply, nor did she dissent, to this, and that said Minnie, in the presence of the said Alice, in relating the circumstances of the said offense, told her (the said witness) that she (Minnie) had tried to get Alice to come home with her from church that night, but that she would not do so, and went with the defendant, who was alone, and that after she (Minnie) and her sister had got home, and found that the said Alice was not there, her mother sent her (Minnie) and her sister back after Alice, and that she met Alice in the mouth of the lane, about 500 yards from the house; that when they first saw Alice she was some 20 or 30 steps from the wagon of the defendant in which the defendant was sitting, and that the said Alice had in her hand a bundle that looked like a small bundle of white cloth; that when they went near Alice she ran back, and threw said bundle in the wagon; at the same time she said something to the defendant which the said Minnie did not understand, and then turned and came back to her, and that they (meaning Minnie, Alice, and Bell) then went home; and that she upbraided Alice about her conduct with the defendant." It was shown that both Minnie and Bell had died after the date of the alleged offense, and had never testified in the case.

The issue in the case was whether the act of carnal intercourse was committed with or without the consent of the prosecutrix. On this point the prosecutrix herself testified that she did not consent, but that the appellant forced her to have carnal intercourse with him. Appellant testified that he had intercourse with her, but that it was with her consent. Upon this question there were in proof circumstances supporting each theory. Among other circum-

stances in proof, it was shown that after the act of copulation, which occurred in the wagon, at night, on the way from church, and about a mile from the home of the prosecutrix, it was found that the underclothes of the prosecutrix were bloody. She states that when they reached a water tank the defendant made her get out, and forced her to pull off her clothes and wash them, and that it took her a half hour to wash them, and that the defendant then took the clothes from her and carried them home with him. Defendant testified that she washed the clothes of her own accord, after she found they were bloody. After this they proceeded towards the home of the prosecutrix, and when they got near the mouth of the lane, which was some three to five hundred yards from the house, they met Alice and Bell, who had preceded them in another wagon from church. He testified that the girls were calling Alice, and she got out of the wagon and started to meet them, and then came back to the wagon and threw her wet underclothing in the wagon. Under the peculiar attitude of this case, as to the question of consent vel non, it was important that appellant have the benefit of every circumstance, however slight, that might serve to shed any light upon this matter. The fact, if Mrs. Gober would testify thereto as is alleged, that Minnie stated in the presence of Alice that it was her fault, and that she did not deny it, it seems to us, was material. And, moreover, if appellant forced the prosecutrix to submit to carnal intercourse with him, equally, according to her testimony, he forced her to wash the blood off her clothing in the tank. It might appear that after this was done it was reasonable that he would force her to give them to him, and that he carried them to his home. This was her testimony. Defendant testified, however, that just before the prosecutrix met her sisters she came back and gave him her wet clothing. Mrs. Gober, the absent witness, according to the application for continuance, would state that Minnie, the sister of the prosecutrix, stated to the witness, in the presence of the prosecutrix, that when they met the prosecutrix she got out of the wagon and started to them, and before she got to them she turned back to the wagon, and handed her wet underclothing to the appellant, and said something to him which she did not hear. This is alleged to have been stated in the presence of the prosecutrix by said Minnie to Mrs. Gober, and the prosecutrix did not deny this version of the affair, but tacitly admitted it. The prosecutrix was certainly not under coercion of defendant when she met her sisters at the mouth of the lane,—at least, there is no evidence of it,—and her return to the wagon with the wet clothing was evidently a voluntary act, and suggested that she was endeavoring to conceal the evidence of her act of intercourse. When the clothing was originally washed it may have been intended by her that she could get to the house unobserved, and that her clothing would not be discovered in that condition; but when she met her sisters her

purpose in this regard was frustrated, and it then occurred to her that it was best to otherwise dispose of the wet clothes, so she returned and threw them in the wagon. At least, this evidence could have been used by the defense as a circumstance to indicate that she was a party with the defendant in concealing the evidence of the alleged offense, and so would have been pertinent and material to show her consent in the act of copulation. But, whether worth much or little, it was evidence which, in our opinion, the appellant was entitled to have before the jury. By the ruling of the court, however, he was deprived of this testimony. In our opinion, a new trial should have been granted the appellant on account of this absent witness; and for the error of the court in overruling appellant's motion for a new trial on this ground the judgment is reversed, and the case remanded.

YOUNG v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

LARCENY—WHAT CONSTITUTES.

A person taking an article, without the consent of the owner, but with the intent of allowing him the value of the article on settlement of their accounts, is not guilty of larceny.

Appeal from Hamilton county court; J. C. Main, Judge.

J. J. Young was convicted of a crime, and appeals. Reversed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of the theft of a plow, and his punishment assessed at a fine of \$100, and by confinement in the county jail for 20 days; and he prosecutes this appeal.

1. Several special instructions were asked by the appellant, presenting his theory of the case, which were refused by the court, and exceptions duly reserved by the appellant. These charges, in substance, presented for the consideration of the jury the question as to whether appellant, at the time he converted said plow stock to his own use, did so with the fraudulent intent to deprive the owners of its value. The facts bearing upon this point are substantially as follows: It is a conceded fact that appellant took the plow stock, without the knowledge or consent of the alleged owners; that he took it home with him, and never returned it; and that he used and kept it. The testimony is also contradicted that the appellant had been hauling goods for the owners of the plow stock from the nearest railroad station, and that this character of business had been carried on between them for a long while, and that at the time the plow stock was taken the alleged owners were indebted to the appellant in the sum of \$21. Appellant testified that, at the time he took the plow stock, it being at night,

and the owners absent, and he having urgent necessity for the plow stock the following morning, he took the same with the intention of allowing it as a credit on the \$21 which was due him by the alleged owners. He further testified that, on account of this hauling and dealing with the alleged owners of the plow stock, it did not occur to him that there would be any trouble about it, and that he would be guilty of stealing the plow stock, and that he had no intention whatever of committing a theft, or fraudulently appropriating the same, and that his intention was to pay for it. And when he had the settlement with the alleged owners, he offered to pay them for the plow stock, and placed the value of the alleged plow stock at \$2 as a credit on the \$21 due him by said owners. In this connection the alleged owners testified that on two occasions between the time of the taking of the plow stock and the arrest of the defendant, appellant was in their place of business, and did not mention the circumstance of the taking of said plow stock, and that on one of these occasions they refused to sell him on credit a sulky cultivator. Whatever the jury may have thought of this testimony, as to whether he did or did not have the fraudulent intent at the time of taking the plow stock, was not a question for the court to decide. It was a question of fact, and should have been submitted to the jury under appropriate instructions. If he took the property, as he claimed, with no fraudulent intent, under the circumstances detailed by him, and with the intent to pay the owners for the same, in the settlement between the alleged owners and himself of the amount due him, and the jury believed this, he would be entitled to an acquittal. The special instructions asked by the appellant submitting the question of intent, under the facts detailed for the defense, should have been given by the court.

2. Appellant proposed to prove by the witness Stevens that, on the evening preceding the taking of the plow stock at night, he was at work on the appellant's farm, having rented his land on the shares, and was in need of a plow stock, and the defendant told the witness on that day, and before he left home for town, that he would go to town, and get some plow handles, and fit them on the old plow stock for the witness, and, if he could not get the handles, that he would get a new plow stock. The court excluded this testimony on the ground that it was fabricated. What one says when he goes on a journey—his purpose and object—is generally held admissible. This testimony, we believe, should have been admitted. But we do not hold that it is of such material character as, standing alone, would afford the ground for a reversal of the judgment. For the error of the court, however, in refusing the charges asked on the testimony offered by the appellant tending to show that he took the plow stock, intending to pay for it in his settle-

ment with the alleged owners, who owed him money, the judgment of the lower court is reversed, and the cause remanded.

COTHRAN v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

DEALING IN FUTURES—INDICTMENT.

Under Rev. Pen. Code 1895, art. 377, providing that if a person shall conduct a business commonly known as "dealing in futures," in any agricultural product or stocks, or shall conduct any business commonly known as a "produce or stock exchange," where future contracts are bought and sold with no intention of an actual bona fide delivery of the article or thing so bought or sold, he shall be guilty of a misdemeanor, an indictment alleging that defendant unlawfully carried on a business commonly known as "dealing in futures," in agricultural products, to wit, cotton, with no intention of an actual, bona fide delivery of the articles bought and sold, is insufficient, in failing to allege that the dealing in futures was with reference to future contracts in regard to the cotton about which the contract was made.

Appeal from Travis county court; D. A. McFall, Judge.

C. H. Cothran appeals from a conviction. Reversed.

Hogg & Robertson, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted for dealing in futures. Omitting the formal parts, the information charges that appellant "was the agent and representative of the firm of Fairchild & Hobson, whose other names are to affiant unknown, and, as such agent and representative of said firm of Fairchild & Hobson, said C. H. Cothran did then and there unlawfully conduct, carry on, and transact a business commonly known as 'dealing in futures,' in agricultural products, to wit, cotton, with no intention of an actual, bona fide delivery of the article and thing bought and sold, against the peace and dignity of the state." Several exceptions were urged to the sufficiency of this information. This prosecution was brought under article 377 of Rev. Pen. Code 1895, which reads as follows: "If any person shall, directly or through an agent or agents, manage or superintend for himself, or shall as agent or representative of any other person, firm or corporation, conduct, carry on, or transact any business which is commonly known as dealing in futures, in cotton, grain, lard, in all kinds of meat or agricultural products, or corporation stocks, or shall keep any house or manage, conduct, carry on, or transact any business commonly known as a produce or stock exchange, or bucket shop, where future contracts are bought and sold, with no intention of an actual bona fide delivery of the article or thing so bought or sold,—such person, whether acting for himself or for another as aforesaid, shall be deemed guilty

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of a misdemeanor," etc. In order to constitute this offense the party must not only conduct, carry on, and transact a business commonly known as "dealing in futures," but that business must be based upon the fact that future contracts are to be bought and sold with no intention of an actual, bona fide delivery of the article or thing so bought or sold; and in order to charge an offense under this statute it would be necessary to allege, not only that the business commonly known as "dealing in futures" was conducted, carried on, and transacted, but it must further allege that it was a business where future contracts are bought and sold with no intention of an actual, bona fide delivery of the article or thing, specifying the article or thing bought or sold. It would be necessary, as we understand this statute, to allege these matters, and that the thing so bought or sold should be specifically set out in the indictment. It is not an offense to deal in futures, unless the intention on the part of the dealer was not to deliver the article or thing bought or sold. It would be no offense to deliver the contract, nor would it be an offense to make the contract, unless there was no intention to deliver the article about which the contract was made. The information in this case, as we understand it, fails to allege that the dealing in futures was with reference to future contracts in regard to the cotton about which the contract was made. It is not sufficient to allege that the party was dealing in futures, for this does not meet the measure of the denunciation set out in the statute. The dealing in futures must be where future contracts are bought or sold with reference to some one or more of the articles or things about which the contract is made, and the article bought or sold, and of course these articles or things must come within the terms of the enumeration in the statute. Dealing in futures in agricultural products is not sufficient. The dealing in futures in agricultural products must be in those cases where future contracts are bought or sold, and where there is no intention of an actual, bona fide delivery of the article or thing so bought or sold. For the reasons indicated the judgment is reversed, and the prosecution ordered dismissed.

CLARK v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

THEFT—CONTINUANCE FOR ABSENT WITNESS—DILIGENCE—MATERIALITY OF EVIDENCE—FLIGHT—EVIDENCE—INSTRUCTION.

1. When defendant's case, the first on the docket, was called, the judge recused himself, and subsequently a special judge was appointed, and the case was then recalled, it being the first on call. *Held*, no error.

2. A subpoena was issued for a witness March 3, 1896, and was returned, April 6, 1896, "Not found in the county." On the lat-

ter day the state had process issued for the witness, and defendant did not duplicate it. The case was tried April 13, 1896. The indictment was returned into court April 14, 1894, and it did not appear when defendant was arrested thereunder. Held, that there was not a proper showing of diligence for a continuance for absence of the witness.

3. On a trial for theft of hogs, the state having proved the taking thereof before they were seen in a wagon, and that they were subsequently found in a pen on the ranch of defendant or his father, and it being shown circumstantially that they must have been carried there in a wagon, a continuance for an absent witness, who would testify that he saw the wagon on the way between defendant's home and the ranch, and that then it had no hogs in it, was properly refused, the evidence not being sufficiently material.

4. That defendant, after his preliminary examination, escaped from one who was carrying him to jail, may be shown by parol testimony; it not being necessary to show his previous examination by the papers in the case.

5. Evidence of flight after a preliminary examination having been admitted, it is not necessary to charge with reference to the purpose in admitting it.

Appeal from district court, Bandera county, Eugene Archer, Judge.

D. W. Clark appeals from a conviction. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of the theft of hogs, and given two years in the penitentiary, and prosecutes this appeal.

1. Appellant excepted to the action of the court in taking up said case, as he alleges, out of its regular order. The explanation of the court to the bill of exceptions shows that the case was the first on the docket, and, when it was called, the judge recused himself, and that subsequently a special judge was appointed, and the case then recalled; it being the first on call. In this there was no error.

2. Appellant also made a motion for a continuance on account of the absence of one John Penley, alleged to reside in Bandera county. The application shows that a subpoena was issued for said witness on the 3d day of March, 1896, and that it was returned, on the 6th day of April, "Not found in this county." The case was tried on the 13th day of April. The appellant excuses himself from further diligence by showing that, after the 6th of April, the state had process issued for said witness, and that he did not duplicate the process. The indictment was returned into court on the 14th day of April, 1894. There is nothing in the record to show when the defendant was first arrested under the indictment. If he was arrested shortly after the finding of the indictment, there was certainly no diligence used in this case. The application should have shown when the defendant was first brought under the jurisdiction of the court, in order that his diligence might have been made to appear. Moreover, it does not ap-

pear to us that the testimony was of that material character which would authorize a continuance of the case. The state proved the taking of the hogs prior to the time when they were seen in the wagon, and also that the hogs were subsequently found in a pen on the ranch of the defendant or his father. It is shown circumstantially that the hogs must have been carried to the ranch in the wagon. The object of the defendant's absent testimony was to show that the witness saw the wagon on the way between where the defendant lived and the ranch in question, and that then it had no hogs in it; but the proof of this fact would not negative the fact, established by the state, that the defendant had already taken the hogs at a time before they may have been hauled in the wagon.

3. The charge on circumstantial evidence in this case was sufficient. See *Smith v. State* (Tex. Cr. App.) 34 S. W. 960.

4. The testimony of John Burdett, which was excepted to by the appellant, was admissible to show the flight of the appellant, which, in a criminal case, is always admissible; and there was no error as to the parol proof, made by Burdett, that he was carrying him to jail, after his preliminary examination before the justice of the peace for the theft of said hogs, and that he escaped from him. It was admissible to prove the charge of the theft of the hogs against the defendant, and his knowledge thereof, and his flight, without proving the same by the papers in the case; nor was the court called on to charge the jury with reference to the purpose in admitting said testimony. It was a circumstance of a criminative character against the defendant, and it would have been error for the court to have singled out this fact and charged upon it.

5. Appellant excepted to the charge of the court, in that it did not charge upon the theory of his defense in the case. The evidence does not present any substantive defense on the part of the appellant, and an affirmative charge on some substantive defense was not called for. The evidence in the case was sufficient to warrant the verdict, and the judgment is affirmed.

DILWORTH v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

CONSTITUTIONAL LAW — STATUTES — TAKING PRIVATE PROPERTY WITHOUT COMPENSATION OR DUE PROCESS.

1. Rev. Pen. Code 1895, arts. 973, 974, making it a misdemeanor to build or maintain a fence extending more than three miles in the same general direction without providing a gateway of a specified kind, and which provide no compensation to the owner, violate Bill of Rights, art. 1, § 17, prohibiting the taking of private property for public use without compensation first made to the owner, since they impliedly give the public the right to pass through the gates and over the land, and re-

quire the owner to maintain the gates at his own expense.

2. Such sections are also in violation of Bill of Rights, § 19, providing that no person shall be deprived of his property without due process of law.

Appeal from Wilson county court; A. R. Stevenson, Judge.

G. N. Dilworth was convicted of a violation of the statute regulating pasture fences, and appeals. Reversed.

Rudolph Kleberg and Geo. Burgess, for appellant. Mann Trice, for the State.

DAVIDSON, J. Omitting the formal parts of the information in this case, it charges that the appellant "did then and there unlawfully build and maintain more than three miles, lineal measure, of pasture fence, running in the same general direction, without a gateway in the same, against the peace and dignity of the state." The statement of facts is an agreement to the effect that the allegations in the information are true. Appellant on the trial was convicted, and fined in the sum of \$25, and from this conviction he appeals.

Appellant contends that the judgment should be reversed, and the prosecution dismissed, because the law under which he was prosecuted and convicted is violative of sections 17, 19, art. 1, of the state constitution. This article is familiarly known as the "Bill of Rights." His two general propositions may be embodied in this statement,—that article 974 of the Revised Penal Code is violative of said sections of the bill of rights, in that it seeks to take the property of the citizen without compensation, and without due process of law. Section 17 of article 1 of the constitution reads as follows: "No person's property shall be taken, damaged or destroyed for or applied to public use, without adequate compensation made, unless by the consent of such person, and when taken, except for the use of the state, such compensation shall be first made or secured by a deposit of money. * * *" Section 19 provides: "No citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." Article 974, Rev. Pen. Code 1895, is as follows: "If any person or persons shall build or maintain more than three miles, lineal measure, of fencing, running in the same general direction, without providing such gateway, he shall be deemed guilty of a misdemeanor." The preceding article describes the character of gateway to be constructed in the line of fencing. These statutes were evidently intended to provide passage or road ways through the fences and across the inclosed pasture land of the party building such fences, and it was also evidently intended that the owner of this fencing should create or give easements and right of travel across

his lands through these gateways. It is further evident that these easements are to be taken from the owner, not only without compensation, but against his consent; and not only so, but he was required, at his own expense, to build these necessary gateways, in addition to furnishing free of charge the right of passage across his land, and upon his failure to do so is to be punished. Property of the citizen, in this state, cannot thus be taken and appropriated, even though it be for the use of the public. There is no rule of law in this state, constitutional or otherwise, but what prohibits, or ought to prohibit, the taking of private property of one individual for the private use of another individual or set of individuals. That the lands of the citizen may be taken, under the right of eminent domain for public highways, is well established, and is necessary for public convenience; but, even when taken for the public, it is a requisite that the owner be recompensed by adequate compensation, and our constitution and laws have carefully guarded this matter, and pointed out the manner and the means by which the property of the citizen may be thus set apart for public travel or public usage. "The right of eminent domain implies that the purpose for which it may be exercised must not be a mere private purpose; and it is conceded on all hands that the legislature has no power in any case to take the property of one individual, and pass it over to another, without reference to some use to which it is to be applied for the public benefit. The right of eminent domain does not imply a right in the sovereign power to take the property of one citizen, and transfer it to another or to his use, even for a valuable consideration, where the public interests will be in no way promoted by such transfer. It seems not to be allowable, therefore, to authorize private roads to be laid out across the lands of unwilling parties by an exercise of this right. The easement in such a case would be the property of him for whom it was established, and, although the owner would not be deprived of the fee in the land, the beneficial use and exclusive enjoyment of his property would, in greater or less degree, be interfered with. Nor would it be material to inquire what quantum of interest would pass from him. It would be sufficient that some interest, the appropriation of which detracted from his right and authority, and interfered with his exclusive possession as owner, had been taken against his will, and if taken for a purely private purpose it would be unlawful. Nor could it be of importance that the public would receive incidental benefits such as usually spring from the improvement of lands, or the establishment of prosperous private enterprises. The public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies; and

a due protection to the rights of private property will preclude the government from seizing it in the hands of the owner, and turning it over to another, on vague grounds of public benefit to spring from the more profitable use to which the latter may devote it." Cooley, Const. Lim. (4th Ed.) § 531. While the right of eminent domain may be reserved in the state, or exercised under proper legislation, and roads, highways, and thoroughfares may be provided for the convenience of the people, yet property, when thus taken, must be taken for the benefit and use of the public, and not for private individuals. This is necessary for the wants of travel and traffic. If the legislature, under the article under which the appellant was indicted and convicted, intended to take the property of the citizen for the use of private parties living near and adjoining this fence, and simply for their benefit, then the law would have no standing at all. If it was intended thereby to take it for public use, it would be necessary to lay out roads and provide gateways, under the different articles of the Civil Statutes making provisions for third-class roads. This is not done, nor intended to be done, by the article under discussion. Not only was adequate compensation not made or provided for under this article, but the property was set aside at the expense of the owner; and, upon his failure to provide the gateways through his pasture, along the line of fencing, he is to be punished for not so providing such gateways, and is afforded the privilege of paying out of his own pocket for this incumbrance. It would hardly be a tenable position, in view of the constitution of our state, to assume that the private property of the citizen can be taken in this manner; for if so he is not only made to give up or donate to the public his individual property, but is burdened with the extra expense of providing gateways at his own expense, and punished for a failure to do so. This is so plainly violative of those guarantied rights reserved by the citizenship of this state to themselves, that we deem it unnecessary to discuss this question further. Where roadways and gateways are necessary for public use, ample authority has been provided by legislative enactment for securing the same. These statutes are full and explicit as to the manner and means of condemning the property of the private individual for public use. For a discussion of the questions pertaining to the matter at issue, the following authorities are cited: Davidson v. State, 16 Tex. App. 336; Thompson v. State, 22 Tex. App. 323, 3 S. W. 232; Bradley v. State, 22 Tex. App. 330, 2 S. W. 828; Cummings v. Kendall Co. (Tex. Civ. App.) 26 S. W. 439; Hopkins v. Cravey, 85 Tex. 189, 19 S. W. 1067; Dulaney v. Nolan Co., 85 Tex. 225, 20 S. W. 70; McIntire v. Luckner, 77 Tex. 259, 13 S. W. 1027; City of Ft. Worth v. Howard, 3 Tex. Civ. App. 539, 22 S. W. 1059; Wooldridge v. Eastland Co., 70 Tex. 680, 8

S. W. 503; Railway Co. v. Downie, 82 Tex. 383, 17 S. W. 620; Bounds v. Kirven, 63 Tex. 161; Railway Co. v. Fuller, Id. 467; Rosenthal v. Railway Co., 79 Tex. 327, 15 S. W. 268; Aggs v. Shackelford Co., 85 Tex. 147, 19 S. W. 1085; Rhine v. City of McKinney, 53 Tex. 354; Cooley, Const. Lim. (4th Ed.) §§ 528-533, 559. And many other authorities can be cited in support of the same proposition.

In view of what has been said, it will be unnecessary to discuss the second proposition, that the property has not been taken by due process of the law of the land. The statute under which appellant was indicted makes no provision for condemning the property of the fence owner for public uses. As we understand the law of this state, articles 973 and 974 of the Revised Penal Code are clearly in violation of sections 17 and 19 of the bill of rights, and therefore void. For the reasons indicated the judgment is reversed, and the prosecution dismissed.

SCOTT v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

BURGLARY—ERRONEOUS INSTRUCTIONS—POSSESSION OF PROPERTY TAKEN—CONSIDERATION OF EVIDENCE—LIMITING ARGUMENT.

1. An order requiring defendant's counsel, after having occupied 45 minutes, to close within 5 minutes, will not be held prejudicial, where the bill of exceptions fails to show that the time allowed was not sufficient to complete the argument.

2. An instruction authorizing a conviction of burglary on the fact that defendant, shortly after the burglary, was found in possession of property taken in the burglary, on proof of the falsity of the explanation given by him of his possession when he was discovered with it, is on the weight of the evidence, and therefore erroneous.

3. An instruction, in a criminal case, directing the jury to disregard certain evidence in passing on the "guilt or innocence" of the defendant, is objectionable, since it is their duty to pass only on the question of guilt.

4. An instruction directing the jury, in weighing defendant's evidence, to consider other charges against him, admitted to impeach him as a witness, is erroneous.

Appeal from district court, Dallas county; Charles F. Clint, Judge.

Winfield Scott was convicted of burglary, and appeals. Reversed.

Walter S. Lemmon, for appellant. Mann-
Trice, for the State.

HENDERSON, J. Appellant was convicted of burglary, and given two years in the penitentiary, and prosecutes this appeal.

1. Appellant excepted to the action of the court in requiring his counsel to close his argument within the next 5 minutes, after he had been arguing about 45 minutes. The court says that he requested counsel to close his argument. A request of the court, in such matters, is equivalent to a command:

and if it was merely a request for counsel to compass the remainder of his remarks within the space of 5 minutes, if he could reasonably do so, but if he could not the court would enlarge the time, the court should have made the bill of exceptions so state. We have heretofore said that it was within the province of the judge trying the case to limit the argument, within reasonable bounds, and that this court would not revise a case where a limitation had been made, unless there should appear to be a clear abuse of discretion, calculated to injure or impair the rights of the appellant. See *Huntly v. State* (decided at Dallas term, 1896) 34 S. W. 923, and authorities there cited. This limitation, however, should always be made before the beginning of the argument, and not after it has commenced. The bill in this case does not show that the five minutes allowed by the court at the time when he interposed, was not a sufficient time within which counsel for appellant could compass the remainder of his argument, and, in the absence of such showing, we cannot presume that he was not able to get through, and say all that was necessary to be said by him in the case.

2. On the trial of the case, on the subject of recent possession of property alleged to have been taken in a burglary, in connection with an explanation therewith by appellant, the court gave the following charge to the jury: "A person who may be found in possession of personal property, recently stolen, who, when first called upon, explains said possession, and if the same is natural and reasonable, and probably true, then such person cannot be convicted of burglary of such property, unless the state shows by legal evidence that such explanation is false. And in this case, if it appears from the evidence that the defendant was found in possession of a watch that belonged to the witness Richard Morgan, recently after the said watch is charged to have been stolen, and that, when first called upon, he made an explanation of his said possession, and it was natural and reasonable, and probably true, then you should acquit, unless the state has shown by legal evidence that such explanation is false; but this the state may do by circumstances, as well as by direct or positive evidence." This charge instructs the jury that they can find the defendant guilty of burglary on the fact of being found recently thereafter in possession of goods shown to have been taken in the burglary; that is, it tells the jury, if the defendant is found in possession of property taken in a burglary, recently thereafter, and that he was called on to make an explanation, and that he gave an explanation, but the state showed such explanation to be false, then the jury were authorized to convict the defendant upon the fact of the possession of the goods alone. This fact of possession of goods recently stolen in a burglary is a criminative fact against a defendant, but it is not the province of the

judge to tell the jury so; much less, to instruct them to convict upon this fact alone. Moreover, it can rarely occur that such fact of possession stands alone, but in every case there are other facts and circumstances developed in the testimony besides the fact of possession. As a matter of law, the jury might be authorized to convict, in a proper case, upon the fact of possession of recently stolen property, standing alone; but a charge telling the jury that they could do so would be a charge upon the weight of the testimony, and, besides, would be singling out a solitary fact in a case, and charging upon that. This matter was before this court in *Wheeler v. State*, 34 Tex. Cr. R. 350, 30 S. W. 913, and we there laid down the character of charge which should be given when the facts rendered such a charge necessary. And also see *Pollard v. State*, 33 Tex. Cr. R. 197, 26 S. W. 70. This identical question has come before us from the criminal district court of Dallas county heretofore, and, in reversing the cases upon such charges, we have suggested a proper charge on the subject, but this seems to have been utterly disregarded. If, in the trial of cases, more care was manifested, and attention directed to the decided cases, many reversals would be avoided.

3. The learned judge, upon another branch of the case, instructed the jury as follows: "In considering of your verdict, you will not look to any evidence relating to any other charge against defendant, in passing upon the guilt or innocence of the defendant; but you may look to such evidence in weighing the evidence of defendant as a witness, and any evidence about other charges against Steve Jackson was admitted alone to aid you in properly weighing his evidence." In the first portion of said charge, it is suggested to the jury that they are passing upon the guilt or innocence of the defendant, when the defendant's innocence is not a matter for the consideration of the jury at all, except that they are to presume his innocence. They simply pass upon the evidence as to the guilt of the defendant, and, if they find this beyond a reasonable doubt, they convict; otherwise, they acquit. However, a greater vice is apparent in the latter portion of said charge, in that the jury are instructed to look to other charges against the defendant in weighing his evidence as a witness. We understand that the evidence of such other charges, in a case like this, is admitted as evidence going to discredit the defendant as a witness, and not to be used as a factor in weighing the evidence of the defendant. If the defendant, as a witness, is discredited, the jury disregard his testimony altogether, and they do not weigh it in the case. Under the charge, the jury may not have considered the defendant entirely discredited, but may have weighed against his evidence the fact that he was charged with other offenses. A proper charge upon this subject is simple

enough, and could very easily have been given.

Other questions raised in the case will not likely occur again, on another trial, and we will not discuss them. For the errors pointed out, the judgment is reversed and the case remanded.

GOLDSTEIN v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

CRIMINAL LAW—DEALING IN FUTURES—INDICTMENT—SUFFICIENCY.

Pen. Code 1895, art. 377, provides that, if any person shall carry on any business which is commonly known as "dealing in futures in cotton, grain," etc., or shall conduct any produce or stock exchange where future contracts are bought and sold with no intention of an actual bona fide delivery of the article sold, he shall be guilty of a misdemeanor. *Held*, that an information charging that defendant carried on a "business commonly known as a dealer in futures, cotton, grain," etc., was insufficient for failing to allege that the futures were bought or sold with no intention to deliver, and for want of a designation of the particular thing bought or sold, and for omitting the word "in" before "cotton."

Appeal from Wilson county court; A. R. Stevenson, Judge.

Ed. Goldstein was convicted for dealing in futures, and appeals. Reversed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted for dealing in futures. The charging part of the information alleges that the appellant "did then and there unlawfully conduct, carry on, and transact a business commonly known as a dealer in futures, cotton, grain, meats, and stocks, against the peace and dignity of the state." This prosecution was brought under article 377 of the present Revised Penal Code (1895), which reads as follows: "If any person shall, directly or through an agent or agents, manage or superintend for himself, or shall as agent or representative of any other person, firm or corporation, conduct, carry on or transact any business which is commonly known as dealing in futures in cotton, grain, lard, any kinds of meat or agricultural products, or corporation stocks, or shall keep any house, or manage, conduct, carry on or transact any business commonly known as a produce or stock exchange, or bucket-shop, where future contracts are bought and sold with no intention of an actual bona fide delivery of the article or thing so bought or sold, such person, whether acting for himself or for another, as aforesaid, shall be deemed guilty of a misdemeanor," etc.

Motion to quash the information was urged upon several grounds. We are of opinion that the motion ought to have been sustained. In order to constitute this offense, the party must not only conduct, carry on, or transact the business commonly known as "dealing in

futures in cotton, grain, lard," etc., but it must also be alleged that future contracts were bought or sold, or both, as the case may be, with no intention of an actual bona fide delivery of the article or thing so bought or sold, and the particular article or thing dealt in, bought, or sold should be specified in the information. In other words, the information should specifically state the offense of which the state expects to prove the accused guilty, so that, if a judgment is rendered on the trial, it can be pleaded in bar of a subsequent prosecution for the same offense. As we understand this statute, the dealing must be in futures in regard to some one or more of the particular articles or things mentioned in the statute, and the contracts must be operative in the future, where there is no intention of an actual bona fide delivery of the article or thing so bought or sold. It is not a violation of the law to deal in futures, where the thing or article sold or bought is to be delivered under the terms of the contract. The information does not meet the requirements of the law. It simply charges that appellant conducted, carried on, and transacted a business commonly known "as a dealer in futures, cotton, grain, meats, and stocks." This he could do legitimately, and against which there is no legal denunciation. The information is also fatally defective in not charging that the dealing in futures was "in cotton, grain, meats, and stocks." The word "in," preceding the article with reference to which the dealing in futures was carried on, is a necessary word, by the statutory definition of this offense. The statutory dealing in futures must be carried on, conducted, or transacted "in cotton, grain, lard, any kinds of meat or agricultural products, or corporation stocks." It is not an offense to simply deal in futures, or cotton, etc. The dealing must be in futures "in cotton," etc. Rev. Pen. Code 1895, art. 377. The motion to quash should have been sustained. The judgment is reversed, and the prosecution ordered dismissed.

TROTTER v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

HOMICIDE—JURORS—COMPETENCY—REMARKS OF PROSECUTOR—REVIEW—WITNESS—CREDIBILITY—THREATS—EVIDENCE—INSTRUCTIONS.

1. One who, from rumor and hearsay, had formed an opinion as to the guilt or innocence of accused, but who stated that such opinion would not influence his verdict, was competent to sit as a juror.

2. It was proper to sustain the district attorney's challenge to a juror who stated that he formed an opinion as to defendant's guilt or innocence from conversing with the witnesses in the case.

3. While it was not proper for the district attorney to remark, "I demand the strict rule, because I believe there are witnesses here who would not regard the rule unless strictly enforced," it was not prejudicial.

4. On a trial for murder deceased's brother testified that immediately after the killing, and when he was about to leave the place where deceased was killed to get some one to stay with the body, a certain person, who was with defendant at the time of the homicide, was there, and "was watching" witness. Held, that such testimony was not objectionable on the ground that it was the opinion of the witness, and, if not admissible as part of the *res gestæ*, it was of such a character that its withdrawal from the jury cured the error in admitting it.

5. The state is not obliged to place on the stand one who was an eyewitness of the homicide.

6. Remarks of counsel will not be reviewed where no request was made for an instruction directing the jury to disregard the same.

7. On a trial for murder, a charge that evidence of threats made by deceased, and not communicated to defendant, are not to be considered in justification of defendant's acts at the time of the killing, was not prejudicial where the court immediately added that they were to be considered as a circumstance tending to explain the acts of deceased, and as tending to show whether the latter commenced the difficulty.

8. It was not error to charge, in effect, that, notwithstanding testimony had been introduced tending to impeach the witnesses, the credibility of said witnesses was a question for the jury.

Appeal from district court, Bandera county; Eugene Archer, Judge.

Albert L. Trotter was convicted of murder in the second degree, and appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder in the second degree, and given 15 years in the penitentiary, and prosecutes this appeal.

1. Appellant excepted to the action of the court in overruling his challenge for cause as to the juror D. C. Cox. As to said juror the bill shows as follows: "The court propounded to the juror the statutory questions, to wit: 'From hearsay or otherwise, is there established in your mind such a conclusion as to the guilt or innocence of the defendant as would influence you in finding a verdict?' The juror replied, 'I have formed an opinion.' The court then asked the juror 'if it was such an opinion as would influence his action in finding a verdict.' The juror said, 'I do not think it would.' The court then told the juror he would have to say positively whether it would or not. The juror then said it would not. Counsel for the defendant then asked the juror if he still had that opinion. He replied that he still had it; and in answer to further questions by counsel for the defendant the juror said, 'I cannot go into the jury box free from that opinion, and I will have to hear evidence before I can change that opinion.' The court then asked the juror if his opinion was formed from hearing the witnesses talk about the case or from rumor and hearsay. The juror said it was from rumor and hearsay, and that, notwithstanding the opinion, he could go into the jury box and

render an impartial verdict according to the law and the evidence. Thereupon the court, over the objection of the defendant, held the juror competent, and the defendant was compelled to exhaust a peremptory challenge upon said juror, and the defendant afterwards exhausted all of his peremptory challenges before the jury was formed." This action of the court is assigned as error. Under the former decisions of this court we hold that the juror was competent. See *Suit v. State*, 30 Tex. App. 322, 17 S. W. 458.

2. The second bill of exceptions relates to the sustaining of a challenge to a juror, made by the district attorney. The juror, in response to an examination by the court, fully qualified as a juror, and stated that he had formed no opinion as to the guilt or innocence of the defendant that would influence him in finding a verdict. The district attorney then asked said juror if he had formed any opinion as to the guilt or innocence of the defendant, to which the juror replied, "I have." The district attorney then asked the juror if he had formed that opinion from talking to the witnesses in the case. The juror replied that he had. The court then asked the juror, "Do you say that you formed that opinion from conversing with the witnesses in the case?" The juror replied, "I do." Thereupon the court sustained the challenge of the state for cause, and said juror was discharged, to which the defendant excepted. The statute seems to make a difference between an opinion formed by a juror from hearsay merely and where the juror has formed his opinion from having heard the testimony, or from having conversed with the witnesses in the case. This distinction has been recognized by this court. See *Shannon v. State*, 34 Tex. Cr. R. 5, 28 S. W. 540. No injury is shown to appellant in the action of the court, and there was no error in sustaining the challenge for cause.

3. Counsel for appellant excepted to the remarks of the district attorney when the witnesses were placed under the rule. Said remarks were as follows: "I demand the strict rule, because I believe there are witnesses here who would not regard the rule unless strictly enforced." This remark did not single out the defendant's witnesses, but was applied to all of the witnesses. It was not a proper remark to suggest that all or any of the witnesses would not comply with the rule unless it was strictly enforced. When the district attorney had asked for the rule, and requested the court to instruct the witnesses in regard thereto, he had performed his duty; and when the district attorney had done this he should stop. However, we cannot see how the remark may have affected the rights of the appellant injuriously, and the bill does not show that it had this effect.

4. On the trial of the case the state proved

by the witness Robert Allsop that after the difficulty the defendant left the scene of the difficulty; that he (Allsop) left the body of his brother in the road where he had been killed, and started off to get some one to come and stay with his brother's body; that John Criswell, who was with the defendant at the time of the homicide, and who had come there with him, had ridden off several hundred yards, and that the said Criswell remained there on his horse, as long as witness was in sight, and he stated that Criswell was "watching him." This latter expression, on objection by appellant, was excluded. Appellant, however, contends that it was improper testimony, and was calculated to affect the defendant injuriously, and its effect could not be thus withdrawn from the jury. The court, in his explanation of the exclusion of said testimony, says that this was a mere opinion of the witness. In our opinion, the evidence was not objectionable on this ground. A witness can testify as to whether he was being watched or not, and his evidence is not an opinion, but a fact. However, appellant contends that, if it was admissible at all, it was only admissible on the ground that Criswell and Trotter were co-conspirators, and, the conspiracy having ended with the death of Joe Allsop, the testimony was not admissible against his co-defendant, Albert Trotter. If it be conceded that the conspiracy had ended, still this testimony appears to us to be admissible as a part of the *res gestæ*. It was very shortly after the homicide had been committed by Trotter, who had fled from the place, but Criswell had not left, but remained in proximity to the scene of the homicide. Again, this testimony was withdrawn as soon as the court's attention was called to it, and the jury instructed to disregard it. The testimony must be shown in such case to be more than merely improper evidence; it must be prejudicial. As was said in *Miller v. State*, 31 Tex. Cr. R. 609, 21 S. W. 925: "It is not intended to hold that cases may not arise in which the withdrawal of testimony would not cure the error committed in admitting the same, for it may occur that such evidence was of such a prejudicial character as to so influence the jury against the defendant that he would be deprived of a fair and impartial trial." The evidence admitted and excluded in this case does not appear to us to be of such character.

5. The contention of the appellant that the state should have put Criswell on the stand because he was an eyewitness to the transaction is not the law. See *Gibson v. State*, 23 Tex. App. 414, 5 S. W. 314; *Kildwell v. State* (Tex. Cr. App.) 33 S. W. 342; *Reynolds v. State*, 33 Tex. Cr. R. 143, 25 S. W. 786.

6. Appellant contends that error was committed by the district attorney in his closing argument by traveling out of the record and in indulging in certain remarks. It is sufficient to observe in this connection that the

remarks complained of do not seem to be hurtful, and no request was made by the appellant to have the court instruct the jury to disregard the same, which, under the decisions of this court, should have been done before the appellant can avail himself of this matter.

7. Appellant excepted to paragraph No. 22 of the court's charge, which is a charge presenting the theory of the defendant having provoked the difficulty. His contention is that such charge is not applied to the facts of the case. We have examined this charge, and in our opinion it, in connection with the other charges on self-defense, presents all of the law bearing on the subject, as shown by the facts. The law of self-defense, we think, is fully presented in the charge in every phase that the evidence required. And in that portion of the charge predicated on a demonstration by Joe Allsop with a gun the charge directly applies the law to the evidence in the case; and the charge also instructs the jury that the defendant could rely on a demonstration made by either Joe Allsop or his brother, Robert. We fail to see any cause of complaint as to the court's charge on self-defense.

8. Appellant also complains of the court's charge on threats. Said charge is as follows: "Evidence of threats (if any) made by the deceased and his brother, Bob Allsop, or either of them, and not communicated to the defendant, are not to be considered by you in justification of the defendant's acts at the time of the killing, but are to be considered as a circumstance tending to explain the acts of the deceased and said Bob Allsop at the time of the killing, and as a further circumstance tending to show whether or not they may have commenced the difficulty at the time of the killing." In the first portion of said charge, if there was nothing further said, the charge would certainly be erroneous, but in the latter portion thereof, the very object and purpose of the admission of uncommunicated threats is stated; and this charge, in connection with the charge on self-defense given in the case, which the jury were authorized to look to, could not have misled or confused them. They were instructed to look to uncommunicated threats in order to ascertain who may have made the first hostile act or demonstration, and they were instructed, if the deceased or his brother made the first hostile act or demonstration, that the defendant was justified.

9. Appellant insists that the court erred in not stating to the jury the purpose for which the impeaching testimony was introduced. There was no affirmative testimony of an impeaching character introduced against the defendant that required of the court a charge limiting the same to its legitimate purpose. The effect of the court's charge on this subject was simply to instruct the jury that, notwithstanding testimony had been introduced tending to impeach the witnesses in

the case, the credibility of said witnesses was a question for the jury. In this there was no error. The evidence in this case, in our opinion, amply supports the verdict, and the judgment is affirmed.

BRISCOE v. STATE.

(Court of Criminal Appeals of Texas. June 10, 1896.)

CRIMINAL LAW—EVIDENCE—STATEMENT BEFORE EXAMINING MAGISTRATE—BILL OF EXCEPTIONS—QUALIFICATION BY JUDGE.

1. In a murder case, the admission of a statement made by defendant before the examining magistrate will not be considered reversible error, on a bill of exceptions reciting that the statement was made by defendant while he was under arrest and in jail, and after several persons, including the magistrate, had urged him to make it, where it appears, from qualifications added by the judge to the bill, that there was no evidence sustaining such recitals, and that defendant had requested to be allowed to make a statement, and that he had made it after having been warned as to its effect.

2. One convicted of murder in the second degree cannot complain that the conviction was erroneous on the ground that the evidence showed murder in the first degree.

Appeal from district court, Harris county; E. D. Cavin, Judge.

Abe Briscoe was convicted of murder in the second degree, and appeals. Affirmed.

Wm. A. Carter, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of murder in the second degree, and allotted a term of 25 years in the penitentiary, and appeals. The indictment was against Mack Jones, Abe Briscoe, and Martha De Costa. Appellant was placed upon trial, and the prosecution dismissed as to the other two defendants, and they were used as witnesses on the trial of the case.

1. Appellant reserved a bill of exceptions to the action of the court in permitting a written statement, made and sworn to by the defendant, to be read in evidence before the jury. Said statement was taken by J. T. Mahoney, justice of the peace. The objection urged, as stated in the bill of exceptions, was "that said statement was made by the defendant while he was under arrest and in jail, and after several parties, the said Mahoney being one, had talked to, requested, and urged the defendant to make such statement, and that the language used in said statement was not the language of the defendant, but the language of said Mahoney." The court qualified said bill in the following language, to wit: "The approval of this bill is not to be taken as certifying that the reasons why the defendant objected to the admission in evidence of said written statement referred to in this bill are true, or for any foundation in evidence; but, on the contrary, in my judgment said reasons

were wholly unsupported by the evidence, and directly contradicted thereby, as will fully appear from the statement of facts herein, and the approval of this bill shall only be taken to certify that the reasons stated therein were the reasons stated by the defendant's attorney when he objected to the introduction of this evidence." The bill of exceptions, as qualified by the judge, and viewed from the statement of facts, to which the court referred, shows that the appellant desired to make a statement, and that he was warned, as shown by the written statement, introduced on the trial and certified by the justice of the peace who reduced the same to writing. He was therefore not only warned, but desired of his own motion to make said statement. The bill of exceptions as prepared by counsel was rather too indefinite to authorize its consideration, but as qualified by the judge it is sufficient for that purpose. Where a bill of exceptions is qualified by the trial judge, and that qualification is antagonistic to the statements in the bill prepared by counsel, and the bill as thus qualified is accepted by the party presenting it, the judge's statement of the matters will control. If counsel are not satisfied with the bill as qualified by the court, it becomes their duty to prepare a bill under the terms of the statute in such state of case. We note with approbation the action of the trial court while qualifying this bill, stating that he did not certify to the truthfulness or correctness of the grounds of exception. Frequently grounds of exception reserved in bills are based upon matters of fact, and the facts themselves are not stated in said bill, except as grounds of exception. In all such cases, if such statements correctly represent the proceedings, the bill of exceptions should state them as matters of fact, and not as grounds of exception. The court very properly here states that he does not certify that the defendant was not warned when the statement was made by him, as testified by Mahoney, but that he only verifies the bill to the extent that such an exception was urged. There is no error manifested by this bill of exceptions.

2. It is urged that the court erred in charging the law applicable to a case of murder in the second degree, upon the ground that the facts showed murder in the first degree, if appellant was one of the guilty participants in the homicide. We do not so understand the law. While the testimony may have shown a cold-blooded and unprovoked killing, still the defendant cannot complain that the court gave him the benefit of a possible doubt as to the origin, cause, and attendant circumstances of the homicide, and submitted the issue of murder in the second degree.

3. It is contended that the evidence in the case is insufficient to support the conviction. The testimony of the two accomplices, De

Costa and Jones, shows, beyond any question, that the defendant is guilty. De Costa was an eyewitness to the homicide, and by her testimony Jones was a participant. The witness Lasker testified to facts corroborating her testimony, tending to connect Briscoe and Jones with the homicide. There are some circumstances in the case, though slight, tending to show that he may have been an accomplice. If he was not, then we think the corroboration sufficient from this source. The relation of these witnesses to the crime was properly submitted by the court in his charge to the jury. Independent of Lasker's testimony, there are some circumstances, of more or less cogency, which tend to connect both Jones and Briscoe with the homicide, and, we think, sufficient under the law to support this conviction. There is quite a mass of testimony along this line, and we do not propose to sum up or discuss the same. We think the testimony, however, is sufficient to support the verdict of the jury, and the judgment is affirmed.

MEXICAN CENT. RY. CO. v. MITTEN.¹
(Court of Civil Appeals of Texas. May 13, 1896.)

CARRIERS—INJURIES IN FOREIGN STATE—JURISDICTION—AMENDED PETITION—NEW CAUSE OF ACTION—DAMAGES.

1. In an action in a local court for personal injuries sustained in a foreign state, and resulting from a wrong for which a remedy was given at common law, the presumption will prevail that the common law is in force in the foreign state, and the remedy will be applied.

2. Where it was alleged that plaintiff was injured through a wreck caused by defendant's negligence in running its train, and that the train was wrecked by the giving way of a bridge, an amended petition which makes no change in the allegations except that the defect was in the approach to the bridge, instead of the bridge itself, does not state a new cause of action.

3. A charge which makes plaintiff's right to recover for future suffering, as an item of damages, contingent on its existence, is not erroneous.

4. Where plaintiff had a leg broken in two places, and had some ribs broken, and the broken leg was shortened by the fractures, causing continuous pain, and resulting in curvature of the spine, a verdict for \$5,000 was not excessive, the injuries being permanent.

Appeal from district court, El Paso county; C. N. Buckler, Judge.

Action by Harry Mitten against the Mexican Central Railway Company for personal injuries. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Falvey & Davis, for appellant. Leigh Clark, A. G. Wilcox, and T. T. Teel, for appellee.

FLY, J. On the 9th day of July, 1889, a wreck occurred on the railway of appellant near Chihuahua, Mex., in which appellee was

injured and he instituted suit to recover \$25,000 damages. It was alleged in the petition upon which the case was tried that appellee was a newsboy on the train of appellant, on his way from El Paso, Tex., to the city of Mexico; that he was a passenger thereon, arrangements having been made by his employers with appellant by which he was transported between the points named from time to time; that, on the date above named, the train on which appellee was a passenger was derailed and wrecked, through the negligence of appellant, and appellee seriously and permanently injured. The negligence was alleged to consist in failure to keep the roadbed in proper condition, in running the train at a rapid and reckless rate of speed, failure to send out track walker after a heavy rain that just previously had fallen, and the recklessness of the employés in refusing to obey instructions to run slowly, and to stop and examine all bridges before attempting to cross the same. The case was tried by a jury, and resulted in a verdict and judgment for \$5,000 for appellee.

We find that the allegations in the petition were substantially proved. Appellee was a passenger on the train of appellant, and was seriously and permanently injured, through the negligence of appellant in failing to use reasonable care in the construction and repair of its roadbed, and in not using ordinary care in running its train and in inspecting its roadbed after a heavy rain. The following order was given to the conductor on the wrecked train: "Heavy rains during night between Sans and Chihuahua. You are the first train over this track. Run very slowly and carefully, and stop and examine all bridges before you pass or cross." No examination of the bridge was made before the accident, and the train was running at the rate of over 30 miles an hour when the accident occurred. The breach in the approach to the bridge was open and apparent, and would have been discovered by the exercise of ordinary care. In the third amended petition, it was alleged that appellee was a resident of El Paso county, Tex., and that appellant was a corporation duly incorporated by and under the laws of the state of Massachusetts, and was engaged in operating a railroad between El Paso, Tex., and the city of Mexico, in the republic of Mexico, and had a local agent and representative residing in the city of El Paso. It was also alleged that the injury was inflicted on appellee by appellant a few miles north of Chihuahua, in the republic of Mexico.

It is urged, through the first and second assignments of error, that no cause of action was shown by the petition that was cognizable by the courts of Texas, because the injury was inflicted in a foreign country, and it does not appear from the petition that the laws of Mexico would entitle appellee to recover damages of appellant by reason of the injuries; that it is not shown that appellee

¹ Application for writ of error pending.

could not have subjected appellant to the jurisdiction of the courts of Mexico, and no necessity is shown in the petition for the courts of Texas to assume jurisdiction of the cause. These questions were not raised in the lower court, but for the first time in this court. The only authority cited in support of the propositions is the case of *Railroad Co. v. Jackson*, 33 S. W. 861, recently decided by the supreme court of this state. From that greatest and most perfect system of laws evolved by the minds of our English ancestors, from the necessities, exigencies, and difficulties surrounding them through the centuries of their history, have American states drawn largely for the laws and system of jurisprudence by which our rights are preserved and our wrongs redressed; and to this reservoir of legal lore it is not only interesting, but profitable and instructive, for us to go, when questions of perplexity and doubt present themselves for solution. The policy of England in the matter of opening her courts to litigants who present themselves with their grievances at their doors has been of the most liberal, enlightened, and generous character. Not only is it the boast of the English people that their courts are ever open to protect the rights and redress the wrongs of those aggrieved by acts done within their own confines, but, with a few simple conditions, the privilege is extended in all transitory actions, no matter where the cause of action may have arisen. Under the wise and beneficent operation of that system, except in certain cases, a remedy can be found in English courts for torts committed in places outside the territorial jurisdiction of those courts. The rule is thus stated by Sir Frederick Pollock, the erudite scholar and distinguished writer: "(1) The act may be such that, although it may be wrongful by the local law, it would not be a wrong if done in England. In this case no action lies in an English court. * * * (2) The act, though in itself it would be a trespass by the law of England, may be justified or excused by the local law. Here, also, there is no remedy in an English court. * * * But nothing less than the justification by the local law will do. (3) The act may be wrongful by both the law of England and the law of the place where it was done. In such a case an action lies in England, without regard to the nationality of the parties, provided the cause of action is not of a purely local kind, such as trespass to land." *Webb's Pol. Torts*, pp. 237-239. In the case of *Phillips v. Eyre*, L. R. 6 Q. B. 1, cited by Pollock, the principle is thus stated: "As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled: First. The wrong must be of such a character that it would have been actionable if committed in England. * * * Secondly. The act must not have been justifiable by the law of the place where it was done." These rules are plain, enlightened, reasonable, and

just, and have been the guide of English courts in the administration of justice in the classes of cases mentioned for many years. A review of American authorities shows the adoption of the same rules in America. Judge Cooley, in his great work on Torts, says: "It is a general rule that, for the purpose of redress, it is immaterial where a wrong was committed; in other words, a wrong being personal, redress may be sought for it, wherever the wrongdoer may be found. To this there are a few exceptions, in which actions are said to be local, and must therefore be brought not only within the country, but also within the very county where they arose. The distinction between transitory and local actions is this: If the cause of action is one that might have arisen anywhere, then it is transitory; but, if it could only have arisen in one place, then it is local." Cooley, *Torts* (2d Ed.) p. 551. In support of the text, the English case of *Mostyn v. Fabrigas*, 1 Cowp. 161, is cited. In that case the governor of a British colony was prosecuted in England, and a heavy judgment recovered against him for an assault and imprisonment of the plaintiff, without authority of law in the colony. In another cited English authority it was held to be unimportant whether the foreign tort was or was not committed within territory subject to the British crown, the only proviso being that, to support an action, an act complained of must have been wrongful or punishable where it took place, and that whatever would be a good defense to the action, if brought in the foreign state would be a good defense everywhere. In the case of *Leonard v. Navigation Co.*, 84 N. Y. 50, it was said: "The rule, no doubt, is that all common-law actions for an injury in a foreign country are transitory in their character, and may be brought in another state or country besides that in which they originated. In contemplation of law, the injury arises anywhere and everywhere." This was the enlightened English rule, as we have heretofore seen; and in every state of the Union, unless it be Texas, the same rule has been adopted. Where the action is given by statute, and is not one that arose at common law, it becomes necessary for the plaintiff to establish the existence of a law in the foreign state that gives the right of action, as well as in the state where the case is tried. However, where the wrong is one for which a remedy was given at common law, the presumption will prevail that the common law is in force in the foreign state, and the remedy will be applied. "Actions for injuries to the person committed abroad are sustained without proof as to the *lex loci*, upon the presumption that the right to compensation for such injuries is recognized by the laws of all countries." *McDonald v. Mallory*, 77 N. Y. 548.

It is insisted, however, that the rules governing such cases in England and America have been swept aside by the decision of the

Texas court in the case of *Railroad Co. v. Jackson* (Tex. Sup.) 33 S. W. 857; and the mere statement in the petition that the tort was committed in the republic of Mexico showed that the district court of El Paso county had no jurisdiction. In the *Jackson Case* the laws of Mexico touching on the case were alleged and proved, and a large portion of the opinion of the supreme court is devoted to the task of showing that there existed such radical dissimilarity between the laws of Mexico and Texas that the courts of the latter state could not enforce them. So far as the opinion rests on the dissimilarity of the laws, it does not necessarily become a matter of discussion in this case, where the laws of Mexico were not proved. Our views on that subject are clearly set forth in the opinion delivered by Chief Justice James in the *Jackson Case*, 32 S. W. 230. Dissimilarity of the laws, however, was not the sole ground upon which the aid of our courts was denied to *Jackson*, but other, and, to us, novel, reasons were given why the right should be denied; among the number being the difficulties that would beset Texas courts in determining the meaning of Mexican laws. On this point it is said: "We understand the Mexican courts are not governed by precedent, and we have no access to reports of adjudicated cases of those courts, from which we could ascertain their interpretation of these laws." If it be true that the Mexicans have no precedents, and keep no record of adjudicated cases, it would seem that a Mexican court would be in no better position to follow in the track of the decisions than would an American court; and while "it is well settled that, if one state undertakes to enforce a law of another state, the interpretation of that law, as fixed by the courts of the other state, is to be followed," still it does not follow that where the other state has not interpreted its laws, or has failed to record its interpretations, this state should therefore refuse to extend a remedy for a wrong inflicted on a citizen within the borders of such foreign state. In many of the cases in which jurisdiction has been assumed or held to attach in the courts of one state when the wrong was perpetrated in another, the offending party had removed from the latter state; but we have found no case where the fact of removal was made the ground for assuming jurisdiction. Our courts either have jurisdiction of the class of cases we are discussing, or they have not; and the question of whether a man has voluntarily resorted to our courts, or been forced into them, or whether commerce between Mexico and Texas will be injured or protected by compelling the payment by a corporation of damages for the wrongs it has inflicted, or the condition of our dockets, can have no weight or force in determining jurisdiction. These are considerations that

might possibly address themselves to the notice of legislatures, but not to the determination of courts. Courts are not at liberty to assume or decline jurisdiction upon speculative grounds, or for reasons of public policy. *Percival v. Hickey*, 18 Johns. 257. We are not willing to subscribe to the doctrine that a citizen of Texas who has suffered wrongs, transitory in their nature, in a foreign country, at the hands of one who has his legal domicile in this state, before he can obtain redress at the hands of our courts, must show that he has been refused aid in the foreign courts, and make it appear that he comes to the courts of his own country unwillingly, and as a last resort. Jurisdiction of a cause should not be made to depend upon any such state of circumstances. If the construction placed upon the decision in the *Jackson Case* be the true one,—and some of its expressions would seem to justify the construction,—it is a practical denial of remedies for wrongs that may be inflicted by one of our citizens upon another in Mexico, by relegating him to a trial in the courts of a country where the laws are said to be enforced without precedent or authority, and which laws are claimed to be so uncertain and obscure that our courts cannot undertake to construe them. We are not willing to subscribe to such doctrine, and will not extend the scope of the decision referred to beyond the purview of the facts of that case. We hold that the petition showed a cause of action, and that the district court of El Paso county had jurisdiction of the case.

There is no merit in the third assignment of error. It was the duty of the district judge, under the circumstances, to permit a reinstatement of the cause after a nonsuit had been taken by appellee. The nonsuit resulted from the action of the court in holding that there was such a variance between the allegations and proof as to the cause of the wreck as was fatal to a recovery, and that, if the cause went to the jury, he would instruct a verdict for the defendant. A refusal to reinstate, under the facts, would have been good cause for reversal of the judgment. *Lockett v. Railway Co.*, 78 Tex. 211, 14 S. W. 564; *Cotton v. Lyter*, 81 Tex. 10, 16 S. W. 553.

In the third amended petition, it was alleged that on July 9, 1889, appellee, a newsboy, was lawfully on a passenger train of appellant, on his way from El Paso, Tex., to the city of Mexico, and "that on the 9th day of July, or the second day after plaintiff so as aforesaid boarded said train, and within a few miles north of the city of Chihuahua, said train was wrecked by the giving way of a bridge over an arroyo; and the cars composing said train were thrown with great force and violence down to the bed of said arroyo, and were piled one upon another in a wrecked and demolished condition," etc. In the fourth amended petition,

which was filed April 18, 1895, and upon which the case was tried, it was alleged, after stating that the injury was caused through the negligence of appellant, "that said wreck was occasioned by a defective roadbed within a few feet of a bridge over said arroyo." The two petitions are almost identical in setting up the cause of action, the only difference pointed out by appellant being the allegation as to the cause of the wreck. Appellant interposed the plea of limitation to the cause of action as alleged in the fourth amended petition, pointing out the difference between it and the former statement of the cause of action. The plea was not sustained, and error on this ground is urged in this court.

The plea of limitation, if sustained at all, must be upheld on the ground that the last petition set up a new and different cause of action from the one formerly pleaded. The cause of action in all the pleadings was an injury inflicted upon appellee through a wreck, caused by the negligence of appellant. In the last pleadings, as in those going before, the same cause of action was alleged. It was the same wreck, at the same time and place, inflicting the same injuries upon appellee, from which resulted the same damages. To all intents and purposes, it was the identical cause of action. There was no change, except as to the statement that the defect was in the approach to the bridge, instead of the bridge itself. In the case of *Bigham v. Talbot*, 63 Tex. 271, cited by appellant, the court, after holding that the amendment set up an entirely new cause of action, said: "If, however, there had been any allegations in the first amended petition in any way retaining, even as part of the cause of action therein asserted, that which was asserted by the original petition, and afterwards reasserted by second amended petition, that would have been sufficient to prevent the running of the statute after the original petition was filed." In all the authorities cited by appellant, while the original subject-matter was retained in the amendment, a new cause of action was set up, such as an amendment setting up a verbal promise to pay a debt, which was sued on as evidenced by a promissory note, or an amendment setting up a debt due on a note, when the original suit was on the allowance of a claim by an administrator. Those cases do not apply to this case. In this suit the demand is for damages growing out of the same transaction, but depending upon different evidence for its establishment, and was not a new cause of action. *Cotter v. Parks*, 80 Tex. 539, 16 S. W. 307; *Sweetzer v. Clafin*, 82 Tex. 513, 17 S. W. 769. In the case of *Foster v. Smith*, 66 Tex. 680, 2 S. W. 745, the original petition set up as cause of action a judgment recovered by the plaintiff against the defendants, which had not been paid, and alleged that no execution had ever

issued on it. In the amendment it was alleged that execution had been issued within a year after its rendition, but that nine years had elapsed since the last one had issued. It was held that it did not set up a new cause of action. In the celebrated case of *Landa v. Obert*, 78 Tex. 33, 14 S. W. 297, where new facts were pleaded, it was held that the cause of action remained the same. The following cases are also in point: *Railway Co. v. Irvine*, 64 Tex. 533; *Railroad Co. v. Pape*, 73 Tex. 501, 11 S. W. 526; *Railway Co. v. McGowan*, 73 Tex. 355, 11 S. W. 336; *Compress Co. v. Mitchell*, 78 Tex. 64, 14 S. W. 275; *Association v. Smith*, 83 Tex. 499, 18 S. W. 955. The case we are considering comes clearly within the purview of *Hill v. Clay*, 28 Tex. 650. We have given this subject closer attention more from the fact that the point has been urged with much vigor both in brief and oral argument than that it presented any difficulty in its solution. We think it clear that the plea of limitations could not be maintained.

The court gave this charge to the jury: "If you find for the plaintiff, you are instructed that the measure of his damage is a sum which you may find from the evidence would fairly and reasonably compensate him for the injury sustained, if any; and, in order to arrive at that amount, you would be authorized to take into consideration the character of his injuries, whether permanent or otherwise, his sufferings, both mental and physical, if any, in consequence of such injuries, and what he may suffer hereafter in consequence thereof, and for time lost while disabled from such injuries, if any, and his impaired ability to earn money in the business plaintiff was accustomed to follow prior to and subsequent to the accident; but, if plaintiff has been able to earn as much money since his injuries as before in said business, you could not consider that claim in arriving at the amount of damages which you may find plaintiff to be entitled, if to any amount." That portion of the charge allowing the jury to consider future mental and physical suffering in arriving at the amount of damages is assigned as error, because it should have limited appellee's right to recover for such future suffering to such as he showed that he would suffer. The charge makes the consideration of future suffering as an item of damages contingent on its existence, and that is all that is required or that appellant demands. The criticism of the charge, on the ground set out in the assignment, is not well founded. Appellee had a leg broken in two places, near the hip and near the knee, and also had ribs broken. The broken leg is shorter than the other, and continually pains appellee, and curvature of the spine has resulted. The injuries are permanent. A verdict for \$5,000 was not excessive. The judgment will be affirmed.

JACKSON v. LEE et al.

(Court of Civil Appeals of Texas. June 17, 1896.)

PARTNERSHIP—DISSOLUTION—LIABILITY OF PARTNERS THEREAFTER.

On the dissolution of a partnership, and sale of the business to a third person, not theretofore interested in the business, the partners are not required to give reasonable notice of the dissolution to the persons from whom they were accustomed to purchase goods, to relieve them from liability for purchases made by their vendee in the old partnership name, which was used without their authority.

Appeal from Fannin county court; James Q. Chenoweth, Judge.

Action by W. H. Lee & Co. against Burt Jackson. There was a judgment for plaintiffs, and defendant appeals. Reversed.

Taylor, Galloway & McGrady, for appellant. Agnew & Duncan, for appellees.

COLLARD, J. This suit was brought by W. H. Lee & Co., merchants of St. Louis, against Burt Jackson, for balance due on account for goods and merchandise alleged to have been sold to Burt Jackson, and at his request shipped to A. Jackson, of Elwood, Tex. The account is sworn to. It runs from October, 1892, to December 9, 1893. The first and second items of the account are: "Oct. 15, 1892, Mdse. per invoice, 90 d, 182.30;" and "Jan. 4th, 1893. Mdse. per invoice, 90 d, \$145.50." The next item is dated February 27, 1893, and is followed by several items in April, May, June, August, October, November, and December; and the whole account aggregates \$1,084.05. It is credited by \$180.30, January 19, 1893; \$47.50, February 11th; and \$100, April 27, 1893. Other credits were made down to November 23d, reducing the account to \$256.90, the amount sued for. Defendant filed demurrer, general denial, and special sworn plea that all the items of the account, from and including February 27, 1893, are unjust, for that neither defendant nor A. Jackson received or bought or contracted for the same, and authorized no one to purchase the same, or any part thereof; that the first two items of the account were just against defendant and A. Jackson, but, as shown by the petition, have been paid, as shown by the first three items of credit. October 26th there was a trial, resulting in verdict and judgment for the plaintiffs, for balance of account claimed by plaintiffs, from which this appeal is taken.

A son-in-law of defendant did a grocery business, selling spirituous liquors, and kept a small stock of family groceries. Upon his death, A. Jackson, son of defendant, and defendant, took charge of the business, to wind it up. Soon afterwards, B. D. Wilson, traveling salesman for plaintiffs, was in Elwood, to sell goods. He found defendant and A. Jackson in the store. Wilson testified that defendant told him (Wilson) that the business was his, but that it was run in the

name of his son A. Jackson, and told him to let A. Jackson have what goods he wanted, and he (defendant) would pay for them. The salesman then took an order for the first bill of goods,—the first item in the account; and Wilson said he thought that at the same time he took an order for a bill of goods to be delivered in the future,—the item in the account of date January 4, 1893,—amounting to \$145.50. He sent the orders to plaintiffs to be filed, and the goods were sent to A. Jackson. Further than this, defendant and Wilson made no other agreement about buying goods in the future, but Wilson told the firm, if they wanted more goods, to let his house hear from them. Plaintiffs shipped to A. Jackson the other goods itemized in the account on orders signed "A. Jackson," the first bill of date February 27, 1893. On February 20, 1893, defendant and his son A. Jackson sold out the business to one J. T. Hopper, and he ordered all the goods subsequently bought from plaintiffs, and the orders were signed "A. Jackson." Both the Jacksons testify that, after their dissolution and selling out of the business, they had no further connection with the same, and never consented that the name of A. Jackson should be used in connection with it, and, if the name of either of them was used in connection therewith, it was without their knowledge or consent, and without their authority; that Hopper had no connection with their business, had never clerked for them; and that Hopper had requested of them that he be permitted to order goods in the name of A. Jackson, but that they had declined to allow him to do so, and told him not to do so. A. Jackson also testified that he had signed none of the orders for goods after the dissolution and after the sale to Hopper, and never ordered any of the goods itemized in the account but the first two, which was before the sale to Hopper. Seventeen letters were read in evidence to plaintiffs, signed "A. Jackson;" and he (A. Jackson) testified that he signed but three of them, two of which ordered the goods in the first two items, and the other remitting \$100 to balance his account. The other letters (14 in number), he says, were neither written nor signed by him, and his name signed thereto was without his authority, knowledge, or consent. One J. H. Richards says he wrote 8 of the 14 letters, at the dictation of Hopper, as a favor to him, as he said he was nervous, and could not write; but he did not know who wrote the other of the entire 17 letters. Hopper, he says, never claimed to him to have authority from A. Jackson or defendant to use the name of A. Jackson, and witness knew nothing of any such authority. A. B. Scarborough, cashier of the First National Bank of Bonham, Tex., C. L. Bradford, cashier of the Fannin County Bank, and D. W. Sweeney, cashier of the Bonham National Bank of Bonham, Tex., each swore that they had a great deal of ex-

perience in examining handwriting, and had compared different writings, and, after comparing the handwriting of the 17 letters, they were of the opinion that the letters were written by three different persons; the first 5 (to wit, one dated January 16, 1893; one, February 5, 1893; one, February 22, 1893; one, March 29, 1893; and the other written, but not dated, about April 22, 1893) were all written by the same person, and were in the same handwriting; that 8 of the letters (dated May 16, 1893; March 24, 1893; June 14, 1893; June 21, 1893; July 14, 1893; August 28, 1893; September 27, 1893; and October 2, 1893) were all written by the same person; and that the other 4 (dated July 20, 1893; September 29, 1893; November 20, 1893; and December 5, 1893) were all written by the same person, and were all in the same handwriting. The letters all were signed "A. Jackson." The first 5 were to following effect: The one dated January 16, 1893, inclosed \$182.30 for whisky received; the one dated February 5, 1893, inclosed \$2 neglected in paying for first bill, and \$45.50; the third, dated February 22, 1893, was an order for a barrel of whisky; the fourth, dated March 29th, was an order for one barrel of whisky; and the fifth, written (without date) about April 22, 1893, inclosed \$100. All the other letters were orders for goods and inclosures of remittances to plaintiffs for goods shipped.

The foregoing being the state of the testimony, the court below, among other things, instructed the jury, in the third paragraph of the general charge: "If you believe from the evidence that the partnership between the defendant and A. Jackson was at any time dissolved, and the business was continued by another party in the name of A. Jackson, orders were received by plaintiff Lee, and goods shipped, and received by said plaintiff, to A. Jackson, then I charge you that the defendant, Burt Jackson, having given the business conducted in the name of A. Jackson the credit of his name, in order to terminate his liability for the obligations arising out of the legitimate transactions of said business, must have given reasonable notice of the dissolution of the business relationship which had formerly existed between himself and A. Jackson." This charge is subject to the objection made to it by appellant that it made defendant, Burt Jackson, liable for the credit extended to Hopper in the conduct of the business in the name of A. Jackson, after stock in the business had been sold to him, and the partnership dissolved, whether defendant or A. Jackson authorized Hopper to continue the business in the name of A. Jackson or not. Hopper was not a member of the firm carrying on the business in the name of A. Jackson, and plaintiffs' sales to him would be upon his credit, and not upon the credit of the A. Jackson firm, though he may have ordered goods in the name of A. Jackson, unless he

did so by authority of the Jacksons, or with their knowledge or consent. The facts making defendant liable should have been submitted to the jury,—the authority of Hopper to use the name of A. Jackson in his business, or not. If plaintiffs let Hopper have goods in the name of A. Jackson under circumstances that would not render defendant liable, they did so at his peril, even though the name of A. Jackson was used in ordering the goods. To render defendant liable, Hopper must have had authority to use the old firm name. The old firm would not be liable for goods ordered in the firm name by a forged order, or one made without authority. The question of such authority should have been left to the jury. It might be established by circumstances, but the testimony was, to say the least, upon this point, conflicting. The court's charge was erroneous, and it was not corrected by other parts of the charge given. The judgment of the lower court is reversed, and the cause remanded. Reversed and remanded.

STEPHENS v. HOBBS et al

(Court of Civil Appeals of Texas. June 17, 1896.)

EXEMPTIONS — FORAGE FOR HOME CONSUMPTION.

Under Rev. St. 1895, art. 2395, subd. 15, exempting from forced sale "all provisions and forage on hand for home consumption," cotton seed suitable for feeding stock is exempt, if the supply reserved be not unreasonably excessive, though it may not, in view of other forage on hand, be indispensable; and therefore an instruction that the forage must be "necessary" for home consumption, to render it exempt, is erroneous.

Appeal from Fannin county court; James Q. Chenoweth, Judge.

Action by O. T. Stephens against T. J. Hobbs and others. There was a judgment for defendants, and plaintiff appeals. Reversed.

R. B. Young, Robert B. Semple, and Richard B. Semple, for appellant.

KEY, J. Appellant sued appellee T. J. Hobbs and the sureties on his bond as constable for damages for seizing under execution, and selling, certain cotton seed claimed by appellant to be exempt from forced sale, under the provision of the statute exempting to families "all provisions and forage on hand for home consumption." Rev. St. 1895, art. 2395, subd. 15. The court below charged the jury, in effect, that, in order for the cotton seed to be exempt, they must find from the evidence that it was necessary for home consumption; and this phase of the charge is complained of by appellant, and, we think, justly so. The word "necessary" signifies "essential," "indispensable," "requisite." Webst. Dict. Now, it is not necessary that a particular kind of forage be indispensable in order to bring it within the

purview of the exemption statute. If it be suitable for feeding stock, and the supply reserved for home consumption be not unreasonably excessive, it is exempt, although some of it may not, in view of other forage on hand, be absolutely indispensable. The testimony tended to show that appellant had a considerable quantity of corn; and therefore, under the charge referred to, the jury may have concluded that he was not entitled to any exemption on cotton seed. Assignments of error presenting other questions are not well taken. For the error indicated, the judgment is reversed, and the cause remanded.

HALE v. HOLLON et al.¹

(Court of Civil Appeals of Texas. June 17, 1896.)

DEED—RECORDING—NOTICE—COVENANT OF WARRANTY—AFTER-ACQUIRED TITLE.

1. Under Rev. St. 1895, art. 4639, authorizing the record of "conveyances or other instruments in writing concerning lands," the record of an instrument purporting to convey grantor's expectant interest in his sister's estate, with warranty of title, is notice to creditors and subsequent purchasers of the grantor.

2. Under a deed conveying an expectant interest in an estate, with covenants of warranty, grantor's subsequently-acquired title to the lands inured immediately to the grantee, binding the grantor and his privies, whether purchasers or creditors, with notice.

Action by V. W. Hale against W. R. Hollon and D. P. Hollon. A judgment for defendants having been affirmed, plaintiff moves for rehearing. Motion denied.

For former report, see 35 S. W. 843.

COLLARD, J. We are of opinion that the motion for rehearing should be overruled. On the question of constructive notice by registration of the Hollon deed, which presents the most difficult question to us in the case, we wish, in support of our former conclusion, to add the following: The statute (Rev. St. 1895, art. 4639) authorizes the record of "all deeds, mortgages, conveyances, deeds of trust, bonds for title, covenants, defeasants or other instruments of writing concerning any lands or tenements or goods and chattels, or movable property of any description." The deed in question was an "instrument in writing concerning lands," under the statute, as authorized its registration, and, when recorded, was notice to creditors of, and subsequent purchasers from, the vendor. It vested in the vendee a present, equitable right to such title as the vendor might subsequently acquire by inheritance from his sister. The conveyance contained covenants of warranty by which his subsequently-acquired title inured to the vendee. The covenant of title was binding upon the grantor as to the title subsequently cast upon him, and also bound his privies in estate in blood and in law. He and his privies would be estopped from denying his right and power to sell at the date of

the deed, and from denying the investiture of title in the vendee when it became perfect in the vendor. *Digman v. McCollum*, 47 Mo. 372; *Tefft v. Munson*, 57 N. Y. 97; *Wark v. Willard*, 13 N. H. 389; *Kimball v. Blaisdell*, 5 N. H. 533; *Somes v. Skinner*, 3 Pick. 52; *Bank v. Mersereau*, 3 Barb. Ch. 528; *Pike v. Galvin*, 20 Me. 183; *Buckingham's Lessee v. Hanna*, 2 Ohio St. 551. The instant the title was cast upon the vendor, Hollon, it vested in the vendee by virtue of the warranty. The conveyance was binding upon the vendor and his privies, subsequent purchasers and creditors with notice, which would be effectual by the registration of the deed. *Jarvis v. Aikens*, 25 Vt. 635; *Somes v. Skinner*, 3 Pick. 51; *Doyle v. Petroleum Co.*, 44 Barb. 239; *Jackson v. Bull*, 1 Johns. Cas. 81. In *Doswell v. Buchanan's Ex'rs*, 3 Leigh, 365, which holds that where a vendor with equitable estate only in the lands, conveying the same, without warranty, in trust to secure debts, the deed being recorded, afterwards acquiring the legal title and selling to another by warranty deed, the last purchaser should be protected, and that the record of the deed of trust was not notice to the last purchaser under the recording acts. Evidently this decision must rest upon the ground that there was no warranty in the deed of trust passing the legal title, when acquired, to the trustee. A covenant of warranty in a conveyance by one who has an expectant estate in lands binds the vendor at the time of the covenant, and he cannot hold the land by an after-acquired title, the fulfillment of the expectancy against the warranty, nor can his privies in estate, in blood, or in law. If, then, the conveyance is binding at the time it is executed, it is a written contract concerning lands, subject to registration and its consequences. *Hetzel v. Barber*, 69 N. Y. 1; *White v. Patten*, 24 Pick. 324. We do not think that the duty of search for incumbrance or deed commences at the time of inheritance of title in the vendor, as was held in *Calder v. Chapman*, 52 Pa. St. 359, when the prior deed was with warranty, and binding upon the vendor and his privies. It may be troublesome to search the records, but that would not excuse a want of search when the statute authorized the recording of the conveyance. The statute authorizing its registration, the consequences of registration must follow, in favor of the vendee who is vigilant and complies with the law. The motion for a rehearing is overruled.

FARMERS' NAT. BANK v. JAMES et al.
(Court of Civil Appeals of Texas. May 7, 1896.)

MORTGAGE—BONA FIDE PURCHASERS—NOTICE.

1. J. conveyed land to plaintiff by an instrument, in form an absolute deed, but in fact a mortgage, to secure a note on which C. was surety, and the bank, to secure C., conveyed the land to him by a similar instrument. C.

¹ Application for writ of error pending.

subsequently mortgaged the land to defendant bank to secure an antecedent debt, defendant extending the time for payment, and having no notice that the prior instruments were mortgages. *Held*, that defendant was an innocent lien holder for value.

2. The fact that defendant's cashier was informed that C. was a surety on J.'s note did not affect defendant with notice of the character of the prior conveyances.

Appeal from district court, Wichita county; George E. Miller, Judge.

Action by the Farmers' National Bank against John G. James and another on a note, and to foreclose a mortgage. The Panhandle National Bank, which claimed to be an innocent purchaser of the land under deeds of trust, was made a party. Plaintiff recovered judgment on the note, but the rights of defendant bank under the trust deeds were held superior to those acquired by plaintiff under its mortgage, and plaintiff appeals. Affirmed.

James & Sherrard, for appellant. R. E. Huff, for appellees.

Conclusions of Fact.

TARLTON, C. J. In this case we find the following conclusions of fact, solving all questions of conflict in the evidence in support of the judgment below:

(1) John G. James was indebted to the appellant in the principal sum of \$3,000. (2) On July 20, 1893, he executed and recorded a conveyance, for the purported consideration of \$1, to the appellant, covering the property in controversy, certain real estate situated in the town of Wichita Falls. This conveyance was in form an absolute deed; in reality, to secure the debt of James to the appellant. (3) James was the president of the appellant bank, which, on account of the pressure then existing, had suspended business. To enable it to resume, it was deemed expedient by the directors to change the form of its securities. Accordingly, it was agreed that James should execute his obligation with personal security, and to this end he made his note for the principal sum of \$3,000, signed by himself and D. J. Calkins, whose name constituted the personal security required by the bank. (4) In order to secure Calkins, the bank conveyed to him, on August 9, 1893, the property in controversy, by an instrument filed for record on August 18, 1893, in form an absolute deed, for the recited consideration of \$1; in reality, a mortgage for the purpose above indicated. (5) The Wichita Roller Mill Company, of which D. J. Calkins was president, was indebted to the appellee the Panhandle National Bank in the principal sum of \$5,000, and Calkins himself was thus indebted in the principal sum of \$2,000. In consideration of the extension of time in the payment of this indebtedness, Calkins, on October 17, 1893, executed a deed in trust to the appellee bank upon the property in controversy, securing

the \$5,000 indebtedness, then represented in a note, and on December 15, 1893, executed a second deed in trust securing the \$2,000 indebtedness, then represented in a note. These instruments were respectively filed for record December 15 and 16, 1893. The mortgages were subsequently foreclosed by advertisement and sale, as prescribed in them, and the appellee bank became the purchaser. When the appellee took its mortgages, it had no knowledge that the instruments executed by James to the appellant bank, and by the latter to Calkins, were other than absolute deeds, as they appeared to be.

Conclusions of Law.

1. Upon the foregoing facts, the equities of the Panhandle Bank were superior to those of the appellant. The appellee bank was accordingly held to be a bona fide lien holder for value. Its mortgages, executed not merely for the purpose of securing an antecedent indebtedness, but in the further consideration of an extension of time in the payment of the obligations, were supported by a valuable consideration. *Steffan v. Bank*, 69 Tex. 517, 6 S. W. 823.

2. We are not prepared to hold that the court erred in failing to find the Panhandle Bank to be affected with notice of the character of the instruments executed by James to the appellant, and by the latter to Calkins, by reason of the fact that the cashier of the appellee had been informed that Calkins was a surety on James' paper.

The judgment is affirmed.

MISSOURI, K. & T. RY. CO. v. HANSON.¹
(Court of Civil Appeals of Texas. May 9, 1896.)

ACTION FOR INJURIES—DAMAGES—EVIDENCE—APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.

1. In an action for injuries, plaintiff alleged that he had suffered and still suffered great physical pain and mental anguish, and would continue to do so; that he had necessarily expended, and would hereafter necessarily expend, large sums of money for medical treatment; that his injured foot had to be amputated; that, prior to such injury, he was a sound man; that his health was ruined, and he was a physical wreck. *Held*, that it was not error to permit plaintiff to testify that he had used morphine and been kept under its influence to alleviate the pain caused by his injury; that he used morphine all the time; that he could not live without it; that he never took opiates before the injury; and that his physician gave it to him internally, and afterwards hypodermically, for 30 or 31 days.

2. In an action for personal injuries, where the evidence of defendant's negligence and as to contributory negligence is contradictory, the verdict will not be disturbed.

Appeal from district court, Cooke county; D. E. Barrett, Judge.

Action by A. Hanson against the Missouri, Kansas & Texas Railway Company for personal injuries caused by defendant's negli-

gence. From a judgment for plaintiff, defendant appeals. Affirmed.

R. C. Foster and A. E. Wilkinson, for appellant. Davis & Garnett, for appellee.

HUNTER, J. This action was brought by A. Hanson against the appellant to recover damages for personal injuries caused January 18, 1891, by reason of appellant's negligence, the charges being that while plaintiff, Hanson, was riding in a buggy behind a horse owned and driven by one C. Paddock, upon California street, in the city of Gainesville, when about to cross the tracks of appellant on said street, an engine of appellant alarmed the horse and caused him to run away, throwing plaintiff from the buggy and breaking his leg. The negligence alleged was the omission to ring the bell or blow the whistle on approaching the crossing, and failing to keep and maintain a watchman or flagman at said crossing to warn people of the approach of the engines, suffering the view to be obstructed by cars on appellant's tracks, and running the engine rapidly out from behind same into the street, and negligently permitting the escape of steam. It is alleged that the plaintiff, "In consequence of said injury, has suffered and still suffers great physical pain and mental anguish, and will continue to do so, * * * and has necessarily expended, and will hereafter necessarily expend, large sums of money for medicine, nurses, and for surgical care and medical treatment, and that, in order to save his life, his injured foot, after months of suffering, had to be amputated; that by reason of said amputation plaintiff has been rendered a cripple and disfigured for life; that, prior to such injury, he was a sound, healthy, robust man, without injury or disfigurement of any kind; that, by reason of said disfigurement and injuries, from the date of said injuries to this time, he has suffered, and still suffers, intense physical and mental pain; that, by reason of the loss of his said foot and said injury, he has been, and for the remainder of his life will be, incapacitated from attending to business; that his earning capacity and his ability to labor has been greatly lessened and depreciated; that his health is ruined, and he is a physical wreck." Appellant's answer was a general denial, and a plea that the injury was due to the horse being unruly and dangerous, and to plaintiff's contributory negligence in permitting him to be driven into the position where he received his fright.

On the trial the plaintiff testified that he had used morphine, and had been kept under its influence to alleviate the pain consequent upon his injury; that he used morphine all the time; that he could not live without it; that he never took opiates before the injury; that his physician gave it to him internally, and afterwards hypodermically, for 30 or 31 days. This evidence was objected to, upon the ground that it was immaterial and ir-

relevant, and not warranted by any issue made in the case by the pleadings. This constitutes the first assignment of error, which we overrule, because we think the evidence was admissible (1) to show the continued physical suffering demanding the use of morphine to alleviate it; (2) to show a continued expense for medicine which he had never had to use before. Besides, appellant does not complain of the verdict being excessive, but concedes, in its brief, that the "doctor's and nurses' bills, drugs and medicines, time lost, pain endured, permanent disability from loss of foot, and impairment of health, were sufficient in amount to sustain a recovery for the sum awarded, if for any." The remaining assignments of error, which we consider important to notice, relate to charges given and refused by the court, and in none of which do we find any material error. The charge of the court was correct and fair, and while we think it an unsafe practice for the court to refer the jury to the pleadings of the parties for the grounds of negligence relied upon to recover, yet in this case the petition was so well and carefully drawn, and so clear of anything that was not material, that we can find no clause therein upon which the jury could have been misled. Those charges, asked by appellant, which grouped together certain specified facts as constituting contributory negligence which would bar the plaintiff from recovering, or which would excuse the appellant from liability, are such as have been held by our supreme court to be charges upon the weight of evidence, unless such facts are by the statute declared to be negligence, or sufficient to excuse liability. *Campbell v. Trimble*, 75 Tex. 271, 12 S. W. 863; *Railway Co. v. Hill*, 71 Tex. 459, 9 S. W. 351; *Railway Co. v. Murphy*, 46 Tex. 356. We find that there is evidence in the record sufficient to establish negligence on the part of defendant company, and also sufficient to establish contributory negligence on the part of the plaintiff, Hanson; but upon both issues the evidence is contradictory, and we cannot, therefore, interfere with the verdict of the jury. No complaint is made of the sufficiency of the evidence to support the verdict. The case seems to have been well tried and ably managed on both sides, and clearly and ably briefed here, which facts we refer to and commend, as they greatly reduce our labors. Finding no material error in the record, we are of opinion that the judgment ought to be affirmed, and so order.

TEXAS & P. RY. CO. v. WATSON et al.
(Court of Civil Appeals of Texas. May 23, 1896.)

RECEIVERS—DISCHARGE—EFFECT OF JUDGMENT—
ABATEMENT OF ACTION—LIABILITY OF COMPANY—
LIMITATIONS—VOID RECEIVERSHIP—SPECIAL
VERDICT—SUFFICIENCY.

1. A judgment rendered against the receiver of a railroad, after he has been discharged

and the property restored, does not bind either the company or the property. 24 S. W. 952, affirmed.

2. A railroad company is liable for injury to stock sustained while the road is under the sole management of a receiver, who subsequently returns the property without sale, after a large expenditure of current revenues in betterments.

3. Where, after a judgment has been rendered against the receiver of a railroad, subsequent to his discharge and the restoration of the property to the company, the company is substituted as defendant, and plaintiff seeks to charge it on the ground of a fraudulent and void receivership, the action is not a continuation of the original one against the receiver, but is in so far a new suit in which limitations will be a bar if the prescribed period has elapsed between the accrual of the cause of action and the substitution.

4. In such case plaintiff can avoid the plea of limitations only by allegation and proof of a concealment by defendant of the fraudulent character of the receivership.

5. A special verdict must find all the facts controverted by the pleadings, and not admitted by the parties, necessary to support the judgment, and the court cannot look to the evidence for facts on which to base the judgment.

Appeal from Bastland county court; G. W. Dakan, Judge.

Action by R. Watson and another against the Texas & Pacific Railway Company for injury to horses. From a judgment for plaintiffs, defendant appeals. Reversed.

Scott & Brelsford, for appellant. R. B. Truly and B. F. Cotton, for appellees.

STEPHENS, J. The history of this case may be found in the opinion of Justice Head on the former appeal (24 S. W. 952), and need not be repeated. Instead of conforming to the views there so clearly expressed, appellees upon the next trial again insisted upon the original judgment against the receiver, rendered after his discharge, as conclusive against appellant, and erroneously caused it to be read in evidence to the jury. They also sought to avail themselves of the principles announced in the opinion of Chief Justice Stayton in the case of *Railway Co. v. Gay*, 86 Tex. 571, 26 S. W. 599, charging that the receivership was void ab initio for want of jurisdiction in the court creating it, etc. To the claim so founded and for the first time alleged, the statute of limitations was interposed as a defense, but the court, though requested so to do, refused to submit it to the jury. In the *Gay Case* no such request was made. Hence the omission was there held not to be reversible error. 27 S. W. 742; 30 S. W. 543. We are of opinion, however, that there was no occasion for appellees to have attacked the validity of the receivership, as the proof made the usual case against the company of liability for the acts of the receiver resulting from a return of the property to the company without sale after a large expenditure by the receiver of current revenues in betterments, etc. 86 Tex. 608, 26 S. W. 599, and cases cited on that page. Had appellees not thus needlessly extended their declaration, the issue of limita-

tion, as held in the cases just referred to as well as in our former opinion, would have been eliminated. Appellant could not itself have been heard to dispute the validity of the fraudulent receivership, so long as appellees did not attack it. But in so far as they sought to recover against appellant on the ground of a fraudulent and void receivership, the action was not a continuation of that originally brought against the receiver. It was a new suit, to which the defense of limitation was consequently a bar, unless avoided by allegation and proof, not only of a collusive and void receivership, but also of a concealment by appellant of its true character by a fraudulent holding out of Brown as the receiver of the court, instead of its own agent. It is very doubtful whether such matter in avoidance of the plea of limitation was sufficiently alleged or proven to call for any qualification of the charge requested and refused on that subject. In the *Gay Case* it was charged that the receivership was a collusive one, obtained for a fraudulent purpose, and in a court without jurisdiction; that the Texas & Pacific Company had fraudulently held out Brown as receiver when he was really but its agent, thereby misleading the deceased and the parties suing, so that the true status was not discovered till just before the filing of the new petition. The pleading in the case at bar barely suggested such matter in avoidance of the plea. The proof was even more deficient, the transcript of the proceedings in the federal court showing the circumstances under which the receiver was collusively appointed not being produced in evidence, as was done in the *Gay Case*. Nor did appellees testify, as they might easily have done, that they had been deceived and misled by the pretended receivership, though this was perhaps inferable from their conduct.

But, if there was no error, as assigned, in refusing the charge submitting the defense of limitation, though it seems to us there was, the judgment must still be reversed for fundamental error, in that it is not supported by the special verdict upon which it purports to stand. Four special issues only were submitted, which, with the verdict thereon, are as follows: "First issue: 'Were the plaintiffs' horses injured in course of shipment from Ranger, Tex., to New Boston, Tex., on or about October 20, 1887, under a contract of shipment as alleged in their petition?' Answer of jury to first issue: 'Yes.' Second issue: 'Did such injuries occur while John C. Brown had the management and control of the Texas & Pacific Railway Company as receiver of said company?' Answer of jury to second issue: 'Yes.' Third issue: 'Find the difference in the market value of the horses so injured, if they were injured, at New Boston, Tex., at the time of their arrival there, if any, without such injuries, and in the condition they would and should have been delivered, and their condition injured

as they were, if they were injured, at that time and place.' Answer of jury to third issue: 'We, the jury, find horses damaged to the extent of \$400 (four hundred dollars).' Fourth issue: 'State whether, or not John C. Brown had the sole management and control of the property of the Texas & Pacific Railway Company at the time of the injuries to plaintiffs' horses, if any?' Answer of jury to fourth issue: 'Yes.' It will be observed that the issue as to betterments was not submitted, and without a finding against appellant on that issue the verdict falls short of finding it liable for the acts of the receiver in question. The fact was put in issue by the general denial, and, though indisputably proven, it was not admitted. The court cannot look to the evidence for facts upon which to found the judgment, where special issues are submitted. The verdict must either be a general one, finding for one party against the other, or, if a special one, it must find all the facts controverted by the pleadings and not admitted by the parties necessary to support the judgment. This is a well-settled rule of practice in this state. *Ledyard v. Brown*, 27 Tex. 393; *Smith v. Warren*, 60 Tex. 462; *Maxwell v. Bank* (Tex. Civ. App.) 23 S. W. 342, and case there cited; *Moore v. Moore*, 67 Tex. 294, 3 S. W. 284. The judgment will therefore be reversed, and the cause remanded for a new trial.

SCHINTZ v. MORRIS, District Judge.

(Court of Civil Appeals of Texas. May 11, 1896.)

Dissenting opinion. For former report and opinion on rehearing, see 35 S. W. 516, 825.

R. C. Walker and Hogg & Robertson, for petitioner. F. G. Morris, pro se.

KEY, J. Being unable to agree with the other members of the court as to the disposition to be made of this case, it is proper that I should state the reasons for my nonconcurrence. Whether or not this court has both original and appellate, or only original, jurisdiction, I do not regard as material, because, whatever be the character of its jurisdiction, it should not grant a writ of mandamus in this proceeding, unless the judge has refused to proceed to trial and judgment, and, if granted, it would only require him to so proceed. Nor do I deem it necessary to decide whether or not the district judge erred in the rulings complained of. Neither is it material if, as contended by counsel for the plaintiff, the judge, in granting half and refusing half of the defendants' motion for a new trial of the entire case, pursued a novel and unusual course, not expected by either side. Mandamus is not available to restrain, correct, or otherwise control judicial eccentricities,

unless they result in injuries for which that writ is the appropriate remedy. My dissent is based upon two propositions of law, either of which, if correct, is sufficient reason for refusing the mandamus. These propositions are: (1) That the rulings complained of involve such judicial discretion as should not be controlled by mandamus; and (2) the plaintiff has another adequate legal remedy by appeal.

1. On the first proposition the rule is thus summarized by an approved text writer: "The fundamental principle underlying the entire jurisdiction by mandamus over the action of inferior courts is that, in all matters resting within the discretion of the inferior tribunal, mandamus will not lie to control or interfere with the exercise of such discretion. And, while the jurisdiction of superior common-law courts over courts of inferior powers by the writ of mandamus is well established, it is exercised with the utmost caution, lest there should be any improper interference with the exercise of the judicial powers of the court below, and it will only be used in such manner as to leave the inferior tribunal untrammelled in the exercise of the discretionary or judicial powers with which it is properly vested by law. And the rule may be regarded as established by an overflowing current of authority, both English and American, that mandamus will not lie to control the exercise of the discretion of inferior courts, and where such courts have acted judicially, upon a matter properly presented to them, their decision cannot be altered or controlled by mandamus from a superior tribunal. And it is important to observe that the rule applies with equal force, regardless of the propriety or impropriety of the action of the inferior court. It is sufficient that the discretion has been exercised; and, whether rightly or wrongly exercised, it cannot be questioned by mandamus." High, Extr. Rem. § 156. This authority is referred to with approval by Chief Justice Willie in *Ewing v. Cohen*, 63 Tex. 482, where it was held that mandamus would not lie to compel a county court to reinstate a cause appealed from a city court, and dismissed on account of an alleged defective appeal bond and the failure to give notice of appeal; and the supreme court held that Cohen was not entitled to a mandamus, although he had no other remedy. Both the text and the case just cited are referred to in the following language by Mr. Justice Brown in *State v. Morris*, 86 Tex. 229, 24 S. W. 393: "In *Ewing v. Cohen*, 63 Tex. 482, Chief Justice Willie, delivering the opinion of the court, quoting from High on Extraordinary Legal Remedies, said: 'Mandamus will not lie to control the exercise of the discretion of inferior courts, and where such courts have acted judicially, upon a matter properly presented to them, their decisions cannot be altered or controlled by mandamus from a

superior court.' This rule is amply supported by a large number of cases, of which we cite the following: *Little v. Morris*, 10 Tex. 263; *Sansom v. Mercer*, 68 Tex. 492, 5 S. W. 62; *Com. v. Boone County Court*, 82 Ky. 632; *State v. Megown*, 89 Mo. 156, 1 S. W. 208; *State v. Smith*, 105 Mo. 6, 16 S. W. 1052; *Judges of Common Pleas v. People*, 18 Wend. 79; *Ex parte Hoyt*, 13 Pet. 279; *Ex parte Nelson*, 1 Cow. 147; *People v. Superior Court of New York City*, 18 Wend. 575; *Ex parte Perry*, 102 U. S. 183; *Potter v. Todd*, 73 Mo. 101." Justice Brown wrote the opinion in *Terrell v. Greene*, 88 Tex. 540, 31 S. W. 632, which the other members of this court regard as overruling or qualifying the doctrine announced in *Ewing v. Cohen*, *supra*; but in the *Terrell* Case he did not refer to nor attempt to overrule or qualify the *Morris* Case. I think the *Terrell* Case is distinguishable from this case. The action of the district court in that case in refusing to allow *Terrell*, the county attorney, to represent the county in a suit to which the county was a party, did not relate to the merits of the suit, nor in any wise affect the rights of any party to it, but was a ruling on a preliminary and incidental question, raised by one who was in no sense a party to the suit; and, as shown by the opinion, *Terrell's* right and duty to represent the county was clearly fixed by statute, and he had no other adequate remedy.

In this case the plaintiff, *Schintz*, embraced in one suit in the district court both his causes of action; the respondent, as district judge, called the case for trial, heard the pleadings read, allowed evidence to be introduced, and submitted both causes of action to a jury, who returned a verdict for the plaintiff on one, and for the defendants on the other; and, according to the plaintiff's contention, the judge, on motion of the defendants, set aside as much of the verdict as was against them, and has refused to set aside the remainder thereof, and proposes, at another term of his court, to allow the parties to retry the issues of fact involved in the action for false imprisonment, as to which he granted the rehearing, but will not allow them to retry the issues of fact involved in the action for malicious prosecution, the branch of the case as to which he refused to grant a rehearing, but proposes, after obtaining another verdict upon the issue of false imprisonment, to render a judgment thereon, and at the same time to render a final judgment, based upon the verdict now in the record, upon the issue of malicious prosecution. Now, in my opinion, when the case culminates as above stated, the judge will have "proceeded to trial and judgment," within the meaning of the statute, and the plaintiff will be in a position to have whatever errors may have been committed corrected by appeal, and therefore is not entitled to a writ of mandamus. It may be

that, when the judge set aside the verdict on the issue of false imprisonment, he vacated and annulled the entire verdict; but such was not his intention, and, in the further progress of the case in his court, it is his prerogative to decide the status and declare the legal effect of said verdict, or any other part of the record. And if, in the exercise of his discretion as a judge, he decides that so much of the verdict as relates to the issue of malicious prosecution has not been annulled, and can properly be made the basis of a judgment on that issue, and renders judgment accordingly, will not such action on his part, whether proper or improper, in connection with what has already been done in the case, constitute a trial and a judgment? It cannot be denied that both causes of action have been once tried by the court and a jury; and, although the result of the subsequent ruling of the judge on the defendants' motion for a new trial may have been to annul the entire verdict, still, if he holds otherwise, and proposes to render a judgment on said verdict, I do not think a mandamus should issue to control his discretion, and compel him, in deciding whether or not the verdict referred to has settled and concluded the rights of the parties, to substitute the judgment of this court for that judgment which the law contemplates shall flow from his own mind and conscience,—his own judgment. Suppose the judge had granted the last motion made by the plaintiff, asking him to vacate the order refusing to retry the issue of malicious prosecution, and the defendants, *Hume* and *Tobin*, had pleaded the former verdict as a bar to the plaintiff's right to recover on said issue, and it was made to appear to the satisfaction of this court that the judge would permit the plaintiff to read his pleading and introduce his evidence, and would then instruct the jury that the former verdict was a bar to the action for malicious prosecution, and direct them to return a verdict for the defendants. Under such circumstances, would this court grant a mandatory writ to prevent the court below from pursuing that course? I presume not, because to do so would be to control the judge in the manner of trial. But what substantial difference is there in the case at bar and the case stated? It is true that, in the supposed case, there would, in form, be a retrial on the facts; but such retrial would be in form only, because it, like the other case, would be controlled by the effect given by the judge to the former verdict, and the result in each would necessarily be the same. The court below has not refused to exercise jurisdiction over the case. On the contrary, it has exercised jurisdiction, and proposes to continue to do so until a final judgment is rendered on all the issues involved. And that is the object which, I think, the statute authorizing this court to issue mandamus against district judges was intended to accomplish.

2. But, if I am wrong in my views on the first proposition, I am well satisfied that the mandamus should not be granted because the relator has another adequate legal remedy. That mandamus is a last resort, and will not be awarded when the law affords any other sufficient mode of redress, is a well-settled proposition. It has been repeatedly so ruled in this state. *Cullem v. Latimer*, 4 Tex. 330; *State v. Morris*, 86 Tex. 227, 24 S. W. 393; *Steele v. Goodrich*, 87 Tex. 401, 28 S. W. 939. By combining the two causes of action in one suit, the plaintiff has indicated his willingness to have them both disposed of by one final judgment, as required by statute, and to avail himself of his right to appeal from such final judgment for the correction of errors prejudicial to him; and, such being the case, I see no sufficient reason for holding that, because no judgment from which an appeal can be prosecuted has yet been rendered, therefore the remedy by appeal is not adequate. If the court had erroneously sustained a demurrer to that part of the petition seeking a recovery for malicious prosecution, the plaintiff could not have appealed, and had the ruling on the demurrer revised, until after the other issue was tried and a final judgment rendered; and it seems to me that such remedy by appeal as has been provided by the legislature, as an adequate remedy to correct such an error as this illustration involves, ought to be held an adequate remedy for the errors of which the plaintiff is now complaining. A judgment based on the verdict in the record, although rendered at a term subsequent to the rendition of the verdict, will not, in my opinion, be absolutely void, but only voidable, and whatever errors may have been committed in reaching such a judgment may be corrected on appeal therefrom.

HARTER v. CITY OF MARSHALL.

(Court of Civil Appeals of Texas. May 30, 1896.)

MUNICIPAL CORPORATIONS—OPERATION OF WATERWORKS—OVERFLOW OF STANDPIPE—DAMAGES.

1. In an action for damages resulting from the overflow of defendant's standpipe, located on plaintiff's land under contract, the court charged that, if plaintiff had suffered the damages alleged, and the same had resulted from defendant's negligence in operating its waterworks, plaintiff should recover. In another portion of the charge the jury were told that under the contract between the parties defendant had bound itself to pay for such damages, and was liable, regardless of the question of negligence. *Held*, that the charge was erroneous, because inconsistent and misleading.

2. Where a city has placed a standpipe on private lands by a contract under which it paid a money consideration for the privilege, and agreed as a further consideration that it would pay any damage which might accrue, it is liable for damages resulting from an overflow of the standpipe, regardless of the

question of negligence in the operation of its waterworks.

3. It is error to submit an issue which is unsupported by any evidence.

Appeal from Harrison county court; W. J. Graham, Judge.

Action by John Harter against the city of Marshall for damages to fruit trees and to land, resulting from an overflow of defendant's standpipe. From a judgment in favor of defendant, plaintiff appeals. Reversed.

T. P. Young, for appellant. Arthur H. Cooper, for appellee.

FINLEY, J. This is a suit instituted by appellant, Harter, against the city of Marshall, for the recovery of \$740 damages for injury to 128 apple trees, part of which were alleged to have been killed; and for injury to one acre of land, alleged to have been rendered valueless. It is alleged that the city owned and operated a system of waterworks, and that the standpipe was situated upon appellant's land, and that the damages accrued by overflow of water in said standpipe. It was alleged and shown that the standpipe was placed upon appellant's land under a contract with the city, under which it paid a certain sum of money for the privilege, and agreed as a further consideration that it would pay any other damage which might accrue. The petition set out this contract, and defendant's liability under it for the damages alleged to have resulted from said overflow. It further alleged that the city negligently operated its waterworks, and that the overflow was caused by the negligent manner of operating the same. The defendant denied the execution of the contract alleged, above alluded to, denied the charge of negligence, and further denied that the plaintiff's property had been damaged by the overflow. It also specially pleaded that plaintiff had been negligent himself in not preventing the damage, where it was easily within his power to do so. The city also filed a cross action for damages against the plaintiff, upon the ground that it had sought to repair the standpipe, and that appellant had refused to allow the city, through its agents, to enter upon the premises and make such repairs, and that the foundation of the standpipe had suffered and deteriorated in value for the want of such repairs, and prayed for a recovery of such damages over against plaintiff. The court below first instructed the jury that, if the plaintiff had suffered the damages alleged by him, and if the same had resulted from the negligence of the city in operating its waterworks, the plaintiff would be entitled to recover. In another portion of the charge of the court the jury were told that if the plaintiff had been damaged by overflow of said standpipe, as alleged by him, under the contract under which the standpipe was placed upon the property of the plaintiff the city had bound itself to pay for such damages, and that the plaintiff would be entitled to recover

such damages, regardless of the question of negligence. These two charges are separate and distinct in themselves, and appear to place the right of plaintiff to recover in one part of the charge upon the ground of negligence, and in the other portion of the charge the jury were instructed that the city is bound, by the terms of its contract, to pay for all damages which have been inflicted. The charges are apparently conflicting, and may have misled the jury in determining the real issue in the case. When the charge of the court in its several portions is inconsistent or conflicting upon material issues in the case, unless it clearly appears that the rights of appellant could not have been injured by it, the cause should be reversed for such error. *Railway Co. v. Robinson*, 73 Tex. 284, 11 S. W. 327. In this case the court correctly charged the jury that the contract of the city under which the standpipe was placed upon appellant's land bound it to pay plaintiff such damages as resulted therefrom. 2 Devl. Deeds, § 1035; *Fisk v. Flores*, 43 Tex. 340; *Railway Co. v. Titterington*, 84 Tex. 218, 19 S. W. 472. The court further erred in submitting to the jury the issue raised by the counterclaim for damages interposed by the city, for the reason that there was no evidence which justified the submission of that issue to the jury. The evidence in the case was conflicting upon the issue as to whether plaintiff's property had been damaged, and the extent to which the damage went. Appellant was entitled to have the issue of his damages submitted fairly to the jury, unembarrassed by the errors above set out. On account of the errors in the charge the judgment of the court below is reversed, and the cause remanded. Reversed and remanded.

ST. LOUIS S. W. RY. CO. v. FENLAW.

(Court of Civil Appeals of Texas. May 30, 1896.)

RAILROAD COMPANIES—ACCIDENT ON SIDE TRACK —DEFECTIVE BRAKE—NEGLIGENCE.

1. In an action for personal injuries it appeared that a train crew let in a car at the upper end of an inclined side track; that below it were standing two cars on which the brakes were set, and below them was a car from which plaintiff was unloading corn; that when the brakeman attempted to stop the moving car it was found that the brake was defective; that it struck the two cars, causing their brakes to give way, and the cars to collide with the one in which plaintiff was working. Defendant pleaded the general denial. *Held*, that defendant was entitled to a charge that, if the collision resulted from the defective brake, defendant was not liable, "unless defendant's servants knew, or in the exercise of ordinary care and diligence could have known," of such defect.

2. Under the general denial, any fact that went to establish a want of negligence on the part of defendant could be proved without having been specially pleaded.

3. Defendant was bound to use only ordi-

nary care, and was entitled to an instruction defining that degree to be such as an ordinarily prudent person would have used under similar circumstances.

Appeal from district court, Upshur county; Felix J. McCord, Judge.

Action by J. A. Fenlaw against the St. Louis Southwestern Railway Company for personal injuries. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Sam H. West and Marsh, McIlwaine & Fitzgerald, for appellant. Eberhart & Briggs, for appellee.

RAINEY, J. This suit was brought by appellee against the appellant railway company to recover damages for personal injuries. The substance of plaintiff's petition is that while he was engaged in unloading a car of corn transported by appellant over its line of railway to the town of Beddy, and there placed upon the side track, so that appellee, the consignee, might unload the same, appellant's agents carelessly and negligently caused other cars to come in violent collision with said car of corn, whereby appellee was thrown against the floor and wall of the car, and received serious and permanent injuries. Appellant pleaded general denial and contributory negligence on the part of appellee. There was no evidence to sustain the plea of contributory negligence. The evidence shows that while appellee was unloading said car of corn on said switch, appellant's agents or servants cut loose a car from a train, and dropped it in on the side track. It being down grade on said switch to where the car being unloaded was standing, said car so cut loose from the train run down to and collided with two other cars which were standing between it and the car which appellee was unloading, causing the brakes on said two cars to give way, and run down to and collide with the car in which appellee was unloading the corn, and injured him. There was testimony going to show that the employes of the defendant attempted to stop the car by setting the brakes, but by reason of the defective brake they were unable to do so. There was also testimony tending to show that appellant's agents were not aware of such defective brake, and that they were not guilty of negligence in failing to discover said defect.

The second assignment of error complains of the action of the court in refusing to give the following special charge asked by defendant: "Gentlemen of the jury, you are charged that if the evidence shows that the cause of the collision was the result of a defective brake on the car that first came in contact with the two cars standing on the side track, it will be your duty to return a verdict for the defendant, unless the evi-

dence further shows that the defendant's servants knew, or in the exercise of ordinary care and diligence could have known, of such defective brake." We think, under the facts of this case, that this charge should have been given, because it is a defense relied upon by the appellant to show that it was not negligent. Appellee contends, however, that it was not error in the court to refuse it, because appellant did not specially plead that the defective brake was the cause of the accident. Appellee, in his petition, charged negligence. It was incumbent upon him to prove negligence, and under the general denial any fact that went to establish a want of negligence on the part of appellant could be proved without being specially pleaded. If the defective brake was the cause of the collision, and the defect was not known by appellant's servants, and they were not guilty of negligence in not knowing it, then appellant was not guilty of negligence, and appellee could not recover.

Appellant also complains of the refusal of the court to give the following special charge: "Gentlemen of the jury, you are, at the instance of the defendant, charged that, in order to entitle plaintiff to recover, you must believe from the evidence that defendant's servants were guilty of negligence,—that is, a want of such care and diligence as an ordinarily prudent person would have used under similar circumstances in avoiding a collision of the cars,—and unless the evidence so shows it will be your duty to return a verdict for the defendant, and this, though you may believe from the evidence that the plaintiff was injured as alleged by him." The duty that was owing by appellant to appellee under the circumstances was ordinary care. The court, in its main charge, did not instruct the jury as to what degree of care, under the circumstances, it was the duty of appellant to use, and this charge should have been given. If appellant's servants used ordinary care to prevent the injury, then appellee was not entitled to recover. *Railway Co. v. Pennell*, 2 Tex. Civ. App. 127, 21 S. W. 273; *Bonner v. Bryant*, 79 Tex. 540, 15 S. W. 491; *Eason v. Railway Co.*, 65 Tex. 577.

The court erred in instructing the jury to find any amount in favor of appellee for physicians' bills, as the proof failed to show that any were incurred. Appellee alleged that he had paid \$25 for physicians' bills, and offers to remit that amount; but the verdict is a general one for \$500, and there is nothing to show whether or not the jury allowed anything on account of physicians' bills, and, if so, how much. As the judgment has to be reversed, and this error is not liable to again occur, we deem it unnecessary to pass upon the question as to whether or not the offer to remit would cure the defect. The judgment is reversed, and the cause remanded.

CITY OF DENISON v. WARREN.¹

(Court of Civil Appeals of Texas. Oct. 12, 1895.)

CITIES—DEFECTIVE STREETS—LIABILITY.

Where the grade of a street east of a corner lot was maintained by a city on a level with the lot, and that of the street south of it gradually declined from its intersection with the east street so as to leave the lot, about 30 feet from such intersection, several feet above grade, the city was not liable for injuries sustained by one from passing upon the lot from the east street on a dark night, and falling over the embankment into the south street, though it had erected no barrier to prevent persons from entering on the lot from the east street, and the street lights were out; the evidence not showing that the absence of lights was due to its negligence.

Appeal from district court, Grayson county; Don. A. Bliss, Judge.

Action by Anna Warren against the city of Denison and the Denison Light & Power Company for personal injuries. From a judgment for plaintiff against it alone, defendant city appeals. Reversed.

Decker & Harris, for appellant.

RAINEY, J. This suit was filed by Anna Warren, appellee, against the city of Denison, appellant, and the Denison Light & Power Company, a private corporation, for damages on account of certain injuries alleged by her to have been caused by the negligence of appellant in grading its streets, and in failing to keep them properly lighted, and by failure of said corporation to furnish the lights on said streets it had contracted with appellant to furnish. Appellant pleaded over against said private corporation on an alleged contract to furnish lights on appellant's streets, claiming that appellee's injury, if she had received any, was caused by the failure of said private corporation to comply with said contract. The trial, on December 23, 1893, resulted in a verdict and judgment in favor of appellee against appellant for \$2,500 and costs, but in favor of said private corporation, against both appellee and appellant, and from this judgment appellant has perfected this appeal.

The foregoing statement is taken from the brief of appellant. Appellant assigns 23 errors, but the decision of one disposes of the case, and we will not discuss the others. The assignment which we deem necessary to consider is, in substance, that, under the facts shown, the city of Denison was not guilty of negligence, and therefore appellee, Warren, was not entitled to recover.

The city of Denison is a municipality duly incorporated under the general incorporation act of the state of Texas, by which it had "full power and authority to grade, gravel, repair, pave and otherwise improve any avenue, street or alley, or any portion thereof

¹ Application for writ of error by appellee dismissed for want of jurisdiction. See 36 S. W. 404.

within the limits of said city." Laws 1875, p. 148, § 128. In pursuance of the power authorized by its charter, it had graded Woodard street below the level of the private lots abutting thereon. Woodard street crossed Armstrong avenue. The two run at right angles with each other. At the intersection of these streets, the surface of the streets and abutting lots was level. The grade of Woodard street east from Armstrong avenue gradually became lower than abutting lots until at the point where Mrs. Warren, appellee, was injured, the street and sidewalk were about two or three feet lower than the level of abutting lots. Mrs. Warren was a physician. The substance of her testimony as to how she was injured, taken in part from her counsel's brief, is as follows: "She was detained on professional business until after dark on the night that she was injured; that, when she started home, she found that it was very dark; that, when she got onto Woodard street (which was her nearest and best way home), she crossed from the south to the north side of same, just west of its intersection with Armstrong avenue; that Woodard street had been excavated eastward from said Armstrong avenue to a depth of about two feet below the adjoining north-side lots on said street, but that there was no excavation in said Armstrong avenue, and that there was a gradual incline eastward on the north side of Woodard street, and on the east side of Armstrong avenue, leading up onto the lots on the north side of Woodard street, from which she fell; that the incline led up onto the lot on the northeast intersection corner of said street and avenue; that there was no fence on the north side of said Woodard street, and the fence on the east side of said avenue was removed for about 20 feet back from said northeast intersection corner, along the east side of Armstrong avenue. 'It was so dark that I could not see where I was going, and I walked up this incline from said avenue, going east, thinking that I was on the sidewalk on said Woodard street, and did not know where I was until I walked against a bush, and stepped back, fell over the embankment caused by the excavation of Woodard street to a depth of about two feet, and onto the sidewalk of said street, and was injured.'" She further testified: "I lived about four blocks northeast of the place where I was hurt. I knew that some work had been done at the point where I fell, and I had been along there a few days before I was hurt; but I did not know the condition of the place, for I had never paid any attention to it, or had my attention called to its condition, and I did not go that way very often, and I had not paid any attention to the place. There was an electric light at the first street crossing north of where I was hurt, being about 300 feet away, but it was not burning. If it had been burning, it would have thrown a light on Armstrong avenue where I went upon the lot, and I could

have seen where I was, and would not have gone upon the lot, but would have kept in Woodard street, and then I would not have been hurt." The mayor of the city of Denison testified: "The grading on Armstrong avenue on the east side thereof, where it intersects the north side of Woodard street, had been graded in such a way that a person walking east along Woodard street, on the north side thereof, could walk up onto the lot east of Armstrong avenue, and on the north side of Woodard street, without knowing that they had left the street or avenue, if it was dark." There is no contention that there was any negligence on the part of the city in grading said street, further than making said street lower than the abutting lot at the point where appellee was hurt, and leaving it on a level at the intersection of the two streets. The street was in good repair, and was not dangerous to travel. Plaintiff's injury was occasioned by her starting from the street, and walking some 30 feet over a private lot, before she fell and was injured.

Cities are required to keep their streets and alleys in good repair, and are required to erect barriers "where, in traveling near the edge of the way, there is danger of being precipitated down an embankment, or into an excavation, or into water." *Sparhawk v. City of Salem*, 1 Allen, 30. In treating of this question, the court, in case of *Murphy v. Inhabitants of Gloucester*, 105 Mass. 470, say: Cities "are bound to erect suitable railings or barriers where a dangerous place exists in such close proximity to the highway as to render the use of the highway for purposes of travel unsafe. But they are not obliged to erect barriers to prevent or warn travelers from straying from the highway, where there is no dangerous place within such close proximity." In the case just quoted, the plaintiff, on a dark night, passed out of the limits of the highway, and fell into a dock some 25 feet away. The land between the dock and street was level, and there was no railing or other barrier to warn him of danger. The court held there could be no recovery. We think that case states the true doctrine. See, also, *Goodin v. City of Des Moines*, 55 Iowa, 67, 7 N. W. 411; *Puffer v. Inhabitants of Orange*, 122 Mass. 389; 2 Dill. Mun. Corp. 1019; *City of Detroit v. Beckman*, 34 Mich. 125; *Carr v. Northern Liberties*, 35 Pa. St. 324. We are of the opinion that the evidence fails to show that there was such a dangerous place contiguous to the street as to warrant a finding that there was negligence in the construction of the street, or in failing to erect barriers to prevent travelers from walking up onto the private lot; nor does the evidence show negligence on the part of the city in not having the street lighted on this particular night. Therefore plaintiff is not entitled to recover from the city.

In view of the conclusion here reached as to the liability of the city, we deem it unnecessary to discuss the liability of the Deni-

son Light & Power Company to the city. The judgment is reversed, and the cause remanded.

BURTON v. LAING.

(Court of Civil Appeals of Texas. Jan. 18, 1896.)

STREET IMPROVEMENTS—AGREEMENT BY ABUTTING OWNER TO PAY HIS SHARE.

An abutting owner who agrees with one having a contract with a city to improve a street to pay his pro rata share of the cost of improving the street is personally liable for such amount if the improvement is completed in accordance with the contract.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action by Mary A. Burton against Joseph Laing to remove a cloud occasioned by the sale of plaintiff's land under a special assessment for street improvements. Plaintiff recovered judgment, and defendant was permitted to file a trial amendment as to the issues presented by his cross bill, such amendment being substantially a suit to recover the amount of said assessment by virtue of a contract by plaintiff to pay her pro rata share of the cost of the improvement. From a judgment in favor of defendant on his amended cross bill, plaintiff appeals. Affirmed.

H. I. Phillips, for appellant. Watts, Aldredge & Eckford, for appellee.

RAINEY, J. This was a suit brought by appellant to remove a cloud from title, alleged to exist by reason of a sale of the land under a special tax assessment levied by the city of Dallas, to improve a certain street on which said lot of land fronted. Various grounds of irregularity were set out in the petition as to the illegality of the manner in which such assessment was made. Appellee answered, pleading the validity of said sale, authority of the city of Dallas to levy such taxes and make the assessment, and, further, that, when the street was improved, appellant, by her written agreement, agreed to pay for her proportional part of such improvement. Appellant excepted to said answer on the ground that the statements made therein did not show that such sale was legal. This exception was sustained. Permission was given appellee to amend, which he did, abandoning any claim to the property under the sale, and set up a contract made by appellant for the payment of her proportional part of said taxes. Various exceptions were urged against this answer, which were overruled by the court. As the case now stands in this court, the only question involved is the ruling of the court on the exceptions to the trial amendment, and whether or not the court was justified in rendering personal judgment against appellant for the cost of said improvement.

We think the allegations of the petition were not subject to the vices alleged in the demurrers, and there was no error committed by the court in so holding. We are further of the opinion that the evidence fully shows that the appellant made the contract as alleged, for the payment of her proportional part of said improvements. We also think that the evidence fully sustains the finding of the court that the improvements were made according to the contract, and that the appellant is liable therefor. Finding no error in the judgment, the same is affirmed. Affirmed.

CHRISTIAN v. HUGHES et al.¹

(Court of Civil Appeals of Texas. Feb. 22, 1896.)

CONSTRUCTIVE NOTICE—RECITAL IN DEED—ASSIGNMENT FOR BENEFIT OF CREDITORS—RIGHTS OF ASSIGNEE.

1. Where a grantee assumes payment of notes executed by his grantor for the price of the land, a recital in the deed under which the grantor acquired title, that such notes are secured by a deed of trust, is notice to the grantee of the existence and terms of the trust deed.

2. An assignee for the benefit of creditors can assert no better rights than his assignor had before the assignment.

Error from district court, Dallas county; R. E. Burke, Judge.

Action by William Christian against George V. Hughes and others to redeem from a sale under a deed of trust, and for other relief. There was a judgment for defendants, and plaintiff brings error. Affirmed.

K. R. Craig and Wm. Thompson, for plaintiff in error.

FINLEY, J. This suit was filed August 1, 1891, and was to set aside and redeem from a sale of certain lots in the city of Dallas, made by J. D. Crutcher as trustee, to recover the lands so sold, as well as to vacate a deed of trust held by the Security Mortgage & Trust Company; or, in default of that, for a recovery subject thereto, and to set aside a conveyance of a part of the land, made by George V. Hughes, claiming under the trustee's sale to M. W. Russey, as well as generally an adjustment of the equities of all parties. All the defendants appeared and answered. The case was tried without a jury April 18, 1893, and judgment rendered for defendants. Plaintiffs filed petition and bond for writ of error as well as assignments of error, April 2, 1894. Service was accepted by all defendants in error by indorsement on petition therefor.

The following facts were established upon the trial: (1) Ophelia Eakins was the agreed common source of title. (2) Ophelia Eakins conveyed the land to Moses C. Gray, reciting the consideration in this language: "\$900,

¹ Writ of error denied by supreme court.

of which the sum of \$100 is in cash paid, and four notes of even date, for \$175 each, payable respectively, in 1, 2, 3, and 4 years from date, with interest from date at the rate of ten per cent. per annum, payable semiannually, the same secured by deed of trust on said land hereinafter mentioned; these notes being a vendor's lien on the land herein conveyed." This deed was executed January 4, 1888, and filed for record same date, and was duly recorded. (3) Moses C. Gray executed a deed of trust upon the land to secure the unpaid purchase money, constituting J. D. Crutcher the trustee. This deed of trust was executed January 4, 1888, acknowledged January 4, 1891, filed for record April 6, 1891, and recorded April 9, 1891. It recited that it was executed "to secure payment of four notes of even date, for \$175 each, with 12 per cent. interest, interest payable semiannually, due 1, 2, 3, and 4 years, respectively, and providing for attorney's fees in case of suit, payable to Ophelia Eakins"; and conveying the land in controversy; authorizing the trustee, in default of the payment of any one of the notes, at the request of the holder, to sell the property at public auction for cash at the door of the courthouse in the city of Dallas, after having given 20 days' notice by posting on the bulletin board in the courthouse; the proceeds of such sale to be applied—First, to cost and expense of executing the trust, including a fee to the trustee; second, to the payment, ratably, of said notes then unpaid, principal and accrued interest, adding: "It being understood that when default shall be made in the payment of any of said notes, all the others shall at once become due and payable at the option of the holder thereof;" third, balance of the money to be paid to the grantor. (4) Moses C. Gray conveyed the land to R. H. Waggener, October 9, 1888, and the deed was filed for record November 27, 1888, and duly recorded. This deed recited the consideration to be "\$1,253.47, paid as follows: Five hundred dollars cash, the receipt of which is hereby acknowledged, and the assumption by the said R. H. Waggener of 4 certain notes executed January 4, 1888, by said Moses C. Gray, each in the sum of \$175, payable to Ophelia Eakins, or order, 1, 2, 3, and 4 years after date, with 10 per cent. interest per annum from date until paid, payable semiannually; said notes and interest at this date amounting to \$753.47." (5) R. H. Waggener, individually and as a member of a firm of partners, executed a statutory deed of assignment for the benefit of creditors, naming William Christian as assignee. This deed of assignment was executed October 13, 1890, was duly recorded, and plaintiff qualified as assignee. The deed conveyed all the property, both real and personal, of R. H. Waggener, except such as was exempt from execution; not particularly specifying this lot of land. (6) J. D. Crutcher, trustee, conveyed the land to Charles S. Swindells, April 7, 1891, and the

deed was recorded two days thereafter. The deed recites a consideration of \$100, and the further recitals: "Whereas, on January 4, 1888, Moses C. Gray executed and delivered to me J. D. Crutcher a deed of trust of said date, whereby to secure Mrs. Ophelia Eakins in payment of four notes, each for \$175, dated January 4, 1888, and due, respectively, in one, two, three, and four years after date thereof, each bearing 12 per cent. interest per annum, interest payable semiannually, he conveyed to me, the said trustee, in trust, the following described land; and whereas, default has been made in the payment of the third of said notes, though same is long since due and payable, and Mrs. Ophelia Eakins, the holder of said notes, has since said default requested me, the said trustee, to sell said property (land) in accordance with the provisions in said trust, and for the purpose of paying said note," etc. Then following with recital of advertisement and sale of the land to grantee, describing the land in controversy. (7) Charles S. Swindells conveyed the land to George V. Hughes, April 13, 1891. The deed was filed for record same day, and duly recorded, and recited a consideration paid of five dollars. (8) May 7, 1891, George V. Hughes borrowed from the Security Mortgage & Trust Company the sum of \$500, and to secure the same executed a deed of trust upon the northwest half of the lot of land to J. T. Dargan, trustee. The loan was made after an examination of the record title, and without any notice of any claim adverse to that of Hughes, except such as might arise from the record of the deed of Gray to Waggener. (9) August 3, 1892, J. T. Dargan, as trustee, conveyed the said northwest half of the lot to the Security Mortgage & Trust Company under a foreclosure and sale made on the first Tuesday in July, 1892, under the said deed of trust from Hughes to Dargan. (10) May 4, 1891, George V. Hughes conveyed the southeast half of the lot of land to M. W. Russey. The deed recites a consideration of \$1,000,—\$500 paid and \$500 secured by notes. (11) When R. H. Waggener bought the land he had no actual knowledge of the fact that the notes executed by Moses C. Gray to Ophelia Eakins, the payment of which he assumed, were secured by deed of trust upon the land. (12) William Christian, assignee, had no actual knowledge that there was purchase money due upon the land until February 25, 1891, when he learned that fact through a letter from W. N. Vernon, a former clerk of Waggener, who lived in Dallas. Christian lived in Houston, Tex. He then wrote to Vernon, to have the notes sent to a bank in Houston for collection, and he would pay them; but, if the holders of the notes would not do this, to pay them off himself, and draw on him (Christian) for the money. Christian did not actually know of the deed of trust until after the sale thereunder. In the early part of 1891, the third note due upon the land was presented to R.

H. Waggener for payment, through the National Exchange Bank of Dallas. He informed the bank of the assignment which he had made, and requested that the note be presented to the assignee, Christian, who would pay it. In the early part of 1891 the said note was presented, through the City National Bank of Dallas, to Cooper & Robinson, as agents of R. H. Waggener, for payment. The collector of the bank was informed of the assignment, and was told that the assignee, William Christian, of Houston, would probably pay it. Cooper & Robinson immediately wrote to William Christian of the presentation of the note. In a few days thereafter W. N. Vernon called at their office, and inquired as to the note. Robinson went with Vernon to the bank, inquired about the note, and learned that it had been returned to the owner in Corsicana, Tex. Mr. Vernon asked the bank to get the note sent back to Dallas, and he would pay it, or have it paid; and the officer of the bank promised to do so. No further effort was made to pay the note, and on account of default in its payment the lot was thereafter sold under the deed of trust, as before recited. No actual knowledge of the sale was had by the assignee, or his agent, Vernon, until after Swindells conveyed the land to Hughes, when Vernon proposed to Hughes to pay him the amount of the past-due note, interest on the other note, and whatever expense had been incurred, if Hughes would give up his title under the trustee's sale.

Conclusions of Law.

1. The assignee, Christian, stands in the same attitude that R. H. Waggener would occupy if he had not made an assignment of his property for the benefit of creditors, and were the plaintiff in this suit. The assignee can assert no higher or additional rights than Waggener himself could enforce.

2. The deed from Ophelia Eakins to Moses C. Gray is a link in the chain of title under which the plaintiff claims, and the recitals in that deed visited notice upon him of the existence and terms of the deed of trust executed by Gray to Crutcher, trustee, to secure the payment of the four purchase-money notes executed by Gray to Ophelia Eakins, the payment of which was assumed by Waggener. *Willis v. Gay*, 48 Tex. 469, 470; *Robertson v. Guerin*, 50 Tex. 317; *Gaston v. Dashiell*, 55 Tex. 516, 517; 16 Am. & Eng. Enc. Law, p. 798; *Graff v. Castleman*, 16 Am. Dec. 754, and note; *Baker v. Mather*, 25 Mich. 51.

3. Having full notice of the terms of the deed of trust, and having assumed the payment of the notes secured thereby, and having defaulted in the payment of the notes, and allowed the property to be sold under the deed of trust, and to pass to remote purchasers, Waggener's right of redemption has been concluded.

The facts, as developed, do not, in our opin-

ion, authorize a cancellation of the several conveyances and the redeeming of the property by Waggener's assignee, plaintiff in error. Judgment affirmed.

Additional Conclusions of Fact.

(1) The deed to Charles Swindells from the trustee recited the payment of purchase money, and there was no testimony as to the payment of the purchase money by him. (2) The deed from Swindells to Hughes recited payment of purchase money, and there was no testimony as to such payment. (3) The deed from Hughes to Russey recited payment of purchase money, and there was no testimony as to such payment. (4) R. H. Waggener, when he purchased, paid \$500 in property, and assumed the payment of the vendor's lien notes due on the land.

TEXAS & P. RY. CO. v. PADGETT.¹

(Court of Civil Appeals of Texas. Feb. 22, 1896.)

JUDGMENT—MISDESCRIPTION OF VERDICT—INSTRUCTIONS—TRIAL—VERDICT.

1. Where the judgment is sustained by the verdict, the fact that a mistake is made in the judgment in the description of the verdict does not invalidate the judgment.

2. It is not error to refuse an instruction sufficiently covered by the charge already given.

3. In an action against a railroad company for damages to plaintiff's land due to the negligence of defendant in constructing its roadbed, thereby causing the land to be overflowed, it is not error to refuse to require the jury to specify in their verdict the several items of damages allowed, so as to prevent the possibility of a second recovery for the same injuries.

Appeal from district court, Van Zandt county; Felix J. McCord, Judge.

Action by W. J. Padgett against the Texas & Pacific Railway Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

M. H. Gossett, for appellant. Kearby & Greer, for appellee.

Conclusions of Fact and Law.

LIGHTFOOT, C. J. The statement of the case by appellant is substantially correct, as follows: W. J. Padgett sued the Texas & Pacific Railway Company, in the district court of Van Zandt county, for the sum of \$1,975, damages alleged to have been sustained by reason of the negligent construction and maintenance of the roadbed, and the failure to provide sufficient outlets and bridgeways by defendant company for the free passage of the water flowing down the valley of Saline creeks, opposite plaintiff's farm, of 220 acres, and thereby causing the overflow of a large portion of said farm, causing sickness in plaintiff's family, doing damage to growing crops, switch cane, timber, etc. The contention by appellant was

¹ Writ of error denied by supreme court.

that its roadbed was carefully and skillfully constructed, and that openings and bridgeways had been provided sufficient to allow the passage of the natural flow of water down the valley of Saline creek, and that plaintiff's land had not only been subject from time immemorial to overflow from the natural flow of water in Saline creek, but also from back water from Sabine river, for which defendant was in no wise responsible. On trial April 5, 1894, the plaintiff recovered judgment in the sum of \$560, from which the railway company has appealed.

The facts proved, and the verdict and judgment thereon, justify the conclusion that the charges made in plaintiff's petition were substantially correct, and that appellant was guilty of negligence in the construction and maintenance of its roadbed, in its failure to provide sufficient outlets for the flow and free passage of the water flowing down the valley of the Saline creek, opposite plaintiff's farm, of 220 acres, thereby causing the overflow of a large portion of said farm, as alleged in plaintiff's petition, whereby plaintiff was damaged to the full amount found by the verdict and judgment below.

1. Appellant's first assignment is that the court erred in refusing to grant appellant a new trial, because the judgment does not correctly describe the verdict. This assignment is not well taken. The judgment would be good if sustained by the verdict, whether it was set out in the judgment at all. The verdict of the jury was for \$560, in favor of plaintiff. The judgment of the court was for that amount; and a mistake in the description of the verdict would not avoid the judgment.

2. The second assignment of error is to the effect that the court erred in its charge to the jury in authorizing any finding of interest as a part of the damages. This assignment is not well taken.

3. The third assignment is as follows: "The court erred in refusing defendant's special charge No. 2, wherein the jury was instructed that if they found from the evidence that the backing of water and consequent damage to plaintiff's farm was caused in part by high water from Saline creek, and in part from Sabine river, that for so much of the damage resulting from back water from Sabine river, defendant would not be responsible." The court, in its charge to the jury, especially restricted them to the finding of such damage as might have resulted from high water from Saline creek; and the jury were expressly charged by the court that they could find no damage from any overflow or high water from Sabine river. The charge of the court sufficiently covered the requested charge, and it was properly refused.

4. The fourth, seventh, eighth, and ninth assignments of error complain at the ruling of the court in failing to grant a new trial

upon the various grounds alleged,—because the verdict was excessive, and against the preponderance of the evidence. The verdict and judgment are amply supported by the testimony, and we cannot say that the judgment is excessive.

5. In the sixth assignment of error, appellant complains that the court erred in refusing the special charge requested by appellant, instructing the jury that, in the event they should find for the plaintiff, the verdict should be itemized so as to show the damage to the land,—that which was permanent, and the different items of it, and that which was only temporary. While, in cases of this character, where successive suits have been or may be brought against a railway company for damage done to a farm, it would not be improper for the trial court to submit the case on special issues, so that the different items of damage may be known and distinctly passed upon, so that, in the event of a subsequent suit, there would be no danger of a second recovery for the same damage, yet we cannot say that it was error for the court to refuse to do so in the absence of a law requiring it.

We find no error in the judgment, and it is affirmed.

WESTERN UNION TEL. CO. v. TEAGUE.¹

(Court of Civil Appeals of Texas. March 7, 1896).

TELEGRAPH COMPANIES — DELAY IN DELIVERY OF MESSAGE—SUFFICIENCY OF EVIDENCE.

A telegram addressed to plaintiff, calling him home on account of sickness of his father, reached the receiving office at 8:43 p. m., and was given to the messenger boy at 9 p. m. The telegram was addressed in care of a medical college situated just beyond free-delivery limits of the telegraph office, these limits extending a mile from the office. Street cars ran by defendant's office to within half a block of the college. Plaintiff boarded a block beyond the college, but was at the college till 9:30 o'clock that evening. The telegram was delivered to a saloon keeper near the college between 10 and 11 o'clock, the messenger collecting 15 cents delivery charges. Plaintiff did not receive the telegram until 9 o'clock the next morning, too late to catch the train, and, as a result, did not reach home before his father died. Held sufficient to sustain a judgment for plaintiff.

Appeal from district court, Franklin county; John L. Sheppard, Judge.

Action by J. W. Teague against the Western Union Telegraph Company. There was judgment for plaintiff, and defendant appeals. Affirmed.

W. W. Wilkins, for appellant. Hiram Glass, for appellee.

Conclusions of Fact.

RAINEY, J. At 8 o'clock p. m., January 8, 1891, J. S. Teague, brother of appellee, J. W.

¹ Writ of error denied by supreme court.

Teague, filed with appellant's agent at Mt. Vernon, Tex., the following message, addressed to appellee, at Memphis Hospital College, Memphis, Tenn.: "Pa is very sick with pneumonia. Come at once;" the charges for its delivery being paid. The message was attempted to be forwarded to appellee immediately, but was delayed 20 minutes at Ft. Worth, Tex., a relay office, on account of the operator at Ft. Worth not responding to the call of the agent at Mt. Vernon. It was then forwarded, and received by appellant's agent at Memphis at 8:43 p. m. same day. The message was then delivered to the messenger boy at 9 o'clock p. m. The messenger went out to near the college, and delivered the message about 10 or 11 o'clock to a saloon keeper, who received it, the messenger boy stating at the time that he was afraid to go to the college. The blank on which the message was written contained this provision: "Messages will be delivered free within the delivery limits of the terminal office. For delivering at a greater distance, a special charge will be made to cover the cost of delivery." The free-delivery limits were one mile each way from appellant's office, and the hospital was situated a few feet beyond the free-delivery limits. When the messenger boy delivered the message to the saloon keeper, he collected 15 cents as extra charges. Appellee boarded a block and a half from the college, and was at the college that night until 9:30 o'clock. It was the custom, however, for the college to be closed at 9 o'clock each night. Street cars ran by the office of appellant, and to within a half block of the college, which was a little over a mile from appellant's office. It took about six minutes to go on the street car from appellant's office to the college, and the cars ran until midnight each night. The time it would have taken to have walked from the appellant's office to the college was about 15 or 20 minutes. The message was not delivered to appellee until the following morning, at about 9 o'clock. The trains leave Memphis for Texas at 7:50 a. m. and at 5:45 p. m. each day. Had the message been delivered to appellee on the night it was received at Memphis, he could have taken the train the next morning for Texas, and reached his father's bedside before he died. As it was, he left the next evening, at 5:45 p. m. (the first train out of Memphis for Texas after receiving the message); and, when he reached home, his father was dead. Appellee suffered great mental distress in being deprived of the privilege of reaching and seeing his father before he died, which was caused by the negligence of the appellant in failing to deliver the telegram.

Conclusions of Law.

The evidence is sufficient to sustain the judgment of the court below. There are no material errors assigned requiring a reversal of the judgment, and the same is affirmed.

HOWELL et ux. v. STEPHENSON et al.¹
(Court of Civil Appeals of Texas. March 7, 1896.)

HOMESTEAD—WHAT CONSTITUTES—SUFFICIENCY OF EVIDENCE.

Where defendants executed a deed of trust, in which they covenanted that the premises conveyed were not a part of their homestead, and that they had a homestead elsewhere, occupied by them as such, a finding that the property so conveyed was not the homestead will not be disturbed where it appears that at the time of the execution of the trust deed defendants did not in fact regard the property as a homestead, but occupied other lands as residence and business homesteads.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action of trespass to try title by Mary A. Stephenson and others against J. M. Howell and his wife. From a judgment for plaintiffs, defendants appeal. Affirmed.

R. D. Coughanour, for appellants. J. C. Patton and F. M. Etheridge, for appellees.

LIGHTFOOT, C. J. The statement of the case by appellants is substantially correct, as follows: This is an action of trespass to try title, instituted February 11, 1896, by Mary A. Stephenson, joined pro forma by her husband, C. B. Stephenson, plaintiffs, appellees herein, against J. M. Howell and his wife, Julia Howell, and W. A. Smith, defendants,—the said J. M. Howell and Julia, his wife, being appellants herein,—for the title and possession of a triangular piece of ground lying in the city of Dallas, and designated as lot No. 5, in J. M. Howell's addition to said city. On June 29, 1887, appellants executed a deed of trust on said lot, together with other lots, to J. M. Hays, trustee, for the purpose of securing Samuel Armstrong in the payment of a certain promissory note for \$1,000, and Mary A. Stevens in the payment of another promissory note of \$500, both made by the said J. M. Howell, bearing even date with said deed of trust, and to become due at one year from the date thereof, with interest thereon at the rate of 12 per cent. per annum, payable semiannually; and on May 20, 1889, appellants executed, or attempted to execute, another deed of trust on said lot No. 5 to the said J. M. Hays, trustee, for the purpose of securing the said Mary A. Stevens in the payment of another promissory note for \$1,500, made by the said J. M. Howell, payable to the order of the said Mary A. Stevens, bearing even date with the said deed of trust, and to become due at one year from the date thereof, with interest thereon at the rate of 12 per cent. per annum, payable semiannually. Both of said deeds of trust contained the following recitation, to wit: "We, the said grantors herein, covenant with the said grantees herein that the above premises are no part of

¹ Writ of error denied by supreme court.

our homestead, and that we have a homestead elsewhere in Dallas county, Texas, now occupied by us as such." Subsequent to the execution of said first deed of trust, and prior to March 7, 1894, the said Samuel Armstrong died, leaving the said Mary A. Stevens his sole heir; and subsequent to the execution of said last trust deed, and prior to said March 7, 1894, the said Mary A. Stevens intermarried with the said C. B. Stephenson. On June 29, 1890, appellants sold and conveyed 25x80 feet of said lot No. 5 to the said W. A. Smith, defendant, as aforesaid. On March 7, 1894, appellants having made default in the payment of said promissory notes, the said J. M. Hays, trustee, foreclosed said deeds of trust on said lot No. 5, by selling and conveying the same to the said Mary A. Stephenson for the sum of \$500. Appellees' petition is in the ordinary form of an action of trespass to try title, to which appellants interposed the plea of not guilty, and by proof endeavored to show that the lot in controversy was, on the dates of the execution of said deeds of trust, a part and parcel of their homestead, and that it was the place where the said J. M. Howell, the head of a family, as nurseryman, florist, horticulturist, and gardener, exercised his said calling and business. The case was tried April 13, 1895, by the court without a jury, and resulted in a judgment in favor of appellees against appellants and their co-defendant, W. A. Smith, for the title and possession of said lot No. 5, and costs of suit; and that the defendant W. A. Smith have judgment over against the said J. M. Howell on his warranty of title for \$1,500, with interest thereon from date of judgment at the rate of 6 per cent per annum, from which judgment Howell and wife have appealed.

The testimony introduced on the trial, the judgment thereon, and the trial court's conclusions of fact, which are supported by the evidence, justify our conclusion, that the deeds of trust above mentioned, executed by J. M. Howell and wife, and the foreclosure of the same by the trustee, and the sale of said property thereunder by the trustee, fixed the title to the same in appellee Mary A. Stephenson, and that the property was not the homestead of the appellants, either at the time of the execution of said deeds of trust, or either of them, nor at the time of the sale of the property thereunder by the trustee; that appellees were entitled to judgment for the recovery of said property, and that the judgment below is fully sustained by the facts. Also it appears that Howell and wife sold the property to defendant Smith after the said deeds of trust were made, and executed to him a warranty deed therefor for the consideration of \$1,500, which was paid, and that the title to the property attempted to be conveyed by Howell and wife to said Smith failed by reason of the foreclosure of said deeds of trust, and that said Smith was entitled to recover over against said Howell

and wife the amount of \$1,500 and interest, embraced in the judgment below.

The appellants in an able and exhaustive brief present numerous questions of fact by their different assignments of error, claiming that the court erred in finding as a fact that the property was not the homestead of appellants at the time of the execution of the deeds of trust. The court below had before it the parties and the numerous witnesses, heard their testimony, saw the manner of their testifying; and, the question of fact being strongly controverted, and there being ample testimony to support the ruling of the court, we feel constrained, in deference thereto, to uphold its finding upon the homestead question. It seems from the testimony that the appellants themselves, at the time of the execution of the deeds of trust, did not regard the property in controversy as a part of their homestead, and in the deeds of trust they recite this fact: "We, the said grantors herein, covenant with the said grantees herein that the above premises are no part of our homestead, and that we have a homestead elsewhere in Dallas county, Texas, now occupied by us as such." While such a recitation would not be considered as conclusive upon the question of homestead if in truth and in fact it was clearly apparent that such recitation was placed in the instrument merely to evade the homestead law, but where it is clear from the testimony of the parties themselves that they did not regard the property in controversy as their homestead, and where it appeared that their residence homestead was elsewhere, and that they had also another place at which they did their nursery business, it would seem but a mockery of justice if, as an afterthought, they should be allowed to come in and claim this property as their homestead, when it was never claimed before the execution of the deeds of trust, when they seemed never to have considered it as a part of their homestead, and it was not such in fact. This property was clearly not a part of their residence homestead, and whether it was or was not a part of their business homestead was a question of fact, about which the parties themselves certainly ought to have had some knowledge. The homestead law is one which was enacted, and has been wisely upheld, and should always be carefully guarded by the courts; but, on the other hand, the courts should be as scrupulously careful to see that the object of the law should not be defeated by allowing parties who have borrowed money on property which was not in fact a part of their homestead to subsequently claim it as such, to the detriment of others. We find that the conclusion of the court below to the effect that the land in controversy was not the homestead of appellants at the time of the execution of the deeds of trust is fully sustained by the facts and by the law. We find no error in the judgment, and it is affirmed.

CITY OF DALLAS et al. v. EMERSON et al.
(Court of Civil Appeals of Texas. May 30,
1896.)

MUNICIPALITIES — VOID ASSESSMENT FOR STREET
PAVING.

1. Where a city contracts for paving, limiting its liability to one-third of the cost, and providing that the contractors were to look to the abutting owners for the balance, an assessment by the city for such balance is void.

2. The levy of an assessment for a public improvement should be made at the time of the contract, and based on estimates of the cost of the work in front of each abutting lot.

3. The amount assessed against each abutting lot should be fixed by the amount of the cost of the work in front of each lot.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action by S. P. Emerson and others against the city of Dallas and J. C. Bogle, city collector, for an injunction. From a judgment for plaintiffs, defendants appeal. Affirmed.

This suit was instituted February 1, 1892, in the district court of Dallas county, Tex., by S. P. Emerson and 11 other property owners on Haskell avenue, in the city of Dallas, asking for a temporary injunction restraining the city of Dallas and J. C. Bogle, their attorneys, agents, and servants, from selling the property of petitioners abutting on said street, to satisfy a lien claimed on said property by said city for the payment of two-thirds of the cost of the grading, macadamizing, curbing, and guttering of said Haskell avenue, levied by an ordinance of the city of East Dallas,—said petitioners praying that, on final hearing, said injunction be made perpetual; that they have judgment declaring said ordinance void, and that there is no lien on said properties, as sought to be enjoined, etc.; that they have judgment for costs, for all general and special relief to which they may be entitled, etc. Defendants, by their first amended original petition, filed October 12, 1892, pleaded the general demurrer, special exception, general denial, and special pleas upon which defendants went to trial. The case was tried without a jury, October 9, 1893, and resulted in a judgment for the plaintiffs, perpetuating the temporary injunction theretofore granted by the court, and that the city of Dallas and J. C. Bogle, their attorneys, agents, and servants, be perpetually enjoined and restrained from selling the said properties of plaintiffs fronting and abutting on Haskell avenue, city of Dallas, state of Texas, for the purpose of paying the said tax referred to above, and levied upon for the purpose of paying for the grading, macadamizing, and improving Haskell avenue, from Ross avenue to Armstrong avenue, and that the plaintiffs recover of and from the defendants their costs expended in the case. Plaintiffs' petition, in effect, alleged that the city of East Dallas, prior to its an-

nexation to the city of Dallas, by act of legislature, acted under and by virtue of the general laws of the state of Texas with reference to the corporation powers, etc., of cities, to wit, Sayles' Rev. Civ. St. tit. 17, cc. 1-10, inclusive, and its powers with reference to paving, grading, and otherwise improving its streets were limited by the provisions of said statutes, during the entire time that said East Dallas was a city, and especially at the time covering the transactions set forth in said petition; that there was an understanding upon the part of the contractors, incorporated in an ordinance passed by the city of East Dallas, to the effect that said contractors should hold the city of East Dallas bound for one-third the cost of said improvement, and should look to the property holders personally for two-thirds of said costs, and whether or not they should receive such two-thirds would depend upon the terms of private arrangements made, or to be made, with said property holders by said contractors; that arrangements were made with some of the property holders, but in no case were liens created upon the property or properties of such owners; that the ordinance passed by the council of the city of East Dallas was fatally defective, and was for the purpose of assisting the contractors in the collection of private debts due, or supposed to be due, them; that, by reason of irregularities in the passage of said ordinance in the pretended levy and assessment, the same was void and of no effect, and failed to fix a lien upon the property sought to be sold by the defendants, etc.

McLaurin & Wozencraft and T. A. Work, for appellants. Gano, Gano & Gano, for appellees.

FINLEY, J. (after stating the facts). The case, as stated, was tried by the court, without the intervention of a jury; and the record contains no findings of fact prepared by the trial judge. A statement of facts is contained in the record; and under a well-established rule, if there is any view of the facts which will support the judgment rendered, it should be affirmed.

The record before us justifies these conclusions: (1) The city of East Dallas, a municipal corporation, acting under the general incorporation laws of the state, entered into an agreement with Grigsby Bros. to macadamize Haskell avenue, a street of said city. It was expressly understood and agreed between the city council and the contractors that the contract was not made under and pursuant to the terms of the statute authorizing the city to contract for such improvement of its streets. It was agreed that the city should pay one-third of the cost of such improvement, as fixed by the terms of the contract, and the cost of street intersections, and that the contractors should arrange

with and look solely to the abutting property owners for two-thirds of the cost of the work. The city refused to become even primarily liable for the two-thirds of the cost for which the contractors were required to look to the abutting owners. (2) Under this arrangement, the contractors arranged with a large number of the abutting owners to pay their proportionate shares of the cost. This contract was in writing, and did not include any of the plaintiffs in this suit. (3) Grigsby Bros. did the work of macadamizing the street, and the city paid its part of the cost, and the abutting owners with whom the contractors expressly contracted also paid the amount agreed upon by them. (4) After the work had been partially performed, at the instance of the contractors, and for the purpose of enabling them to collect part of the cost of the work from abutting owners who had not agreed to pay for the work, the city attempted to levy a tax upon the abutting owners along said street, assessing against each lot a sum equal to the proportion which the number of front feet bore to two-thirds of the entire cost of the improvement. The cost of the improvement was shown not to be uniform in front of the lots, but varied considerably along the different portions of the street. The levy of the tax declares that the sums shall be paid in five equal annual installments, to be collected as other taxes, but does not state when such sums shall fall due. (5) The city of East Dallas was subsequently, by an act of the legislature, absorbed by and made a part of the city of Dallas, which seeks to enforce the levy made by the city of East Dallas.

It is not deemed necessary to go further into the details of the facts established on the trial, as those above stated are considered of controlling effect.

The authority of the city to incur the property of its citizens with such a charge as is sought here to be enforced is statutory, and the law conferring the authority must be followed and substantially complied with by the city. *City of Dallas v. Ellison* (Tex. Civ. App.) 30 S. W. 1131; *Kerr v. City of Corsicana* (decided by this court at present term) 35 S. W. 694; 2 Dill. Mun. Corp. § 769, note 1.

The levy in this case is void for these reasons: (1) The contract under which the work was performed contemplated that the cost of the work in excess of the amount to be paid by the city should be provided for by voluntary contract with the abutting owners. (2) The levy of the tax, if authorized at all, should have been made at the time the contract was entered into, and based upon proper estimates of the cost of the work in front of each lot. (3) The amount assessed and levied against each lot should be fixed by the amount of the cost of the work in front of each lot, and cannot be determined by the proportion the front

feet bear to the cost of the entire work. (4) The ordinance making the levy should fix the time when the assessed installments fall due. *Sayles' Rev. Civ. St. tit. 17, arts. 474-476*, and authorities above cited.

We think it unnecessary to discuss the several assignments of error. They present no reversible error, and the judgment of the court below will be affirmed. Affirmed.

BONNER v. HUCKABY.

(Court of Civil Appeals of Texas. March 21, 1896.)

APPEAL — OMISSION OF PLEADINGS FROM RECORD.

Assignments of error in regard to pleadings cannot be considered on appeal where the record does not contain all the pleadings.

Appeal from district court, Navarro county; Rufus Hardy, Judge.

Action by E. P. Huckaby against J. J. Bonner. Judgment for plaintiff, and defendant appeals. Affirmed.

Frost, Neblett & Blanding, for appellant. W. W. Ballew, G. W. Hardy, and Kirven & Boyd, for appellee.

LIGHTFOOT, C. J. This suit was brought by appellee for the partition of several different tracts of land, and for an accounting for rents among the owners. The partition was granted, of which neither side complains; but a judgment was rendered in favor of appellee against appellant for \$1,325.46 upon rent account, from which this appeal was taken. Neither the original petition nor any amended petition is brought up in the record, and, as pleading, we find only the second supplemental petition of plaintiff, and the first amended answer and the first supplemental answer of the defendant. From the facts set out in the record, and the verdict and judgment thereon, we conclude that appellant and appellee jointly owned all the tracts of land originally in controversy in this suit, being equal owners of all the tracts except the tract known as the "Hanson Survey," in which appellee, Huckaby, owned one-third, and appellant, Bonner, owned two-thirds; that, by mutual agreement between the parties about 1887, appellant took possession of certain tracts of said land, and appellee of certain other tracts, with the understanding that each would account to the other for the rents of the same after paying all expenses of the same; and on such mutual accounting at the time of the trial, including interest collected, rents, etc., appellant was indebted to appellee to the amount found in the verdict and judgment.

The assignments of error presented by appellant in regard to the pleading of plaintiff below cannot be considered, for the reason that neither the original nor amended petition is brought up with the record. The charge of the court fairly presented the is-

sues to the jury, and, while there was a conflict in the testimony, there is sufficient evidence to sustain the verdict. The judgment is affirmed.

HUFFMAN et al. v. WESTERN MORTGAGE & INVESTMENT CO., Limited.

(Court of Civil Appeals of Texas. March 28, 1896.)

FOREIGN CORPORATIONS—CONDITIONS PRECEDENT TO MAINTAINING ACTION—NECESSARY ALLEGATIONS—VENDOR AND PURCHASER—ASSUMPTION OF MORTGAGE DEBT—RELEASE—LIABILITY OF VENDEE AFTER RELEASE.

1. A state may lawfully prohibit foreign corporations—other than those engaged in interstate or foreign commerce, or which are employed by the federal government—from transacting business in the state without first obtaining a permit.

2. In an action by a foreign corporation, the petition must allege that the statutory prerequisites to the right to sue have been complied with.

3. A mortgagee has no right of action against his mortgagor's vendee, who assumes the debt, but is released before he has been accepted by the mortgagee, or before suit is brought.

Appeal from district court, Dallas county; R. E. Burke, Judge.

Action by the Western Mortgage & Investment Company, Limited, against C. H. Huffman and others, on a note, and to foreclose a deed of trust securing the same. A demurrer to the answer was sustained, and defendants appeal. Reversed.

Robertson & Firmin, for appellants.

RAINEY, J. This is a suit by appellee to recover on a note executed by C. H. Huffman, and to foreclose a deed of trust given by said Huffman and wife, to secure the payment of said note, on the property described in plaintiff's petition. Recovery is also sought against M. L. Robertson, who, it is alleged, assumed payment of said debt to appellee. The petition alleged "that plaintiff is a foreign corporation, chartered under the laws of England, and is now, and has been during the past five years, engaged in loaning money in the state of Texas, with a general office in Kansas City, Missouri," etc. The appellants excepted to said petition on the ground that appellee was a foreign corporation, and there was no allegation in its petition that it had obtained a permit to do business in this state, as required by the statute. They also answered specially to this effect. The demurrer to the petition was overruled, and the demurrer interposed by plaintiff to said special answer was sustained by the court.

The act of the Twenty-First legislature (1889) provides that any foreign corporation "desiring to do business in this state, or solicit business in this state, or establish a general or special office in this state, shall be, and the same are hereby required to file

with the secretary of state a duly certified copy of its articles of incorporation, and thereupon the secretary of state shall issue to such corporation a permit to transact business in this state." It is further provided that, four months after that date, "no such corporation can maintain any suit or action, either legal or equitable, in any courts of this state upon any demand, whether arising out of contract or tort, unless at the time of such contract so made or tort committed the corporation has filed its articles of incorporation under the provisions of this act in the office of the secretary of state for the purpose of procuring its permit." Acts 1889, p. 88. In the case of *Horn Silver Min. Co. v. State*, 143 U. S. 305, 12 Sup. Ct. 403, the court, in discussing the rights of a foreign corporation to transact business in states other than those by which they were created, quotes with approval the following language from *Paul v. Virginia*, 8 Wall. 163-181: "The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states,—a comity which is never extended where the existence of the corporation, or the exercise of its powers, is prejudicial to their interest, or repugnant to their policy. Having no absolute right or recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent. It follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with its citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." And the court further says: "This doctrine has been so frequently declared by this court that it must be deemed no longer a matter of discussion, if any question can ever be considered at rest. Only two exceptions or qualifications have been attached to it in all the numerous adjudications in which the subject has been considered since the judgment of this court was announced, more than half a century ago, in *Bank v. Earle*, 13 Pet. 519. One of these qualifications is that the state cannot exclude from its limits a corporation engaged in interstate or foreign commerce, established by the decision in *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 12. The other limitation on the power of the state is where the corporation is in the employ of the general government,—an obvious exception, first stated, we think, by the late Justice Bradley, in *Stockton v. Railroad Co.*, 32 Fed. 9, 14. As that learned justice said: 'If congress should employ a corporation of shipbuilders to construct a man-of-war, they would have the right to purchase the necessary timber and iron in any state of the Union.' And this court,

in citing this passage, added, 'without the permission and against the prohibition of the state.' *Pembina Con. Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, 186, 8 Sup. Ct. 737." It is evident from the allegations that appellee was a foreign corporation, and was not engaged either in interstate or foreign commerce. It follows that it was necessary for it to have a permit to do business in this state before it could maintain any suit or action in any of the courts of this state. See *Bateman v. Western Star Milling Co.*, 1 Tex. Civ. App. 90, 20 S. W. 931; *Reed v. Walker*, 2 Tex. Civ. App. 93, 21 S. W. 687. The appellee not being entitled to bring the suit without having been granted a permit from the state to do business in this state, the question arises, is it necessary for the petition to show that such permit has been granted? The state having prescribed this requirement, it is a condition precedent to the right of appellee to sue; and we think, in order for a foreign corporation to maintain an action, that the allegations of the petition should show that the statutory requisite has been complied with. *Insurance Co. v. Wright*, 55 Vt. 530. The court therefore erred in overruling appellants' exceptions to the petition, and also erred in sustaining the exceptions to defendants' special answer stating the want of a permit by appellee to do business in this state.

In the answer of Huffman and M. L. Robertson, it was alleged that, in the conveyance from Huffman to Robertson of the land in question, Robertson had assumed the payment of the note sued on. It was further alleged, however, that said Robertson had reconveyed the land to Huffman in consideration of being released from his obligation upon the note sued on. It was further alleged that appellee was not a party to this transaction, and that it was wholly between the said defendants Huffman and Robertson, and that it was prior to the filing of this suit, and that the rights of appellee were not affected or impaired in any way by reason of said release, and that appellee acquired no right, either in law or equity, thereby. This answer was stricken out on the exception of appellee, on the ground that it constituted no defense to appellee's cause of action. While there is some diversity of opinion on this proposition, we think the great weight of authority is to the effect that where one assumes the debt of the original promisor, and there is a release by the promisor before there is an acceptance on the part of the creditor, or before suit is brought, then in that case the party assuming said indebtedness is released, and the creditor has no right of action against him. Where, however, there has been an acceptance upon the part of the creditor, then a release by the original promisor does not affect the creditor's right to recover from the party assuming the debt. *Morrison v. Barry* (Tex. Civ. App.) 30 S. W. 376; *Crowell v. Hospital*, 27 N. J. Eq. 657;

Keller v. Ashford, 133 U. S. 621, 10 Sup. Ct. 494; *Bassett v. Hughes*, 43 Wis. 319. There was some evidence as shown in the statement of facts, introduced upon the trial upon this point; but, in view of the fact that the exceptions were sustained, this court cannot say that such evidence was passed upon by the court below, and we will therefore not consider it. The answer of defendants presented a good defense, and the court should have heard evidence thereunder; and it was therefore error in the court, in sustaining the demurrer to the defendants' answer. The judgment is reversed, and the cause remanded.

ADOUE v. COLLINS.¹

(Court of Civil Appeals of Texas. April 17, 1895.)

ASSIGNMENT FOR BENEFIT OF CREDITORS — MORTGAGE.

An instrument conveying property in trust for the payment of debts, and expressly providing that the balance of the proceeds of the property remaining after payment of the debts shall be returned to the grantor, is a mortgage, and not an assignment for creditors.

Appeal from district court, Dallas county; R. E. Burke, Judge.

Action by J. B. Adoue, assignee, against Cortez Collins. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Alexander, Clark & Hall, for appellant. Davis & Astin, for appellee.

RAINEY, J. There are several issues urged by appellant's counsel why the judgment in this case should be reversed, but under our view of the law the solution of one question disposes of the case, and renders it unnecessary to discuss the others. That question is, does the instrument executed by A. A. Wise, conveying his property in trust to Cortez Collins, constitute a mortgage, or does it constitute an assignment? Said instrument contains the usual clauses found in instruments conveying property in trust for the payment of debts, and after specifying how the proceeds of the property shall be applied to the payment of creditors, as preferred, the following language is used, to wit: "And the balance of such proceeds, if any, remaining on hand after such payment as aforesaid, said trustee shall pay to me." Heretofore there has been much confusion in the decisions as to the distinguishing feature between a mortgage and an assignment. We understand, from late decisions of our supreme court, that the true test is the express reservation, or not, of any surplus to the debtor that may remain after the payment of the debts. *Tittle v. Vanleer* (Sup.) 29 S. W. 1085; *Burnham v. Logan*, Id. 1087; *Adams v. Bateman* (Tex. Civ. App.) 29 S. W. 1124. The last-named case was decided by the court of civil appeals, Second district of

¹ Writ of error denied by supreme court.

Texas. In refusing an application for a writ of error in said case (30 S. W. 855), Gaines, C. J., used the following language: "A conveyance which passes the legal title of property to a trustee, to be immediately sold, and directs that the proceeds should be applied to the payment of a debt, is generally held by other courts to be an assignment. An instrument which is intended merely to secure a debt is, on the other hand, usually held to be a mortgage. Whether this distinction has been properly recognized in this court may be doubted. But, however that may be, in the cases which first came before this court, involving the question of the distinctive character of such instruments, those in which the right to any surplus that might remain after the payment of the debt was expressly reserved to the debtors have been treated as mortgages, while such as contained no such express condition have been held to be assignments. The distinction so recognized has become a long-established rule, under which many transactions have been entered into which involve property of great value. Such being the case, we are not at liberty to overrule the former decisions of the court upon the question. It is far more important that a line of decisions, under which valuable rights have accrued, should be deemed settled, than the court should conform to what may be thought a more correct technical rule. If, however, the express reservation of the surplus, if any, to the debtors, be the true test between an instrument to secure a debt and one to pay a debt, then our former decisions are correct. We have deemed it proper to say this much in passing upon this question, because we desire that there shall be no misunderstanding as to the rule which is to apply in similar cases." Applying the test prescribed by the decisions referred to, it is clear that the conveyance under consideration is a mortgage, and not an assignment. This view is not in conflict with the case of Blankenship & Blake Co. v. Foreman (recently decided by this court) 37 S. W. —, and cited by appellant in support of his position. The instrument considered by the court in that case contained no "express reservation of the surplus, if any, to the debtor." It follows from the foregoing that the appointment of appellant as assignee was error, and he is not entitled to recover in this action. The judgment is affirmed.

MERZBACHER et al. v. STATE.

(Court of Civil Appeals of Texas. April 18, 1896.)

INTOXICATING LIQUORS—"OPEN HOUSE"—STATUTORY DEFINITION—INSTRUCTIONS—EVIDENCE.

1. In an action on the bond of a liquor dealer for failure to keep an open house, under Rev. St. 1895, art. 3380, defining an open house as one in which no screen or other device is

used to obstruct the view, it was error to submit to the jury the special questions whether there was a partition extending across the front part, inside of defendant's saloon, and whether "such obstruction obstructed the view through the open door," the question assuming that the partition was an obstruction.

2. The term "an open house" having a specific statutory meaning, under Rev. St. 1895, art. 3380, it was error to refuse to instruct the jury as to what constitutes an open house under the definition given by the statute.

3. It being a question of fact, and not of opinion, whether the screen placed inside the door of defendant's saloon obstructed the view into the room where the liquors were sold and drunk, it was not error to admit testimony to the effect that the screen did obstruct the view.

Appeal from district court, Harrison county; W. J. Graham, Judge.

Action brought by the state against F. A. Merzbacher and others to recover the penalty on a liquor dealer's bond. There was judgment for plaintiff, and defendants appeal. Reversed.

L. P. Wilson, for appellants. John B. Carter and M. P. McGee, for the State.

LIGHTFOOT, C. J. This is a suit on a liquor dealer's bond, to recover a penalty of \$500 for an alleged breach of that condition of the bond which provides that the liquor dealer shall keep an open house. It is claimed by the state that appellee failed to keep an open house, as contemplated by the statute, in this: that he placed inside of the house a frame partition or screen which obstructed the view of such premises from the open door. The defendants filed a general denial. After the introduction of testimony, the court submitted the case to the jury upon the following special issues: (1) "Was there on the 30th day of January, A. D. 1895, and prior thereto, a frame partition used and extending across the front part and inside of the house in which the defendant F. A. Merzbacher was engaged in the business of selling spirituous, vinous, and malt liquors, and medicated biters capable of producing intoxication, in quantities of one gallon or less, to be drunk on the premises?" (2) "Did said obstruction obstruct the view through the open door or place of entrance into said house? If yes, say 'Yes,' and then state how much of the premises of said house, the view to which was obstructed thereby. If you find that no part of said premises, the view to which was obstructed thereby, then state that the view to no part of said house was obstructed thereby." Upon the verdict of the jury in answer to the above questions, judgment was rendered for the state, from which this appeal was taken.

Appellants, by proper assignments of error, complain at the above charge, and also at the refusal of the court to give the following special instructions as requested: "An open house is one in which no screen or other device is used or placed either inside or outside of said house for the purpose of, or that will obstruct the view through the open

door or place of entrance into such house or place of business where intoxicating liquors are sold to be drunk on the premises. Now, if the jury believe from the evidence that the defendant F. A. Merzbacher did, at the time and place mentioned in the petition in this cause, keep an open house, as defined in this instruction, then the jury will find for defendants." Appellants also requested the following instruction to the jury, which was refused: "Did defendant F. A. Merzbacher keep an open house at the time and place when it is charged in plaintiff's petition that he did not keep an open house? The jury are charged that an open house, inquired about in the above question, is one in which no screen or other device is used or placed either inside or outside of such house or place of business, for the purpose of, or that will obstruct the view through the open door or place of entrance into such house or place where intoxicating liquors are sold to be drunk on the premises." In the discussion of the case, appellants' counsel present quite an interesting argument against the submission of a case on special issues. It is needless for us to enter into this discussion, as the practice has been too long established in this state to be now seriously called in question. Rev. St. 1895, arts. 1330, 1333; *Railway Co. v. Miller*, 79 Tex. 84, 15 S. W. 264; *Douglas v. Baker*, 79 Tex. 507, 15 S. W. 801; *Newbolt v. Lancaster*, 83 Tex. 273, 18 S. W. 740; *Railway Co. v. Snelling*, 59 Tex. 122. In submitting a case on special issues, it is necessary that all the issues should be found by the jury, and the court should by its charge explain the law upon any issue, where it is necessary for a thorough understanding of the question by the jury. In no case should the questions be propounded in such a manner as to assume that any particular issuable fact has or has not been established by the evidence. The two questions above, as presented by the court, are not so worded as to be free from objection. There is no question made by appellants, under the facts, that there was a partition extending across the room in which the business was done, in which there were openings, a part of such partition being of glass, but the serious contest made was whether or not this partition obstructed the view from the open door, or place of entrance to the house. The second question, as submitted, seems to assume that it was an obstruction, and the question is there asked, "Did said obstruction obstruct the view through the open door," etc? Under our statute, a bond is required of a liquor dealer, and one of the conditions of the bond is that he will keep an open house. It is provided by law that "an open house in the meaning of this title, is one in which no screen or other device is used or placed, either inside or outside of such house or place of business, for the purpose of or that will obstruct the view through the open door or place of entrance into any such house or place where intoxicat-

ing liquors are sold in quantities less than a quart." Rev. St. 1895, art. 3380; *Sayles' Civ. St. art. 3226a, § 4*. The charges requested by appellants, though not strictly accurate in their definition of an "open house" under the statute, yet they were sufficient to direct the attention of the court to the question, and the jury should have been properly instructed upon the subject. The questions submitted by the court were calculated to mislead the jury. As the term "an open house" has a specific statutory meaning, the jury should have been instructed what that meaning was, as requested by appellants. In the case of *Heflin v. Burns*, 70 Tex. 353, 8 S. W. 48, our supreme court said: "There is no well-defined practice as to the mode of framing and submitting special issues. It is not material whether prepared by counsel and sanctioned by the court, or whether formulated by the judge at the request of counsel, or, from his own motion, determined from the wants of the particular case, and for the furtherance of justice. Our courts uniformly hold that, when a special verdict is rendered, no other facts can be looked to in aid of the judgment."

The only remaining question which is likely to be raised on another trial is under the eighth assignment of error, where objection is made to the testimony of C. O. Friend. He was asked, "Does that screen make any difference with the view through the open door and place of entrance into said house, with the screen there and it away?" To which he answered: "With the screen there, you cannot see much of anything in the house. It being away, you would have a clear view of all the house." The question and answer were objected to as calling for an opinion of the witness. The question is awkwardly worded, but, when fairly construed, it calls for the fact whether the screen or partition will or will not obstruct the view through the open door, or place of entrance into the house; and the answer is, clearly, that it does obstruct the view. We find no error in the admission of the evidence. For the errors above indicated in the charge of the court, the judgment is reversed, and the cause remanded for a new trial. Reversed and remanded.

LEVY et al. v. LEE.

(Court of Civil Appeals of Texas. April 25, 1896.)

FRAUD — PROOF — ADMISSIBILITY OF EVIDENCE — REPLEVIN — LIABILITY OF BOND.

1. In an action for the recovery of personal property, where the plaintiff's claim is based on the alleged fraud and misrepresentation of the defendant in obtaining possession thereof, testimony to show that defendants had been guilty of gross fraud in transactions with other persons not parties to the suit was inadmissible.

2. Plaintiffs seized under a writ of sequestration certain property held by defendant un-

der a deed of trust executed by a debtor, and defendant replevied the property. In another action, to which plaintiffs were not parties, a receiver of the debtor's property was appointed, and defendant was ordered to turn the property in his hands over to such receiver. *Held*, that the order of court requiring defendant to turn the property over to the receiver does not relieve defendant or his sureties from liability upon the replevin bond.

Appeal from district court, Navarro county; Rufus Hardy, Judge.

Action by William H. Lee, doing business as William H. Lee & Co., against I. P. Levy and others, to recover certain specific property or its value. From a judgment for plaintiff, defendants appeal. Reversed.

R. S. Neblett and McKie & Autry, for appellants. McClellan & Prince, for appellee.

FINLEY, J. This suit was instituted by W. H. Lee & Co. originally against I. P. Levy to recover certain specific property, merchandise, or its value. The writ of sequestration was prayed for, and it was issued, and the property levied upon, while in the possession of I. P. Levy, and Levy replevied the property, giving as his sureties on the replevy bond S. S. Freedman and M. Cohen. At the time the merchandise was seized under the writ of sequestration it was held by Levy as a trustee, under a trust deed executed by H. Cohen & Co., whereby the property was conveyed to Levy for the benefit of certain creditors of H. Cohen & Co. After the property was replevied, the court in which this suit was pending appointed a receiver to take charge of all the property of H. Cohen & Co. covered by the deed of trust to Levy, and under the order of the court Levy was forced to deliver to the receiver the property here in question. The receiver was appointed in a suit to which W. H. Lee & Co. were not parties. The basis of the claim of W. H. Lee & Co. to the property, as disclosed by the pleadings, is as follows: (1) That they sold the merchandise to H. Cohen & Co. upon the express agreement that they were to be paid for in cash upon delivery, and that they had not been paid for, and therefore no title had passed out of them. (2) That the goods had been obtained from them through false and fraudulent representations of H. Cohen & Co. as to their solvency. (3) That at the time H. Cohen & Co. purchased the goods they did not intend to pay for them, but made the purchase with the purpose and intent to defraud plaintiffs. (4) It is alleged that I. P. Levy was aware of the fraudulent purposes of H. Cohen & Co., and participated with them in the fraud. Levy, by proper pleadings, controverted these claims of the plaintiffs, and defends his right to possession under the deed of trust. He and his sureties on his replevin bond further claim that they are not liable upon the replevin bond for the reason that the court had forced him (Levy) to deliver up the property to a receiver appointed by the

court, and he was thereby deprived of his statutory right to deliver the property in satisfaction of the bond, etc. Other parties were made defendants merely for the purpose of adjudicating any interest which they might assert in the property. The case was tried, and resulted in a verdict and judgment in favor of W. H. Lee & Co. against Levy and his sureties on the replevin bond, S. S. Freedman and M. Cohen, and from this judgment they have appealed.

There are several assignments of error raising questions of practice upon the pleadings, which we deem it unnecessary to discuss in view of the disposition to be made of the case. It would be proper for us to say, however, that the pleadings do not fully meet the requirements of the rules, and before another trial the parties should be required to replead. The first question of material importance arises upon the admission of testimony. Upon the trial of the case witnesses were permitted to testify, over objection, as to all the details of the purchase by J. D. Stokes of an interest in the business, whereby he became a partner in the business of H. Cohen & Co. The details of this purchase from M. Cohen, as testified to, as well as the treatment of Stokes by his partner, H. Cohen, which was also detailed by testimony, tended to show that Stokes had been overreached and unfairly treated by M. Cohen and H. Cohen in connection with the business. Witnesses were also permitted to testify in detail as to transactions between the partners and other persons wholly disconnected with this suit, tending to show that such third persons were swindled and defrauded; among them the mother of the partner Stokes. Witnesses were allowed to testify that entries in the books of H. Cohen & Co. had been changed in favor of M. Cohen after they were placed in the hands of the trustee, Levy, and before they were turned over to the receiver, Damon; that the two partners had been arrested upon complaint that they had embezzled the cotton receipts of their former customers, and other matters in relation to the claim of these farmers were testified to by witnesses. There was a mass of testimony of the general character of that outlined admitted before the jury upon the issue of fraud. The dealings of any character and every character of the partners, and each of them, with various persons not interested in or connected with the matter in controversy, were laid before the jury. Did this evidence tend to establish either basis of plaintiff's right to the property in controversy? The first issue was that the goods were sold for cash. The money was not paid, and therefore the title did not pass. The evidence did not bear upon this issue. The second issue was that the goods were obtained by false representations of solvency and ability to pay for the goods, etc. The evidence was not pertinent to this issue. The third issue was that H. Cohen & Co. pur-

chased the goods without any intention to pay for them, but with the intent to defraud plaintiffs, and that I. P. Levy and others, defendants, were parties to the fraud. It was doubtless upon this issue of a fraudulent purpose in the purchase of the goods that this testimony was admitted. The evidence undoubtedly tended to show that H. Cohen and M. Cohen were bad men, and capable of fraudulent transactions; but, outside of this disclosure of their bad character, we cannot see that it tended to show that the purchase involved in this controversy was made under the fraudulent circumstances alleged. It did not point to this particular transaction, or throw any certain light upon it. Under an alleged issue of fraud in one transaction, evidence of fraud in another, wholly disconnected from that alleged, and not embraced in an alleged plan or scheme of fraud, is no more admissible to establish the alleged fraud than is a general reputation for dishonest dealing. 1 Whart. Ev. §§ 29, 33. The evidence was prejudicial in a high degree, and the court erred in not restricting the testimony to such as had a legitimate tendency to establish the issues made by the pleadings. Evidence tending to show that the sale was a cash transaction; that false representations, such as are alleged, were made to induce the sale and delivery of the goods; that the purchase was made by H. Cohen & Co. with intention not to pay for the goods, but with the design to defraud the plaintiffs, and that Levy knew of such fraudulent purpose, and aided in the fraud,—would be pertinent to the issues, and would be admissible. But evidence of other matters and transactions having no connection or bearing with these issues should not have been admitted. It would be impracticable to discuss the various items of evidence admitted which is of this objectionable character, and it is thought that what has been said will sufficiently indicate our views to the trial court to enable it to avoid such errors upon another trial.

It is urged by appellants Levy and his sureties on the replevin bond that the action of the court in requiring him (Levy) to turn over the property to the receiver, Damon, discharged them from liability upon the bond. In support of this proposition we are cited to cases as holding that, where the act of God or the sovereignty destroys the existence of the chattel, liability upon the replevin bond ceases. *Porter v. Miller*, 7 Tex. 471, *Townsend v. Hill*, 18 Tex. 427, *Pait v. McCutchen*, 43 Tex. 297, and other cases are referred to in support of the contention. It is not necessary to discuss the force of these cases in determining the real question involved, as will presently be made to appear. It is further urged that contracting parties are not held liable for the result of events

which could not have been contemplated or foreseen by the parties to the contract, and over which they had no control, and, if such events occur, rendering compliance impossible, the obligation is discharged; citing *Clark, Cont. (Hornbook Series)* pp. 678, 681, 682, and other authorities. In the present case it does not appear that the property has been destroyed by the act of God or the government; nor does it appear that performance of the obligation contained in the replevin bond has been rendered impossible by an event which could not have been contemplated, and over which the obligors had no control. The facts of this case do not come within either of the legal propositions. It appears from the record that the district court in a receivership proceeding, to which appellees were not parties, peremptorily ordered that this property should be turned over to the receiver, and that Levy complied with the order. The court that made this order was the same court in which this case was pending. It would not aid the solution of the questions here involved to discuss the validity or propriety of that order. It was within the power and privilege of appellants to bring the receiver and appellees into the same proceeding, and have their respective rights to the property adjudicated at the same time and in the same case in which appellants' liability was determined, and they could have avoided the double liability of the appropriation of the goods by the receiver and the recovery of their value by appellees. In such a proceeding, if the court determined that appellees were entitled to recover the goods, it would at the same time order the receiver to restore them, or the proceeds, if sold. It was the duty of appellants to take such course, and not the duty of appellees to follow the goods in the hands of the receiver. Appellants had given a replevin bond, which stood in the place of the property, so far as appellees were concerned; and they were not required to pursue the property further. If appellants desired to be protected from the assertion of the conflicting claims of appellees and the receiver to the property, they should have made themselves parties to the same proceedings, and procured the holding of the goods or their proceeds by the court until the matter should be determined. It is not a valid defense to this suit for them merely to show that the goods had been taken out of Levy's possession under an order by the court in another case. The receiver was not a necessary party to this suit, as urged by appellants, but he was a proper party for their protection. The only necessary parties were W. H. Lee & Co. and I. P. Levy.

There are other questions presented, which it is not deemed necessary to discuss. Judgment reversed, and cause remanded.

HOPSON v. CASWELL.

(Court of Civil Appeals of Texas. April 25, 1896.)

VENUE—PLEA IN ABATEMENT—BURDEN OF PROOF.

1. Under Sayles' Civ. St. art. 1198, which prohibits persons being sued out of the counties in which they have their domicile, except where the residence of defendant is unknown; and article 1235, providing that where plaintiff, his agent or attorney, shall make affidavit that the residence of defendant is unknown, citation shall be served by publication,—plaintiff may sue a defendant whose residence is unknown, outside of the county of the latter's residence, without being first required to use diligence to discover his residence.

2. The burden is on defendant to sustain a plea in abatement, on the ground of privilege to be sued in the county of his residence, to show that his place of residence was known to plaintiff when suit was filed.

Appeal from district court, Ellis county; J. E. Dillard, Judge.

Suit by A. H. Hopson, Jr., against D. H. Caswell. There was a judgment for defendant on his plea in abatement, and plaintiff appeals. Reversed.

F. M. Cunyus, for appellant. West & Cochran, for appellee.

FINLEY, J. This suit was instituted by A. H. Hopson, Jr., December 18, 1894, against D. H. Caswell, to recover \$15,000, damages for personal injuries sustained while plaintiff was engaged as a laborer and employé of defendant in the erection of an oil mill in Caldwell, Burleson county, Tex. The injuries were alleged to have been caused by the negligence of the defendant, etc. The petition alleged the residence of plaintiff to be in the county where suit was filed, Ellis, and the residence of the defendant to be unknown, and prayed for citation by publication, which was had. The defendant, Caswell, in due order of pleading, filed his plea in abatement, alleging that he had resided in the county of Travis, state of Texas, and resided there at the time suit was brought, and for a long time prior thereto, and that his residence was not unknown to plaintiff at the time of the institution of the suit, and claimed the privilege of being sued in the county of his residence. The issue raised by the plea in abatement was tried by the court below, the plea sustained, and the suit of plaintiff dismissed. From this judgment of dismissal, plaintiff has appealed, and assigned as error the action of the court in sustaining the plea and dismissing the suit. This is the only question presented for our consideration and decision upon this appeal.

Upon the trial of the plea, the evidence introduced by the defendant established that he resided in Travis county, Tex., at the date of the institution of the suit, and had resided there for nearly a year previous to the bringing of the suit. It was shown that he was engaged in the business of erecting oil mills, and went from place to place as his business

demand. His evidence did not show that plaintiff knew of the place of his residence, or that it was so notorious that he should have known it. The plaintiff produced evidence showing that, before the institution of the suit, his attorney made an unsuccessful effort to ascertain certainly the place of defendant's residence. The information which his inquiries elicited tended to the conclusion that he resided in the city of Nashville, state of Tennessee. Did this state of facts justify the action of the trial court in deciding against its jurisdiction, and dismissing the suit? Article 1198 of our Statutes (Sayles' Civ. St.) prohibits persons from being sued out of the county in which they have their domicile. There are a number of exceptions to this general rule made by the statute, among them this one: "Where the defendant or all of several defendants reside without the state, or where the residence of the defendants is unknown, in which case the suit may be brought in the county in which the plaintiff resides." Article 1235 provides: "Where any party to the suit, his agent or attorney, shall make oath at the time of instituting the suit, or at any time during its progress, that the party defendant is a non-resident of the state, or that his residence is unknown to the affiant, that citation shall be issued and served by publication," etc. The fact that the residence of the defendant is unknown is made by the statute a jurisdictional fact; and when this fact is made to appear by the oath of the plaintiff, his agent or attorney, citation is authorized to be issued and published, which brings the defendant into court. The legislature had authority to provide that its citizens could be sued in any county of the state, and prescribed the mode of notice to be by publication. The exceptions to the general rule that persons shall be sued in the county of their residence, therefore, rest upon the same authority, and are of the same force and effect, as the general rule itself. If the fact existed, as alleged and sworn to at the time of the institution of the suit, that the residence of the defendant was unknown to the plaintiff, the court had jurisdiction of the suit, and subsequent developments in relation to the defendant's residence could not defeat the jurisdiction. *Whiting v. Briscoe*, Dall. Dig. 540; *Brown v. Boulden*, 18 Tex. 431; *Walker v. Walker*, 22 Tex. 331; *Kuteman v. Page*, 3 Willson, Civ. Cas. Ct. App. 164, 185. The cases cited are authority to the effect that the conditions existing at the time of the institution of the suit must determine the jurisdiction.

The plea in abatement does not raise the issue, in this case, as to the place of defendant's residence at the date of the bringing of the suit. The issue presented is, was the place of his residence unknown to plaintiff at the time the suit was filed? The want of knowledge on the part of plaintiff as to defendant's place of domicile was the statutory

jurisdictional fact alleged and sworn to, and it is the truth of this alleged fact which is brought in question by the plea in abatement. It is not enough that the alleged ground of jurisdiction is denied by the plea in abatement; the plea must be followed up and sustained by proof, or it will be unavailing. The burden of sustaining the plea was upon defendant. The evidence must have shown that the jurisdictional ground relied upon did not exist. This might have been proved, as almost any other fact, by either positive or circumstantial evidence. As has already been stated, it was clearly shown that defendant's residence was in Travis county, but it was not shown that the fact was so generally known as to authorize the inference that the plaintiff knew it. On the contrary, the fact of his residence was shown by the defendant himself and those intimately associated with him; and that evidence showed that he had resided there less than a year, and that he had been going from place to place, building oil mills. We have been cited to no case, and have found none in our investigation, which determines the exact question here presented. The cases to which we have been cited, with one exception, are those where the issue was the place of residence; the plaintiff having alleged one place of residence, and the plea in abatement asserting another and different place. The case of *Kuteman v. Page*, 3 Willson, Civ. Cas. Ct. App. 164, 165, is a case where the ground of jurisdiction relied upon was the fact that the residence of the defendant was unknown. In that case the defendant offered no evidence to sustain his plea, while the plaintiff affirmatively showed that he did not know defendant's residence, after diligent effort to ascertain it. In that case the court said that it was not aware that it had ever been decided whether the plea in abatement proved itself, but expressed the opinion that it only established prima facie the facts stated in the plea. We are of opinion that it only raised the issue, and that it required proof to sustain it. In this position, the cases of *Robertson v. Ephraim*, 18 Tex. 124, and *Graves v. Bank*, 77 Tex. 535, 14 S. W. 163, sustain this contention. See, also, 1 Enc. Pl. & Prac. 32, where it is said: "The burden of sustaining the plea rests on the defendant." This rule would seem to be specially called for where, as in this case, the jurisdictional fact had been previously verified by plaintiff in accordance with statutory requirement. The *Kuteman* Case sustains the jurisdiction, but furnishes no special light to us in this case.

Appellee's counsel urge that it was incumbent upon plaintiff to show upon the trial, by positive testimony, that, at the time of the institution of the suit, he had used due diligence to ascertain defendant's residence, and had been unable to do so. The statute is plain in its terms, and it does not make this requirement. Had the statute provided that

when the residence of the defendant is unknown, after due diligence to ascertain it, suit may be brought in the county of plaintiff's residence, then the contention would be sound. For a court to make this requirement would be to add to the terms of the statute something more than was made necessary by the legislature to invest the court with jurisdiction. We think it wise that the statute was enacted as it is, for, if the diligence clause had been added, the grounds of jurisdiction would have been left uncertain, depending upon the verdict of a jury in each given case, as to whether the facts proven showed diligence. As the statute stands, when the plaintiff in fact does not know the county of the defendant's residence, a place is pointed out to him by law where he may bring his suit, and cause the defendant to be cited to appear and answer, by swearing that the defendant's residence is unknown to him. If, upon trial, it should be shown, the issue being properly raised, that the plaintiff had acted in bad faith, and that he, in fact, was not ignorant of the defendant's place of residence, the jurisdiction should not be sustained. While it is the settled policy of our state that its citizens, as a rule, shall be sued only in the counties in which they reside, exceptions to that rule are provided for; and those exceptions should not be so treated by courts as to render them dangerous snares to the litigant who in good faith follows the statute, and files his suit in a court fairly embraced within one of the exceptions. We are of the opinion that the court below erred in sustaining the plea and dismissing plaintiff's suit, and that the judgment should be reversed, and the cause remanded for a trial upon its merits. Reversed and remanded.

BUILDING & LOAN ASS'N OF DAKOTA v. HAMM.

(Court of Civil Appeals of Texas. May 2, 1896.)

CONTRACT—CONSTRUCTION—RELEASE OF STOCK— PAROL EVIDENCE.

1. In an action against a building and loan association to recover the value of 60 shares of stock, it appeared that, after the stock was issued to plaintiff, he negotiated a loan from defendant, giving a mortgage on land, and transferring the stock as security; that, a short time after making the loan, he ceased paying assessments on the stock, but made several payments on the loan; that in a settlement subsequently made, after several months' correspondence, plaintiff signed an instrument reciting that he had received from the association "abstract of title, bond, trust deed, and release of same, having this day released my stock in said association, and settled all accounts with the same"; and that plaintiff received the papers named in the instrument, and the corporation retained the certificate of stock. *Held*, that the instrument was a release of plaintiff's stock to defendant.

2. Where the meaning of a written instrument is clear and unambiguous, parol evidence is not admissible to show that a different mean-

ing than that shown on its face was intended, in the absence of any allegation of fraud or mistake.

Appeal from Dallas county court; T. F. Nash, Judge.

Action by Frank Hamm against the Building & Loan Association of Dakota. From a judgment for plaintiff, defendant appeals. Reversed.

O. W. Starling, for appellant. Parks & Carden, for appellee.

LIGHTFOOT, C. J. This suit was brought by appellee, Frank Hamm, against appellant, to recover the value of 60 shares of stock in the building and loan association, alleged to be worth \$564. It was claimed by appellant that the stock was canceled by agreement between the parties in a mutual settlement, and such release, as shown by the record, is as follows: "Dallas, March 19th, 1894. Received of the Building and Loan Association of Dakota abstract of title, bond, trust deed, and release of same, having this day released my stock in said association, and settled all accounts with the same. [Signed] Frank Hamm." It appears from the undisputed testimony that the stock was issued to appellee in March, 1890; that he paid the regular assessments thereon until April 1, 1891, amounting in all to about \$564, after which time he ceased to pay; that in June, 1890, appellee borrowed from appellant \$3,000, giving a mortgage on certain real estate, and also transferring to appellant, as collateral security, the 60 shares of stock. Certain payments were made on the debt, and no further assessments were paid on the stock after April 1, 1891. Upon a settlement between the parties March 19, 1894, the above instrument was executed by appellee. At the time of the settlement, the abstract of title, the bond and trust deed, and the release of same, were returned to appellee, but the certificate of stock was retained by the association. The instrument of writing, on its face, shows that appellee released his stock in the association, and settled all accounts with the same. There is no allegation in the pleading of appellant that, by fraud or mistake, the instrument in question was caused to evidence a different settlement from the one really made between the parties; and, in this state of the pleading, we are only called upon to construe the instrument as it stands. Under such construction, the release of the stock, introduced in evidence, if it speaks the truth of the settlement between the parties, and there was no fraud or mistake in its execution, is a bar to plaintiff's action.

In the replication filed by plaintiff below to the pleading of the defendant setting up the release, it is claimed that "the same was executed and delivered in a matter utterly foreign to and different from the matters on which plaintiff bases his cause of action, and in no way affects the same"; and it is further averred that the same was executed

without consideration. The facts show that this was the only stock transaction between the parties; that they had been corresponding for several months in regard to a settlement between them; and that the instrument was executed on such settlement. The court should have granted appellant's motion for a new trial.

We refrain from any discussion of the disputed facts, as the judgment must be reversed, under the views above set forth, and we will only notice one other point, which may arise on another trial.

Under the second assignment of error, complaint is made that the appellee, as a witness, was allowed to testify, over the objection of appellant, that he thought the words in the instrument "having this day released my stock in said association" meant that the association was releasing his stock from the loan. Under the pleading of plaintiff, this testimony was not admissible. The instrument must be construed according to its terms, and in the light of surrounding circumstances. There was no allegation of mistake in the execution of the instrument, and, according to its plain meaning, the appellee released his stock in the association, and settled all accounts with the same, and parol evidence was not admissible to show that appellee understood the contract another way. Where the instrument is not ambiguous, and the intent of the parties can be gathered from the document itself, the court will look to the written evidence, and parol testimony is not admissible to show how one of the parties construed it. *Soell v. Hadden*, 85 Tex. 187, 19 S. W. 1087; *Lanes v. Squyres*, 45 Tex. 383; *Belcher v. Mulhall*, 57 Tex. 17; *Adams v. Hicks*, 41 Tex. 240.

For the errors indicated, the judgment is reversed, and the cause remanded.

WESTERN UNION TEL. CO. v. WARREN. (Court of Civil Appeals of Texas. April 25, 1896.)

TELEGRAPH COMPANIES—NEGLIGENCE IN DELIVERY OF MESSAGE—PLEADING—DAMAGES—MENTAL ANGUISH.

1. In an action against a telegraph company for negligence in the delivery of a telegram, it is proper to refuse to strike out allegations of the complaint that defendant was operating its office, at the town to which the message was sent, in a negligent manner, in that its operator, a woman, intrusted the delivery of messages to a child 12 years old, who was to find the residences of the sendees.

2. The sendee of a telegram announcing the death of his father may recover for the negligence of the telegraph company in delivering the message, thereby preventing his attending the funeral, for any increase of sorrow or grief at his father's death caused thereby.

3. Where the sender of the telegram and the agent of the telegraph company contract for the delivery of the message to the sendee, with the understanding that he might live outside of the free-delivery district, and that if he did live outside of such district the sender, who was amply solvent, would pay all addi-

tional charges, the company is liable for negligence in the delivery of the message, though the sendee was outside of such district.

Appeal from district court, Johnson county; J. M. Hall, Judge.

Action by J. C. Warren against the Western Union Telegraph Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

W. F. Ramsey and Field, Brown & Camp, for appellant. Davis & McKoy, for appellee.

LIGHTFOOT, C. J. This suit was brought by appellee, J. C. Warren, in the district court of Johnson county, to recover damages against the telegraph company for failing to deliver promptly the following message, which was sent by J. D. McGee: "Eagle Mills, Ark., Jan. 26, 1895. To J. C. Warren, Cleburne, Texas: Your father died this a. m. Will take corpse to Atlanta to-morrow. [Signed] J. D. McGee." It was alleged by plaintiff below that his father died near Eagle Mills; that the above dispatch was sent to him with the fees paid in advance; that his father was buried near Atlanta, Tex., on the 28th day of January, 1895, and that if the dispatch had been promptly delivered he could and would have attended the funeral of his father, and that by the negligence and failure to deliver the message he was deprived of paying this respect to the memory of his father, and was greatly grieved at not being able to do so, whereby he was damaged in the sum of \$985. The case was tried before a jury, and verdict and judgment in favor of appellee in the sum of \$250, from which this appeal was taken.

The facts proved, and the verdict and judgment thereon, justify the conclusions: That J. T. S. Warren, the father of appellee, died at Eagle Mills on January 26, 1895, about 4 o'clock a. m., and was buried at Douglasville, near Atlanta, Tex., on the 28th day of January, 1895. That about 8 o'clock a. m. on January 26, 1895, the above message was sent to appellee by J. D. McGee, who paid the fees for the transmission of the message, and made an arrangement with the operator at the time that if there were other charges he (McGee) would pay the same. That at the time it was unknown by the sender of the message, or the operator at Eagle Mills, whether appellee lived in the town of Cleburne, or in the country; but McGee stated to the operator that the post-office address of appellee was Cleburne, Tex., and that if there were other charges for the delivery of the message he would pay the same. The message was duly transmitted to Cleburne, and the agent of appellant at that place was negligent in attempting to find appellee, but finally telegraphed back to the operator at Eagle Mills that appellee lived six miles in the country. The free-delivery limits at Cleburne were fixed at one mile from appellant's office. Upon receiving the message from the operator at Cleburne, the agent of appellant

at Eagle Mills wired back for the message to be delivered, and that he would be responsible for the fees. The message was delivered to appellee, but too late for him to attend the funeral of his father. The cost of delivery (three dollars) was promptly paid by McGee to the agent at Eagle Mills as soon as it was made known to him what such fees were. McGee was responsible for the amount, and the agent at Eagle Mills knew him to be responsible, and made the arrangement with him above stated. If the message had been promptly transmitted and delivered to appellee, he could and would have attended the funeral of his father; and, by reason of the negligence of appellant's agent in failing to deliver the same, appellee was deprived of the privilege of attending his father's funeral, whereby he was damaged in the sum awarded by the verdict and judgment.

1. Appellant's first assignment of error complains of the ruling of the court in refusing to sustain its special exception to that portion of plaintiff's petition in which it is alleged that when said message was delivered for transmission the defendant was operating its office in Cleburne, Tex., in a negligent manner; that its operator who was in charge of said office at Cleburne was a lady of limited acquaintance, and did not and does not attempt to deliver messages to persons, or find out their residence, but intrusts, and did intrust, the delivery of all messages, and the ascertaining of the residence or place of business of persons for whom messages are received, to an inexperienced boy of tender years, and did intrust the delivery and ascertaining of the place of plaintiff's residence to said boy when said message was received at the defendant's office in the city of Cleburne, —all of which was negligence on the part of the defendant. While this pleading may be unnecessarily prolix, and might have been made shorter and clearer, yet the court did not err in refusing to strike it out. The particular ground of negligence upon which the plaintiff based his cause of action was the failure to deliver the message promptly, and the above paragraph of the petition was no doubt merely stated by way of introduction, and was not improper.

2. The second assignment of error complains of the refusal of the court to sustain defendant's exceptions to that portion of plaintiff's petition which is as follows: "Plaintiff further avers that if said telegram had been delivered to him within a reasonable time, and in compliance with the agreement and undertaking upon the part of the defendant, that plaintiff would have attended the funeral and burial of his said father; but he avers that on account of the negligence and failure on the part of the defendant, its agents or servants, in not delivering or causing said telegram to be delivered until 11:22 o'clock a. m. on January 28, 1895, he was prevented from attending and being present at the burial of his said father, and was there-

by greatly grieved, and was caused great distress of mind and mental suffering, and that his sorrow and grief from the death of his father was thereby greatly increased, and that by reason thereof he suffered great mental agony," etc. Appellant contends that its exception to the above should have been sustained, because the sorrow and grief of the plaintiff from the death of his father, whether increased or diminished by its acts, are not the subject of damages. This assignment is not well taken. While it is true that plaintiff was not entitled to recover for the death of his father, or for the grief and sorrow which he suffered on account of his father's death, yet he was entitled to recover for any increase of mental suffering which he might have sustained by reason of the failure of the defendant to deliver the message, and this was properly alleged by the plaintiff.

3. The third assignment of error is, in substance, that the court "erred in modifying and changing the first special charge requested by defendant, in that said special charge instructed the jury that the sender of the message and the local agent of the defendant at Eagle Mills, Arkansas, must have contracted with the mutual understanding that plaintiff lived outside the free-delivery limits of Cleburne, Texas, whereas the court charged the jury that said parties must have contracted with the mutual understanding that the plaintiff might live outside of said free-delivery limits, there being no evidence to support the charge as modified by the court; and said special instruction No. 1 requested by defendant's counsel being, as it stood, the law of the case, the court erred in not giving the special instruction No. 1 in charge, as requested by defendant." Upon a careful examination of the record, we find that the appellant did request the court, in its special instruction No. 1, to charge the jury as suggested in the above assignment. We also find that the court, in its main charge to the jury, instructed them as follows: "In this case you are further instructed that if you find from the evidence that the free-delivery limits for the delivery of telegrams had been established in Cleburne, Texas, and that such free-delivery limits were recognized and acted upon by the defendant company, at and before the delivery of the message in question for transmission from Eagle Mills, Arkansas, to Cleburne, Texas; that the plaintiff did not reside in said free-delivery limits, but resided without same,—then and in such event the defendant was under no obligation or legal duty to deliver the message in question to him, unless it had been paid the special delivery charges for such services, or unless, without such payment, it had assumed and agreed, by contract with the sender of such message, to so deliver same to plaintiff, wherever he might be. And in this connection you are charged that the parties contracting (that is to say, the sender of the message in question, and the local agent at Ea-

gle Mills, Arkansas) must have contracted with a mutual understanding that plaintiff might live outside of such free-delivery limits, and that special delivery of such telegram would have to be made, and a general contract or agreement by the parties to pay other charges than the ordinary and usual tolls for the transmission and delivery of said message would not bind the defendant to deliver said message to plaintiff outside the free-delivery limits, unless the defendant contracted with the understanding that plaintiff might live without such free-delivery limits, and contracted to deliver said telegram with reference to such information." The above charge, as given by the court, was clearly applicable to the facts proved in the case, because it appears from the testimony that the sender of the message and the appellant's agent at Eagle Mills, while they knew that Cleburne, Tex., was the post-office address of appellee, yet neither of them knew whether he lived in town or in the country, and their contract was made with reference to that state of facts; and the sender of the message, who was amply solvent, made arrangements with the operator to have the message delivered, and that he would pay whatever expense might be necessary, which he subsequently did. The instruction requested by appellant should not have been given, because it would have been misleading and erroneous, in this: that it provided that the "sender of the message in question and the local agent of the defendant at Eagle Mills, Arkansas, must have contracted with the mutual knowledge that plaintiff lived outside of such free-delivery limits, and that special delivery of such telegram would have to be made." The facts clearly show that the parties did not have such mutual knowledge, but that they did have reason to believe that appellee might live beyond the free-delivery limits, and their contract was made with reference to that condition of affairs. The above assignment is not well taken, because the court did not change or modify the requested charge of appellant, but properly refused to give it. The court, in its main charge, correctly presented the question to the jury. The fourth assignment of error is upon the same subject.

4. The fifth assignment is upon the same objection set out in the third. The court did not modify the special instruction requested by the defendant's counsel, but refused the charge requested, and gave a proper charge upon the subject.

5. The sixth assignment of error complains of the refusal of the court to give the tenth special instruction requested by the defendant, which was practically an instruction to the jury to return a verdict for the defendant, which would have been improper and erroneous under the facts proved.

6. The seventh, eighth, ninth, tenth, eleventh, and twelfth assignments of error attack the ruling of the court in refusing to

grant defendant's motion for a new trial, and under these assignments appellant thoroughly discusses the facts of the case. The facts were amply sufficient to show negligence on the part of the defendant in the transmission and delivery of the message, and the damage to plaintiff by reason of such negligence. We find no error in the judgment, and it is affirmed.

KILGORE v. MOORE.

(Court of Civil Appeals of Texas. May 2, 1896.)

INSTRUCTIONS—SPECIAL ISSUES—SUBMISSION—JURY—CLERK—UNAUTHORIZED PRESENCE.

1. In a suit on 36 notes made by defendant to plaintiff at different times, defendant claimed greater credits than plaintiff had allowed him in at least 11 different instances. The court instructed the jury to find for defendant certain undisputed credits, and further submitted to them the question as to any other credits defendant might be entitled to. The jury found that defendant was entitled to several other credits, none of the 11 being included. *Held*, that the instructions were sufficient to cover the issues, and that the finding of the jury was responsive thereto.

2. Where special issues are submitted to the jury, all of the issues of fact made by the pleadings must be submitted and determined, or the verdict will be set aside.

3. Where defendant has testified that he never at any time received any money from plaintiff for which he did not make his note, the testimony raises an issue as to whether he did make notes for all the money, and it should be submitted.

4. It is error to permit a person not a member of the jury to be present during their deliberations, though he took no part in them, and was there for the sole purpose of type-writing the verdict as rendered.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Action by L. B. Moore against S. C. Kilgore on notes. From a judgment in favor of plaintiff, defendant appeals. Reversed.

G. G. Randall and Wolfe & Hare, for appellant. A. B. Person, T. W. Stratton and Arthur G. Moseley, for appellee.

RAINEY, J. This suit was brought by appellee to recover upon 36 different promissory notes executed by appellant at various times in favor of appellee; said notes stipulating for 12 per cent. interest and attorney's fees. Appellee also sought foreclosure of various chattel mortgages upon personal property, and to foreclose certain vendor's liens and deeds of trust on certain real estate given to secure certain of said notes. Defendant answered by general and special exceptions, general denial, and special answer to the effect that all the notes described in plaintiff's petition had been paid off and discharged, and that he was not indebted to plaintiff on account of the execution and delivery of any of said notes. There were various transactions between appellant and appellee, covering a period of several years; the transactions consisting partly of money advanced by appellee

to appellant for or on his account, and payments made at various times and in various amounts by appellee to appellant, all of which were duly set up in the pleadings either of appellant or appellee. On hearing, judgment was rendered in favor of appellee for the sum of \$18,028.35. The court, by its charge, submitted to the jury special issues, upon which the court rendered judgment.

The first assignment of error presented by appellant complains of the action of the court in failing to submit to the jury issues as to whether or not he was entitled to greater credits in as many as 11 different instances where he claimed to have paid a larger amount than appellee had allowed him credit for. The court, in its charge, instructed the jury to find for appellant certain credits, about which there was no dispute; and further submitted to them the question, in effect, to state in their answer any and all the credits other than those mentioned in his instructions to which appellant might be entitled. The jury, in answer to such question, found that appellant was entitled to several other credits, none of the 11 being included. We think the instructions of the court to the jury were fully sufficient to cover the issue raised by appellant, and that the finding of the jury thereon was responsive thereto, and clearly indicated that under the instructions of the court the defendant was not entitled to credit on the notes sued on for the amounts claimed.

The second assignment of error is: "The court erred in not causing the jury to find as to the amount of money received and paid out by plaintiff upon the Commercial College contract, because the evidence showed that said contract was assigned and transferred to plaintiff by defendant, and that all moneys were to be received from said contract by plaintiff, and certain amounts thereof paid out for labor and material used in the construction of said building; and defendant was entitled to a finding of the jury as to the amounts of money paid out by plaintiff on said contract, when the same was paid, to whom paid, the amount paid, and the purpose for which such payments were made; and, the plaintiff having failed to show what disposition had been made of all moneys received by him upon said contract, defendant was entitled to a credit for the entire contract price, to wit, \$14,959."

The seventh question submitted by the court to the jury was as follows: "Was there any agreement between Moore and Kilgore with reference to the contract price Kilgore was to get for erecting the Commercial College building? If so, what was the agreement? How much of said contract price did Moore actually collect? How much had Moore advanced to Kilgore for the purpose of purchasing the material for the construction of said building, and for paying labor employed by Kilgore on said contract? How much, if any, of the amount actually collected by

Moore on said contract was paid out for labor or material employed or used in the construction of said building?" The answer of the jury to said question was as follows: "There was an agreement between Moore and Kilgore with reference to the contract price Kilgore was to get for erecting the Commercial College building. The agreement was that Moore was to furnish money to carry on the work on said college contract, and pay for labor and material. The remainder of said money on said contract was to be applied to the credit of Kilgore's indebtedness to Moore. Moore collected on said contract \$7,136.64. We are unable to state the amount so advanced by Moore to Kilgore for the purpose of purchasing material for the construction of said building and for paying labor employed by Kilgore on said contract. We are likewise unable to state the amount paid out by Moore for labor and material employed or used in the construction of said building." It will be noted that the jury failed to find how much money appellee advanced for the purpose of purchasing material and for labor in constructing said building. The appellee contends that, as the evidence shows the amount he received on said contract, and that it was applied to appellant's indebtedness, the finding of the jury was sufficient to form a basis upon which the court was authorized to render judgment. We cannot concur in this contention. Under our decisions, when special issues are submitted to the jury, it is necessary that all of the issues of fact made by the pleadings must be submitted and determined, or the verdict will be set aside. *Paschal v. Acklin*, 27 Tex. 173; *Cole v. Crawford*, 69 Tex. 126, 5 S. W. 646; *Newbolt v. Lancaster*, 83 Tex. 271, 18 S. W. 740. We are of opinion that the pleadings and evidence raised the issue as to how much had been advanced by appellee on this contract, and the jury should have made a specific finding on that point. The issue as to the application of the amount collected as a credit should have been submitted to the jury, and a specific finding made thereon.

The court, in its instructions, in effect assumed that there had been an indebtedness due by appellant to appellee other than that evidenced by the various notes executed by appellant. In other words, that during their dealings appellee had at various times advanced money to appellant for which no notes were at the time executed, and an account of same was kept by appellee, and to which certain credits were applied. We think the evidence fairly raised the issue as to whether appellant had executed notes for all the moneys received by him or on his account from appellee. Appellant, in substance, testified that he never at any time received any money for which he did not execute his note; and his wife's testimony is to the same effect as to transactions had with her. Such being the testimony, we think such an as-

sumption on the part of the court was improper, and, instead, the issue should have been submitted covering that point.

We think, under the evidence, a larger credit for usurious interest should have been allowed appellant, but, as appellee offered to remit, such will not constitute ground for reversal; but we call the attention of the trial court to same in order that on the next trial proper attention may be paid thereto.

The thirteenth assignment of error is as follows: "The court erred in requiring and permitting one C. S. Arnold, without the knowledge or consent of defendant or his counsel, said Arnold not being a member of the jury sworn to try the cause, to be present in the jury room for the space of about one hour and thirty minutes while the jury before whom this cause was being tried was deliberating on said cause, and making their verdict therein; all of which is more fully shown by the affidavit of J. A. L. Wolfe, attached to and made a part of defendant's motion for new trial; and as also shown by the affidavit of said Arnold, filed with the record of this cause." The evidence above referred to shows that Arnold was not one of the jurors; that he was a deputy clerk of the court; that the jury came into court, and asked for an amanuensis to take down their answers to questions submitted, and said Arnold was directed by the court to go into the jury room, and when in there he took no part in the deliberations further than to take down on the typewriter the verdict of the jury as rendered. There is nothing in the record to show that there was any influence brought to bear by his honor upon any of the jurors in rendering the verdict they did render. While this is true, the court erred in permitting Arnold to be with the jury in the manner indicated. The law does not contemplate that any one shall be with the jurors while they are deliberating upon their verdict, and such conduct is contrary to the spirit of the law in the trial of causes by jury.

This is a case involving many transactions, covering a period of several years, and the evidence, being to a great extent conflicting, is necessarily voluminous, which made it exceedingly difficult to properly present the issues raised; and it is not surprising that the learned judge below made omissions in submitting proper issues. Other assignments of error are presented, but it is unnecessary to discuss them, as enough has been said to show that all issues properly raised should be submitted to the jury. Owing to the multitude of transactions and the great volume of evidence,—conflicting in many respects,—we think this case one in which the services of an auditor would be eminently beneficial. However, we give no instructions as to this suggestion. For the reasons above set forth, the judgment of the court below is reversed, and the cause remanded, and it is so ordered.

HOPEWELL v. PATTERSON et ux.

(Court of Civil Appeals of Texas. May 2, 1896.)

ESTATES—LIFE ESTATE.

Where a mother agreed to let her son occupy land owned by her during her lifetime if he would enter on and improve it, and the son went upon and occupied it during his lifetime, cultivated and placed valuable improvements on it, his widow and children, after his death, are entitled to occupy the land, either in person or by tenants, till the death of the mother.

Appeal from district court, Hunt county; E. W. Terhune, Judge.

Action by Mrs. S. J. Hopewell against Charles Patterson and Lillian Patterson, his wife, for possession of land. From a judgment for defendants, plaintiff appeals. Modified.

Evans & Hargrave, for appellant.

Conclusions of Fact.

RAINEY, J. The evidence fully sustains the findings of the court below, and its conclusions of fact are adopted as the conclusions of this court, and are as follows: "(1) Ben Johnson and his wife, S. J. Johnson, owned 160 acres of land as community property, including that in controversy, at the time of the death of Johnson, in 1864, which was their homestead; and the wife, S. J. Johnson, now S. J. Hopewell, plaintiff herein, has used and occupied the entire tract, except that in controversy, ever since. (2) Johnson and wife had two children which survived the father,—one a daughter, now Mrs. Shields; one a son, Thomas Johnson, who married Lillian Collier, and afterwards died. (3) Two children were born to Thomas Johnson and Lillian Collier. One of these died after the father died. The other is living. The mother, Lillian, has since married Charles Patterson. (4) About the year 1874, when Thomas Johnson was about 17 years of age, the plaintiff, his mother, told him if he would go on the land in controversy, and improve it, he could have it during her lifetime. He took possession of the land under this agreement, and cleared and fenced it, and broke it up, and put it in cultivation; the value of such improvements being about \$150. He continued to cultivate the land until he married Lillian Collier, in 1883; and he then built dwelling and other houses on it, and lived with his wife in the house, and continued to cultivate the land until he died, in 1887. After Thomas Johnson died, his widow, with her children, moved off the place, and lived with a neighbor, until she married Patterson. Plaintiff demanded possession of the place as soon as Mrs. Johnson moved off, but told her she should have the place as long as she would live on it, but she was not willing for her to put it in possession of tenants. Mrs. Johnson refused to give

possession, and has been cultivating the place with tenants ever since."

Conclusions of Law.

The evidence in this case is sufficient to sustain the legal conclusions of the court below; and appellee was entitled to possession of the land during the lifetime of appellant. There was error, however, in the form of the judgment as entered. By the terms of the judgment, appellee was, in effect, decreed to be the owner of the title to the land, when it should have been that she have possession of the land during appellant's lifetime. The judgment of the court below is here reformed, allowing appellee's possession of the land, as above indicated, until the death of appellant, but is to in no way affect the title to the land. The judgment, as entered, does not conform to the legal conclusions of the trial court; and the same was not called to the attention of the court, by motion for new trial or otherwise. The judgment, as reformed, is affirmed, at the cost of appellant. Reformed and affirmed.

TEXAS & P. RY. CO. v. FULLER et ux.¹
(Court of Civil Appeals of Texas. March 21, 1896.)

ACTION BY WIFE—PARTIES—AMENDMENT—RAILROADS—PERSONAL INJURIES—RAILROAD CROSSINGS—CONTRIBUTORY NEGLIGENCE.

1. In an action for personal injuries received by a married woman who had been deserted by her husband, though the husband is an unnecessary party plaintiff, yet it is not reversible error to permit the suit to be prosecuted in the names of both the husband and wife, there being no other showing that defendant was prejudiced thereby.

2. An action for personal injuries to a married woman who had been deserted by her husband was instituted in the name of both husband and wife. The complaint failed to allege the fact of desertion, so as to authorize her to sue. *Held*, that an amendment setting up the desertion did not change the cause of action, and was therefore properly allowed after the statute of limitations would have run against the action.

3. Plaintiff was struck by defendant's switch engine at a railway street crossing. The engine, as it approached, was in plain view for half a mile, but was running at an excessive rate of speed, and without giving the statutory signals. Plaintiff testified that before crossing the track she looked for approaching trains, and failed to see any, or hear any noise indicating their approach. *Held*, that plaintiff, as a matter of law, could not be said to have been guilty of contributory negligence.

Error from district court, Dallas county; Edward Gray, Judge.

Action by William Fuller and wife against the Texas & Pacific Railway Company. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

Alexander, Clark & Hall, for appellant. John Bookhout and R. H. Capers, for appellees.

¹ Writ of error denied by supreme court.

FINLEY, J. This is an action for damages on account of personal injuries, instituted February 2, 1890, in the name of William Fuller and his wife, Sarah M. Fuller, against the Texas & Pacific Railway Company. The trial resulted in a verdict and judgment for plaintiffs in the sum of \$2,500, from which defendant has prosecuted its writ of error to this court. This is the second time the cause has been presented to this court for a revision, and the case will be found reported in 24 S. W. 1090. On the trial below the defendant excepted to the petition upon the ground that the wife was an unnecessary and improper party. The court sustained the exception, whereupon a trial amendment was filed by Mrs. Fuller, alleging, in substance, "that in the month of December, 1888, her co-plaintiff and husband, William Fuller, left their home, in the city of Dallas, Texas, as she then believed, temporarily, and with the view of returning; that the injury occurred to her in the month of January, 1889; and that at the time of the institution of this suit she believed that her husband would soon return to their home, in Dallas, Texas. But she charges that he never has returned to their said home, nor in any way contributed to her support, and since that time she has never seen him, and she charges that since her said injury, on, to wit, February 15, 1889, he abandoned and deserted her, and has never returned to her. And your petitioner further shows that she is, and has been since 1889, destitute of the means of support, and has no separate estate of her own, and that she is compelled to resort to the community property for her support and maintenance, and, with the exception of the damages to which she is entitled by reason of the injury to her by reason of the negligence of the defendant company, they have no community property or estate. Wherefore she prays that she be permitted to prosecute this suit in her own name, and she prays for judgment as prayed for in her first amended original petition, filed herein on the 11th day of December, 1889, and she adopts all the allegations in the said petition. Should the court hold that she is not permitted to prosecute this suit in her own name, then she asks to be permitted to prosecute the same jointly with her said husband; and she prays for judgment as in their amended petition filed herein on September 11, 1889." The defendant below specially excepted to said trial amendment: "(1) Because 't shows this suit was instituted without the consent of William Fuller. It shows that the suit should be abated. It is uncertain as to the cause of action alleged, and is duplicitous, seeking to maintain the suit either as the cause of action of William Fuller and wife, Sarah M. Fuller, or of the said Sarah M. Fuller. It is not certain as to who is the plaintiff. (2)

Because there is a misjoinder of parties plaintiff, in this: suit should be maintained in the name of William Fuller, or should be maintained in the name of Mrs. Sarah M. Fuller, with proper allegations showing her right to prosecute the suit in her own name." Defendant below further pleaded in answer to said trial amendment "that the plaintiff Mrs. Sarah M. Fuller ought not to recover upon her cause of action alleged in her trial amendment, filed herein on the 26th day of February, 1895, for the reason it is a new and different cause of action from that sued upon in the original petition and first amended original petition herein, and barred by the statute of limitations of one year, not having been sued upon for more than a year next after the accrual of the cause of action." The court overruled said special exceptions to said trial amendment, and ordered that the suit proceed in the name of William Fuller and his wife, Mrs. Sarah M. Fuller, to which ruling defendant below excepted.

The first assignment of error is directed at the action of the court in overruling the defendant's special exception to the trial amendment, and ordering the cause to proceed in the name of William Fuller and his wife, Sarah M. Fuller. It is urged that the damages sued for, if recovered, would be community property, and that the husband alone was a proper plaintiff, or in case he had abandoned his wife, and left her unprovided for, she alone was the proper party plaintiff; that in no event was it proper for the suit to be prosecuted in both names. It is further urged that the pleadings showed that the suit was instituted without William Fuller's knowledge or consent. It is well established in this state that ordinarily the husband alone is the proper party to maintain a suit for community property. It is equally well settled that the wife may maintain such suit in her own name, when she has been wrongfully abandoned by the husband, and left without means of support. *Craddock v. Goodwin*, 54 Tex. 578; *Ezell v. Dodson*, 60 Tex. 331; *Cullers v. James*, 66 Tex. 494, 1 S. W. 314; *Gallagher v. Bowie*, 66 Tex. 206, 17 S. W. 407. Under the allegations contained in the trial amendment, the wife had the right to maintain the suit in her own name, and her husband's name was unnecessary for the prosecution of the suit. That his name was permitted to remain as a party plaintiff certainly worked no injury to the railroad company. In *Railway Co. v. Helm*, 64 Tex. 149, Justice Stayton said: "It is not for every erroneous ruling that a judgment should be reversed, but this should be done only in those cases in which the opposite party has probably been injured thereby. In suits of the character of the present, we are of the opinion that a judgment in favor of the husband and wife does not ordinarily operate to the

prejudice of the defendant against whom it is rendered. Such a judgment is as complete a bar against any claim which might subsequently be set up by the husband or wife as would be a judgment rendered in a cause in which the husband was sole plaintiff. If the costs be increased by the joinder of the wife when she ought not to be joined, or if a defendant be shown in any other manner to have been prejudiced, then the overruling of an exception based on the misjoinder of parties would be sufficient ground for reversal; but, if no such injuries be shown, then the action of the court below in overruling such an exception is not sufficient ground for reversal in cases of this character. * * * This assignment does not present reversible error.

It is urged by the second assignment of error that the cause of action, as presented in the light of the trial amendment, was a new cause of action, and, as said trial amendment was filed more than one year after the injuries were alleged to have been inflicted, the action was barred by the statute of limitation. The only additional facts alleged were those relating to the right of the wife to maintain the suit, the abandonment of the husband, etc. The case had been once tried on the original pleadings, the case appealed to this court, and her right to be a party plaintiff was first challenged upon the last trial. The cause of action was not changed by the amendment. The facts originally alleged were only added to by allegations showing the right of the wife to prosecute the suit. At most, as to the wife, the original petition was defective in failing to set forth the grounds upon which her right to sue was based, and the trial amendment cured that defect. There was no such change in the pleadings as disclosed a new cause of action. The contention is not sound, and the court did not err in refusing to submit the issue of limitation to the jury.

There is but one other question presented for our decision, and that is an issue of fact. Does the evidence establish that Mrs. Fuller was guilty of contributory negligence? The injury occurred at a place where the railroad is operated along and upon Pacific avenue, a public street in the city of Dallas, and at a point where a street-car line crosses said street and railroad. It was shown, beyond cavil, that the servants of defendant, having in charge a light engine, with no cars attached, ran the engine down Pacific avenue at a reckless rate of speed, without giving out any signals of warning, crossing railroad and street-car crossings without halt or notice, and while so running came in collision with Mrs. Fuller, upon the track, and seriously injured her. The carelessness of the operatives of the engine is not questioned. It was shown that Mrs. Fuller had started to market, and, in attempting to cross the street

and railroad diagonally, she was struck by the engine and injured. She was not warned of the approach of the engine by any signal, and the engine did not make such noise in running as to attract her attention. The track was shown to be open in the direction from which the engine came for nearly half a mile, and an engine might be seen for about that distance. Mrs. Fuller testified that before getting on the track she looked up and down it, and saw no engine, and heard no noise from one; that she had a nubia thrown loosely over her head, but that it was light, and its meshes so large as not to interfere with her hearing. The evidence tended to show that the engine was being run at a speed of 30 miles an hour, and persons seeing it thought it was a wild engine and running without control. Under this state of facts, can we say, in contravention of the verdict of the jury, that Mrs. Fuller was guilty of contributory negligence? It is contended by counsel for the railway company that the testimony of Mrs. Fuller touching her acts of caution is patently untrue, and that we should so treat it. As a basis for this contention it is urged, first, that she swore upon the former trial that she did not look or listen before going upon the railroad track. It is true, this court reversed this case upon the former appeal upon the ground that the evidence showed that Mrs. Fuller was guilty of contributory negligence. The record then before us showed that Mrs. Fuller herself testified that she went upon the track without a thought of danger, and without looking or listening, and with her head wrapped in a nubia covering her ears. Upon the last trial Mrs. Fuller testified that her former testimony was not correctly given in the statement of facts used upon the former appeal, and she affirmatively testified that she did both look and listen before going upon the railroad, and neither saw nor heard the engine. She further explained that the nubia was thrown loosely over her head, and it was light, and its meshes so large as not to obstruct her hearing. Her testimony denying the correctness of the statement of her evidence as contained in the former statement of facts was sought to be impeached by the testimony of witnesses that she did testify on the former trial that she did not look nor listen before entering the track. This issue of credibility of the witness it was peculiarly the province of the jury to settle, and the verdict settled it in favor of Mrs. Fuller. Unless there is some inherent reason in her testimony itself for setting it aside as untrue, or unless some other conclusively established fact demonstrates the falsity of her testimony, we must, in deference to the verdict of the jury, accept it as true. It is insisted that it was conclusively shown that the track was open, and practically straight, for about a half mile, and that the engine could be seen upon the track for this distance, and

therefore it must be concluded that Mrs. Fuller could not have looked without seeing the engine. This inference or conclusion of fact was also a question for the jury, and it must be regarded as settled by the verdict, unless the conclusion supporting the verdict can be said to be without any sufficient basis. Let us analyze the facts, and see if this is true. The railroad was in the public street, and Mrs. Fuller had a perfect right to go upon it, and she had the right to expect that the usual and required signals of warning by an engine running upon the street and approaching crossings would be given. There is no statute defining what acts will constitute contributory negligence, and the test to be applied is, would an ordinarily prudent person act as did the injured party, under similar circumstances? No bell was rung or whistle blown to give notice of the approach of the engine. How far one may rely upon the sense of hearing as a safeguard, under such circumstances, is a question for the determination of the jury, under the test above stated. In looking out for danger, the vision is usually directed only to that extent of distance from which danger may reasonably be apprehended. Objects lying in the direction of the view, but beyond the scope to which it is directed, rarely make an impression upon the mind. May Mrs. Fuller, as she approached the railroad, not have listened and looked, within reasonable range of danger, without apprehending the approach of the engine? She could not hear it, perhaps, for the reason that no signals of its approach were given, and it was only a light engine, and made little noise by running. It does not appear that she looked just as she was about to step upon the track, but that she looked as she was approaching the track. She might have looked as she approached the track, within the ordinary range of danger from cars being operated at a reasonable rate of speed, and in a cautious manner, while the engine was not in the scope of her vision; and the engine, running at the high rate of speed indicated by the evidence, may have had sufficient time after she looked to reach the point of collision while she was on the track. We cannot say that such was not the fact. The propositions urged were proper arguments before the jury, but if we should accept them we would assume the province of the jury, and seriously invade the right of trial by jury. *Railway Co. v. Lee*, 70 Tex. 496, 7 S. W. 857; *Railway Co. v. Elliott* (Tex. Civ. App.) 26 S. W. 455; *Brown v. Griffin*, 71 Tex. 659, 9 S. W. 546. We therefore conclude, as a matter of fact, that the evidence warranted the conclusion reached by the jury,—that the defense of contributory negligence was not established by proof.

There are no other issues of fact raised by the assignments of error. The other facts were proven as alleged, and the injuries sustained authorized the damages assessed. Judgment affirmed.

PIONEER SAVINGS & LOAN CO. v. NALL.¹

(Court of Civil Appeals of Texas. March 28, 1896.)

PLEADING — FAILURE TO VERIFY — EXCLUSION OF EVIDENCE.

Where the petition alleged that the contract sued on was made by defendant's authorized agent, and defendant failed to deny such allegation under oath, as required by Sayles' Civ. St. art. 1265, subd. 8, evidence offered by defendant relative to the agent's authority was properly excluded.

Appeal from district court, Dallas county; R. E. Burke, Judge.

Action by Robert H. Nall against the Pioneer Savings & Loan Company to recover for breach of a contract to sell real estate. Judgment for plaintiff, and defendant appeals. Affirmed.

Morris & Crow, for appellant. Thompson & Thompson and T. T. Vanderhoeven, for appellee.

RAINEY, J. The Pioneer Savings & Loan Company, appellant, a corporation with headquarters at Minneapolis, Minn., was on September 2, 1893, the owner of a house and lot in the city of Oak Cliff, Tex. On that date the Metropolitan Land Bureau was a real-estate agency doing business in the city and county of Dallas, of which L. A. Wilson & Co. were proprietors, agents, and managers, which, in fact, was composed solely of L. A. Wilson. On that date this land bureau, through Wilson, who was agent and manager, wrote to appellant, stating that he had a customer who desired to purchase the E. R. Kimball and H. H. Price places in Oak Cliff, describing the same, and asking upon what terms the same could be sold; to which appellant replied that it was not en rapport with the market at Dallas for the Kimball and Price places, and hence could not judge of the price that might be obtained. "In our opinion, the Price property should be \$2,000, and the Kimball property \$1,750. On these valuations we will pay you a commission of 5 per cent. If you will effect a sale. We will expect one-fourth down, and the balance in monthly payments, interest on the deferred payments to be 8 per cent. If these terms are satisfactory to your client, advise us, and we will send forward the papers. If not, let us know what will suit him." Diamond & Co. were the regular agents of appellant for the collection of rents and sale of its properties, and appellant so stated to Wilson; and it further wrote to Wilson that if he had any purchasers for any particular properties, they would be glad to receive propositions, and would give them prompt consideration; and also that he could close the trade for the Kimball and Price places at the price theretofore given. On September

¹ Writ of error denied by supreme court.

13, 1893, Wilson wrote to appellant that he had sold the Kimball property, "but the party wanting to buy wants about \$1,000 improvements put on it, and only has \$1,000 in cash, and that the party would pay as much as \$2,750, and let the \$1,000 go in on these improvements as the first payment. You might be willing to take notes for the balance of \$1,750, being the amount you now hold the property at." "We will go over today with a contractor, and see what the work can be done for, and if the sale can be made on these terms we will send you a telegram." On September 16, 1893, Wilson wrote appellant as follows: "Not knowing whether you would prefer to sell the Kimball property on the terms of the contract inclosed, we made another contract with Dr. Robert H. Nall in accordance with the terms mentioned in your letter of the 6th inst.,—\$1,750,—one-fourth cash, and the balance in monthly payments; but he would prefer to make the notes read 'on or before,' and make two notes." On September 18, 1893, appellant, replying to Wilson's letter of date September 13, 1893, stated: "We wired you today. Your offer is not acceptable. All our propositions withdrawn. We now beg to confirm telegram. It now develops that the party to whom you refer as wishing to buy the Kimball place, has been shown the property by another agent of ours long before he saw you, and the trade was about completed, when you interfered, and endeavored to make a commission out of it by dealing direct with us. You knew at the time that there was another agent in Dallas who was dealing with the property in our behalf. This was unprofessional and unbusinesslike, and we will not be parties to any such transactions. We withdraw our former propositions to you making a price on the Kimball and Price properties. We will not sell through you any property, at any price. All our transactions regarding any real estate in Dallas will have to be had through Diamond & Company." The telegram referred to from defendant to Wilson is as follows: "Your offer not acceptable. All our propositions withdrawn." In a letter of September 19, 1893, from Wilson to appellant, was inclosed the following contract: "Dallas, Texas, September 14, 1893. Received of Dr. Robert H. Nall, of Fort Worth, Texas, (\$100.00) one hundred dollars, on account of a bargain and sale of the following described property, lying and being situated in the county of Dallas, state of Texas, to wit: All of lots Nos. 15 and 16, in block No. 154, according to the map or plat of the Second addition to Oak Cliff, Texas, being 100 feet front on 9th St., and extending back of even width 194½ feet to an alley, and being the property heretofore known as the 'E. R. Kimball Place.' This day sold to the said Robt. H. Nall by Metropolitan Land Bureau, L. A. Wilson & Co. Mgrs., as agents of the Pioneer Savings & Loan Co., for the sum of \$1,800, payable \$450

in cash, or one-fourth in cash, and the balance of said consideration to be paid as follows: In notes or monthly payments of \$25.00 per month, with interest at the rate of (8) eight per cent. per annum, interest payable semiannually as it accrues. Said notes and interest made payable to the order of the Pioneer Savings & Loan Co. Should the title to said property prove defective after sixty days has been allowed for examination of abstract, said deposit or part payment of \$100.00 to be refunded to the said Nall, vendee. Should the remaining payment be not made according to the foregoing agreement, when general warranty deed is presented, conveying said property, then the above-mentioned deposit or part payment to be forfeited, and the same apply, first, toward the payment of commission due to the said Metropolitan Land Bureau, L. A. Wilson & Co., Mgr., and the balance, if any, to go to the vendor of said property. [Signed] Robt. H. Nall. The Pioneer Savings & Loan Co., Vendor, by Metropolitan Land Bureau, L. A. Wilson & Co., Mgr., Agents. W. N. Lorange, Witness." The appellant declined to ratify this contract. There was no collusion between Wilson and Nall to swindle or defraud appellant. The market value of the Kimball place at the time of the making of this contract was \$2,800. Nall, in his petition, set out this contract in *hæc verba*, and alleged that said contract was executed by the authority of appellant, and that said land bureau, L. A. Wilson & Co., managers, were the duly-authorized agents of appellant to make said contract. There was no plea under oath denying the authority of Wilson to execute the instrument as alleged.

Conclusions of Law.

A majority of the assignments of error relate to the exclusion of evidence and the refusal of special charges asked relative to the authority of L. A. Wilson to make the contract sued upon. The petition having alleged that said contract had been executed by the authority of appellant company, and said allegation not having been denied under oath, the exclusion of such evidence and the refusal to give such charges did not constitute error. *Sayles' Civ. St. art. 1265, subd. 8; Waterworks v. White, 61 Tex. 536; Bradford v. Taylor, Id. 508; Water Co. v. Kelley (Tex. Civ. App.) 32 S. W. 436; Railway Co. v. Tisdale, 74 Tex. 8, 11 S. W. 900; Railway Co. v. Wilbanks, 7 Tex. Civ. App. 489, 27 S. W. 302.*

The other assignments of error are not well

² *Sayles' Civ. St. art. 1265*, provides that: "An answer setting up any of the following matters, unless the truth of the pleadings appear of record, shall be verified by affidavit: * * * 8. A denial of the execution by himself, or by his authority, of any instrument in writing upon which any pleading is founded in whole or in part, and charged to have been executed by him, or by his authority, and not alleged to be lost or destroyed," etc.

taken. The evidence is sufficient to sustain the verdict of the jury, and the judgment is affirmed.

SMITH v. WRIGHT et al.¹

(Court of Civil Appeals of Texas. April 4, 1896.)

HOMESTEAD — EXECUTORY SALE AND REPURCHASE BY WIDOW—WHAT CONSTITUTES A FAMILY.

1. A widow having a right of homestead in lands left by her husband, who, with the heirs, made an executory sale of the property, retaining a vendor's lien, and taking a trust deed securing the purchase money, with the intention of acquiring another homestead when the purchase money was paid, but who on its nonpayment, not having acquired a new homestead, foreclosed the trust deed, and repurchased the property, with the intention of resuming its occupancy as a homestead, which she did on regaining possession, will not be held to have lost her homestead right, as against a creditor obtaining and registering a judgment after her repurchase of the property.

2. A widow with whom resides an orphan grandson, 18 years of age, and whom she supports, is the head of a family, and entitled to acquire and hold a homestead.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action by W. J. J. Smith against Lucy C. Wright and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Martin W. Littleton and Oeland & Smith, for appellant.

LIGHTFOOT, C. J. The statement of the case in appellant's brief is adopted, as follows: "Appellant (plaintiff in the trial court) brought this suit against Lucy C. Wright, Jesse Wright, Otis Britain, and Kate Britain, his wife, in the district court of Dallas county, Texas, in trespass to try title to a tract of land, which is fully described in the pleadings, and prayed for judgment for the land, and that he be placed in possession of the same, and for his damages and costs of suit. The defendants answered by general demurrer, general denial, and a plea of not guilty. The trial was had before the court April 15, 1895, and a judgment was rendered for the defendants, from which plaintiff appeals."

The conclusions of fact filed by the court below are adopted, as follows: "That the land in controversy was conveyed by William J. Walton to James W. Wright, by deed bearing date January 12, 1862, and was paid for with the separate property of said James W. Wright, who was then a married man and the head of a family, consisting of his wife, defendant L. C. Wright, and several children, and was used and occupied by said James W. Wright as a homestead until his death. (2) That said James W. Wright died in 1881, leaving a written will, whereby he bequeathed all his estate to his two children, defendants Jesse Wright and Kate T. Britain, who were then both mi-

nors, subject to the community interest and homestead rights of his wife, defendant L. C. Wright; that said will of said James W. Wright was duly probated in the probate court of Dallas county, Texas. (3) That said children and minor children of said James W. Wright, defendants, L. C. Wright, widow, and Jesse Wright and Kate T. Britain, continued to use and occupy the said premises together as a homestead until January 29, 1891, prior to which the defendant Jesse Wright had attained his majority, and defendant Kate T. Britain intermarried with her co-defendant Otis D. Britain. (4) That on the said 29th day of January, 1891, the said widow and children of said James W. Wright, defendants, L. C. Wright, Jesse Wright, and Kate T. Britain (joined by her husband, Otis D. Britain), sold said premises to one M. M. Miller, in payment for which said Miller paid defendants \$500 cash, which was applied to the payment of a joint debt of the defendants, and executed his two promissory notes, one in the sum of twelve thousand dollars, and the other in the sum of three thousand three hundred and seventy-one dollars, payable to the order of defendants; and the defendants executed their deed of conveyance of that date to said M. M. Miller, and retained the vendor's lien in the said deed of conveyance and in the said promissory notes to secure the payment of the purchase money, and said Miller further secured the payment of the purchase money by his deed of trust to W. S. Coffman, as trustee. (5) That after the execution of said notes, by an agreement between said Miller and defendants, said Miller paid off the smaller note, by conveying to the defendants certain real estate, which real estate was divided between the defendants; defendant L. C. Wright getting one-third, defendant Jesse Wright getting one-third, and defendant Kate T. Britain one-third; part of said real estate being situated in Taylor county, and the balance being town lots in the city of Dallas, all of which was heavily incumbered to its value, and was lost by reason of said incumbrance thereon. (6) That said M. M. Miller made default in the payment of the first installment of interest which fell due, and after due notice, and at the request of the defendants, the said W. S. Coffman, trustee, duly sold said premises in accordance with the terms of said trust deed on the first Tuesday in October, 1891, and at said sale the defendants purchased said premises, and said Coffman, trustee, conveyed said premises to the defendants, and credited the amount of the bid on the note given by said M. M. Miller to defendants for said land. (7) That, at the time said defendants sold said premises to said Miller, it was their intention, as soon as they received the money from said Miller for said land, to remove to Taylor county, Texas, and reside there, but they did not remove, and defendant L. C. Wright did not acquire any other home or

¹ Writ of error denied by supreme court.

lands outside the incumbered lands conveyed her by said Miller, as above set out; that she lived on a rented place in Dallas county from the date of the sale to Miller until about the 10th day of December, 1891. (8) That at the time defendants caused said Coffman, trustee, to advertise said premises for sale, it was the purpose and intention of defendant L. C. Wright to purchase said lands, and return to and use and occupy the same as her homestead; that it was her intention to use and occupy the same as her homestead at the time of the purchase thereof by defendants, and the intent and purpose to make the said premises * * * until she got possession thereof; that immediately after the purchase thereof by defendants, and a month before plaintiff's judgment was recorded, L. C. Wright, for the declared purpose of residing thereon as a homestead, demanded possession of the premises from the tenants of M. M. Miller, who refused to give possession; that the defendants caused a suit in trespass to try title to be instituted in the Dallas district court, against said M. M. Miller and his tenants, for the recovery of said premises, on the 12th day of November, 1891; that said tenants of said M. M. Miller abandoned said premises about the 10th day of December, 1891, and the next day thereafter the defendants L. C. Wright and Jesse Wright moved onto and took possession of said premises, and have continued to occupy and use the same as a homestead until the present time. (9) That defendant L. C. Wright declared her intention to purchase the said premises, and move upon and use and occupy the same as her home, to her children and friends, from the time the defendants requested said Coffman, trustee, to sell the same, until she actually took possession thereof, in December, 1891. (10) That at the time of the sale of the premises by defendants to said Miller, for a long time prior thereto, and from thence to the present time, Milton Pollard, an orphan grandson of defendant L. C. Wright, lived with her as a member of her family, and has been supported by her ever since; that said Milton Pollard's mother, the daughter of the defendant Lucy C. Wright, died when said Milton Pollard was an infant, and she took him and cared for him from the death of his mother, in the year 1878, for four or five years, and until his father's second marriage, when his father took him home, and kept him until he died, during the year 1888, when defendant L. C. Wright again took him, and has supported him, and he has continued to live with her to the present time, and she has great affection for him; that he was thirteen years old when the said defendant repurchased the land in controversy. (11) That W. P. Pollard died seised and possessed of three tracts of land, aggregating 300 acres; that upon said W. P. Pollard's death his widow took possession of the farm, and has used the property and rents ever since; that the wid-

ow has married again, and said Flemming now occupies the farm; that no part of the rents or of the property have been turned over to or have been used by the said Milton Pollard; that the said Milton Pollard has a brother about 25 years old, and a sister, Mrs. Flemming, who was married to Flemming at the time of his father's death. (12) That on the 4th day of November, 1891, one W. L. Williams recovered a judgment in the county court of Dallas county against the defendant L. C. Wright for the sum of \$611.10 and costs, amounting to \$7.25; that on the 28th day of November, 1891, said W. L. Williams had an abstract of said judgment duly made, and on same day had an abstract of said judgment duly recorded and indexed in the record of judgments of Dallas county, Texas. (13) That execution was duly issued out of the county court of Dallas county on said judgment, in favor of said W. L. Williams, and against defendant L. C. Wright, on December 1, 1891, which execution was duly placed in the hands of the sheriff of Dallas county on the date of its issuance, and was duly returned nulla bona; that alias execution was duly issued out of said county court of Dallas county on said judgment in favor of said Williams, and against defendant L. C. Wright, on the 2d day of September, 1892, and was duly placed in the hands of the sheriff of Dallas county, and was duly returned by him nulla bona; that pluries execution was issued out of the county court of Dallas county on said judgment in favor of said Williams, and against defendant L. C. Wright, on the 31st of January, 1895, and was duly placed in the hands of the sheriff of Dallas county, and was by him duly levied on the property in controversy on the date of its issuance, and after due notice the property in controversy, as the property of the defendant L. C. Wright, was regularly sold by the sheriff of Dallas county on the first Tuesday in March, 1895, to plaintiff W. J. J. Smith, to whom the judgment had been duly transferred by W. L. Williams prior to the issuance of the pluries execution, and the amount of the bid (\$250.00) was duly entered as a credit on said execution, and the said sheriff of Dallas county conveyed the property in controversy to plaintiff, W. J. J. Smith, which deed was regular on its face; that no other executions were issued on said judgment except those above named,—that is, no execution was issued on said judgment from the 2d day of September, 1892, until the 25th day of January, 1895."

The land in controversy was the homestead of Mrs. Wright and family at the time the judgment under which appellant bought was abstracted, and also at the time of his purchase at execution sale. Appellant's counsel, in a strong and able presentation of the case, insist that the homestead rights of Mrs. Wright were lost by abandonment upon the sale of the property, and that, when it was

bought in at the foreclosure sale and repossessed by her, she had no such family as would justify the acquisition of a homestead, or protect it from forced sale. It cannot be questioned that, upon the death of her husband, the property was her homestead, and, as such, was exempt from forced sale. There is no statement of facts in the record, and it appears from the conclusions of fact filed that, at the time Mrs. Wright and her children sold the property to Miller, it was their intention, as soon as they received the purchase money from Miller, to move to Taylor county, and reside there. She had no other homestead, and has never acquired any other. Upon the sale of the property to Miller, under an executory contract, the superior title remained in the vendors until the purchase money should be paid; and, as it was never paid by Miller, this superior title was never at any time divested. During the occupancy of Miller under his executory contract of purchase, Mrs. Wright occupied a rented place in Dallas, awaiting the payment of the purchase money, intending, as soon as such payment was made, to move to Taylor county. But, payment not being made, she took the proper steps to repossess her homestead, and at once moved back to it. The case cannot be very different in principle from one in which the widow sought to exchange her homestead for another; the difference being that here she was never divested of the superior title to her homestead property. *Schneider v. Bray*, 59 Tex. 672; *Watkins v. Davis*, 61 Tex. 414; *Childers v. Henderson*, 78 Tex. 664, 13 S. W. 481; *Hunter v. Wooldert*, 55 Tex. 436; *Cameron v. Fay*, Id. 58; *Chase v. Swayne*, 88 Tex. 218, 30 S. W. 1049. But, outside of that question, it is clear that Mrs. Wright, even if she should be considered as having abandoned her homestead rights in the property (which we are not prepared to hold under the facts), was the head of a family, consisting of herself and her orphan grandchild, Milton Pollard, who had been a member of her family for many years, and she repurchased the homestead property at the foreclosure sale, intending to make it her future home, and immediately took the proper steps to that end, before any rights were acquired by appellant. The property was clearly the homestead of Mrs. Wright, and her interest was not subject to forced sale. *Clark v. Goins* (Tex. Civ. App.) 23 S. W. 703; *Wolfe v. Buckley*, 52 Tex. 641. The judgment is affirmed.

HUNTER v. CLAYTON.

(Court of Civil Appeals of Texas. June 17, 1896.)

EQUITY—ACTION TO COMPEL CONVEYANCE.

1. Where land is purchased under an agreement to convey to another on payment of the price, a tender of the amount due is necessary to a decree conveying title.

2. In an action to quiet title, where defendant claims that he has improved the land and paid the taxes, he is not entitled to a decree for the amount so paid without evidence of the value of the improvements and the amount of taxes paid.

Appeal from district court, Jones county; Ed. J. Hamner, Judge.

Action by Judson Hunter against George Clayton. Judgment for defendant, and plaintiff appeals. Affirmed.

Appellant sued appellee, and alleged, in substance, that he (appellant) had purchased a tract of land from one W. H. Smyth; that by agreement between him and appellee the deed had been made to appellee; that of the consideration for which Smyth sold the land appellant had paid \$201 and appellee \$344. Appellant alleged a willingness to refund to appellee the \$344, but made no tender thereof. He prayed for judgment canceling the deed from Smyth to appellee, vesting title in him, etc. Appellee pleaded the general issue, title in himself, that the contract pleaded by appellant was without consideration, and prayed for judgment for the land, and that his title be quieted, etc., which prayer was granted. The trial court filed the following conclusions of fact, which are sustained by the evidence, and are therefore adopted by this court, viz.:

"(1) Both plaintiff and defendant claim under and through Wm. H. Smyth.

"(2) Wm. H. Smyth, by his deed of date September 16, 1889, conveyed the land in controversy to defendant, George Clayton, for a consideration of \$360, of which amount plaintiff paid \$40 and defendant paid \$320, obtained by him from the Texas Loan Agency of Corsicana, Texas, as a loan on the land in controversy, for which defendant executed his note on September 25, 1889, due September 25, 1894, and secured by deed of trust.

"(3) At the time deed was made to defendant, Clayton, there was a verbal understanding between plaintiff and defendant that defendant should take title to the land, obtain the loan from the Texas Loan Agency, that plaintiff should pay the interest and principal of said loan as they respectively came due, and on payment in full thereof defendant was to convey the land to plaintiff.

"(4) On April 10, 1890, defendant, George Clayton, executed and delivered to plaintiff the following instrument in writing:

"State of Texas, County of Taylor. Know all men by these presents, that I, George Clayton, of the state and county aforesaid, do certify that I bought in the month of September, 1889, for J. Hunter, of the county of Jones and state of Texas, a certain tract or parcel of land lying and being in Jones county, Texas, described as follows: A quarter section (southwest quarter) of section No. 17, railroad land, situated about 2 miles north of the Clear Fork of the Brazos river, east of the Abilene and Anson road. The title was made to me in

order that said J. Hunter might get the benefit of a loan through me on said land, as he had no homestead, and would have been deprived of the benefit of said loan if I had not had title made in my name. The loan was made to me by the Texas Loan Agency, of Corsicana, Texas, for the sum of \$320.00. A mortgage or deed of trust was given on said one-fourth section to secure the payment of said \$320.00 at the expiration of 5 years from 25th of Sept., 1889. Now, be it known that I, G. C., agree to and bind myself to make due to said J. Hunter as soon as he shall have paid off the interest and last payment due to the Texas Loan Agency on said loan.

"Given at Abilene, Texas, this April 10, 1890. George Clayton.

"Witnesses:

"J. W. Love.

"J. W. Hampton."

"(5) No consideration was paid for above agreement by plaintiff, and none was ever received by defendant, Clayton.

"(6) Plaintiff has had exclusive possession of the land in controversy from September, 1889, up to the time of trial, is still in possession, and has during said time received all rents, revenues, and profits of said land, and defendant has received none of the rents, revenues, or profits of said land.

"(7) Plaintiff has paid all the interest on the loan except \$32, which, together with the principal of \$320, has been paid by defendant, George Clayton.

"(8) Plaintiff has never paid or tendered to defendant the sums paid by defendant, nor is the plaintiff now, nor has he ever since the land was bought and the loan made been, able to pay or tender to defendant said sums, nor did he make any tender in court to defendant.

"(9) The following affidavit was made by plaintiff after the deed was made to George Clayton by W. H. Smyth:

"Appraiser's Report.

"State of Texas, County of Jones. We, the undersigned, do solemnly swear that we are well acquainted with the value of real estate in Jones Co., Texas, and with the premises described in the above application for loan, and belonging to George Clayton; that we are not interested in said premises, or the result of this application for a loan; that we have carefully appraised said premises, and in our judgment they have a fair cash value as follows:

Land, exclusive of buildings and fences, \$5 per acre..... \$800 00
Buildings and fences.....

Total value \$800 00

"J. Hunter.

"C. A. Hunter.

"Sworn to and subscribed before me at Anson, Texas, this, the 20th day of Sept., A. D. 1889.

"Jno. F. Ferguson, Clerk C. O.,

"By R. V. Cobert, Deputy."

A. M. Craig, for appellant. Kirby & Kirby, for appellee.

KEY, J. (after stating the facts). 1. As appellant had not paid all the purchase money for the land, as he was required to do in order to obtain the title, and as he did not tender the amount thereof paid by appellee, he was not entitled to a judgment vesting title in him.

2. Appellant contends that, as he had taken possession, improved the land, paid the taxes thereon, and paid part of the purchase money, he was entitled to equitable relief, and appellee should not have recovered the land. The proof shows that appellant made certain improvements on the land, and paid all the taxes due thereon, but it does not show the value of the improvements, nor the amount of the taxes paid. It was shown that he had been in possession of the land from September, 1889, to the time of trial; and it may be that the use of it was worth as much as the improvements made and the amounts paid out by him. Appellee exhibited a legal title to the land, and, if appellant desired the court, in the exercise of its equitable powers, to fix a charge against the land in his favor, he should have so developed the case as to have enabled the court to determine what would have been a fair and reasonable amount to allow him. This he failed to do, and therefore he cannot be heard to complain. Judgment affirmed.

WILSON v. HALL.

(Court of Civil Appeals of Texas. April 11, 1896.)

PLEADING—PETITION BY ADMINISTRATOR—ALLEGATION OF CAPACITY IN WHICH HE SUES.

A petition declaring on a judgment of another state in favor of a decedent, which alleges that plaintiff was appointed and qualified as temporary administrator of the estate of said decedent, and was afterwards appointed administrator, but contains no allegation that he qualified as such, or that he brings the action in such capacity, is insufficient to support a judgment in his favor as administrator.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action by W. L. Hall against L. A. Wilson, Judgment for plaintiff, and defendant appeals. Reversed.

Morris & Crow, for appellant.

FINLEY, J. This is a suit upon the judgment of a circuit court of the state of Missouri in favor of Thomas Allen for \$2,488.41, against Louis A. Wilson. W. L. Hall was the plaintiff in this suit in the court below. His petition recites "that on the 15th day of January, 1892, he was appointed and duly qualified as temporary administrator of the estate of Thomas Allen, deceased, late of the city of St. Louis, state of Missouri; that since said date he has been appointed by the

county court of said Dallas county, Texas, permanent administrator of said estate." The petition in no other way refers to his character as the administrator of the estate of Thomas Allen. The prayer is "that the plaintiff have judgment," etc. The petition does not state that said Hall prosecutes the suit as administrator, and contains no allegations showing that he seeks to recover for the benefit of said estate. The cause was tried in the court below, and resulted in a judgment in favor of plaintiff, from which this appeal has been perfected.

Conclusions.

There is no statement of facts contained in the record. The trial judge filed the following conclusions of fact, which we adopt: "(1) I find that March 13, 1879, Thomas Allen filed suit on two promissory notes—one for \$501, and the other for \$885.08—against L. A. Wilson, in the circuit court of the Tenth judicial circuit, in and for Cape Girardeau county, in the state of Missouri, and that on the 17th day of March, 1879, L. A. Wilson was duly and legally cited to appear and answer therein; and it remained a pending suit until January 2, 1882, when the attorneys of said Wilson filed an amended answer, pleading payment of said notes and failure of consideration, and asking for judgment in reconvention over against plaintiff for \$2,000. I find from the recitals in the judgment that January 6, 1882, said cause came on for trial before a jury in said court, all parties appearing by attorneys. Upon the verdict of the jury, plaintiff, Thomas Allen, recovered against L. A. Wilson, defendant, judgment for \$2,488.41 and costs. I find no execution ever issued on this judgment. (2) I find that January 5, 1892, the county court of Dallas county, Texas, sitting in probate, appointed W. L. Hall temporary administrator of the estate of Thomas Allen, deceased; that the order of appointment recites Thomas Allen died April 8, 1882, and that he had credits in Texas, and the judgment sued on, which is unpaid, and that there is immediate necessity for suit on same, to preserve it, and winds up as follows: 'It is therefore ordered by the court that letters of temporary administration upon the estate of Thomas Allen, deceased, be granted to the said W. L. Hall, he having taken the statutory oath and given bond as required by this court.' Said appointment was duly signed by the judge of said county court, and attested by the clerk, and, before being delivered, was recorded in the minutes of said court. The next term of the county court met the first Monday in February, 1892, and no order was entered then, or at any subsequent term of said court, continuing in force W. L. Hall as temporary administrator of said estate of Thomas Allen, deceased; and no orders or action were had therein until July 10, 1893, when W. L. Hall filed his report as temporary administrator, informing

the court of the pendency of this suit, and asking to be appointed permanent administrator of said estate, and said county court, without notice of said application posted as required by law, or any notice whatever, on November 25, 1893, entered an order appointing W. L. Hall administrator of said estate, and fixed his bond at \$500, and he qualified as such December 30, 1893. (3) I find W. L. Hall, as temporary administrator of the estate of Thomas Allen, deceased, filed this suit in this court January 5, 1892, against L. A. Wilson, and citation was issued and served on defendant January 12, 1892, and he at once filed answer; and the cause remained on the docket, without further orders or action, except orders continuing it, until March 6, 1894, when W. L. Hall, as permanent administrator of the estate of Thomas Allen, deceased, filed his original amended petition. (4) L. A. Wilson, defendant, alone testified as to the matters of defense set up in his amended answer, and from his testimony I find the following facts: That March 13, 1879, when the suit of Thomas Allen against L. A. Wilson was filed, the latter resided in Cape Girardeau county, Missouri, and that he at once employed attorneys and filed answer in said suit, setting up the same defense as is contained in his amended answer herein; that he and his attorneys appeared at two or three terms of court, ready for trial, when, the plaintiff and his attorneys not appearing, the cause was continued; that he insisted on his attorneys having the case dismissed, as the plaintiff or his attorneys did not appear, but said Wilson's attorneys insisted on keeping the case in court, as the latter was sure of recovering a judgment over against plaintiff, and, if dismissed, another suit might be instituted; that the last time the case was thus continued was in May, 1880, and, about an hour after the continuance was entered, defendant, Wilson, met the attorney of plaintiff, Louis Houck, and he agreed with defendant that the suit might be dismissed, and directed him to have it dismissed, and said Louis Houck then and therestated to said Wilson that plaintiff or his attorneys would not again appear in the case; that Wilson then and there informed Louis Houck he was soon to leave the state of Missouri, and move to the state of Texas to live, and that he wanted a distinct understanding about the matter of dismissal before he left, and said Louis Houck assured said Wilson he need give himself no uneasiness, as the case would be dismissed, and not come up again; that soon thereafter Wilson saw his attorneys, and directed them to have said suit dismissed and to do nothing more, and that any further action in the case by them was without his authority, and that the amended answer of Wilson filed in said suit January 2, 1882, was without any authority from him; that Wilson left Missouri and moved to Texas in August, 1880, and has continuously lived in the city and county of Dallas,

Texas, since said date; that during 1881 he was back in Missouri, and once or twice saw his attorneys and plaintiff in said suit, but neither made any mention of the same, and he never knew of the judgment until after it was rendered; that before the judgment was rendered, a week or two, one of his said attorneys wrote him at Dallas, Texas, the suit on a certain date was to come up for trial, and when that letter reached Dallas, Texas, defendant was traveling in the southern part of the state, and the letter was forwarded to him, but did not reach him, and was returned to Dallas, where defendant received it, and another one, about the same time, from his said attorneys, notifying him the judgment had been rendered some month or more before the court adjourned; that his evidence was essential to his defense to said suit; that he never knew of the amended answer filed in this suit January 2, 1882, until the institution of this suit, and never knew of said judgment until the spring of 1882."

From the record as presented to us, we reach the following conclusions of law:

1. The allegations in plaintiff's petition are not sufficient to show that he sues as the administrator of the estate of Thomas Allen, deceased, and seeks to recover judgment for the benefit of said estate. The allegations in the petition, in so far as they relate to his character as administrator, are merely descriptio persone, and cannot be regarded as furnishing a sufficient basis for a recovery by him in the capacity of administrator of the estate of Thomas Allen, deceased. *Roundtree v. Stone*, 81 Tex. 299, 16 S. W. 1035; *Rider v. Duval*, 28 Tex. 623; *Cochrane v. Day*, 27 Tex. 385; *Thomas v. Jones*, 10 Tex. 52; *Beal v. Batta*, 31 Tex. 371; *Guest v. Phillips*, 34 Tex. 176.

2. The conclusions of fact filed by the trial judge show no cause of action in favor of W. L. Hall individually, and, as his allegations are not sufficient to permit him to recover as administrator, he was not entitled to recover at all, upon the facts proven.

This cause was submitted originally to us upon the briefs of appellant only. We set aside the submission, and directed the attention of counsel on both sides to the questions involved in the case, and requested counsel to rebrief the case in the light of these questions, and resubmit the cause to the court upon such additional briefs and argument. Counsel for appellant complied with the request of the court, and has rebriefed the case, presenting in writing their views of the questions submitted by the court. Counsel for appellee wholly ignored the request of the court, and has declined to in any way support the judgment of the court below. When the cause was decided by this court, counsel for appellee then came in and made a motion for rehearing, and requested that we should file our conclusions, and these conclusions are filed in answer to such request. In view of the action of appellee's

counsel in the conduct of the case in this court, we do not feel disposed to enter into a discussion of the various questions in the case, but will content ourselves with filing only such brief conclusions as we deem necessary to a correct disposition of the case.

WILLIAMS v. ST. LOUIS S. W. RY. CO.
(Court of Civil Appeals of Texas. April 11, 1896.)

CARRIERS—INJURIES TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.

Plaintiff was injured in attempting to alight at her place of destination from defendant's train, while in motion, the train having only stopped at the station a short while. Her testimony showed that at the time she attempted to alight she thought the train was moving too fast to permit her to do so safely. *Held*, that a verdict was properly directed for defendant on the ground of contributory negligence on the part of plaintiff.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Action by Mary Williams against the St. Louis Southwestern Railway Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

J. W. Finley and A. B. Person, for appellant. Sam. H. West and Head, Dillard & Muse, for appellee.

RAINEY, J. Suit brought by appellant for injuries received by her in alighting from a moving train on appellee's road, which injuries were alleged to have been caused by the negligence of the appellee railway company. The evidence shows that Mary Williams, appellant, bought a ticket over appellee's road from Sherman to Tom Bean. When the train reached Tom Bean, it only stopped $1\frac{1}{2}$ or 2 minutes for passengers to alight. After the train started, appellant jumped off, while the train was in motion. From her testimony, we gather that when she jumped from the platform of the train she was guilty of contributory negligence, because she thought the train was going too fast for her to alight in safety. The court below, under the facts, charged the jury to return a verdict for the appellee. This action of the court is the only error assigned. We think the instructions were proper, because the evidence, as above stated, fully shows that appellant was guilty of contributory negligence. The judgment is affirmed.

WILLIS et al. v. HOLLAND et al.
(Court of Civil Appeals of Texas. May 2, 1896.)

USURY—SUFFICIENCY OF EVIDENCE—ASSIGNMENT FOR BENEFIT OF CREDITORS—MARSHALING SECURITIES.

1. Where, under the testimony on the issue of usury, the court could have separated the interest from the principal of notes, and it

appeared that the interest charged was usurious, it should have been stricken out.

2. A conveyance by an insolvent debtor of all his property to a trustee, to sell it, and apply the proceeds to the payment of certain debts described in the instrument, and providing for the return of the surplus, if any, to the grantor, is not an assignment for the benefit of creditors, but is a mortgage.

3. Where, in a contest between creditors jointly secured by a mortgage, it appears that one of them holds notes belonging to the debtor as collateral security, he should be required to fully account for such collateral before being allowed to participate in the mortgage fund.

Appeal from district court, Johnson county; J. M. Hall, Judge.

Action by P. J. Willis & Bro. and another against J. B. Holland, A. F. Wayland, and others. From a judgment against defendant Wayland and in favor of the other defendants, plaintiffs appeal. Reversed and remanded.

Crane & Ramsey, for appellants. Davis & McKoy, for appellees.

LIGHTFOOT, C. J. On December 4, 1894, A. F. Wayland was insolvent, and executed to J. B. Holland, as trustee, an instrument in writing, whereby the former conveyed to such trustee all of his stock of goods, wares, and merchandise, grain, and fixtures in his business house in Cleburne, Tex., together with his book accounts, etc., for the following purposes: For such trustee to sell such property immediately for cash, at private or public sale, and to collect the debts as quickly as possible, and to pay certain debts described, in the order named; and closing as follows: "Fourth. If there are any funds left in the hand of said J. B. Holland after paying off the amounts in the order as above set forth, then he shall pay pro rata such amount to all of my other creditors who shall present their claims to him within sixty days from this date. And if, after paying all of the claims above mentioned, in the order as set forth, he shall have any funds out of said proceeds on hand, he shall turn the same over to me." The trust was accepted by J. B. Holland on the day of its execution, and he took possession of the property under it, and filed it for registration. This suit was brought by appellants P. J. Willis & Bro. and the Waples-Platter Grocer Company, who are unpreferred creditors of A. F. Wayland, who accepted under the instrument, and who claim that the same is an assignment, and not a mortgage; that the preferred debt of John W. Floore is fraudulent and usurious, and that he holds a large number of notes belonging to A. F. Wayland, more than sufficient to pay all that is due him. The preferred creditors, the trustee, and Wayland were all made parties to the suit. J. B. Holland (the trustee) was appointed as receiver by the court, and an injunction granted. The parties answered, and on final hearing the court dissolved the injunction and discharged the receiver. The

appellants recovered judgment against Wayland for the amounts of their several debts, but the other defendants were discharged free of costs. From that judgment this appeal is taken.

1. The first assignment of error attacks the sixth conclusion of fact found by the court below and the conclusion of law based thereon, to the effect that, while it was shown that the debt of John W. Floore contained usurious interest, yet the facts were not sufficiently specific to justify the court in striking it out. The notes of Floore are specifically set out and described in the deed of trust, and aggregate about \$3,683.10. Floore testified by deposition substantially as follows: "A. F. Wayland did execute to me a note for \$560, of date May 8, 1894, and due November 8, 1894. The same was given for money, and not in renewal of a former note. Five hundred dollars. I decline to answer anything about the rate of interest, or what Wayland agreed to pay. Wayland did execute to me a note for \$684, dated April 4, 1894, and due November 4, 1894. It was not given in renewal of any other note, but for money. I decline to answer as to the rate of interest, but amount of interest was \$84. A. F. Wayland did execute to me a note for \$359.10, dated April 23, 1894, and due November 23, 1894. I decline to answer in regard to the interest rate charged. The note was not given in renewal of any other, but was given for money. The amount of interest included was \$44.10. A. F. Wayland did execute to me a note dated February 19, 1894, due October 19, 1894, for \$460. Said note represents an original transaction. I let him have \$400 for said note. I decline to answer what was the rate of interest. A. F. Wayland did execute to me a note for \$696, dated March 7, 1894, due November 7, 1894, and said note represents an original transaction. The \$96 was added as interest. I decline to answer further concerning interest. Wayland did execute to me a note for \$216, dated June 11, 1894, due October 11, 1894, and said note represents an original transaction, and the \$16 was interest. I decline to answer further concerning interest. A. F. Wayland did execute to me a note for \$500, dated June 5, 1894, and I suppose, it was executed the day it was dated. I saw it first on the day I wrote it, on the 5th day of June. It was given me for money. I let Wayland have \$40 as consideration for said note. I decline to answer further concerning interest. I was in Waukesha, Wisconsin, on August 30, 1894, but John D. Mitchell, who was representing me, did take a note from Wayland, payable to me, for \$208, dated August 30, 1894, due October 30, 1894, and same represents an original transaction. Eight dollars interest was included or added into said note. I decline to answer further as to interest. I advanced to him \$3,255 during the year 1894 in cash and checks on my bank. I advanced him this \$3,255,

as represented by the notes, described in preceding instrument." Under the testimony, the court could have separated the interest from the principal of the Floore notes, and, it appearing that the interest charged was usurious, it should have been stricken out.

2. Under the assignments of error from 2 to 7, inclusive, appellants contend that the instrument executed by Wayland to Holland, trustee, is an assignment, and not a mortgage. It is clear from an inspection of the whole instrument that it was the intention of the parties to execute a mortgage for the security of debts, the surplus, if any, to be returned to the grantor. We do not deem it necessary for us to go into an elaborate discussion of the question, as the ground has been so thoroughly covered in the recent able and exhaustive opinion of Judge Denman, on rehearing, in the case of Tittle v. Vanleer, reported in 34 S. W. 715. See, also, original report of the case, 29 S. W. 1065; *Adams v. Bateman*, 88 Tex. 130, 30 S. W. 855; *Manufacturing Co. v. Woodson* (Mo. Sup.) 81 S. W. 1037; *Jones, Chat. Mortg.* 352a. We find no error under the above assignments.

3. Under the eighth and ninth assignments of error appellants complain that the court refused to limit the claim of J. W. Floore to the actual amount of money furnished by him, purged of usurious interest, and credited by the amounts collected by him on the collaterals turned over to him by Wayland outside of the chattel mortgage. It appears from the testimony as set out in the record that Wayland had received from Floore about \$3,255, that his notes represented more than this amount, and that most, if not all, of them embrace usurious interest. It further appears that Floore's claims are secured by collaterals held by him, which are sufficient to extinguish a large portion, if not all, of such indebtedness; and with his claims out of the way appellants would realize a considerable portion of their claims out of the assets in the hands of the trustee. A secured creditor of an insolvent debtor may plead usury against the claims of a preferred creditor, and have such claims purged. *Maloney v. Baheart*, 81 Tex. 281, 18 S. W. 1030; *Shoe Co. v. Mayo* (Tex. Civ. App.) 27 S. W. 780. A creditor of an insolvent debtor, secured by mortgage with another creditor, also has the right to a marshaling of the securities held by such other creditor against the common debtor, and to have such securities applied to the debt of such other creditor before he will be allowed to participate in such common fund. *Brown v. Thompson*, 79 Tex. 58, 15 S. W. 168; *Pridgen v. Warn*, 79 Tex. 588, 15 S. W. 559; *Mortgage Co. v. Kempner*, 84 Tex. 102, 19 S. W. 358; 1 Story, Eq. Jur. § 633 et seq. The court below, in its second conclusion of fact, finds that previous to the execution of the mortgage Wayland had transferred to John W.

Floore a lot of notes as collateral security, but does not find the amount or value of such securities. This is an important inquiry, and one which appellants are entitled to pursue, as it is shown that John W. Floore is the principal preferred creditor, and but few of the creditors of Wayland have accepted under the mortgage. It appears from the testimony of Wayland that he got from John W. Floore about \$3,200, and indorsed to him notes amounting to about \$4,000. The latter should be required to fully account for such collaterals before being allowed to participate in the mortgage fund. For the errors indicated, the judgment is reversed, and the cause remanded for a new trial.

MATTHEWS et al. v. FIRST NAT. BANK OF BONHAM.

(Court of Civil Appeals of Texas. May 9, 1896.)

APPEAL—REVERSAL—IMMATERIAL ERROR.

A judgment will not be reversed because the amount thereof is 29 cents greater than the facts warrant.

Appeal from district court, Fannin county; Don A. Bliss, Judge.

Action by the First National Bank of Bonham against J. G. Matthews and others on a note. A judgment by default was entered, and defendants appeal. Affirmed.

J. G. Matthews, for appellants.

FINLEY, J. This is a suit instituted by the National Bank of Bonham against J. G. Matthews upon a promissory note for \$1,000, which is fully set out in the petition. Citation was had upon the defendant, and, he failing to answer, judgment by default was taken against him for the amount of the note, interest, and attorney's fees, and costs of suit. From this judgment the defendant Matthews prosecutes this writ of error. There is no statement of facts contained in the record, and the only question raised on the appeal is as to the amount of the judgment rendered below, the contention being that the note sued upon does not authorize a judgment in the sum recovered.

The first assignment of error complains that the judgment is for the sum of \$1,224.02, whereas the note sued on, with interest and attorney's fees, on the day upon which the judgment was rendered, amounted to \$1,223.73,—a difference of 29 cents. If this assignment was sustained by the record, it would not furnish a sufficient ground for a reversal of the judgment. No such trifling matters will be regarded by appellate courts as sufficient ground for the revision of judgments rendered below. The assignment, however, is not sustained by the record. The amount of the note, with interest and attorney's fees, at the time of the rendition of the judg-

ment, was as much as the sum for which judgment was rendered.

The second assignment of error urges that the judgment should have been only for \$1,213.13, instead of the amount for which it was rendered,—\$1,224.02. This assignment is based upon the idea that the 10 per cent. attorney's fees should have been calculated upon the principal only, and not upon the principal and interest. The note expressly provides that the attorney's fees shall be upon the amount of principal and interest due upon the note. The assignment is therefore without merit. There was no error committed by the trial court, and the judgment is affirmed.

WHITE et al. v. HUDSON et al.

(Court of Civil Appeals of Texas. May 3, 1896.)

PARTNERSHIP—NOTE MADE BY PARTNER AFTER DISSOLUTION.

A creditor of a firm doing business under the sole name of one of the partners, the business being conducted by the other, can enforce a note signed in the firm name by the managing partner after dissolution of the partnership for a firm debt, where it was in accordance with the former course of dealing, and the creditor was not notified of the change.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Action by H. L. White & Co. against J. S. Hudson and A. G. Moseley. Judgment for defendants, and plaintiffs appeal. Reversed.

F. C. Dillard, for appellants.

RAINEY, J. This is a suit by appellants against appellees to recover on a note for the sum of \$788.84, with interest and protest fees, alleged to have been executed by A. G. Moseley, and indorsed by J. S. Hudson. Defendant Moseley pleaded non est factum; and, further, that, if ever indebted to plaintiffs, the same had been paid off and satisfied, which he claimed to have done by the transfer to plaintiffs of certain notes executed and delivered to him (A. G. Moseley) by J. S. Hudson and D. P. Correll. The evidence shows that H. L. White & Co. (appellants) are wholesale merchants, and that A. G. Moseley and F. P. Moseley were partners, doing business under the firm name of A. G. Moseley; that the appellants sold to said A. G. Moseley, as a firm, certain goods, for which said Moseley was indebted to appellants; that F. P. Moseley had charge, control, and management of the firm of A. G. Moseley; that on January 15, 1885, A. G. Moseley made a conditional sale of his interest in said firm to J. S. Hudson and D. P. Correll. Subsequently, about February 1, 1885, the trade between A. G. Moseley and Hudson and Correll was consummated; A. G. Moseley turning over his interest in the firm to said Hudson and Cor-

rell. Subsequent to that time, on February 24th following, F. P. Moseley executed the note sued upon. The correspondence on the part of the firm of A. G. Moseley was conducted by F. P. Moseley. Immediately after the sale by A. G. Moseley to Hudson and Correll, A. G. Moseley wrote one or two letters to White & Co. in relation thereto, to which White & Co. replied. To letters of White & Co., F. P. Moseley replied, and the correspondence relating to the note in suit was conducted in the same manner as the correspondence before the dissolution of the partnership between the two Moseleys. The contention of A. G. Moseley is that, at the date of the execution of this note by F. P. Moseley, the partnership theretofore existing between him (A. G. Moseley) and F. P. Moseley had been dissolved, and that F. P. Moseley had no authority to execute said note, and the same was not binding upon him (said A. G. Moseley). Upon this contention, the controversy arose as to whether or not plaintiffs were aware of the dissolution of the firm of A. G. Moseley and F. P. Moseley at the time the note was executed, and as to the liability of A. G. Moseley for the acts of F. P. Moseley thereafter. On this proposition, the plaintiffs asked the following charge, which was refused: "If you believe that the partnership between A. G. Moseley and F. P. Moseley was a secret partnership, and the business was carried on under the name of A. G. Moseley, or if A. G. Moseley allowed and authorized F. P. Moseley to conduct this business under his name, or to transact business for him with the plaintiffs, and to sign his name to notes and letters during said transactions, that then A. G. Moseley would be bound by the acts of F. P. Moseley in signing his name to notes, in the furtherance of that business, or in settling up the same, even if said partnership was dissolved, unless A. G. Moseley put plaintiffs on notice that F. P. Moseley had been signing his name, and that he no longer had authority to do so."

We think the following proposition of law is applicable to the facts as here stated: "After the dissolution of a partnership, one of the partners cannot bind the firm by new contracts, or change the character of existing obligations; and a partner with general authority to settle up the business of the firm cannot so bind it. But where a third party has been dealing with the firm, and, without notice of the dissolution, continues to deal with one of the partners in the firm name, or takes a note in settlement of an existing debt of the firm from one partner, all the partners would be bound." *Green v. Bank*, 78 Tex. 3, 14 S. W. 253, and authorities there cited. We think the evidence fully raised the issue as presented by the special charge requested, and the same should have been given. The general charge, in a negative way, presented this issue, but, in the connection as presented, was mislead-

ing, and was not presented in such a manner as to clearly present the question affirmatively, and in a way that appellants were entitled to have it presented. We think the effect of the general charge, when taken as a whole, was calculated to lead the jury to believe that, after the dissolution of the firm of A. G. and F. P. Moseley, F. P. Moseley could not, under any circumstances, execute a note binding upon A. G. Moseley.

There are numerous other errors assigned, but the error indicated is the only error requiring a reversal of the judgment, and we deem it unnecessary to discuss the others. For the reasons indicated above, the judgment is reversed, and the cause remanded.

EDWARDS et al. v. HUMPHREYS et al.¹
(Court of Civil Appeals of Texas. Feb. 8, 1896.)

TRESPASS TO TRY TITLE — STALE DEMAND — ADVERSE POSSESSION—NOTICE OF HOSTILE CLAIM.

1. Where the purchaser of a land certificate at an administrator's sale locates the same upon land, he acquires the legal title thereto, though the patent is issued to the original owner of the certificate or his heirs; and therefore the defense of stale demand cannot be set up to defeat the purchaser's claim to the land.

2. Actual direct notice of a hostile claim to land by a widow, as against the heirs of her husband, is not necessary to set in motion the statute of limitations.

Appeal from district court, Rockwall county; J. E. Dillard, Judge.

Trespass to try title by John S. Humphreys and others against A. H. Edwards and others. There was a judgment for plaintiffs, and defendants appeal. Reversed.

Word & Charlton and R. L. Chandler, for appellants. Lee R. Stroud, for appellees.

LIGHTFOOT, C. J. The statement of the case by appellants is adopted, as follows: This was an action in trespass to try title, instituted by appellees, John S. Humphreys et al., against A. H. Edwards et al., for 320 acres of the George P. Humphreys survey of land. Defendants specially answered, and set up, by metes and bounds, the particular tract owned by each defendant, and respectively pleaded, as to each defendant's particular tract, not guilty, and the three, five, and ten years' statutes of limitation, and the suggestion of improvements in good faith. At a former term of the court, the case was disposed of as to 120 acres of the land, and as to defendants Bunyon King and B. F. Keahey. The case, as tried, was for 200 acres of said survey, and tried only as to defendants W. I. and T. D. Lofland, A. H. Edwards, and Ed Klutts. May 16, 1894, judgment was rendered in favor of appellees, against defendants W. I. Lofland and T. D. Lofland, for an undivided interest of $67\frac{11}{14}$ acres out of 160 acres of land claimed by said

Loflands, part of said 200-acre survey, and against defendant A. H. Edwards for an undivided interest of $8\frac{3}{14}$ acres out of a certain 20-acre tract claimed by said Edwards in said Humphreys survey, and against defendant Ed Klutts for an undivided interest of $3\frac{11}{14}$ acres out of the said 20 acres in said survey claimed by said Klutts. From this judgment, defendants have appealed.

The first point which we deem it material to consider is presented by appellants under their eighth and ninth assignments of error, which are as follows: (8) "The court erred in that part of its charge which is as follows: 'You are charged that defendants' claim of an outstanding title through their alleged purchase of the Geo. P. Humphreys land certificate, at an administrator's sale in Upshur county, Texas, is a stale demand, and defendants cannot recover under their said title;' and in refusing to give defendants' special charge No. 1." (9) "The court erred in refusing to give defendants' special charge No. 2." The special charge No. 1, as requested by the appellants, was as follows: "The jury are charged that if you believe from the facts and circumstances introduced in evidence in this case that there was an administration on the estate of Geo. P. Humphreys, deceased, in Upshur county, and that the administrator applied to the Upshur county probate court, and obtained an order of sale to sell the Geo. P. Humphreys land certificate, and said sale was made and reported to and approved by said court, and that at said sale David Stinson became the purchaser of said certificate, and that said Stinson sold and conveyed the certificate to Thomas Heath; and if the jury believe that Thomas Heath had said certificate located on the land in suit, and had the survey made, and caused the field notes to be sent to the general land office,—then the jury are charged that Thomas Heath had such a title to the land that stale demand would not apply, and are further instructed that such title would be a superior outstanding title to any title acquired by the heirs of Geo. P. Humphreys, deceased, under the patent; and, if the defendants have purchased the Heath title, then they are entitled to recover, and the jury should find for the defendants, against all of the plaintiffs." This charge was refused. Charge No. 2, as requested by appellants, was as follows: "If you believe from the evidence that, after the death of Geo. P. Humphreys, his estate was regularly administered in the probate court of Upshur county, Texas; and that, in the course of said administration, an order of sale was applied for, and granted the administrator, to sell the land certificate, by virtue of which the land in dispute was located; and that a sale thereof was regularly made by said administrator, under said order of sale; and that, at said sale, David Stinson became and was the purchaser of said land certificate; and that he paid a valuable consideration therefor; and that said sale was duly confirmed

¹ For opinion of the supreme court, see 38 S. W. 434.

by said probate court, and said certificate was thereupon delivered to said David Stinson; and that he or his vendees procured the same to be located on the land in controversy, and secured the patent to said land in the name of the heirs of Geo. P. Humphreys, —you are charged that the right of said David Stinson, and those holding under him, to the land patented by virtue of said certificate, was a legal right, and that stale demand would not run against same, and their legal right thereto could only be barred by a peaceable and adverse possession of the land on the part of the Humphrey heirs, or some one for them, for such a length of time, and under such circumstances, as would be required by the statute of limitation to bar a legal title, as the same may be defined in the general charge of the court. You are further charged that a sale of the certificate by the administrator of Geo. P. Humphreys' estate, and the orders of the probate court directing and confirming such sale, may be established by circumstantial evidence, if you believe the records of said probate court pertaining to said sale had been lost or destroyed." The above charges were refused, and the court, in lieu thereof, gave the charge as set out, in substance, in the eighth assignment of error, above.

There was some testimony in the record tending to show that the land certificate was sold at administrator's sale in Upshur county under the administration of the George P. Humphreys estate, in June, 1851. It was for the jury to determine from said testimony, when submitted to them under a fair charge of the court, whether there was a valid sale and confirmation of sale, so as to transfer to the purchaser a valid title to the land certificate. If there was, and then such certificate was located by the purchaser upon the land in controversy, even though the patent should subsequently be issued in the name of George P. Humphreys, the original grantee, or his heirs, the superior title would inure to the benefit of the purchasers of such certificate, and their vendees. We cannot undertake now to pass upon the sufficiency of these facts to establish such sale, location, and subsequent ownership. That question is one for the jury to pass upon. But the above charge of the court as given was clearly erroneous. Special charges Nos. 1 and 2, requested by appellants' counsel, while they announce correct principles of law, and while they were sufficient to call the attention of the court to the propositions therein contended for, should be more carefully guarded, so as not to charge upon the weight of the evidence. *Satterwhite v. Rosser*, 61 Tex. 172; *Adams v. House*, Id. 641; *Capp v. Terry*, 75 Tex. 403, 13 S. W. 52; *Goode v. Lowery*, 70 Tex. 156, 8 S. W. 73; *Peterson v. Ward*, 5 Tex. Civ. App. 208, 23 S. W. 637; *Duren v. Railway Co.*, 86 Tex. 291, 24 S. W. 258. In the case of *Adams v. House*, above, our supreme court, in consid-

ering the effect of a valid transfer and location of the land certificate, as against the rights of the original grantor or his heirs under a patent subsequently issued, said: "The patents which issued to Decordova in February, 1857, had the effect, by reason of the fact of his previously conveying the land described in them to Considerant, to invest Considerant, eo instanti at the moment of their issuance, with the legal title to the locus in quo." In the case of *Satterwhite v. Rosser*, above, Judge Stayton said: "In this class of cases, the patent, when issued, if in the name of the original grantee, inures to the benefit of the assignee. He acquires the legal title by estoppel." "This, we believe, is the true doctrine, unless by some means, as by a subsequent sale by the original grantee of the certificate to a stranger who has no notice of the first sale, or some like case, some right or equity in favor of some third party may possibly grow up." In the case of *Buren v. Railway Co.*, above, Judge Gaines said: "Our statutes give a party claiming land under a valid certificate, location, and survey the right to maintain an action at law for its recovery, by proof of such title. Rev. St. arts. 4745, 4746. This is a clear, legal right, to which the plea of stale demand cannot be interposed." In this case it is clear that the doctrine of stale demand cannot have any application to the defendants' claim under the George P. Humphreys certificate, and sale and location thereunder. If it should be found that such sale was properly made and confirmed.

2. Appellants' fourth assignment of error is as follows: "The court erred in that part of its charge which is as follows: 'If you believe from the evidence that the land here sued for was, at the time of the death of M. J. Humphreys, the homestead of said Humphreys and his wife, Christina Humphreys, and that said premises continued to be her homestead after the death of her said husband, and until she conveyed same to Bunyon King, by deed of January 31, 1882, then defendants' plea of ten years' limitation is not sustained, and you will find for the plaintiffs one-half of the land in controversy.'" There was sufficient evidence tending to show that the land in controversy was the homestead of Christina Humphreys, to allow that issue to go to the jury; but the section of the charge in which the jury are told, "Then defendants' plea of ten years' limitation is not sustained, and you will find for the plaintiffs one-half of the land in controversy," was clearly erroneous, for two reasons: (1) Because the court undertook to determine itself upon the question of limitation if it was Christina Humphreys' homestead, instead of allowing that issue to be determined by the jury; and (2) the instruction to find for plaintiffs one-half of the land in controversy was, in effect, taking away from the jury every other issue in the case except that arising upon the 10-years stat-

ute, and was virtually an instruction to the jury that, if they should find that the land was the homestead of Christina Humphreys, they must necessarily find for the plaintiffs one-half of the land in controversy.

3. Under appellants' seventh assignment of error, they complain that the court gave the following instruction, requested by the plaintiffs below, to wit: "The jury is here charged that if they believe from the evidence that, after the death of M. J. Humphreys, his widow assumed the sole and full possession of the 202 acres of land in controversy, and, at the time of assuming such control, she acknowledged the interest of plaintiffs, as heirs of her deceased husband, then no limitation would begin to run in her favor because of her entire control until she in some way gave notice to plaintiffs that their interest in the land was denied by her; and the burden of proof in such case would be upon the defendants pleading ten years limitation to show—First, that such widow, then in possession, claimed the entire title as against plaintiffs; and, second, to show that a knowledge was brought home to plaintiffs that she claimed the entire title as against them; and, in the absence of such, defendants could not recover on their plea of ten years' limitation." It was claimed by the appellees that M. J. Humphreys, as the heir of George P. Humphreys, deceased, acquired all the land; that at his death he left his widow, who was entitled to the use of the property as her homestead; and that appellees, as heirs, were entitled to a portion of it. They claimed that the possession of the land by the widow as her homestead was not adverse, and that neither she nor a tenant holding under her could set the statute of limitation in motion against them, without some open, notorious, hostile, act indicating an exclusive claim as against them. Thus far the idea presented in the charge would be proper, but, if it should be conceded from the wording of the charge that it was necessary to bring home to them direct notice of her adverse claim, it would be erroneous. As the case must be reversed and remanded upon other grounds, we would suggest that this charge should be so modified as to present these views plainly, without leaving it open to the interpretation that actual, direct notice is required. *Cryer v. Andrews*, 11 Tex. 181; *Alexander v. Kennedy*, 19 Tex. 496; *Gilkey v. Peeler*, 22 Tex. 668, 27 Tex. 355; *Church v. Waggoner*, 78 Tex. 203, 14 S. W. 581.

4. Under the first assignment of error, appellants claim that the court, in its charge, assumed that the plaintiffs were all of the heirs of George P. Humphreys and M. J. Humphreys, both deceased, when they claim that, in fact, Isaac T. Humphreys was a brother of George P. Humphreys, and that he left a widow at his death, and there is no proof as to her death, or who are her heirs, if any. It would be useless for us to consid-

er this question now, as the matters therein suggested may be overcome on another trial.

The other assignments of error presented by appellants are not believed to be such as will probably arise on another trial. For the errors indicated, the judgment is reversed, and the cause remanded.

LOVING et al. v. RAINEY et al.

(Court of Civil Appeals of Texas. May 30, 1896.)

WILL.—CONSTRUCTION.—CONTINGENT DEVISE.

By item 6 of a will, the revenues from a certain lot were bequeathed to an insane daughter of the testatrix during the continuance of her infirmity, and it was further provided that, "in case of her recovery," the title to the property and its revenues should immediately vest in such daughter, another daughter, and a granddaughter, as tenants in common. There were other provisions indicating that the testatrix regarded the lot as having been disposed of, and a provision that, in case of the death of the insane daughter without having recovered her reason, the property given her should not pass to her heirs, but vest in the other daughter and granddaughter. The insane daughter died, without having recovered her reason, before the testatrix; and, by a codicil, the devise to her, other than the lot mentioned in item 6, were otherwise disposed of. *Held*, that the lot named in item 6 passed to the daughter and granddaughter, and not under the residuary clause of the will.

Appeal from district court, Grayson county; D. A. Bliss, Judge.

Action by J. P. Loving, executor, and others, against Annie Rainey and others, for the construction of the will of Martha B. Moore. From the judgment, plaintiffs appeal. Affirmed.

Woods & Holt, for appellants. Head, Dillard & Muse, for appellees.

FINLEY, J. This is a suit brought in the district court of Grayson county, for the purpose of construing the will of Mrs. Martha B. Moore, and especially items 6 and 9 of said will. The case is presented as an agreed case, and the question for the court to decide is stated thus: "Did the trial court err in holding that said property passed to the said Annie Rainey and Martha Laura Steadman, and for their benefit, under the terms of said will, or does it go to the residuum devised in item 7 of the codicil, dated April 10, 1894, by reason of the fact that the said tal derangement mentioned in item 6 and Juliet Moore never recovered from the men-item 9?" The property, concerning the disposition of which it was necessary to construe the will, is a business house and lot situated in the city of Sherman, on the west side of South Travis street, and which, for convenience, will be referred to hereafter as "lot A." The court below construed the will to pass the property to Annie Rainey and Martha Laura Steadman.

The entire will, together with the codicils, is as follows:

"I, Martha B. Moore, of said county and state, being of sound mind and disposing memory, do make and declare the following to be my last will and testament, hereby revoking all former wills I may have executed, and in particular the will bearing date April 11th, 1887: Item 1. By the will of my husband, Benj. H. Moore, a certain portion of the property which we held and owned in common has been partitioned between our children and myself, and this will is intended to apply to my own property, or my interest in the property of myself and my deceased husband. In other words, this will is intended to include all my property, real, personal, and mixed. Charged with the payment of all my debts, if any, and decent and suitable burial expenses, I make the following disposition of my property, to wit: Item 2. To my son Edwin Moore I give and devise lots 48 and 58 in the M. B. Moore addition to the city of Sherman, Texas, the same fronting 100 feet each on Crockett street, and running east 200 feet. Should I sell said lots or either of them, my son shall have a valid claim against my estate for whatever sum or sums I may have received for said lot or lots; no interest, however, to be allowed. Item 3. I give and bequeath to my son Albert B. Moore lots 49 and 59 in said M. B. Moore addition to the city of Sherman, subject to the same provisions made in Item 2 hereof in the event I determine to sell said lots, or either of them; said provision to be in his favor instead of Edwin Moore's. I further give and devise to my son Albert B. Moore all my property situated on the east side of South Travis street, Sherman, Texas, immediately north of the Methodist Church in said city. If, however, at my death, my said son should owe me any money, he shall take the property devised to him in this item (No. 3) charged with the payment of such indebtedness. Item 4. In my present homestead on the west side of South Travis street, in the city of Sherman, I have 300 feet fronting east on said street, running back 200 feet; that is to say, three lots, of 100x200 feet each. These three lots I devise as follows: The south lot I give to my daughter Annie Rainey. The lot north and adjoining said lot I give to my daughter Juliet F. Moore. The next and last lot, being the one on which my residence stands, I give to my granddaughter Martha Laura Steadman. If, however, I should sell any or all of these lots, the one to whom said lot is here given shall have a valid claim against my estate for the amount I may receive therefor; no interest, however, being allowed. Item 5. My daughter Mary V. Keys is now dead. In her lifetime she received all the property, both from myself and her father, which I intended she should ever have and receive from either of said sources. I therefore make no devise or bequest in favor of the daughter of the said Mary V. Keys, deceased. If I ever do anything for my said granddaughter, it will be

by gift, and not by devise. Item 6. My daughter Juliet F. Moore is now, and has for some time been, a sufferer from mental derangement, and I am at present the guardian of her estate. So long as her said disability shall continue, it is my will that she have the revenues, profits, use, and full enjoyment of my business lot fronting on the west side of South Travis street, in the city of Sherman, said lot being X feet, and having on it a one-story brick business house. In case of her recovery and the full removal of said disability, it is my will that the title to said property, as well as the revenues thereof, shall immediately vest in the said Juliet F. Moore, Annie Rainey, and Martha Laura Steadman, as tenants in common in fee simple. Item 7. I give and bequeath unto my friend R. R. Dulin the sum of two hundred dollars (\$200.00), the same to be credited on any indebtedness the said R. R. Dulin may owe me at my death. Should at that time he be owing me nothing, then, in that event said bequest shall be paid in cash to my executor. Item 8. The remainder of my property, real, personal, or mixed, I give, devise, and bequeath to my daughters Annie Rainey and Juliet F. Moore, and to my granddaughter Martha Laura Steadman, in equal portions, share and share alike; the same being, of course, charged with the payment of all my debts, including claims against my estate in behalf of any devisees for property here willed them that I may elect to sell during my lifetime. Item 9. Notwithstanding the fact that the language used in this will is comprehensive and broad enough to pass unto my daughter Juliet F. Moore the fee-simple title to such of the property as I have left her, such is not and was not my intention. All property left her, except the property described in item 6, may be sold by her guardian under proper orders from the probate court, just the same as if she had fee-simple title, and any deed so executed will convey perfect title; but, if the said Juliet F. Moore should die while still laboring under the disability already referred to, the property here devised and bequeathed unto the said Juliet F. Moore shall not pass to her heirs at law, but shall vest in Annie Rainey and Martha Laura Steadman, share and share alike. So soon as said disability shall cease, and her reason be fully restored, the property devised and bequeathed to said Juliet (subject to limitations contained in item 6) shall be hers absolutely, in fee simple. Item 10. I appoint my friend Jesse P. Loving executor of this, my will, and direct him to make partition and distribution of the property herein mentioned, at as light expense as practicable. I do not require him to give bond, and do not wish any court to have anything to do with my estate further than probating this will, and approving the inventory and appraisement of my property. My executor is to have reasonable compensation for his services. He is requested to spe-

cially look after Juliet's interests until a new guardian shall have been appointed for her, as my successor. I wish my executor, after he is ready to close up the business, to make a statement of all the property that has come into his hands, and the source, all debts collected, all sums paid out, and on what account. I wish him to swear to said statement, and file it in office of county clerk of Grayson county, so that it may be inspected by any party interested."

The first codicil is as follows: "As a codicil to the foregoing will, I desire to make the following additional provisions, to wit: While in no manner desiring to limit or restrict the power and right of my granddaughter Mattie Laura Steadman to dispose of the property devised to her, providing she disposes of it during her lifetime, I, nevertheless, will and direct that, if she dies without leaving heirs of her body, all property she may have received under and by virtue of my will shall immediately vest in my daughters Annie Rainey and Juliet F. Moore, and in my son A. B. Moore, in equal portions, share and share alike. Should my daughter Juliet F. Moore not then be living, then the said Annie Rainey and A. B. Moore shall take the whole of said property; the children of the said Annie Rainey and A. B. Moore to take the place of their respective parents in case of their death. Signed and executed on this February 18th, 1890."

The second codicil is as follows: "As a codicil to my last will and testament, dated 14th day of November, 1889, I make the following changes and additions to said instrument: Item 1. I, Martha B. Moore, direct my executor to erect a good and substantial family monument on the lot in the graveyard in Sherman, Texas, where the body of my late husband is buried, as a substitute for the old stone now standing on said lot, providing I do not have a new stone placed there before my death. Item 2. To the children of my son A. B. Moore, he being dead, I give and devise lots Nos. (49) forty-nine and (59) fifty-nine in the M. B. Moore addition to the city of Sherman, Texas; and I give and devise to the said children all of my property located on the east side of South Travis street, in the city of Sherman, and which is immediately adjoining the Methodist Church, and which is located south of Jones street. Should I sell said lots Nos. 49 and 59, or either of them, then my executor is hereby directed to pay to R. R. Dulin, as trustee, for the use and benefit of said children, a sum of money equal to the amount I may have received for said lots; no interest, however, to be paid on such sum of money. Item 3. The two lots mentioned in item 4 of my will, dated November 14th, 1889, which is situated south of the lot devised in said item to Martha Laura Steadman, said two lots being a part of my homestead in Sherman, Texas, and fronting on South Travis

street, are to be sold by my executor; and one-half of the proceeds of such sale is to be paid to R. R. Dulin, as trustee, for the children of A. B. Moore, and the other half to be paid to H. N. Tuck, as trustee, for the children of my daughter, Annie Rainey. Item 4th. The notes I hold, signed by my son A. B. Moore, I hereby direct my executor to cancel, and not to enforce against his estate. The provision in item 5 of my will, dated November 14th, 1889, regarding said indebtedness, is hereby revoked. Item 5th. In the event I shall sell either or both of the lots devised to my son Edwin Moore in item 2 of my said will, then I direct my executor to pay my said son Edwin Moore an amount of money equal to the amount I received for said last-named lot or lots; no interest, however, to be paid on said amount. Item 6th. In the event Martha Laura Steadman, my granddaughter, should die, leaving no heirs of her body, then I give, devise, and bequeath, and devise all the property given, devised, and bequeathed by my said will to her, to be equally divided between all my children; that is, the property bequeathed and devised by my last will and testament to Martha Laura Steadman is, in event of her death without heirs of her body, to be divided equally between my children. Those children who are dead or who may die are to be represented in such division by their children, and the children of my dead children are to have such part as their parents would have been entitled to had such deceased parent not have died. Seventh item. By way of changing item eight of my said will. I give, devise, and bequeath the remainder of my property, both real, personal, and mixed, not otherwise specially disposed of by me in my said will and its codicils, to Martha Laura Steadman, Maud Sawyer, the daughter of my daughter Mary V. Keys, and to the children of A. B. Moore, and the children of my daughter Annie Rainey. The said Maud Sawyer is to have a one-third part of the said remainder; and, after her part is deducted, the balance of said remainder is to be equally divided between the said Martha Laura Steadman, the children of A. B. Moore, and the children of said Annie Rainey, each one of these persons is to have an equal part. Item 8th. I hereby appoint H. N. Tuck trustee, to receive and control the property bequeathed and devised to the children of the said Annie Rainey by me. Item 9th. I hereby appoint R. R. Dulin, of Sherman, Texas, trustee, to receive and control the property bequeathed and devised to the children of A. B. Moore and Martha Laura Steadman by me. Item 10th. I hereby direct and empower the said trustees to keep possession and control of the property bequeathed and devised to their said beneficiaries during the lives of such beneficiaries. Said trustees are not authorized to dispose of any of the body of said property, but are expressly prohibited from so doing, except

for the purpose of reinvesting, which last they may do at their discretion. Said trustees are authorized, empowered, and directed to expend the rents, interests, and profits arising from said property in furnishing the said beneficiaries with necessaries and such other things as may be suitable for their respective beneficiaries, according to their station in life. Item 11th. I hereby appoint my friend Jesse P. Loving the executor of my last will and testament, and the provisions contained in item 10 of my will are to remain in force and effect. Item 12th. The following words are inserted before this instrument was signed by me: 'during the lives of such beneficiaries,' in line 4, item 10, page 3. The following were erased before signing: 'Annie Rainey by me,' in line 3, item 9, page 3; 'persons,' in item 10, page 3, line 3. Item 13th. The provisions in item 8 of my said will in regard to the property mentioned in that item, and in item 7 of the codicil, being chargeable with all my debts, including claims against my estate, in behalf of any legatees or devisees, for property in my last will and testament willed to them, which I may elect to sell during my life, is to remain in full force. 14th. In event the trustees herein appointed shall die before said children, then I desire the court of the proper county to appoint trustees for said property. In testimony whereof, I have hereunto set my hand, this, the 10th, day of April, 1894."

Appellees' counsel, in their brief, in support of the judgment of the court below, present the following analysis and exposition of the will, and particularly items 6 and 9, in dispute:

"Item 6 is as follows: 'My daughter Juliet F. Moore is now, and has for some time been, a sufferer from mental derangement, and I am at present the guardian of her estate. So long as her said disability shall continue, it is my will that she have the revenues, profits, use, and full enjoyment of my business lot fronting on the west side of South Travis street, in the city of Sherman, said lot being * * * feet, and having on it a one-story brick business house. In case of her recovery and the full removal of said disabilities, it is my will that the title to said property, as well as the revenue thereof, shall immediately vest in the said Juliet F. Moore, Annie Rainey, and Martha Laura Steadman, as tenants in common, in fee simple.' In this clause the word 'property' is evidently used as equivalent to the word 'lot,' and means the lot in controversy, which we have designated as 'lot A.' Did the clause stand alone, there might be a considerable doubt as to whether, in the event of the death of Juliet Moore without recovering her sanity, the title to the lot would pass to Annie Rainey and Mattie Steadman; but we are inclined to the opinion that, even if this item of the will stood alone, it would so pass. The only reason that would give doubt is that the provision of the will is that, in case

of Juliet's recovery and the full removal of the disability, the title to the property shall vest in her, Annie Rainey, and Martha Laura Steadman; and it may plausibly be urged that the recovery from mental derangement of Juliet is a condition precedent to the vesting of the title in Annie Rainey and Martha Laura Steadman, and that, such condition never having come to pass, no title vested. We must remember, however, that, even though there is an apparent condition precedent, yet, if it can be gathered from the will that it was not in truth intended that such condition must happen to bring about the vesting of the title, the title will vest, notwithstanding it has been made clear that the condition must fail. Mr. Redfield says: 'Where the words are in the form of a condition precedent, but the intentions of a testator, as collected from every part of a will, clearly indicated a different purpose, the latter will prevail.' 2 Redf. Wills, p. 290, § 36. Construing this clause alone, it would seem that there was a scheme on the part of the testatrix by which it was intended that the revenues and profits from lot A should go to Juliet Moore so long as she remained in her unfortunate condition, but that the ultimate purpose of the testatrix was that the lot should be for the benefit of Juliet, Annie, and Martha, that the fee-simple title should vest in the three. The real meaning of the item seems to be this: The title to the property shall be in Juliet, Annie, and Martha; but during the continuance of Juliet's disabilities she shall receive the entire revenue, but, just as soon as those disabilities shall cease, not only shall the title vest in the three, but the revenues as well shall be divided among the three. This, we say, would seem to be a just and reasonable construction of this item did it stand alone. When it is read in the light of other clauses of the will, not yet considering those clauses as themselves being sufficient to pass title to the property here spoken of, it is clear to our minds that the meaning we have given is the true one. Before construing other subsequent clauses of the will, we come to notice item 8.

"Item 8 is as follows: 'The remainder of my property, real, personal, or mixed, I give, devise, and bequeath to my daughters Annie Rainey and Juliet F. Moore, and to my granddaughter Martha Laura Steadman, in equal portions, share and share alike; the same being, of course, charged with the payment of all my debts, including claims against my estate, in behalf of any devisees, for property here willed them that I may elect to sell during my lifetime.' In providing for the disposition of this residuum, what property is to be included? The expression is, 'the remainder of my property.' Disposition in a preceding part of the will has been made of a considerable amount of property. In item 6, lot A is referred to, and the interest in the revenue from that passed to Juliet Moore;

and, even according to the contention of appellants, the fee-simple title to the lot passes in a certain event. We take it, then, that, when item 7 speaks of 'the remainder of my property,' it means property other than that surely devised above, and other than lot A. The expression is equivalent to this: 'All the property owned by me other than that which I have named above shall pass by this clause.' We take it that item 8 did not, in any event, intend to include lot A, and did not include it. Item 7 of the second codicil is inserted in place of item 8 of the original will; and, if our construction of item 8 is correct, item 7 of the codicil does not dispose of lot A; and we have this lot specially spoken of, and provision made concerning it in a certain event, and yet falling back into the residuum, not because there is anything affirmatively appearing in the will to show that it was in any event expected by the testatrix that it should become a part of the residuum, but only because of its not vesting by reason of the failure of a condition precedent. In other words, the lot has been specially spoken of by the testatrix. A condition has been declared upon the happening of which the title should vest absolutely, and a life estate in the rents and profits, at least, has been created; but yet the testatrix has made no provision for the disposition of the 'remainder over,' if we might so call it, in the event of the nonhappening of a condition precedent, but the ultimate title is left to seek its destiny through the general provisions of the residuary clause, shown not to have contemplated the lot as at any time returning to the residuum of the estate. Such construction is given to a will only as a last resort. Prior to the time of the making of the second codicil, A. B. Moore and also Juliet F. Moore had died. The testatrix replaces item 8 of the original will by item 7 of the second codicil. It will be noted that item 7 of the codicil specially provides that it is for the purpose of changing item 8 of the original will. Item 8, as we have seen, did not embrace lot A; and it is a fair presumption that item 7, which on its face declares that it was to take the place of item 8, did not intend to embrace it. Indeed, he who contends that lot A was intended to be embraced in item 7 should be able to clearly show this. Property other than lot A, which was specially devised to Juliet Moore, was given her by item 4 of the original will. In the second codicil, a specific disposition is made of this property, but nothing is said with regard to lot A. It is nowhere spoken of or referred to. Would it not, then, be fair to conclude that the testatrix had in mind that this lot, in view of Juliet's death, had passed to Annie Rainey and Martha Steadman? Such seems to us to be the reasonable and just construction.

"Thus far we have construed item 6 according to what it expresses on its face, and read in the light of the remainder of the will other than item 9 of the original will. When

we come to read item 9, it seems to us that whatever doubt might otherwise exist is entirely removed, and that it becomes clear that lot A passes to Martha Laura Steadman and Annie Rainey. That item is as follows: 'Notwithstanding the fact that the language used in this will is comprehensive and broad enough to pass unto my daughter Juliet F. Moore the fee-simple title to such of the property as I have left her, such is not and was not my intention. All property left her, except the property described in item 6, may be sold by her guardian under proper orders from the probate court, just the same as if she had fee-simple titles, and any deed so executed will convey perfect title; but if the said Juliet F. Moore should die while still laboring under the disability already referred to, the property here devised and bequeathed unto the said Juliet F. Moore shall not pass to her heirs at law, but shall vest in Annie Rainey and Martha Laura Steadman, share and share alike. So soon as said disability shall cease, and her reason be fully restored, the property devised and bequeathed to said Juliet (subject to limitations contained in item 6) shall be hers absolutely, in fee simple.' For two reasons, this item of the will must pass title to the property to Annie Rainey and Mattie Steadman: First, because the item speaks of the property as left to Juliet Moore, and indicates the intention of the testatrix as to how it shall pass; and, secondly, because a construction of the item itself shows that it is in itself sufficient to pass the property, as contended for by us. The Encyclopedia of Law uses the following language: 'But if a testator unequivocally refers to a disposition as made in a will itself, which, in fact, he has not made, the erroneous recital is taken as conclusive evidence of an intent to give by the will, and has the effect of an actual gift, provided it be clear that there is nothing in the will to which it can refer.' 29 Am. & Eng. Enc. Law, p. 383, and authorities cited in note 3. Item 9, referring to Juliet F. Moore, uses this language: 'All property left her, except the property described in item 6, may be sold by her guardian.' What, then, is shown? That it was the understanding of the testatrix that she left Juliet Moore certain property in item 6. But the only property named in item 6 was lot A and the revenues therefrom. It surely cannot be contended that, when item 9 refers to the property left Juliet in item 6, it refers only to the revenues of lot A, because this was not what the guardian could not sell, but it was her interest in lot A itself. We cannot escape the conclusion that, in using this expression in item 9, the testatrix meant to show what was her intention in item 6,—meant to declare what she had done in that item. Her declaration was that, by item 6, she had left Juliet certain property. That property was some interest in lot A. Looking to item 6, and construing it in regard to this expression, we find that this lot was

intended by that item to be left equally to Juliet, Annie, and Martha Laura, but that, so long as Juliet should live and be insane, Annie and Martha Laura were to receive nothing from the revenues of the property. But, fortunately, we are not left to arrive at this conclusion from reliance upon the principle announced in the authority above quoted, nor to place the estate in Mattie and Annie by implication. A full reading of item 9 places the estate in them, not by implication, but, as we think, directly in clear and unmistakable terms. As we have seen, this item refers to lot A, or, at least, an interest in it, as left her, and is sufficient to vest such interest in her. The item then goes further than item 6, and provides for two contingencies: First, for the death of Juliet while laboring under the disability of insanity; second, for her restoration to reason. The provision is, if Juliet should die while still laboring under the disabilities referred to, the property here devised and bequeathed unto her shall not pass to her heirs at law, but shall vest in Annie Rainey and Martha Laura Steadman, share and share alike. This provision is supplementary to item 6. Item 6 contemplated a restoration to reason; and a vesting in the three of the title of lot A, item 9, as here shown, contemplates the death while laboring under insanity, and intends, not only that Annie and Martha Laura shall receive the two-thirds of the lot they would get if Juliet were restored to reason, but shall get Juliet's interest as well. The scheme was that this lot should be for the benefit of Annie, Martha Laura, and Juliet. If Juliet was restored to reason, each of them should receive a one-third interest. If Juliet died without being restored to reason, then her interest should not pass to the heirs at law, but the lot should go to Annie and Martha Laura in equal interests. This is made yet clearer by reading the remaining paragraph of this item: 'So soon as said disability shall cease, and her reason be fully restored, the property devised and bequeathed to said Juliet (subject to limitations contained in item 6) shall be hers absolutely, in fee simple.' What were the limitations contained in item 6? They were not that Juliet should receive the revenues during her insanity, because this clause speaks of her restoration to sanity when that provision will no longer be in effect. The limitation was this: By item 6 it was provided that, upon Juliet's restoration to sanity, the property should go to her, Annie Rainey, and Martha Laura Steadman, in equal portions. In item 6 nothing was spoken of except lot A. By item 4, Juliet was given other property. Item 9, in this last clause, provides that all property devised and bequeathed her, including that in item 6, shall go to Juliet; but the word 'property,' in item 6, as we have seen, had been used as equivalent to 'lot A,' and the limitation of item 6, which is referred to in item 9, is this: That the lot should go to Juliet, save and

except that a two-thirds interest in it should go in equal portions to Annie Rainey and Martha Laura Steadman. The clause is equivalent to the testatrix's saying: 'I have provided in item 6 that lot A shall go to Juliet under certain limitations. Those limitations are that Annie Rainey and Martha Laura Steadman shall take an equal interest in it with her.'"

This construction of the will seems to us to be clear and sound, and demonstrates the correctness of the judgment of the court below. We adopt it as expressive of our views, and affirm the judgment of the lower court. Affirmed.

FARGO et al. v. RIDER et al.

(Court of Civil Appeals of Texas. May 9, 1896.)

SALE—FRAUDULENT REPRESENTATIONS—RESCISSION—ACTION AGAINST PURCHASER AND ASSIGNEE.

A petition alleged the sale by plaintiff of goods to defendant R., a retail merchant, on 60 days' time; that at the time of the sale R. made a statement showing his assets to be more than six times his liabilities, and represented to plaintiff that it was a true statement of his affairs, but that at that time R. was insolvent, to his knowledge, and made the statement to obtain the goods on credit; that plaintiff, relying thereon, shipped the goods; that no part of the purchase price was ever paid; that 30 days after the sale, and 10 days after the shipment, R. made an assignment to defendant S., and turned the goods over to him; that immediately thereafter plaintiff, learning that the statement was fraudulent, and that at the time it was made R. was insolvent, and did not expect to pay for the goods, and had no reasonable expectation or belief of being able to pay, revoked the sale, while the goods were still in the possession of S., and informed him of the circumstances, and that the goods belonged to plaintiff, and demanded the same; that S. refused to deliver them, and subsequently sold them, and has in his possession the money obtained therefor; that S. is insolvent, and is about to dispose of the money with intent to defraud plaintiff. Held, that it stated a cause of action against both defendants, entitling plaintiff to the relief asked; that S. be enjoined from disposing of the money; that he be required to deposit it in court; and that plaintiff have judgment against both defendants.

Appeal from district court, Upshur county; Felix J. McCord, Judge.

Action by C. H. Fargo & Co. against Thomas Rider and E. H. Smith. From a judgment dissolving a temporary injunction, and dismissing the action as to defendant Smith, plaintiffs appeal. Reversed.

F. S. Eberhart, for appellants. Buile & Simpson, for appellees.

RAINEY, J. Appellants brought this suit against appellees; the petition alleging, in substance, that on November 23, 1894, and on December 16, 1894, plaintiffs, at the special instance and request of the defendant Thomas Rider, who was at the times stated a retail merchant, shipped and forwarded to him certain goods, wares, and merchandise, fully describing the same by exhibit to said peti-

tion, the value of said goods amounting in the aggregate to the sum of \$535.10; that said Rider promised to pay for said goods at the expiration of 60 days from the respective dates sold, thereafter; that no part of the purchase price for said goods has ever been paid to plaintiffs; that, at the time said goods were purchased, Rider made to plaintiffs a statement of his assets and liabilities, which showed that the assets were about \$8,000, and his liabilities only about \$1,200, and which he represented to plaintiffs to be a true statement of his affairs; that at said time said Rider was insolvent in fact, which was known to him (said Rider), and that said statement so made was false and fraudulent, and made for the purpose of obtaining said goods on a credit; that said plaintiffs relying upon said statement, and believing said Rider to be solvent, and not knowing of his insolvency, and his fraudulent intent to cheat, wrong, and defraud plaintiffs of the goods sued for, plaintiffs shipped said goods to said Rider; that subsequent to that time, to wit, December 27, 1894, said Rider made an assignment to E. H. Smith, his co-defendant herein, and delivered and turned over to said Smith the goods, wares, and merchandise sued for, and said Smith immediately took possession thereof; that on December 28, 1894, plaintiffs learned that said statement theretofore made by said Rider was fraudulent at the time it was made, and that said Rider was then insolvent and did not expect to pay for said goods, and had no reasonable expectation or belief of being able to pay for same when he induced plaintiffs to ship same to him, and plaintiffs, when they learned that such statement was false, then and there revoked said sale on said day, while the goods were still in the hands of the defendant Smith, who was informed that said goods belonged to plaintiffs, and of the circumstances under which said Rider, his co-defendant, obtained possession of the same, and plaintiffs demanded of said Smith that he turn over said goods to them; that said Smith refused to deliver said goods to plaintiffs, and subsequent thereto said Smith sold said goods for money, and that he was at that time holding said money, and had the same in his possession; that said Smith was insolvent, without any visible means out of which plaintiffs could make their money, or any judgment they might obtain against him; that said Smith was about to dispose of said money, the proceeds of the sale of said goods, with intent to defraud plaintiffs of said goods and the value thereof, and would do so unless restrained, and plaintiffs would be without any remedy whatever. Plaintiffs prayed for citation; that the defendant Smith be enjoined from disposing of the proceeds of said property, and that he be required to deposit the same with the clerk of the court, or that he hold said money, as to the court might seem best and proper; that upon final trial plaintiffs have judgment

against both of said defendants; and for general and equitable relief, etc. A temporary writ of injunction was granted as prayed for, enjoining and restraining defendants, Rider and Smith, from disposing of the proceeds of said property; and said Smith was ordered to turn over the proceeds of said sale to the clerk of said district court, subject to the order of the court, or so much thereof as would be sufficient to pay plaintiffs' claim. The defendants filed a motion to dissolve the injunction, upon the following grounds: "(1) Because the said bill in equity shows no equitable or legal grounds for said injunction or relief sought. (2) Because said bill does not show that plaintiffs have any lien or right in or to the money in the hands of the assignee E. H. Smith. (3) Because the bill does not show that plaintiffs are accepting creditors, or attaching as the lien creditors under any assignment to said Smith, and therefore have no legal or equitable right to ask any relief sought in this case against him. (4) Because this court cannot take charge of the funds of said assignee, by injunction or otherwise, except at the instance and suit of an accepting creditor under said assignment, or a lien creditor of assignor. (5) Because plaintiffs do not show that the specific money asked to be taken charge of by the court is the specific money derived from the sale of property charged to have been converted by defendants. (6) Because plaintiffs seek to hold defendant Smith in an individual capacity, when he, as charged, did the things complained of in a fiduciary capacity, and can only be held as such." Defendants also answered by filing general demurrer and special exceptions as follows: "(1) And, specially excepting to plaintiffs' said petition, say that part of same which attempts to charge the statement made by defendant Rider as a basis of credit is wholly insufficient in that it does not particularize said statement, but is general and vague. (2) And, further specially excepting, say that petition is wholly insufficient in that it does not show what part of said statement is false, and what part was relied on by plaintiffs. (3) And, further specially excepting, say that petition is wholly insufficient in that part of same which attempts to charge that defendant Smith is assignee, in that it does not charge what kind of assignee, or what kind of an instrument said Smith is assignee under. (4) And, further specially excepting to said petition, say the same is wholly insufficient in that it does not show any lien or right to the money in the hands of the assignee. (5) And, further specially excepting to said petition, say the same is wholly insufficient in law in that part of same which attempts to charge fraud upon defendant Smith, assignee. (6) And, further specially excepting to said petition, say the same is wholly insufficient in that it does not show who are beneficiaries under said assignment, nor does it make said beneficiaries parties to this suit. (7) And, further special-

ly excepting to said petition, say the same is insufficient in that it does not charge specifically that the statement was fraudulently made to plaintiffs with intent to defraud plaintiffs, whereof they pray judgment of the court. (8) And, further specially excepting to said petition, say the same improperly joins these defendants, whereof they pray judgment of the court." Plaintiffs then filed a supplemental petition setting up more fully the liability of said Smith for the conversion of said goods, and further prayed that, in the event the injunction was dissolved, the court appoint a receiver to take charge of said funds, and for general relief. The motion to dissolve the injunction and the exceptions of defendants were all sustained as to defendant Smith, and, plaintiffs failing to amend, judgment was rendered dismissing the suit as to said Smith, and judgment was rendered against Rider for the amount of the claim. On this state of the record, appellants ask a reversal of the judgment of the court below.

We are of the opinion that the petition of plaintiffs stated a good cause of action against both Rider and Smith, and the court erred in sustaining the demurrers thereto. *Rohrbough v. Leopold*, 68 Tex. 254, 4 S. W. 460; *Schram v. Strouse* (Tex. Civ. App.) 28 S. W. 263; *Morrison v. Adoue*, 76 Tex. 256, 13 S. W. 166; *Harrison v. Hawley* (Tex. Civ. App.) 26 S. W. 765; *Johnson v. Stratton*, 6 Tex. Civ. App. 431, 25 S. W. 683.

The court also erred in dissolving the injunction. Smith holding the funds as trustee, the court had the right to take charge of it, and administer it according to the equities of the case. If, on the trial, the proof should show the facts to be as alleged, plaintiffs would be entitled to judgment against both Rider and Smith, and to have the funds in the hands of the district court clerk applied to the payment of such judgment. The proceeds of the sale of said goods being in the possession of the officers of court, the appointment of a receiver would be of no practical benefit, as the court could administer the funds without the aid of a receiver. The judgment of the court below is reversed, and the cause remanded.

PABST BREWING CO. v. EMERSON et al.
(Court of Civil Appeals of Texas. May 16, 1896.)

PRINCIPAL AND AGENT — AUTHORITY OF AGENT —
INSTRUCTION — PROVINCE OF JURY.

1. In an action on a lease, where the defendant, a corporation, alleged that the lease was made by an agent without authority, an instruction that if defendant's general agent, superior to the agent who made the lease, ratified it, it would be a ratification by the company, was erroneous in view of the testimony of one of the officers of the company that such general agent had no authority to ratify a lease.

2. The secretary of the corporation having testified that he had no personal knowledge of the transaction, it was for the jury to determine what weight should be given to his testimony to the effect that no authority had been given to the agent to ratify the lease.

Appeal from Dallas county court; T. F. Nash, Judge.

Action by S. P. Emerson against the Pabst Brewing Company and another. There was judgment for plaintiff, and defendant brewing company appeals. Reversed.

Watts, Aldredge & Eckford, for appellant.
S. P. Morris, for appellees.

RAINEY, J. This suit was instituted by S. P. Emerson, appellee, against L. F. Bohny and the Pabst Brewing Company, to recover upon a lease contract of certain premises, made between appellee Emerson and L. F. Bohny. The petition charged that said contract was made by Bohny, as agent of said Pabst Brewing Company. The Brewing company denied the authority of L. F. Bohny to make for it such a contract, and denied liability thereon under oath. It seems from the testimony that one Joseph Furst was an agent of the Pabst Brewing Company, and had an office in Dallas, Tex.; and some of the witnesses testified that he was the general agent, and had general charge of the company's business in Texas. Said Furst employed said Bohny to represent said brewing company, but under the written contract made between them said Bohny was not authorized to lease the premises for said company. The premises were occupied a short while by Bohny, and Furst, as agent of said brewing company, paid two months' rent on said contract. One Hemming testified, by deposition, that he lived at Milwaukee, Wis., where the head office of the Pabst Brewing Company is situated, and was secretary and general manager of said company at that time; that said Bohny had no authority to make such lease contract for said company; that said Joseph Furst was a traveler for the Pabst Brewing Company, and resided in Dallas, Tex., at that time, but had no authority to make such lease contract as the one sued on, or any lease whatever; that said Pabst Brewing Company knew nothing of said lease, and had not ratified the same; that he did not have personal knowledge of all the contracts of the company, but he had charge of the lease department of said company, and such lease as the one sued on, if made by an agent, would had to have been approved by him, and that no such approval had ever been made. There are several errors assigned, but only one we think tenable. The appellant complains in its seventh assignment of error of that portion of the court's charge as follows: "You are further told that the Pabst Brewing Company, being a corporation, can do business only through its agents; and if you find and believe from the evidence that said company had an agent

in Dallas superior to Bohny, who knew the terms of the lease, and ratified it, it would be the ratification of the company." One of the objections urged to this charge is that it assumes that the agent of the company, superior to Bohny, knew of the lease, and ratified it, and that by such ratification the company would be liable. The court's charge was erroneous in this particular. It does assume that, if Furst ratified the contract, such ratification would be the ratification of the company itself. We do not think the court was warranted in this assumption, for the reason that the authority of Furst to bind the company by such ratification was disputed; Hemming testifying that Furst did not possess such authority. This was sufficient to raise the question of Furst's authority to bind the company, and was an issue that should have been submitted to the jury. The appellees insist that the testimony of Hemming is not worthy of credit, because he shows by his testimony that other officers of the company may have authorized the lease and bound the company, and that he did not have any personal knowledge of the transaction. This objection to his testimony goes to its weight and credibility, and whether or not his testimony was to be believed was a question for the jury, and not for the court. For the error as indicated, the judgment is reversed, and the cause remanded.

COOK v. ARNOLD.

(Court of Civil Appeals of Texas. May 23, 1896.)

APPEAL — ASSIGNMENTS OF ERROR — JUDGMENT — WHEN SUPPORTED BY PLEADING — CONTRACTS — TIME OF PERFORMANCE.

1. An assignment of error which seeks to revise the action of the court in overruling a general demurrer and six special exceptions, on different grounds, is too general.

2. In an action by A. on a contract by defendant to pay plaintiff \$300 for land when half of it was sold by defendant or any one else, until which time plaintiff was to retain possession, it appeared that a third person sued plaintiff and defendant for the land, and the parties agreed that the plaintiff therein should have half of it, and judgment was rendered accordingly. A.'s petition alleged that, after such judgment, she was compelled to pay \$30 a year rent for the land lost, and asked that she be allowed to recover 6 per cent. interest on the contract price from the date of such judgment to the time of suit, in lieu of the rents which she had been compelled to pay. *Held*, that a judgment in favor of plaintiff for the rents she had paid was not supported by the pleading.

3. A vendee of land agreed to pay the vendor \$300 when the west half of it "is sold by me or any one else." *Held*, that the vendee was bound to sell the land within a reasonable time, and, on failure to do so, the vendor could maintain an action for the money.

Appeal from district court, Grayson county; Don. A. Bliss, Judge.

Action by P. J. Arnold against J. M. Cook. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Arthur G. Moseley, for appellant. Wolfe & Hare, for appellee.

LIGHTFOOT, C. J. The statement of the case by appellant is substantially correct, and is adopted, as follows: The plaintiff, P. J. Arnold, filed her first amended original petition on November 2, 1894, in the district court of Grayson county, Tex., complaining of the defendant, J. M. Cook, and alleged: That on February 13, 1878, she was in peaceable possession and claiming title to 160 acres of land, described in the petition, which was likewise claimed by the defendant, Cook; and, to settle the dispute, she sold the land to defendant, who, in consideration thereof, executed his note to her for \$300, as follows: "Denison, Texas, Feb. 13th, 1878. I hereby agree and promise to pay Mrs. P. J. Arnold or bearer the sum of three hundred dollars when the west half of the Thomas Ward survey, in Grayson county, Texas, is sold by me or any one else; and she is to give possession of same; and she is to have the rent until the same is sold, for interest on said note, for value received. J. M. Cook." That she gave him a special warranty deed, warranting the title against the claims of herself, her heirs, etc. That the whole of the Thomas Ward survey contained 320 acres, and that the west half contained 160 acres. She remained in possession of the 160 acres until 1882, when a suit was instituted against her and defendant, Cook, to recover the land. She made no defense to the suit, but defendant, Cook, employed counsel, and managed and controlled the whole case, and made an agreement by which the west half of the said 160 acres was surrendered to the plaintiff in said suit, and judgment was entered accordingly, whereby she had been deprived of the use and possession of 80 acres of said land from 1882 to 1894, and had been compelled to pay rent thereon, and had paid each year from 1882 to 1894 the sum of \$30, aggregating the sum of \$360. That thereby said note had become due and payable, and that, in equity, defendant should be required to pay a reasonable interest on said note, which would be 6 per cent. from 1882 until the time of suit. That she had made frequent demands upon the defendant for the payment of the obligation, and for him to dispose of the remainder of the lands, but that he had refused to do so. That 16 years had elapsed, which was more than a reasonable time in which to sell the land. That she was ready and willing to surrender possession of the land to defendant upon payment of the note, or that she was ready and willing to surrender the note for cancellation upon a decree of court canceling her deed to Cook for the land; and praying for judgment for the amount of the note, for a foreclosure of her vendor's lien, and, failing in this, that she have judgment canceling the deed, and vesting title to the land in her, for costs of suit, and general relief. Defendant filed his sec-

and amended original answer on February 20, 1895, wherein he presented: (1) A general demurrer to the petition, which was overruled, and he excepted. (2) He specially excepted because there was a misjoinder of causes of action,—one on a note, and one on damages for the agreement for judgment, which was overruled, and defendant excepted. (3) He specially excepted to the prayer for interest on the note, because it was sought to vary the terms of the instrument, which was overruled by the court, and he excepted. (4) He specially excepted to the allegation that plaintiff had been obliged to pay rent, because it did not appear why she had to pay rent, or to whom. (5) He specially excepted to the allegation with reference to the maturity of the note, because it appeared from the petition that the note had not matured, nor had any right of action accrued thereon, either at the time of the filing of the suit or amendment, which exception was overruled, and he excepted. (6) Defendant answered by general denial and other pleas not necessary to mention. On the trial, the plaintiff introduced the following evidence: (1) The note set out in the petition; (2) the judgment in the case of *E. Frenet v. J. M. Cook et al.*, for one-half of the land described in the petition, which was rendered upon the following agreement: "*E. Frenet v. J. M. Cook et al.* In the above-entitled cause, it is hereby agreed that the plaintiff is entitled to recover of defendants her undivided interest in the land claimed in the original petition, and that such interest be fully satisfied by the following land, to wit: Taken out of the northwest part of the Thos. Ward survey, etc., containing 80 acres of land, more or less, and that the balance of said Thos. Ward survey be vested in the defendants. It is also agreed that J. M. Cook pay one-half of the costs, and this agreement be entered for judgment in the case. Woods, Wilkins & Cunningham, Attorneys for Plaintiffs. Hare & Head, Attorneys for Defendants." Then followed judgment in that case in accordance with the agreement. Upon trial of this cause before a jury, there were a verdict and judgment for plaintiff for \$288, rent of the land, and \$300, the amount of the agreement.

1. The first assignment of error seeks to revise the action of the court in overruling the general demurrer and six special exceptions, upon different grounds. This is too general, under the rules, and, under the repeated decisions of the supreme court, cannot be considered.

2. By proper assignment of error, appellant attacks that part of the judgment which gives to appellee \$288 rents upon one-half of the 160 acres of land which was claimed to have been lost in the suit of *E. Frenet v. J. M. Cook et al.* From the undisputed testimony, it appears that after the sale by appellee to appellant, Cook, of the 160 acres of land, suit was brought by *E. Frenet* against

both of them, to recover the property. In that case, appellee, *Mrs. Arnold*, was duly served with process; and an agreement was entered in the cause for a decree, signed by the attorneys for the respective parties (*Hare & Head* representing the defendants), whereby the plaintiff, *Frenet*, on March 17, 1882, recovered of the defendants one-half of the land. It further appears from the pleading of appellee, as well as from her testimony, that, after the above decree was rendered, she gave up to *Frenet* the one-half of the land recovered; and it does not appear that the judgment has ever been appealed from by her, or otherwise called in question. In her pleading, appellee seeks to evade the force of the judgment, by alleging that she relied on *Cook* to make a defense, and did not know of the agreed decree, and asks that she be allowed to recover 6 per cent. interest on the \$300 note from 1882 to the time of suit, in lieu of the rents which she has been compelled to pay out for the 80 acres of land recovered by *Frenet*. Under these allegations, the judgment is rendered in her favor for \$288, as rents upon the half of the land lost in the suit. This was error. The testimony offered, the charge of the court to the jury, and the judgment rendered for rents, were not in conformity with the allegations in the petition. It was not questioned that appellee was allowed the use of the half of the land not recovered by *Frenet*, and the amended petition of plaintiff prayed for interest at 6 per cent. on the note, and not for rents on the lands lost. It is true that the amended petition alleged that she had been compelled to pay rents on the 80 acres of land since it was recovered by *Frenet*, at the rate of \$30 per annum; but she did not allege that this was a fair rental value, nor did she ask to recover it back, nor did she ask to recover any rents whatever, but the above allegations seem to have been made with the view of stating some ground upon which to recover interest on the note. That portion of the judgment for \$288 rents is not supported by the pleadings. *Middlebrook v. Zapp*, 73 Tex. 31, 10 S. W. 732; *City of Laredo v. Russell*, 56 Tex. 403.

3. It is insisted by appellant that in no event could the suit of appellee be maintained upon the contract, for the reason that the same shows upon its face that it can mature only when the west half of the Thomas Ward survey is sold by appellant, *Cook*, "or any one else"; and that, it not being shown that such west half has ever been sold, the contract is not mature according to its terms. This position is not well taken. In plaintiff's pleadings, she sets up the contract, shows that a reasonable time (about 16 years) has elapsed within which the land could have been sold, and prays that she have judgment for her money or for a cancellation of her deed. The property having been deeded by *Mrs. Arnold* to *Cook*, it could only have been sold by him. It was shown that a reason-

able time had been allowed him to make the sale, and, having failed to do it, he was responsible. Appellee was entitled to her judgment, either for her money or the cancellation of her deed. Under a proper verdict, the facts shown would have authorized a judgment for her money on the contract, and a foreclosure of the vendor's lien. Under a proper construction of the contract, we must conclude that there was a sale by Mrs. Arnold to Cook, under a special warranty deed; that the latter executed to her a contract whereby he agreed to pay her \$300. The promise to pay was absolute. The time of payment was fixed as follows: "When the land is sold by me or any one else." The title being fixed in him, he was the only one who could legally make sale. She was to have the rents until sale was made, and then she was to give possession. It would be an unreasonable construction to hold that he could wholly defeat the contract by refusing to make sale of the property. On the other hand, if a reasonable time has elapsed in which to make such sale, under circumstances which show that he could have made it, was it not his duty to have done so under the contract? In the case of *Nunez v. Dautel*, 19 Wall. 560, a contract was executed by the appellant to pay, "as soon as the crop can be sold or the money raised from any other source." The court said: "No time having been specified within which the crop should be sold or the money raised otherwise, the law annexed, as an incident, that one or the other should be done within a reasonable time, and that the sum admitted to be due should be paid accordingly. * * * It could not have been the intention of the parties that if the crops were destroyed, or, from any other cause, could never be sold, and the defendant could not procure the money from any other source, the debt should never be paid. Such a result would be a mockery of justice." In this case it was clearly not contemplated by the parties that the obligor, though opportunities had not been wanting, should fail to sell the property, and thus defeat the obligation, or postpone its performance beyond a reasonable time. *Salinas v. Wright*, 11 Tex. 572; *Lange v. Caruthers*, 70 Tex. 722, 8 S. W. 604; *Crooker v. Holmes*, 65 Me. 195; 1 Story, Cont. § 31.

4. Appellant also complains that the verdict of the jury for the money, without any finding as to a vendor's lien, was not sufficient to support a judgment foreclosing such lien. The pleading of defendant put in issue the existence of the vendor's lien, and the issue should have been found by the jury. *May v. Taylor*, 22 Tex. 349; *Heisch v. Adams*, 81 Tex. 93, 16 S. W. 790; *Loan Co. v. Watson* (decided by this court at its present term) 35 S. W. 827.

For the errors mentioned, the judgment is reversed, and the cause remanded. Reversed and remanded.

BISSO et ux. v. CASPER.

(Court of Civil Appeals of Texas. May 23, 1896.)

ADVERSE POSSESSION--EXTENT.

Where one purchases land inclosed by a fence, and claims title to all within the inclosure, his possession is adverse as to the entire tract, though he believes he is only claiming to the extent of his deed, which in fact does not embrace all the land so fenced.

Appeal from district court, Navarro county; Rufus Hardy, Judge.

Trespass to try title by Bertha Casper against Peter Bisso and wife. Judgment for plaintiff, and defendants appeal. Reversed.

Simkins & Mays, for appellants.

FINLEY, J. This is a boundary suit, brought by the appellee, Bertha Casper, against appellants, in the district court of Navarro county, Tex., the plaintiff therein claiming from defendants a strip of land 2 feet wide by 130 feet long, adjoining on the south side of plaintiff's lot. The petition of plaintiff was in the usual form of trespass to try title. The defendants pleaded general denial, not guilty, and the statute of limitations of three, five, and ten years. The case was tried before the court without the intervention of a jury, and resulted in a judgment for the plaintiff for a strip of land 1.3 feet wide by 130 feet long. From this judgment the defendants have appealed.

The judge trying the case filed conclusions of fact and law, which were duly excepted to by appellants. The evidence upon the trial established without dispute that the land recovered was inclosed within the yard fence of appellants, and that it had been continuously so inclosed for more than 10 years. The evidence further shows conclusively that the defendants bought the property in that condition more than 10 years before the institution of this suit, and that they have always claimed the property so inclosed as their property, believing that it was covered by their deed. The land so inclosed does not exceed the quantity called for in their deed, and they were of the opinion that they did not have the full quantity called for in the deed within their inclosure. While they believed that they were claiming only to the extent of the calls in their deed, they did claim all the land embraced within their inclosure; and the facts established without dispute upon the trial clearly show an adverse holding by appellants for more than 10 years next preceding the institution of this suit. The court below gave judgment for appellee upon the idea that appellants' deed did not embrace the land in dispute, and that they only claimed to the extent of their deed. This view, we think, was clearly erroneous. The question was, not whether their claim to the land actually inclosed was

based upon their belief that the deed covered the land; but the question was whether they claimed the land so inclosed as their own, adverse to appellee and all other persons. The case of *Hand v. Swann*, 1 Tex. Civ. App. 240, 21 S. W. 232, involves this question, and Justice Williams, in the opinion in that case, expresses the views of this court. The judgment of the court below is reversed, and judgment here rendered for appellants. Reversed and rendered.

MCKINNEY v. BALDWIN.

(Court of Civil Appeals of Texas. May 23, 1896.)

TRESPASS TO TRY TITLE—EVIDENCE—BURDEN OF PROOF.

1. In an action for the recovery of land, where plaintiff alleged that the land had been left vacant between two older surveys, and that he claimed it under patent, the burden of proof is on plaintiff to show that the land was in fact vacant when patented.

2. The introduction of plaintiff's patent does not shift upon defendant the burden of proving that the land was not vacant when the patent issued.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Action by D. E. McKinney against J. H. Baldwin. From a judgment for defendant, plaintiff appeals. Affirmed.

Beaty & Culver, for appellant.

LIGHTFOOT, C. J. This suit was brought by appellant, D. E. McKinney, in the district court of Grayson county, to recover of appellee a small tract of about seven acres of land, in the shape of an acute triangle (44 varas at the base, and about 1,343 varas in length), lying between the following older surveys: Ben Nix, on the east, and Hardy Jones and James McKinney, on the west. The land claimed by appellant was patented August 21, 1895. The three older surveys were patented December 3, 1845, January 5, 1843, and March 5, 1847, respectively. It was proved that appellee held the land by regular chain of title under the Ben Nix survey, and that the Ben Nix west line extended west of and included the land embraced in appellant's patent. The issues in the case are thus clearly stated in appellant's brief: "The dispute was as to whether the land in controversy was vacant at the date appellant's patent issued, or was included in the Ben Nix survey, which was patented in 1845, making the location of the Nix west boundary the real question. Appellant contended that a vacant strip was left between the old Nix and McKinney surveys. Appellee claimed that said surveys joined each other, and that the east boundary of the McKinney and the west boundary of the Nix were identical." The above was the issue as admit-

ted by appellant, and it is correctly stated, except in the failure to mention the Jones survey, which is also on the west.

Appellant's only assignment of error, relied on as a proposition, is as follows: "The court erred in paragraph one of his charge to the jury, in instructing them that the burden of proof was upon plaintiff to establish that the land in controversy was left vacant, between the Ben Nix, Hardy Jones, and James McKinney surveys, before he could recover, and in refusing to give the second special charge requested by plaintiff, to the effect that, after plaintiff had introduced his patent from the state of Texas for the land in controversy, it devolved upon the defendant to show the invalidity of said patent." That portion of the court's charge complained of is as follows: "The plaintiff in this case, D. E. McKinney, claims that the land in controversy was a strip of land left vacant between the Ben Nix survey, on the east, and the Hardy Jones and James McKinney surveys, on the west, as said surveys were actually located on the ground by the surveyors who made the original surveys. The burden of proof is upon the plaintiff to establish this by a preponderance of the evidence (that is, by a greater weight and credit of the testimony) before he can recover; otherwise your verdict should be for defendant." Appellant requested the court to give the following special charge: "Gentlemen: The plaintiff has introduced in evidence before you a patent from the state of Texas to the land in controversy, and it then devolves upon the defendant to show the invalidity of said patent." This charge was refused.

We do not find any error in the above charge of the court, or in the refusal of the requested charge. The issue, as stated by the court, is almost in the exact language in which appellant's counsel present it in their brief. Upon the question of the burden of proof, the court correctly stated the law in its charge. *Clark v. Hills*, 67 Tex. 148, 2 S. W. 356; *Scott v. Pettigrew*, 72 Tex. 329, 12 S. W. 161; *Wyatt v. Foster*, 79 Tex. 420, 15 S. W. 679. In the first case named above (*Clark v. Hills*), Judge Willie, where the exact point was involved, said: "The plaintiff alleged that he had good title to the land in controversy, by virtue of a location upon it of an unlocated balance of the Calder bounty warrants, and of a valid survey by the proper officer. The defendants, by their plea of not guilty, denied these allegations, and put the plaintiff upon proof of his case as made by the petition. The onus was therefore upon the plaintiff to prove all these allegations, including the fact that the warrant was located on vacant land, and under the evidence developed at the trial the land was vacant if not covered by the De Leon grant. In support of

his case upon this question, he showed a regular location of his bounty warrant upon the land, and a regular survey of the same by the proper officer. This made for him a prima facie case that the land was vacant and outside of the Ponce boundaries, and with this proof the plaintiff rested. Had no further evidence on the subject been introduced, the plaintiff would have been entitled to a verdict, for the presumption was that the surveyor had not located and surveyed for the plaintiff land within an older grant. But the defendants, in rebuttal of plaintiff's prima facie case, put in evidence facts tending to show that the land was not vacant at the date of location, but was covered by the De Leon grant. The plaintiff, to sustain the prima facie case made by him, produced evidence tending to show that the land was not within the limits of the De Leon grant, and hence was subject to his location. Under this state of case the court charged the jury that the burden of proof was upon the plaintiff, and that, if they believed from the evidence the land in controversy was not within the limits of the De Leon grant, they would find for the plaintiff, but if they found it to be within the grant they would find for the defendants, whether they found the exact location of the boundaries of said grant or not. The jury returned the following verdict: 'Under the instructions in the charge of the court to the jury, that the burden of proof in this case is upon the plaintiff, and not being able to agree upon the location upon the ground or the lines of the Ponce grant as defined in the original field notes, we agree upon a verdict for the defendants.' The appellant complains that the court, having in effect charged that he had made out a prima facie case by proving his location and survey, erred in charging that the burden was upon him to show that the land was without De Leon's lines. He further claims that the jury, being misled as to where the burden of proof lay, found for the defendants upon a state of facts which did not entitle them to a verdict. The whole question turns upon whether or not the burden of proving the land vacant, and without the Ponce lines, which originally rested with the plaintiff, was shifted to the defendants when plaintiff had made out a prima facie case upon the question. * * * Whilst the party having the affirmative of an issue holds the burden of proof, as a general rule, it is not necessary that the issue should always be presented in an affirmative form. 1 Greenl. Ev. § 74. If this were requisite, a mere change in the form of the issue would change the burden of proof, without regard to the substance and effect of the issue. Much less does the fact that a defendant is forced to maintain the affirmative of some fact, in disproving the plaintiff's case, shift upon him the burden of proof. Hence the onus probandi in this case was not af-

fected by the fact that, in showing the land to have been vacant at the date of plaintiff's location, he had to prove that it was not within the lines of the Ponce grant; and the defendant met the issue by proof that it was embraced within the lines of that grant. That a party does not shift to his adversary the burden of proof, by making out a prima facie case, is clear from what we have said, and is a well-settled principle. Blanchard v. Young, 11 Cush. 345, and other authorities cited in said opinion. His case must be disproved, but, when proof having this tendency is produced, it then becomes a question whether, upon the whole evidence, the prima facie case has been successfully met by the adverse party. If it appears that the preponderance of testimony is not in favor of the party having the onus, the verdict should be against him. If the testimony is evenly balanced, he has failed to establish the issue, but has left it doubtful whether he has sustained it or not, and that doubt must inure to the benefit of his adversary. Applying these principles to the case before us, we find the charge of the court correct upon the subject of the burden of proof, and in directing the jury to find for the defendants if the land in controversy was upon the De Leon grant, whether they could locate its boundaries or not. * * * Under the facts proved in this case, it is clear that the Ben Nix is one of the oldest locations made in that neighborhood. Its southeast corner is well established. The southwest corner is gone. But the south line of the Ben Nix, extended from its southeast corner, the distance called for in the patent, not only leaves no land between the Nix and the McKinney surveys, but would lap over a distance of 16 or 17 varas. So that in fact there was no vacant land between the Nix west line and the McKinney and Jones east lines to be covered by appellant's patent. We think the justice of the case has been clearly reached. We find no error in the judgment, and it is affirmed.

LEEDS v. REED.

(Court of Civil Appeals of Texas. May 23, 1896.)

HUSBAND AND WIFE—RIGHT OF ABANDONED WIFE TO SUE ALONE—CHattel MORTGAGE—VALIDITY OF VERBAL LIEN—TRIAL.

1. A wife who has been abandoned by her husband, and left without means, may sue for community property without joining her husband as a party.

2. A parol agreement between the mortgagor and mortgagee of chattels, by which the mortgagor is permitted to exchange property covered by the mortgage for other property, which is to be subject to the mortgage lien in the place of that exchanged, is valid as between the parties, though the property remains in the possession of the mortgagor.

3. Where, under the pleadings, an issue was made as to the binding force of a settlement between the parties, one party claiming to have been deceived as to the facts existing,

it was the duty of the court to instruct the jury as to such issue when requested, though the instructions asked may have been erroneous.

Appeal from Dallas county court; T. F. Nash, Judge.

Action by Annie Reed against L. C. Leeds. Judgment for plaintiff, and defendant appeals. Reversed.

M. L. Dye, for appellant. E. O. Harrell and M. M. Parks, for appellee.

LIGHTFOOT, C. J. The statement of the case by appellant is adopted, as follows: This was an action by Annie Reed, a married woman, who sued, without joining her husband, for community property, consisting of household furniture two sets of wagon harness, \$50 on account of a horse trade, and \$35 in money, which defendant, L. C. Leeds, she alleges, failed to deposit in bank. She alleged that defendant, Leeds, seized and forcibly dispossessed her of said furniture, and converted said furniture and said harness to his own use, while said furniture and harness were exempt from seizure for debts; that said defendant, by falsely representing to her that he had a mortgage on a certain horse, had bought him for \$50 less than the real value; that said defendant had failed to deposit \$35 in bank to her credit. The defendant answered, and (1) excepted to plaintiff's petition, because she had not joined her husband in this suit for the community property, nor made him a party thereto. This exception was overruled, and the defendant excepted. Defendant also answered (2) disclaiming any interest in said harness, and by general denial of plaintiff's cause of action. (3) That defendant bought the horse in question from plaintiff for \$65, giving her \$35 in money, and crediting her husband with the remainder; that after he had bought the horse, and before he had deposited the \$35 in bank, he discovered that one Henry Hatcher had a mortgage for \$30 on the horse, and that defendant then retained the \$30 until plaintiff and Hatcher could settle in regard to the mortgage. (4) That, in regard to the furniture sued for, defendant alleged that it was his own property, but had been embezzled by plaintiff's husband while in the employment of defendant. (5) Defendant, Leeds, further alleged that, prior to the institution of this suit, plaintiff and defendant had a settlement of all matters involved in this suit, whereby, among other things, plaintiff was to return to defendant said furniture, and sell him said horse for \$65.—\$35 in cash, and the remainder to be credited on her husband's indebtedness to defendant, and, by the terms of said settlement, defendant was to release certain liens held by him on certain other furniture and another horse of plaintiff and her husband; that plaintiff, in compliance with the terms of said settlement, did deliver to defendant the furniture and horse in controversy, and

accepted the \$35 cash payment on said horse, and accepted the release on said horse and furniture; and that the terms of said settlement were fully complied with and executed by both plaintiff and defendant before the institution of this suit. The result of the suit was a verdict for plaintiff for \$75, from which this appeal is taken.

1. The first assignment of error presented complains of the ruling of the court in overruling the demurrer of defendant to plaintiff's petition, on the ground that it shows that plaintiff is a married woman, and is not joined by her husband in the suit. It fully appears that plaintiff had been abandoned by her husband, and left without means. The property in controversy was a part of the community estate, and, under this state of facts, the wife has the right to maintain the suit without being joined by the husband.

2. It appears from the undisputed evidence that the husband of appellee, Annie Reed, was employed by defendant, and absconded, leaving his wife unprovided for, and his business with his employer unsettled; that the latter visited Mrs. Reed, with the view of obtaining some kind of a settlement of her husband's business; and that they entered into an agreement, which appellee claimed was wrongfully obtained from her, without a knowledge of the facts, and she afterwards brought this suit against appellant. Among other things attempted to be settled between the parties was a mortgage debt claimed to be due by Mr. Reed to appellant upon a certain horse. It is alleged by appellee in this case that appellant claimed to hold a mortgage upon a certain horse left by her husband to secure a debt of \$50, when, in fact, no such mortgage existed. On the other hand, appellant asserts that he held a written mortgage upon a horse in the possession of Reed to secure his debt of \$50, and that, by mutual agreement between himself and Reed, the latter was allowed to exchange the horse for another, with the understanding that the new horse should take the place of the original horse described in the mortgage, and be subject to the lien to secure the debt. The court charged the jury, in substance, that this agreement would not create a lien on the horse acquired by the exchange, unless the mortgagee all the time kept possession of the animal. This charge is complained of by proper assignment, but neither appellant nor appellee has cited any authority upon it. The question as to whether such an agreement would constitute a lien on the new horse, as against creditors or purchasers from the mortgagor, has been ably discussed by the supreme court of Tennessee in a recent opinion by Judge Wilkes. In the case of *Rodes v. Haynes*, 33 S. W. 564; and, after reviewing the authorities on both sides, the court reaches the conclusion that, as against creditors or purchasers from the mortgagor, such a substitution would not

create a valid lien; but the court says: "Unquestionably, such a substitution would be good between the parties." There being no question in this case concerning purchasers or creditors, and the only controversy being between the wife of Reed, representing the community estate, and the mortgagee, we see no reason why the parties, among themselves, could not, by contract, release the horse originally mortgaged, and create a valid lien upon the substituted horse. 1 Cob-bey, Chat. Mortg. § 13; Jones, Chat. Mortg. § 2; Loyd v. Currin, 3 Humph. 462; Marx v. Davis, 56 Miss. 747; Berghoff v. McDonald, 87 Ind. 549; Fowler v. Hoffman, 31 Mich. 215; 3 Am. & Eng. Enc. Law, 179, citing Sharpe v. Pearce, 74 N. C. 600; Burns v. Campbell, 71 Ala. 271. (We have not access to the last two cases.) The court erred in its charge in holding that it was necessary that the mortgagee must have been in continuous possession of the substituted horse in order to create a valid lien between the parties.

3. Under the sixth assignment of error, appellant complains of the following charge: "If you find that the new furniture was or was not defendant's, you will find for plaintiff the market value of old furniture at the time and in the condition in which it was delivered to defendant's house, when plaintiff's husband made the exchange." This charge was erroneous, and calculated to confuse the jury. Under plaintiff's pleadings, she set up what she claimed to be a conversion of the new set of furniture by defendant. The latter answered, claiming that Reed, while acting as his agent, took from defendant's store a new set of furniture, and left in its place an old set; and that, by consent of Mrs. Reed, defendant had taken away from her house the new set. The testimony tended to show that Reed did make an exchange of furniture with defendant without his knowledge or consent, but the latter had repaired and sold the old set of furniture, realizing about \$20 for it; that, after Reed absconded, defendant had taken away the new set, by Mrs. Reed's consent, and it was claimed by the latter that he did not pay her the value of the old set of furniture. She was entitled to this under the facts contained in the record, but it may be necessary to plead in order to recover it, and, as the facts may be different on another trial, we will express no further opinion upon that question. The above charge was defective, in this: that even if the jury should find that the new furniture was not defendant's, which, under the pleadings, would authorize its recovery by plaintiff, still they were instructed to find for plaintiff the value of the old set.

4. Appellant complains that the court refused his special charges in regard to a settlement between the parties. While such special instructions did not conform in every respect to the law governing the case, yet

they were sufficient to call the attention of the court to the question, and the jury should have been instructed upon that point. If the settlement was entered into by the parties, and all the facts were equally known to them, and it was fairly and justly made, it would be mutually binding upon them; but if the facts were not known to Mrs. Reed, and she was induced by appellant to enter into a settlement which was unfair or unjust, she can maintain her suit, and set it aside, and recover what is justly due.

For the errors indicated, the judgment is reversed, and the cause remanded for a new trial. Reversed and remanded.

SEIP v. GRINNAN et al.¹

(Court of Civil Appeals of Texas. March 7, 1896.)

DEED OF TRUST—FORECLOSURE—FRAUD OF TRUSTEE—EVIDENCE—INADEQUACY OF PRICE.

1. The fact that a purchaser at a sale under a trust deed had acted as intermediary in making the loan which the deed was given to secure did not render his purchase fraudulent as against the grantor; he being the agent of the borrower, and not of the loan company.

2. The fact that land sold for less than its worth, at foreclosure sale under a trust deed, is not conclusive evidence of fraud on the part of, or collusion between, the purchaser and the trustee, requiring the sale to be set aside.

3. A trustee's sale will not be set aside for the reason that the trustee, when he sold the property, knew that the grantor in the trust deed was not represented at the sale, and that if the sale were made under the circumstances the property would probably be sacrificed; it appearing that the grantor's agent, who ordered the sale, knew the date on which it was to take place.

Error from district court, Kaufman county; J. E. Dillard, Judge.

Action by A. N. Seip against J. S. Grinnan and others to set aside a sale of lands under a trust deed. There was a judgment for defendants, and plaintiff brings error. Affirmed.

Alexander, Clark & Hall, for plaintiff in error. J. O. Terrell, for defendants in error.

LIGHTFOOT, C. J. This suit was instituted November 9, 1893, by the plaintiff in error, A. N. Seip, to set aside, vacate, and annul the sale of two tracts of land in Kaufman county: said sale having been made by one of the defendants in error, J. W. Gish, as trustee in a certain deed of trust, to defendant in error J. S. Grinnan, November 7, 1893. The material facts in regard to the transaction are set out in the conclusions of fact found by the court below, which are as follows: "(1) I find that in January, 1892, W. A. Mulkey and wife executed to Jas. L. Lombard a note or bond for \$2,000, with interest coupons of \$70 each thereto attached,—one of said coupons maturing semiannually on the 1st day of Feb-

¹ Writ of error denied by supreme court.

ruary and August,—and that to secure said note they executed a trust deed to Jno. W. Gish, as trustee, covering the two tracts of land in controversy, which trust deed provided that, if default should be made in the payment of any of said coupons, the whole debt should, at the election of the holder of said note, mature. (2) That soon afterwards said payee transferred said note, with attached coupons, for valuable consideration, and without recourse, to A. N. Selp, plaintiff herein. (3) That said Mulkey defaulted in the payment of the interest coupon maturing August 1, 1893, and that after some correspondence the plaintiff, A. N. Selp, early in October, 1893, sent the papers in the case to his agents, the J. B. Watkins Land-Mortgage Company, at Dallas, Texas, with instructions to have said trust deed foreclosed, and said land sold thereunder. (4) That on October 11, 1893, one W. E. Wilkins, an employé of J. B. Watkins Land-Mortgage Company, and intrusted by it with authority in such matters, carried said papers to the trustee, Jno. W. Gish, and requested him to sell said land under said deed of trust, and that said Wilkins and Gish examined the calendar in the office of said Gish, and found there was time to post the notices as required by said trust deed, and to make the sale on Tuesday, November 7, 1893, and so agreed; that said Wilkins did not request the said Gish to have said lands bid in for plaintiff, but told him to make the sale, and that the J. B. Watkins Land-Mortgage Company would attend to the matter; that the reason for asking said Gish to make the sale was that under said trust deed no one else could make such sale until said Gish had failed or refused to act. (5) That, in pursuance of said agreement with Wilkins, said Gish posted notices as required by said deed of trust, and on Tuesday, November 7, 1893, at the courthouse door in Kaufman, Kaufman county, Texas, in the usual way, and at the usual hour for public sales, and at a time when other sales were being made, and in the presence of a number of people, variously estimated at from ten to thirty, sold said lands to the defendant J. S. Grinnan, upon his bid of \$500, the same being the only bid made for said property. (6) That said sale was fairly and lawfully made, and that there was no conspiracy or collusion between said Grinnan and said Gish, or any other person or persons, regarding same, and that said land was fairly and honestly sold by said Gish, and bought by said Grinnan, at the price stated. (7) That said lands at the time of said sale were of the market value of about \$3,500, but that there was an adverse claim to the trust deed against 80 acres thereof, of the value of \$1,200, by a party in possession of said 80 acres at said time, and that said Grinnan had been informed of said adverse claim. (8) That not only W. E. Wilkins, but M. J. Dart, general

manager of the J. B. Watkins Land-Mortgage Company in Texas, knew of the time set for sale, and that it was through their negligence and carelessness that no one was present to represent the plaintiff, A. N. Selp, at said sale. (9) That immediately after said sale said Grinnan paid to the trustee, Gish, the amount of his bid, and that on the next day said Gish, as trustee, executed to said Grinnan his deed therefor. (10) That on November 9, 1893, said Gish tendered the proceeds of said sale to plaintiff's agents, who declined to accept the same, and brought this suit."

1. In his first and second assignments of error, plaintiff in error contends that the court erred in refusing to set aside the trustee's sale because the purchase of the property by the defendant in error Grinnan was fraudulent, in this: That he was the local agent in Kaufman county, obtained the loan for the borrower, Mulkey, and looked after the payment of interest as it became due, for which services he was paid, and that he knew when he purchased the property securing the loan of Mulkey that said Mulkey was insolvent, and that the only opportunity the owner of the note had to collect the debt was to make it out of the property; that he purchased the property for \$500, when he knew that it was worth \$4,000 and that the debt of the plaintiff was \$2,000. And, second, because of collusion between the trustee, Gish, and the defendant Grinnan, whereby the plaintiff's security was sold out for a grossly inadequate consideration. Neither of these assignments of error is sustained by the facts. It does not appear that the defendant Grinnan was the local agent of plaintiff in error, or of the original party who loaned the money, but that he in fact acted for Mulkey in procuring the loan, which would not prevent him, in any way, from purchasing the property, if he desired to do so, when it was sold. The facts show no collusion whatever between Gish and Grinnan for the purpose of defrauding plaintiff, and there is not the slightest evidence of such fraud shown in the testimony. The simple fact that the property sold at forced sale for less than its real value, or for less than plaintiff's debt, would not of itself be sufficient to authorize the court to set the sale aside.

2. The third assignment of error is based upon the same grounds as the first and second, above mentioned.

3. The fourth assignment of error is as follows: "The court erred in rendering judgment for the defendant, because the debt had not been declared due by the plaintiff, or his authorized agents, on account of default in the payment of interest, without which the said trustee could not lawfully make said sale, and because the trustee had not been requested or authorized to sell said property under said trust deed on November 7, 1893; hence the same was not valid, and should

have been set aside." It was provided in said deed of trust that if said W. A. Mulkey and wife should fail or neglect to pay, or cause to be paid, the principal note, or the interest notes attached thereto, or any part thereof, when the same became due and payable, then the whole amount secured by the said deed of trust should become due and payable at once, without notice, at the election of the holder of the notes; and the trustee, John W. Gish, was authorized, at the request of the holder of the notes, at any time after such default, to sell the property. It was further provided that, in case of sale by such trustee, "all prerequisites about the sale shall be presumed to have been performed," and that, in any conveyance given thereunder, all statements of fact or other recitals made as to the nonpayment of the money secured or advanced, or the breach of any covenant in said deed of trust contained, or as to the request of the trustee to enforce the trust, etc., "shall be taken, in all courts of law and equity, as prima facie evidence that the facts so recited are true." The sale was regularly and legally made by the trustee under the deed of trust, and the deed executed by him to Grinnan, the purchaser at such sale, is in conformity with the terms of the trust deed, he having fully paid the purchase money. The facts further show that, after the August coupon for interest became due, plaintiff in error sent said notes, with the deed of trust, to the J. B. Watkins Land-Mortgage Company, with instructions to have the deed of trust foreclosed, and that said mortgage company, through its legally authorized agent, placed the deed of trust in the hands of the trustee, with instructions to foreclose the same. It further appears that the mortgage company knew of the advertisement of the property for sale, not only by its agent who placed the trust deed in the hands of the trustee for foreclosure, but that its general manager, M. J. Dart, also knew of such advertisement under said deed of trust. If the plaintiff in error desired to bid on said property, he should have taken the proper steps to have done so at the sale; and, having allowed the property to be sold under the trust deed without having done so, he cannot be heard to set the sale aside merely because the property failed to bring enough to satisfy his debt.

4. The fifth assignment is that the court erred in holding that the property which sold for \$500 at trustee's sale was worth at the time of the sale \$3,500, and that there was an adverse claim against 80 acres thereof, valued at \$1,200. There was testimony tending to show that prior to the sale one Mr. Bibb claimed that he had conveyed to Mulkey 80 acres of the property in controversy, and that the same was his homestead. The values of the properties were variously estimated, and, from the whole testimony, we cannot say that the estimate of value found by the court was not correct. The defendant Grinnan testified that he was notified of the Bibb claim

on the day of sale, a short time before the sale was made, and that, under the circumstances, \$500 was a reasonable price for the property, with the Bibb claim unsettled.

5. Under the sixth assignment of error, plaintiff in error claims that the court erred in holding that he (Seip) wrote the J. B. Watkins Land-Mortgage Company in October, 1893, instructing them to have the deed of trust foreclosed and said land sold thereunder, because it is claimed that the testimony does not show that he ever declared the debt due, or that he requested the property sold. The original letter and correspondence between plaintiff in error and the J. B. Watkins Land-Mortgage Company when said trust deed was sent to said company was not introduced in evidence by plaintiff in error, and the correspondence was in the hands of plaintiff in error and his agents; but it does appear from subsequent correspondence between the parties that such deed of trust was sent for foreclosure, and that it was the full purpose and intention both of plaintiff in error and his agents to foreclose the deed of trust. It further appears that the trustee was instructed through such agents to foreclose, and that the general manager of the J. B. Watkins Land-Mortgage Company knew that the said property was being advertised for sale by the trustee. Under such circumstances, the court was justified in concluding that the plaintiff in error instructed his agents to foreclose on the property under said deed of trust.

6. Under the seventh and eighth assignments of error, the plaintiff in error complains that the court erred in refusing to set aside the sale, because the evidence shows that the trustee, when he sold the property, knew that the plaintiff, for whose benefit he claims to have been making the sale, was not represented at the sale, and that if the same was then made the property would be sacrificed. This question might properly enter into a suit between the plaintiff in error and his agent, but cannot have any place in a suit of this character, against the purchaser of the property, where the object is to set aside the sale. We find no error in the judgment, and it is affirmed.

Additional Conclusions of Fact.

(May 2, 1896.)

At the request of appellant's counsel, the court finds the following additional conclusions of fact: Appellee J. S. Grinnan was a broker, and as such sent in the application made out by Mulkey for the loan in the Lombard Investment Company, in controversy in this case, upon the security stated in the application set out in the record. Mr. Marmaduke, an agent of the company, was present when they wrote out the application. Grinnan was not the agent of the company, but, like other real-estate brokers and loan agents, he frequently brought in applications

of parties for loans, some of which were accepted, and others rejected. In this way he had brought in a great many applications to the Lombard Investment Company. The loan in this case was not made upon any representation or report of Grinnan, but after the application was filed it was customary for the officers of the company to talk over with him the advisability of making a loan, before sending on the inspector to examine the land. The loans were made upon the report of the inspector. When the matter was closed up the Lombard Investment Company paid Grinnan 3 per cent., which was the customary per cent. paid all brokers when loans were made on applications presented by them. Grinnan was doing a general real-estate, loan, and insurance business in Kaufman county, and sent applications for loans to other companies, as well as to the Lombard Investment Company. The latter had made 25 or 30 loans upon applications sent in by Grinnan. When the interest was due upon this loan, Gish, the agent of the Lombard Investment Company, wrote to Grinnan, asking if Mulkey would pay the interest; and, after seeing Mulkey, Grinnan wrote back that he did not think he would do so. The previous installments of interest had been sent in by Grinnan, who assisted Mulkey in raising the money. At the time the application for the loan was made, there was already a lien upon the land to secure a loan in the Equitable Mortgage Company, and this application was made to take up that loan. Grinnan had never seen the land at that time, and did not know it. He was the notary public who took the acknowledgment to the deed of trust given by Mulkey after the loan was accepted by the company. In the application for the loan the property was appraised, under oath, by T. H. Bibb and T. H. Bibb, Jr., at \$9,000, exclusive of buildings, and the buildings at \$500. There was some conflict in the evidence as to the value of the property at the trial below, and we think the value found by the court was fairly supported by the evidence. The price paid by Grinnan at the sale (\$500) was an inadequate consideration, and much less than the real value of the property; but he was not the agent of appellant, Selp, and had a perfect right to buy at the sale, and was guilty of no fraud or collusion in making the purchase, so that we cannot see that the exact value of the property is a matter of much consequence. If appellant desired to bid in the property at the sale, in order to protect his interests, he should have been there, or had a representative there to look after it. The sale being in all respects fair, appellant cannot set it aside merely on the ground of inadequacy of price. We find the above additional conclusions, and cannot go further into details in the testimony, but appellant can take up all the facts, if necessary, in aiding the supreme court to determine the merits of the controversy.

GRAY et al. v. DALLAS TERMINAL RAILWAY & UNION DEPOT CO.

(Court of Civil Appeals of Texas. March 28, 1896.)

MUNICIPAL CORPORATIONS — ORDINANCE — USE OF STREET BY RAILROAD COMPANY — CONSENT OF ABUTTING OWNERS — COMPENSATION — DAMAGES — IMPEACHING ORDINANCE FOR FRAUD — EVIDENCE.

1. The fact that an ordinance granting a privilege to construct and operate a railway is not sufficiently specific to indicate all the streets over which the line is to run does not render the franchise void as to those streets clearly specified.

2. An ordinance which, in one section, grants to a railroad company the right of way over certain streets, and in another section authorizes it to construct roundhouses and shops, with all sidetracks and switching facilities, and to erect necessary sheds and depots, does not give the company a right to place the improvements mentioned in the latter section in the streets.

3. Where a city council, in accordance with the charter, has granted to a railroad company a right of way over certain streets, the fee of which is in the public, the owners of a majority of front feet having consented to the grant, the appropriation of such way is not a "taking," within Const. art. 1, § 17, requiring compensation to be first made.

4. Where the owners of a majority of front feet are willing that a railroad should be constructed along the street, and the city council has given its consent, as provided by charter, equity will not enjoin the building of such road on the ground that it will damage the property of abutting owners, but will leave such owners to their legal remedy.

5. In an action to enjoin the construction of a railroad in the streets of a city, it was not error to exclude testimony that the ordinance granting such privilege was obtained by false and fraudulent representation to the effect that the owners of a majority of front feet were willing, the court having charged that the ordinance was void as to those streets along which the owners of a majority of front feet were not willing, and having admitted evidence to show the willingness or unwillingness of such owners.

6. In an action to enjoin the construction of a railroad in the streets of a city on the ground that a majority of the owners of front feet along the proposed route were not willing, the written consent of the equitable owners of certain adjoining property was properly admitted, the holder of the legal title having declined to express himself as being willing or unwilling.

7. The mere fact that several railroad companies have been granted rights of way over a street previously dedicated to the public, does not take away its character as a street, so as to allow other companies to lay tracks therein against the wishes of the owners of a majority of front feet.

Appeal from district court, Dallas county; R. E. Burke, Judge.

Action by Mitch Gray, administrator of S. H. Cockrell, deceased, to enjoin the Dallas Terminal Railway & Union Depot Company from constructing and operating a railway and telegraph line over certain streets. The Missouri, Kansas & Texas Railway Company and others intervened, and adopted the allegations of the petition, and from a judgment for defendant, plaintiff and G. Kannady,

who intervened as guardian of Clarence and Louisa Cockrell, minors, appeal. Modified.

Cobb & Avery, for appellants. Simkins & Simkins, for appellee.

LIGHTFOOT, C. J. The following statement of appellants is adopted: This was a suit by Mitch Gray, administrator of Mrs. S. H. Cockrell, against appellee, to enjoin appellee from constructing and operating a double-track steam railway and telegraph line along and over North Market street, South Lamar street, Water street, Broadway street, and South Austin street, in the city of Dallas. The plaintiff alleged that under its charter the city of Dallas had no authority to grant permission to defendant to build its road over these streets, unless the owners of a majority of the front feet of property on each street were willing; that on February 5, 1895, the city council of the city of Dallas passed an ordinance granting this permission, and that said owners were not willing. He set out the owners of the property on each street who were not willing, specifying the front feet owned by each; and, among others, he alleged that H. C. Coke owned, as trustee, 1,046½ front feet on South Austin street, and the Missouri Kansas & Texas Railway Company and the Texas & Pacific Railway Company certain front feet on Broadway street. He also alleged that this ordinance was passed and approved by reason of the fraudulent representations of defendant in presenting to the city council that the owners of a majority of the front feet were willing. He also alleged that the property owned by the estate on these streets would be damaged \$10,000 by the building of this road. The Missouri, Kansas & Texas Railway Company, Texas & Pacific Railway Company, F. M. Cockrell, Alex. Cockrell, Ettie Cockrell, Mrs. G. Kannady, guardian of Clarence and Louisa Cockrell, and E. S. Edwards were allowed to intervene and adopt the allegations of plaintiff's petition. The defendant denied all the allegations of plaintiff and interveners; justified its acts under said ordinance of February 5, 1895, a copy of which was attached to its answer; claimed that Broadway street was used exclusively by railroads, and was a railroad highway, and that the consent of the owners of the property on it was not necessary; and that Mrs. S. H. Cockrell had given her consent for all railroads to run over Water street. The case was tried before a jury, and resulted in a verdict and judgment for defendant. Plaintiff, as the administrator of Mrs. S. H. Cockrell, and intervener Mrs. G. Kannady, as the guardian of Clarence and Louisa Cockrell, minors, have appealed.

It was proved on the trial that on February 5, 1895, the city of Dallas, acting under its charter, passed an ordinance, which was approved by the mayor of said city February

6, 1895, granting to appellee the right to construct, operate, and maintain within the corporate limits of the city of Dallas a double-track terminal railroad with side tracks and switches, together with all depots and buildings necessary for the convenient handling of passengers and freight; and it also granted in said ordinance the right of way to said appellee along and across certain named streets, avenues, and public ways in said city, including the streets set out in the plaintiff's petition. In regard to North Market street and South Lamar street, there is no evidence tending to show that the property owners along the same were not willing to agree to such right of way and the construction of said road along such streets. In regard to Water street, the court charged the jury that under the terms of the deed of dedication in evidence before them, made by Mrs. S. H. Cockrell July 27, 1886, this street is expressly dedicated, not only to the Gulf, Colorado & Santa Fé Railway Company, but to such other railroads as may desire to run their lines over and along said street, and they were instructed to find in favor of the defendant company as to said Water street. Appellants have not brought up in the statement of facts this deed, and, in the absence of it, the presumption is that the terms of the deed were such as to fully authorize the charge. In regard to Broadway street, it was fully proved that there were a number of railroad tracks already in the street; but that said street was also used for wagons and drays, and that the same is a public street in the city of Dallas, and that the owners of a majority of front feet, exclusive of street intersections on said Broadway street, were not willing that the city council should grant the right of way over said street, or that the said appellee should construct its line of railway over said street. In regard to South Austin street, the testimony was conflicting; but from the evidence, and the verdict and judgment thereunder, we are justified in the conclusion that at the time the city council passed said ordinance giving the right of way to appellee over said street the owners of a majority of front feet along said street, exclusive of street intersections, were willing that said privilege should be granted, and that said road should be constructed along said street.

1. The appellants have filed 41 assignments of error, and it would be impracticable, even if we had the time, to enter into a discussion in detail of each one of these assignments separately, and we will only present such of them as we consider important in determining the questions involved. As to North Market, South Lamar, and Water streets, we think it is wholly unnecessary to consider any of the assignments, as the issues involved with those streets seem to be clearly settled upon the facts. The first point raised by appellants in their second and thirtieth assignments of error is to the effect that the ordi-

nance of February 5, 1895, granting the privilege to appellee over said streets, was not sufficiently specific to indicate the streets over which said line of railroad should run. As to the streets in controversy, there can be no doubt that they are clearly specified; and, even if the ordinance should not be so specific in regard to other portions of its line, still this would not render the privilege void as to the streets in controversy in this case.

2. In their second (a) and second (b) assignments of error appellants contend that the ordinance of February 5, 1895, is void, because it authorizes the appellee to construct in the streets therein named a double-track railroad, and also side tracks, switches, depots, sheds, yards, roundhouses, and all needful facilities, connections, and appurtenances, because such use of the streets is a perversion of the same from their original use, and inconsistent with their use by the public, and destroys them as a public thoroughfare and street. The privilege granted to the defendant by the city council will not bear the interpretation placed upon it by these assignments. The city council, under the third section of the ordinance, merely grants the right of way over the streets named, and section 4 of the ordinance grants the appellee the right to construct at convenient points on its line of railway yards, roundhouses, and shops, with all side tracks and switching facilities in connection with its terminal system, and to erect depots and sheds of sufficient capacity and strength, with all needful appurtenances to meet the necessities of the business of said company. This does not give to the company the right to put these things in the streets, being wholly separated from the section of the ordinance which grants the right of way over the streets. It was merely intended by section 4 to grant the privilege of erecting the improvements mentioned inside of the city limits.

3. Under the ninth and twenty-ninth assignments of error appellants complain at the court's refusal to hear evidence or to charge the jury upon the amount of damage to the property owners along such streets if said terminal railroad should be constructed along the same in accordance with the privilege granted. The pleadings of the parties below did not properly raise the issue as to the amount of damages; this suit for injunction being based upon the idea that the owners of a majority of front feet on said streets, exclusive of street intersections, were not willing that such privilege should be granted, or that such line of railway be constructed. Section 116 of the charter of the city of Dallas reads as follows: "The city council shall have the sole authority to grant upon such terms as it may see fit, the right to any person, corporation or company to make and construct street railways or oth-

er railroads, in any street or highway inside the city and receive compensation therefor, and to regulate and control the use thereof; provided the owners of the majority of front feet, exclusive of street intersections, on each street composing the line of road are willing." This is not a suit by plaintiff below to recover damages, nor is it a suit by the appellee to condemn the right of way along the street. If the owners of a majority of front feet, exclusive of street intersections, along said streets, were willing, then the city council had the exclusive right to grant the privilege to the railway company to construct its line of road along such streets; but it is contended by appellants that, although the construction of the line along the streets does not take any part of the lot owned by the several owners, yet, inasmuch as it takes away part of their easement in such streets, that this is such a taking of property under the constitution that the railway company will be compelled to pay such damages before it can be taken. This position cannot be maintained under the authorities. Our constitution (article 1, § 17) provides: "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and when taken, except for the use of the state, such compensation shall be first made, or secured by a deposit of money." Under this section of the constitution, does the appropriation of the right of way over the streets named, with the consent of the city council, the owners of a majority of front feet, exclusive of street intersections, being willing, constitute a taking of property, so that it is necessary that payment shall be first made before such right of way can be used? It is so stated in the opinion of our supreme court in the case of *Railway Co. v. Fuller*, 63 Tex. 469. The right of way had been granted by the city of Houston over St. Emanuel street. The court said: "The word 'property,' as used in the section of the constitution referred to, is doubtless used in its legal sense, and means not only the thing owned, but also every right which accompanies ownership, and is its incident. Thus considered, under the rules established by the great weight of judicial decisions and opinions of elementary writers eminent for their learning, the facts of this case amount to a taking of private property for public use. * * * If, however, there has been no taking of the property of the appellee within the meaning of the constitution, there can be no doubt that it has been damaged," etc. That case was a suit for damages by the appellee after the road had been constructed and operated over the street, and involved the question of damages only. The question of the taking of private property was not involved in the case, and we do not think the court intended the

above argumentative statement as an authoritative settlement of the question. On the contrary, subsequent opinions of the supreme court seem to point to a different conclusion. In the case of *Railway Co. v. Hall*, 78 Tex. 172, 14 S. W. 259, Judge Gaines, in referring to the *Fuller Case*, above, says: "In *Gulf, Colorado & Santa Fé Ry. v. Fuller*, 63 Tex. 467, damages were allowed the plaintiff for an injury to his property resulting from the construction and operation of the defendant's railroad along a street in front of his lots. The plaintiff having an easement in the street peculiarly essential to the full enjoyment of his property, the court held that the appropriation of the street was a taking within the meaning of the constitution. But the court also say: 'If, however, there has been no taking of the property of the appellee within the meaning of the constitution, there can be no doubt that it has been damaged, if the evidence offered to support the averments of the petition be true. The word "damaged" is evidently used in the sense in which the word "injured" is ordinarily understood. By damage is meant every loss or diminution of what is a man's own, occasioned by the fault of another, whether this results directly to the thing owned or be but an interference with the right which the owner has to the legal and proper use of his own. If by the construction of a railway or other public work an injury peculiar to a given property be inflicted upon it, or its owner be deprived of its legal and proper use, or of any right therein or thereto,—that is, if an injury not suffered by that particular property or right in common with other property or rights in the same community or section by reason of the general fact that the public work exists be inflicted,—then said property may be said to be damaged.' We think the language quoted from the opinion in the *Fuller Case* lays down the true rule." The court indorses the portion quoted, which holds that the property owner may be entitled to damages, but does not seem to indorse the portion which holds that such use of the public street is a taking of private property for public use. In the case of *Rosenthal v. Railway Co.*, 79 Tex. 327, 15 S. W. 268, which involved the construction and operation of a railway in front of appellant's property over a public street in *La Grange*, the consent of the municipal authorities having been obtained, the court said: "The company lawfully acquired the right to operate the road along the street, subject, however, to that provision of the constitution which secures indemnity to those whose property is damaged for a public use." This case, we think, clearly announces the correct doctrine, and is supported by the weight of authority. To place the power in the city council to give consent (the property owners being willing) for a railway company to construct its line

along the public streets, would avail nothing if it was necessary for it to condemn the right of way and pay damages to every abutting property owner before the franchise could be made available. But the rule announced in the *Rosenthal Case*, that, when the consent of the city council is properly granted, the company has lawfully acquired the right to operate its road along the street, subject to any lawful claims for damages to the property owner, is in harmony with the constitution and the statutes under it. Const. art. 1, § 17; *Sayles' Civ. St. art. 4173*; *Osborne v. Railway Co.*, 147 U. S. 259, 13 Sup. Ct. 299; *Railway Co. v. Lougorio* (Tex. Civ. App.) 25 S. W. 1022. A different question might be presented in a case where the title to the street itself was in the abutting property owner. This suit does not involve a question of damages, but is based purely upon the equitable remedy by injunction; appellants denying the right of appellee to construct its railway along the streets named. If appellee has obtained the consent of the city council, the owners of the majority of front feet, exclusive of street intersections, being willing, it has acquired the legal right to construct and operate its road, and the question of damages to an abutting property owner is one which can be settled hereafter. The court will not enjoin merely because some one may be damaged. It is well said by Chief Justice Fuller, in the *Osborne Case*, above: "But where there is no direct taking of the estate itself, in whole or in part, and the injury complained of is the infliction of damages in respect to the complete enjoyment thereof, a court of equity must be satisfied that the threatened damages are substantial, and the remedy at law inadequate in effect, before restraint will be laid upon the progress of the public work. And if the case made discloses only a legal right to recover damages, rather than to command compensation, the court will decline to interfere." *Cooper v. Dallas*, 83 Tex. 242, 18 S. W. 565; *Chicago v. Taylor*, 125 U. S. 164, 8 Sup. Ct. 820.

It is contended in the very able brief and argument of appellants that the case of *Railway Co. v. Jennings*, 76 Tex. 373, 13 S. W. 270, is authority upon the proposition that a court of equity should interfere by injunction to restrain a railway company from appropriating a right of way under such circumstances. A careful examination of that case will show that it does not establish the proposition. In that case appellee had granted the right of way over his land to the *Texas & Pacific Railway Company*, reserving the fee in himself. That company, having constructed its road on the right of way designated, undertook to transfer a part of its right of way to another company, which sought to fix upon the land this additional servitude, without the consent of the owner. Jennings not only owned the adjacent prop-

erty, but owned the fee in the roadbed itself, and was entitled to an injunction to prevent the latter company from taking his property without just compensation being first made. The question there involved was a very different one from this.

4. Under their tenth assignment of error appellants complain at the ruling of the court in the exclusion of evidence offered for the purpose of showing that the ordinance of February 5, 1895, was obtained from the city council by false and fraudulent representations made, to the effect that the owners of a majority of front feet along said streets were willing. This question becomes immaterial, in view of the fact that the court admitted testimony tending to show the willingness or unwillingness of the property owners along the streets in controversy; and in its charge to the jury held that, unless the owners of a majority of front feet, exclusive of street intersections, on each street, were willing, that the jury should find for the plaintiffs. But upon the direct question involved in this assignment it has been said by our supreme court in the case of *Mayor, etc., v. Houston Belt & M. P. Ry. Co.*, 84 Tex. 589, 19 S. W. 786, where it was claimed that false representations had been made to the city council to procure the passage of an ordinance declaring the right of way over the streets of said city: "We do not think that an error was committed in refusing both the evidence and the charge. It must be conclusively presumed, as the matter is now presented to us, that the ordinance expresses the purpose of the city in adopting it. Its language, and not the representations made to plaintiff or its agents, must be looked to for its meaning and application." Mr. Dillon lays down the doctrine that an ordinance of a municipal corporation may sometimes be impeached for fraud, at the instance of persons injured thereby. 1 Dill. Mun. Corp. § 311. But in this case the court, in its charge to the jury, and in the admission of evidence, held to the doctrine that, if the owners of a majority of front feet, exclusive of street intersections, were not willing, then the ordinance was void as to such streets upon which such owners were unwilling; and the evidence excluded as to what statements were made to the city council in that regard would not seriously affect the issue.

5. Under the thirteenth assignment appellants complain that the court erred in admitting in evidence two certain papers, dated March 23, 1895, purporting to be signed by Mary J. Hatch, Nettie D. Noble, Mrs. Ada R. Stewart, and R. H. Stewart, giving their consent to the construction of defendant's road over South Austin street. The issue upon South Austin street, as to whether the owners of a majority of front feet were willing, was closely contested. The parties named were the equitable owners of a large body of the land along that street. H. C. Coke was

their trustee, holding the legal title for them, and had declined to express himself as to being willing or unwilling; and, the above-named parties being the real owners, the papers introduced in evidence tended to show their willingness for the construction of the road, and were admissible.

6. In regard to Broadway street, the court submitted to the jury two special issues: (1) As to whether it was a public street; and (2) what was its width, how many railway tracks were on it, and whether it was a highway for railways. The appellants requested the following special instructions, which were refused: "If you believe from the evidence that Broadway street is a street, then the fact that there are other railway tracks on said street would not of itself authorize the building of additional railway tracks on such street, unless the owners of a majority of the front feet, exclusive of street intersections, on said street, were willing; and if you find that Broadway street is a street, and if the owners of a majority of front feet thereon, exclusive of street intersections, are not willing for the construction of defendant's road thereon, then you will find for the plaintiffs and interveners as to that street." Appellants also requested these instructions: "You are instructed that in determining whether Broadway and South Austin streets are so used by the public as to give the abutting property owners thereon such an interest therein as to require the willingness or consent of the majority of them as a condition precedent to the city council giving defendant authority to build its railway thereover, it matters not whether railroad tracks are located thereon, or whether the street has been graded or paved, if it has been taken or given and used for street purposes of any character whatever by the public, the consent or willingness of a majority of the abutting property owners thereon must have been obtained before the city council could pass such ordinance; and, if such consent or willingness was not obtained, you will find for the plaintiffs." The above charges were sufficient to call the attention of the court to the issues contended for, and the court should have charged the jury that if Broadway was a street, and if the owners of a majority of front feet thereon were not willing, then the city council had no authority to grant the right of way over such street. The second of the above charges is incorrect, in that it requires the consent or willingness of a "majority of the abutting property owners," when the statute only requires the willingness of the owners of a majority of front feet. In this connection, appellants also complain that the verdict of the jury is contrary to the law and the evidence as to Broadway street, in that the evidence showed that Broadway was a public street in the city of Dallas, open and used by the public, and that said street was not dedicated solely for rail-

road purposes, and was not merely a highway for railways. Appellee's counsel have presented to us an able and learned argument attempting to show the difference between a highway and a street under the Texas statutes; but we confess that, in view of the evidence introduced, we cannot agree with them. The evidence was undisputed that Broadway was one of the original streets of Dallas, and was dedicated as a street by John Neely Bryan in 1855. It was shown that several railway companies have rights of way over this street; yet the testimony in the record is not sufficient to show that these rights of way have taken away the original dedication of the property as a public street, or that it is not used as such. There was much testimony upon the subject, but appellee's counsel, in their presentation of the case, have shown us no testimony proving that Broadway street is not a street in the contemplation of our law. If there was any testimony introduced tending to show that the street as originally dedicated in 1855 had been changed so as to make it merely a "highway," as claimed by appellee, it has not been pointed out to us by appellee's brief. Mr. Anderson, in his definition of a street, among others, gives the following: "In common parlance, a road or highway;" "prima facie, a public highway;" "a public way.—highway or townroad, or a way which has become public by dedication or prescription." And. Law Dict. 981. All streets are highways, yet all highways are not streets. By our constitution (article 10, § 2) all railroads are declared to be public highways, and yet, where one or more of such roads are along a public street, the fact of its being a highway does not necessarily take away its character as a public street. The fact that the charter of the city of Dallas authorizes the city council to grant the right of way "over any street or highway in said city" will not justify a departure from the well-settled definition of those terms, so as to convert a well-established street into a different character of highway, upon such testimony as is contained in the record before us. As to North Market street, South Lamar street, Water street, and South Austin street, we find no error in the judgment, and it is affirmed; as to that portion of the judgment affecting Broadway street, for the reasons above indicated, the judgment is reversed, and the cause remanded.

ST. LOUIS, K. & S. R. CO. et al. v. WEAR,
Judge.¹

(Supreme Court of Missouri. June 15, 1896.)

PROHIBITION, WRIT OF—RECEIVERS—JURISDICTION TO APPOINT—EX PARTE PROCEEDINGS—RIGHTS OF DEFENDANTS—LIABILITY FOR CONTEMPT—WHO MAY ACT.

1. Where the record discloses a failure of jurisdiction, or an unwarranted exercise of ju-

dicial authority, causing an immediate and wrongful invasion of property rights, a writ of prohibition will lie to prevent the execution of an order of the lower court, or to set aside proceedings already had, either at law or in equity.

2. Under Rev. St. 1889, § 2193, conferring upon judges of trial courts the power to appoint receivers in vacation, such power may be exercised out of the county in which the case is pending, if within the circuit.

3. Laws 1895, p. 91, amending Rev. St. 1889, § 2246, granting an appeal from an order refusing to revoke or modify an interlocutory order appointing a receiver, and providing for the summary determination of such appeals, must be construed as limiting the power of a court to appoint a receiver in an ex parte application, without notice, for a longer time than is reasonably requisite to allow defendant to show cause against the continuance of the receivership; and the procedure in such case must be so shaped as to allow a speedy review of an interlocutory order appointing a receiver in vacation as well as in term time.

4. On an ex parte application, without notice, an order was granted in vacation appointing a receiver for a going corporation, and providing that the corporation should appear at the next term of court, three months distant, and show cause why the receivership should not be continued. *Held*, that the order was in excess of the limitation of the power of appointment without notice, the final hearing not having been fixed within a reasonable time.

5. The proceedings being ex parte, the fact that no objection was made to the jurisdiction at the time the order was granted is not a bar to an application for a writ of prohibition.

6. A petition for the appointment of a receiver for a corporation showed that the corporate property had been transferred to an alleged new company, but such new company was not made a party to the petition. A receiver having been appointed, the officers having control of the property refused to surrender it, whereupon the court granted a writ directing the sheriff to place the receiver in possession, and to arrest for contempt the persons refusing to surrender possession. *Held* that, the new corporation and its officers not being parties to the proceedings, the court was without jurisdiction to grant the writ.

7. A refusal to obey an order of court granted without jurisdiction does not render the person so refusing liable for contempt.

8. Under Const. 1875, art. 12, § 17, providing that the manager of a railroad corporation shall not in any way control, or act as officer of, another railroad corporation operating a parallel or competing line, the president of a railroad company cannot act as receiver for a company operating a parallel or competing line. Sherwood, J., dissenting.

In banc. Application by the St. Louis, Kennett & Southern Railway Company and others for a writ of prohibition against Judge Wear, judge of the circuit court. Writ granted.

The proceeding before Judge Wear was upon a petition in which Mr. Kerfoot was named as plaintiff, and the "St. Louis, Kennett & Southern Railroad Company, a corporation, and Louis Houck, E. F. Blomeyer, L. B. Houck, Theophilus Besel, and E. S. McCarty, as directors in said railroad company, and the Pemiscot Railroad Company, a corporation, and Robert G. Ranney, Leo Doyle, Robert T. Giboney, and John R. Jeannin, directors in said railroad company, and Louis

¹ For additional opinion, see 36 S. W. 658.

Houck," defendants. The substance of that petition (according to the statement of the counsel for defendants in the supreme court, which statement is regarded as sufficiently full for the purposes of the prohibition case) is as follows:

"On the 17th of March, 1890, there was organized under the laws of this state the St. Louis, Kennett & Southern Railroad Company, with a capital of \$180,000, divided into 1,800 shares of the par value of \$100 each, designed to be constructed and operated from Campbell to Kennett, Dunklin county, Missouri,—a distance of 19 miles. Of this stock, A. J. Kerfoot held, and still holds, 108 shares, and E. S. McCarty, Harry H. Ferguson, Melvin L. Gray, and George Denison, respectively, held 108 shares. Prior to the — day of July, 1891, all the shares of the other stockholders in said company were purchased by said A. J. Kerfoot and E. S. McCarty. On July 8, 1891, said Kerfoot and McCarty entered into a contract with relator Louis Houck, by the terms of which said Houck agreed to transfer to said Kerfoot and McCarty ten interest-bearing extension bonds of the Cape Girardeau Southwestern Railway Company, each for \$1,000, which were represented to be worth $\$1\frac{1}{100}$ of their face value, and also to organize a construction company for the purpose of making a connection between the said railroads at the town of Campbell, said connection being of the approximated length of 30 miles. Of the stock of said construction company, said Kerfoot and McCarty were to receive 40 per cent., and on the construction of said connection, said Kerfoot and McCarty were to be superintendent and general manager, respectively, at salaries of not less than \$175 per month. By the terms of this contract, one-half of the real estate belonging to said St. Louis, Kennett & Southern Railway Company at Kennett was to be transferred to said Kerfoot and McCarty. In consideration of the foregoing, said Kerfoot and McCarty were to transfer to said Houck 300 shares of their stock in said railroad company, on the completion of the contract aforesaid. After the above terms of said contract had been agreed on and set forth therein, additional stipulations were inserted by said Houck in said contract, without the knowledge and consent of said Kerfoot and McCarty, to the effect that in no event was said Houck to be personally responsible for the fulfillment of said contract, and that, if said contract should not be kept on his part, such failure should not affect in any wise the said contract, and that 1,360 additional full-paid shares of stock in said company should be issued to said Houck, and that the 240 shares of said Kerfoot and McCarty should be considered full paid. While the bonds above referred to were by said Houck transferred to said Kerfoot and McCarty, not only were they not of the value represented by said Houck, but of no value

whatsoever; and while said construction company was organized, and certain certificates of its stock transferred to said Kerfoot and McCarty, the purpose of its organization—the construction of a connection between the aforesaid railroads—was not only never accomplished, but never attempted to be carried out, and said certificates are consequently of absolutely no value. Shortly after the transfer of the 300 shares of the stock of the St. Louis, Kennett & Southern Railroad Company by said Kerfoot and McCarty to said Houck on the faith of the performance of the terms of said contract by said Houck, said Houck held a meeting of the pretended shareholders holding shares in excess of those held by said Kerfoot and McCarty,—to whom no notice of said pretended meeting was ever given, or attempted to be given, and of which they had no knowledge or information,—whereat said pretended shareholders did attempt and pretend to issue to said Houck 1,360 additional shares of stock of said railroad company. This action of said pretended shareholders, respondent, Kerfoot, claims to be fraudulent, illegal, and void, against which he has protested, and now protests, and in affirmance of which he has done and will do nothing. By reason of the aforesaid facts, it is claimed that the consideration for the transfer of said stock to Houck has failed, and was only brought about by the false and fraudulent representations of said Houck, with the intent to cheat and defraud said Kerfoot and McCarty.

"It is also charged in said petition: That, having thus fraudulently obtained control of said railroad, said Houck and the other relators have mismanaged, and been guilty of gross negligence and misconduct in their trust capacity as directors, officers, etc., and fraudulently combined to cheat and defraud respondent, Kerfoot, and to render his shares of stock valueless, etc., together with those of other of the stockholders. That the other relators, as directors of said company, are under the influence and control of said relator Houck, and conform their actions to accomplish his fraudulent and illegal purposes, and to carry out his unlawful designs. That said Louis Houck is the principal shareholder in a company organized to construct a railroad through the counties of St. Genevieve and Perry, in the state of Missouri, which said road is located many miles from the St. Louis, Kennett & Southern, and that, being entirely without credit, said Houck has used in the construction of said road divers funds belonging to said St. Louis, Kennett & Southern Railroad Company, without any authority so to do from the stockholders and directors of said company, although with the pretended authority of said board of directors. That said Houck is also the principal stockholder in a certain railroad in process of construction through Scott county, Missouri, and in the construction of this road

said Houck has illegally and fraudulently, in like manner and to like ends, appropriated the funds of said St. Louis, Kennett & Southern Railroad Company. That on or about February 15, 1892, the Pemiscot Railroad Company was organized,—and constructed during the year 1894,—of which said Houck was the real and substantial owner. That in the construction of this road said Houck wrongfully and fraudulently appropriated certain of the funds of said St. Louis, Kennett & Southern Railroad Company, in the manner and with the purposes as aforesaid. That on the 22d day of April, 1895, said Houck, in furtherance of his said designs to destroy the value of said Kerfoot's stock, and of the property of said St. Louis, Kennett & Southern Railroad Company, caused the said pretended stockholders of said company to adopt a contract attempted to be entered into between the directors of said last-named companies, whereby the two said railroads should be consolidated into one road. Of none of these proceedings was said Kerfoot notified, and of none of which did he have any knowledge or information, nor did he in any manner participate therein. Under this pretended contract of consolidation, the stock of the two companies was to be called in, and new stock in the consolidated company issued in lieu thereof. That said contract was submitted to a pretended meeting of said shareholders of the St. Louis, Kennett & Southern Railroad Company, and the minutes of said meeting purport to show that said contract was adopted by a majority of its stockholders, all of which is false. That a copy of said minutes, and also the minutes of a similar meeting of the shareholders of said Pemiscot Railroad Company, showing a like pretended ratification of the same contract, have been filed in the office of the secretary of state of the state of Missouri. The said attempted consolidation was fraudulent and void, in that it was not effected in conformity with the laws of the state of Missouri, and with a fraudulent intent and purpose, and because no notice of said meeting was given said Kerfoot, who was not present thereat, although in the copy of the minutes of said meeting on file with the secretary of state he is falsely represented as voting in favor of said consolidation. That the terms of said contract of consolidation were not carried out by said Houck, or the other relators. That the earnings of said company are not sufficient to discharge its accruing obligations, and that the salaries and wages of its employes have not been paid for the last six months, and that it is now in debt to its said employes to the extent of many thousand dollars. That by reason of the acts aforesaid said company is unable to secure supplies needed in the operation of the road. That the rolling stock and other properties are in need of repair and replenishing, which

the relators have failed and refused to have done. That no provision has been or is now being made for the extinguishment of the outstanding debts and bonds hereafter to accrue. That said Houck on the 2d day of December, 1895, did remove respondent, Kerfoot, from his position as superintendent of said road, and did appropriate his salary to himself, through one of the relators, his kinsman Louis B. Houck. That the said Pemiscot Railroad Company is, and was at the time of the attempted consolidation aforesaid, hopelessly insolvent. That its debts have not been paid, except such as were paid out of the earnings of the St. Louis, Kennett & Southern Railroad Company as aforesaid, and that said attempted consolidation was but a part of the plan of said Houck to secure and absorb both properties. That by reason of all of which the said St. Louis, Kennett & Southern Railroad Company has become greatly embarrassed financially, and that a continuation of such acts of mismanagement will bring about the insolvency and bankruptcy of said corporation.

"The prayer of the bill is that relators, as officers of said company, be restrained from diverting further amounts of money from the treasury of said company; that they be suspended from office as directors, etc., and that a new election be ordered to be held to supply the vacancy thus to be created; that an accounting be had with respect of the funds diverted as aforesaid; that a decree be rendered annulling said pretended consolidation, and restoring the funds so diverted from the treasury of the St. Louis, Kennett & Southern Railroad Company; that said 300 shares of stock, or their proportionate interest therein, transferred by said Kerfoot and McCarty, be restored to them, and that said contract under which the transfer was made be annulled, for reasons aforesaid; that said issuance of the 1,360 shares of stock be annulled and canceled, for the reasons before mentioned; and that said Houck be required to account for the benefits that have accrued to him by reason of the transfer of said 300 shares of stock, and the issuance of said 1,360 shares; and that he be ordered to pay one-half of the same to said Kerfoot. An offer is made to return to said Houck one-half of the shares of stock in the construction company before mentioned, and like offer with respect of said extension bonds. The petition then asks for the appointment of a receiver pending the determination of the issues tendered, in order to prevent the misappropriation, and to insure the preservation of the properties involved."

The order of Judge Wear, appointing the receiver, is as follows:

"State of Missouri, County of Dunklin—ss.: In the Circuit Court, July term, 1896. A. J. Kerfoot, Plaintiff, v. The St. Louis, Kennett & Southern Railroad Company, a Corpora-

tion, and Louis Houck, E. F. Blomeyer, L. B. Houck, Theophilus Besel, and E. S. McCarty, as Directors in said Railroad Company, and the Pemiscot Railroad Company, a Corporation, and Robert G. Ranney, Leo Doyle, Robt. T. Giboney, Louis Houck, and John R. Jeannin, Directors in Said Railroad Company. and Louis Houck, Defendants. In Vacation. Order of Appointment of Receiver. Now, on this 11th day of April, 1896, comes A. J. Kerfoot, and presents to me, John G. Wear, judge of the circuit court of Dunklin county, Missouri, in vacation, at chambers, in the city of Poplar Bluff, in the county of Butler, in the state of Missouri, a certified copy of his petition filed in the office of the clerk of the said circuit court of said Dunklin county. in a certain cause entitled above; and with it he presents his motion, verified by his affidavit, by which he asks the appointment of a receiver of the real and personal property of the said defendant corporations named above, which said motion is hereto attached. And the said John G. Wear, judge as aforesaid, having heard said motion, and having duly considered the same, together with the facts offered in connection therewith, does hereby order that Samuel W. Fordyce, of the city of St. Louis, Missouri, he, and he is hereby, appointed as receiver of all and singular the real and personal property, wherever situate, of the said St. Louis, Kennett & Southern Railroad Company, and of the said Pemiscot Railroad Company, and that he shall immediately qualify as such, by giving bond for the faithful performance of his duties as such receiver, in the sum of twenty-five thousand dollars, and that after his qualification as such receiver, having duly taken the oath prescribed, he shall proceed to the county of Dunklin, and to the county of Pemiscot, in the state of Missouri, and shall take charge of the said property of the said railroad companies, including the rolling stock, the depots, books, and papers of the said companies, and that he shall then take an inventory of all of the said property so taken charge of by him; that he shall manage the said railroad properties carefully and discreetly; that he shall continue to fulfill and perform all of the existing contracts of the said railroad companies until the further order of the court in the premises; that he shall discharge all of the current expenses of the management as such receiver out of the earnings of the said roads while they are in his hands or custody; that he shall keep an accurate and exact account of the expenses and of the income of the two said railroads, the one extending from Campbell, Missouri, to Kennett, Missouri, and the other extending from Kennett, Missouri, to Caruthersville, Missouri, preserving the said expenses and income separate in all of the transactions of himself as such receiver, and that he shall keep and maintain the said

properties in good condition until the further order of the said circuit court of Dunklin county, or the judge thereof in vacation; and that he make a full report of his acts as such receiver to the next term of said court, unless ordered to do so before that date. It is further ordered that each and every agent and employé of the said defendant railroad companies named above, whether regarded as the employés of the said companies as one corporation, or as two separate corporations, shall, upon the demand of said Samuel W. Fordyce, after his qualification as such receiver, immediately yield to said receiver the possession and control of all the property, books, and accounts of the said defendant railroad companies or company, and the said Louis Houck and the other defendants named as the officers and directors of said defendant companies are hereby ordered to turn over and deliver to the said receiver all of the books and papers of the said company or companies which pertain in any wise to the management and business of the said company or companies. It is further ordered that in the event that any such employé of said company or companies shall fail or refuse to so deliver to said receiver the property in his said care and custody, or should said defendants fail or refuse to so deliver to said receiver the books, papers, or other property of the said defendant company or companies, the said receiver shall at once report the person so failing or refusing to the undersigned judge for his further orders in that behalf. The said defendants and their employés are hereby enjoined and forbidden from in any manner interfering with the said possession of the said receiver after he shall have obtained the possession of the said property hereby ordered into his hands, until the further orders of the said court, or of the judge thereof in vacation. It is further ordered that this order be filed in the office of the clerk of said court of said Dunklin county, and that a certified copy thereof be furnished the said Samuel W. Fordyce, as such receiver, and that a duly-certified copy thereof be served upon the defendants named above. It is further ordered that the said defendants be notified to appear before me, the undersigned judge of the circuit court, at the next term of the circuit court, in the county of Dunklin, in the state of Missouri, then and there to show cause, if any they can, why the appointment hereby made should not be continued, and the property kept by the said receiver, pending a hearing upon the merits of this controversy, and until the said defendants may be heard upon the merits thereof. And the service of a duly-certified copy hereof shall be deemed sufficient service of the said notice. Done at chambers in the city of Poplar Bluff, in the county of Butler and state of Missouri, this 11th day of April, 1896. John G. Wear, Judge."

The writ issued by Judge Wear for the seizure and delivery of the property of the railroad company is as follows:

"State of Missouri, County of Dunklin—ss.: In the Circuit Court, to July Term, 1896. A. J. Kerfoot, Plaintiff, v. The St. Louis, Kennett & Southern Railroad Company, a Corporation, and Louis Houck, E. F. Blomeyer, L. B. Houck, Theophilus Besel, and E. S. McCarty, as Directors in said Railroad Company, and the Pemiscot Railroad Company, a Corporation, and Robert G. Ranney, Leo Doyle, Robt. T. Giboney, Louis Houck, and John R. Jeannin, Directors in said Railroad Company, and Louis Houck, Defendants. To W. G. Petty, Sheriff of Dunklin County, Missouri: Whereas, it appears to me, John G. Wear, judge of the circuit court of said Dunklin county, Missouri, sitting in chambers, in vacation, by the report of S. W. Fordyce, whom I did on the 11th day of April, 1896, appoint as receiver of all of the property of the said St. Louis, Kennett & Southern Railroad Company, and of the said Pemiscot Railroad Company, which report is duly verified, that the said Samuel W. Fordyce did on said 13th day of April, 1896, proceed to the town of Kennett, in said Dunklin county, Missouri, and did then and there cause to be served upon one Louis B. Houck, whom he found in the charge and management of the said property of the said railroad companies or company named above, a duly-certified copy of my order made in the above-entitled cause, appointing him, the said S. W. Fordyce, as such receiver, and that he did then and there demand of the said Louis B. Houck the possession and custody of the property of the said railroad companies or company, and did demand that the said Louis B. Houck relinquish the possession and control thereof to him, the said receiver, and that said Louis B. Houck did then and there fail and refuse so to turn over and deliver to said receiver the possession and control of the said railroad or railroads, and of the said property of the said railroad company or companies, and did then and there fail and refuse to relinquish the said possession and control thereof; and that the said Louis B. Houck did willfully violate the commands of my said order of appointment of the said Samuel W. Fordyce as such receiver: This is, therefore, to command you that you do forthwith summon the power of the said county of Dunklin, if necessary, and that you proceed to the property of the said railroad company or companies named above, and to its railroad office or offices, wherever situate or found in your county, and that you put and place the said Samuel W. Fordyce, as such receiver, in charge, custody, and possession thereof, and that you dispossess therefrom, and from every portion or part thereof, the said Louis B. Houck, or any other official or employé or agent of the said Louis B. Houck or of the said railroad companies named above, or

of any defendants named herein above; that you take and deliver to the said receiver all of the engines and cars and other equipments of the said railroad or railroads, all of its books and papers, its tickets and other movable property, its depots and ticket offices, and every other property of every description. You are further commanded that you immediately take into your custody the body of the said Louis B. Houck, and him safely keep, so that you have him, the said Louis B. Houck, before me, at chambers, in the city of Poplar Bluff, in the county of Butler and state of Missouri, on Thursday, April 16, 1896, then and there to show cause, if any he can, why he should not be committed to the common jail of said Dunklin county for his disobedience of my said order of appointment of said receiver. And you are further commanded that if any other person shall attempt to obstruct the full and free execution of the above order, or to aid or assist in the attempt to remove any of the said property from the said county of Dunklin, except by orders of the said receiver, you shall, by virtue hereof, arrest each and every such person, and have him or them before me at the time and place designated above, then and there to be further dealt with according to law. In testimony whereof, I have hereunto set my hand, at chambers, in the town of Bloomfield, in the county of Stoddard and state of Missouri, this 14th day of April, 1896. John G. Wear, Judge of the Circuit Court of Dunklin County, Missouri."

The return of the sheriff upon the above writ follows:

"Executed the within writ in the county of Dunklin and state of Missouri on the 14th day of April, 1896, by placing S. W. Fordyce, as receiver, in charge of the depot and all of the property of the above-named company or companies which were at that time at the town of Kennett and in said county, including one engine and two passenger coaches, which were afterwards taken away by L. B. Houck, and carried eastward into Pemiscot county, Missouri. I did further on the 15th day of April, 1896, put the said receiver in charge of all the remainder of the property of the said companies or company in my said county. Said Louis B. Houck was not arrested as ordered above, because he left the said county of Dunklin. W. G. Petty, Sheriff of Dunklin County, Mo."

Other necessary facts appear in the opinion of the court.

M. R. Smith, for plaintiffs.

BARCLAY, J. (after stating the facts). This action is original in the supreme court. The plaintiffs are the St. Louis, Kennett & Southern Railroad Company, Louis Houck, and a number of other shareholders in said company. The defendants are the learned

circuit judge of the Twenty-Second circuit, and Messrs. Kerfoot and Fordyce, plaintiff and receiver in the proceeding before the judge. The object of the action is to obtain a writ of prohibition against the enforcement of certain orders entered by the judge in vacation of the court. Copies of those orders will be printed in the official report. The claim of plaintiffs here is that the orders are void, because made without jurisdiction, or, at least, that they are in excess of any jurisdiction which the circuit judge might properly exercise in the proceeding as it then stood. In response to a preliminary rule in prohibition, defendants made separate returns, and plaintiffs replied thereto. It will not be necessary to state the terms of those pleadings at any great length. The facts on which the result of the action in this court depends are few, and need not be obscured by elaboration of the minor features of the controversy. Those facts are also admitted by the pleadings. The old St. Louis, Kennett & Southern Railroad Company (which we shall call the "Old Kennett Road" for a short name) was incorporated in 1890 to operate a railroad, about 19 miles long, between Campbell and Kennett, in Dunklin county. A new company of the same title was formed in 1895 by an alleged consolidation of the old Kennett road and the Pemiscot Railroad Company, which had been organized in 1892 to extend the railroad from Kennett to Caruthersville. The latter place is in Pemiscot county, on the Mississippi river. The validity of that consolidation is attacked in the petition filed in the case on the circuit. The ostensible public evidence of the consolidation is the certificate issued by the secretary of state of Missouri, proclaiming a compliance with the statutory requirements in regard to the union of such corporations. Rev. St. 1889, § 2567. The property formerly owned by the two old companies was in custody of the new Kennett road, which operated a line, about 44 miles in length, from Campbell to Caruthersville (via Kennett), when Kerfoot's petition was filed. For the purpose of the hearing in this court, the version which that petition gives of the dealings between Kerfoot, Houck, and the companies will be accepted as reliable, in determining the propriety of the proceedings which followed. The statements of that petition need not be repeated. They will be referred to as occasion requires. An ex parte application for the appointment of a receiver was made to the circuit judge, in vacation, on representations additional to the petition. The substance of those representations is that if such appointment were not made the property of said railway companies would "be wasted pending the determination of the said litigation," and the rights of the plaintiff "suffer irretrievable injury," etc. The application excused the want of notice thereof to defendants on the ground "that the

giving of the said notice would tend to defeat the object sought to be obtained by the said appointment, in this, to wit: that the said Louis Houck is in exclusive charge of all of the books showing the condition of the affairs of the said companies, and has persons in charge of the various offices and property of the road, who are entirely under his control; that the said Louis Houck would so handle and dispose of the books and property of the said companies that the order of appointment of a receiver, if made upon notice, would not avail, and would not be obeyed; the books and movable property of the said companies would be removed from the said counties in which said property is situate, and would be removed from the state, so that the said processes of the said court would not be effectual to compel the delivery thereof to the receiver which might be appointed"; "that by the removal of the said books of the said companies the object of the appointment of such receiver would be frustrated, and his performance of his said duties would be made difficult, if not impossible; that all of the said defendants, directors in the said corporations, are under the control of the said defendant Louis Houck"; and "that, if the said defendants should have notice of this application for a receiver, they would resort to various tricks and devices to delay this proceeding, and in the meanwhile to further wreck said property; that the said defendants now are plotting to deprive this plaintiff of his property interest in the St. Louis, Kennett & Southern Railroad Company, by means of a fictitious and fraudulent assessment upon his said stock; and that the giving of the said notice would have the effect to destroy the benefits sought in the appointment of the said receiver." The circuit judge granted the application, without notice to defendants, and made a vacation order, at Poplar Bluff, in Butler county, the terms of which are set forth at large in the statement accompanying this opinion. The main features of the order are that Mr. Fordyce was appointed receiver of all the real and personal property of defendant companies. He was directed to immediately qualify, by giving bond, etc., and then to take charge of all the real and personal property of said companies, "including the rolling stock, the depots, books and papers, of the said companies"; to "manage the said railroad properties carefully," and "continue to fulfill and perform all of the existing contracts of the said railroad companies until the further order of the court in the premises"; to keep accounts, make reports, etc. The order further directed defendants to deliver all said property to said receiver, and enjoined them from interfering with the possession of the latter. The defendants were further ordered to appear before the judge "at the next term of the circuit court in the county of Dunklin," then and there to show cause why the

receivership should not be continued "pending a hearing upon the merits." This order was dated April 11, 1896. The next term of the Dunklin circuit court, as appointed by law, will begin on the second Monday (the 13th) of July, 1896. Sess. Laws 1892, p. 13, § 50. An ordinary summons to defendants to appear and answer the petition in the cause at the opening of the July term of the circuit court of Dunklin county was issued on the 10th of April, 1896. Mr. Fordyce, at the time of his appointment as receiver, was president of the St. Louis Southwestern Railroad Company, popularly known as the "Cotton Belt" route. It is alleged in the petition for prohibition in this court that the latter is "a competitive railroad company, whose policy has ever been hostile to relator railroad company, for the reason that it occupies the same territory for business," and that the connection of the Kennett road with the Mississippi river secures to the people of Dunklin and Pemiscot counties advantages of competition between that road and the Cotton Belt. There is no denial of these allegations in the return of any of the defendants to the preliminary rule in this court, and like statements as to the roads being in competition appear in the replies to the returns. The above recital shows the substance of the charges on that point. When Mr. Fordyce, in obedience to the order for his appointment, demanded possession of the Kennett road, the officers in charge of the property refused to deliver it. That demand was the first actual notification given to them of the receivership. After the refusal to turn over the property, an application was made to the circuit judge for further action, whereupon he issued the writ or warrant of date April 14, 1896, to the sheriff of Dunklin county, directing him to summon the power of his county to put the receiver in possession of the property of the two railroad companies, and to dispossess any official of said companies. The warrant is recited in full in the statement accompanying the opinion. But it may be properly noted here that the warrant was issued in Stoddard county. It directed the arrest of Louis B. Houck, and that he be produced before the circuit judge, at chambers, in the city of Poplar Bluff, Butler county, April 16, 1896, to show cause why he should not be committed to jail for disobedience of the order appointing the receiver. Under the last-described writ, the sheriff put Mr. Fordyce, as receiver, into possession of the property of the Kennett railroad in Dunklin county, and otherwise returned the order unexecuted, for the reasons appearing in his return. At that stage of the case the application for a prohibition was presented to the supreme court, and a preliminary rule issued.

1. It is urged by defendants that prohibition is not applicable to the situation existing on the circuit in the receivership case,

and that no review can occur at this time as to the propriety of the disputed orders. But, if those orders were beyond the legitimate authority of the judge, the enforcement of them may be prohibited. *Morris v. Lenox* (1843) 8 Mo. 252. The fact that the suit in the circuit court invokes the equity powers thereof does not preclude the use of a prohibitory writ to keep the judicial action within the limits marked by law. A court of equity, no less than a court of law, may be called back within the boundaries of its rightful jurisdiction by the process of prohibition. Where a court or judge assumes to exercise a judicial power not granted by law, it matters not, so far as concerns the right to a prohibition, whether the exhibition of power occurs in a case which the court is not authorized to entertain at all, or is merely an excessive and unauthorized application of judicial force in a cause otherwise properly cognizable by the court or judge in question. *State v. Walls* (1892) 113 Mo. 42, 20 S. W. 883; *In re Holmes* (1895) 1 Q. B. 174. Prohibition, however, will not ordinarily be granted where the usual modes of review by appeal or writ of error furnish an adequate and efficient remedy for the correction of an injury resulting from the unauthorized exercise of judicial power. But where those remedies are inadequate to the exigency of the situation, in a particular case, a supervising court may properly interfere by the remedy now asked. If the orders in the Kerfoot suit were in excess of the jurisdiction of the learned judge who entered them, and if they have resulted in the seizure of a large part of a railroad line, and its detention from those entitled to—and whose duty requires them to—operate it for the convenience of the public, the case is one which would permit, if not demand, the application of a writ of prohibition to correct the wrong complained of. The remedy of prohibition affords opportunity for a direct attack upon proceedings questioned upon the point of jurisdiction. If the facts shown by a record reveal an unwarranted application of judicial power, causing an immediate and wrongful invasion of rights of property, the writ of prohibition may go to check the execution of any unfinished part of the extrajudicial programme that may have been outlined. Sometimes the writ may be so shaped as to undo the steps that have been taken in such a programme. To justify the use of the writ, it is not essential that the proceedings in dispute should be so entirely void as to warrant a declaration of nullity upon a collateral inquiry. The statute governing proceedings in prohibition makes no change in the ancient law on these points. Laws 1895, p. 95.

2. The plaintiffs in this court contend that the learned judge had no jurisdiction to appoint a receiver for the railroad company upon the showing made by the petition of Kerfoot, and that the order of appointment is therefore a nullity. It is true that there are pre-

edents declaring that, in the absence of statutory authority for so doing, the property of a solvent and going corporation cannot rightfully be taken from the control of its officers at the suit of a mere creditor at large, and be placed in the hands of a receiver, on account of mismanagement merely, or to secure the performance of some engagement of the company, even in regard to its shares. Some decisions have gone so far as to correct, and even to prohibit, such proceedings, as entirely beyond the general jurisdiction of courts of equity. *Port Huron & G. R. Co. v. Judge of St. Clair Circuit* (1875) 31 Mich. 456; *Iron Co. v. Wilder* (1802) 88 Va. 942, 14 S. E. 806; *Mason v. Supreme Court of Baltimore City* (1893) 77 Md. 483, 27 Atl. 171; *In re Binghamton General El. Co.* (1894) 143 N. Y. 261, 38 N. E. 207; *People v. Weigley* (1895) 155 Ill. 491, 40 N. E. 300; *State v. Superior Court of Pierce County* (1895) 12 Wash. 677, 42 Pac. 123; *Fischer v. Superior Court of San Francisco* (1895) 110 Cal. 129, 42 Pac. 561. But in view of the other serious and sufficiently difficult question involved in the case at bar, and the desirability of prompt announcement of the conclusion that has been reached, we shall not now stop to investigate the soundness of plaintiffs' contention above stated.

3. A power to appoint receivers is expressly conferred upon judges of trial courts in vacation by section 2193, Rev. St. 1889, which greatly broadened the terms of the old law (Gen. St. 1865, p. 678, § 52) under which *State v. Gambs* (1878) 63 Mo. 289, was decided. We shall not be obliged to consider whether the judge might not appoint a receiver in vacation by virtue of inherent power in the circuit court to make such an order, for in the instance under review the order was made in another county than that in which the petition for a receiver had been filed. The inherent as well as the express powers of a court must be exercised within the territorial jurisdiction of that court, unless positive law enlarges the field of their use. But, where a judicial power is given by statute to a judge in vacation, he may exert that power (at least within his circuit) out of as well as in the county where the cause is pending, unless there is something in the statutory authority to forbid such action. It may be conceded for the present, without examining the proposition closely, that the power given to the judge to appoint a receiver carries with it, as a necessary incident, a power in his court, if not in the judge personally, to enforce obedience to orders made within the ambit of that power, and in accordance with established principles of law governing the exertion of such a power. (As to the mode of applying that power we shall have more to say in the next section of this opinion.) But the judicial authority to deal with property by means of a receivership is not unlimited or absolute. *Harris v. Beauchamp*

[1894] 1 Q. B. 801. By a very late statute of Missouri an appeal may be taken from any order "refusing to revoke, modify or change an interlocutory order appointing a receiver or receivers." The same statute further provides for a very summary determination of such appeals, and for that reason directs that they shall, on motion, be advanced on the appellate docket. Laws 1895, p. 91, amending Rev. St. 1889, § 2246. The purpose of this enactment is to moderate the hardships resulting from the long continuance of receiverships granted on insufficient grounds, when no review of interlocutory appointments was permissible. The reports of court proceedings in the United States prior to the passage of that act afforded illustrations of the injuries possible from erroneous judicial action in the matter of receiverships, —injuries for which the law seemed to afford no adequate redress. The right to a summary review of an interlocutory order maintaining a receivership is clearly given by the statute cited. It is a valuable and substantial right. The administration of the law must conform to the intent of the legislature in regard to it. *Andrews v. National Foundry & Pipe Works* (1894) 18 U. S. App. 458, 10 C. C. A. 60, 61 Fed. 782. It is noticeable that a prompt review is allowed by the act of 1895 only where the order continues, not where it dissolves, the receivership. Thus the statute is plainly aimed at the possible abuse of maintaining a receivership (without just grounds) beyond a period required for an investigation of its correctness. If the purpose of the new law is kept in view and effectuated, the procedure in such cases must be shaped so as to permit a speedy review of interlocutory orders appointing receivers in vacation as well as in term. Otherwise such orders, in many parts of Missouri, might stand for nearly half a year without the possibility of even a first review, under the existing law in regard to terms of court. Laws 1892, p. 10, § 30 and following. In other states where statutes allow appeals from interlocutory injunction orders, appointments of receivers, etc., it has been held that the appeals may be taken in vacation as well as in term. *Griffin v. Bank* (1846) 9 Ala. 201; *Montana, etc., Co. v. Helena, etc., Co.* (1887) 6 Mont. 416, 12 Pac. 916; *Railroad Co. v. Dykeman* (1892) 133 Ind. 56, 32 N. E. 823. Such rulings appear necessary to conform to the plain design of the legislation on that subject. The new provisions in this state most clearly import that persons whose possession is to be invaded by a receivership shall have at least a prompt and full opportunity for a hearing (both preliminary and by appeal) as to the justice and equity of such a drastic remedy. Keeping the purpose of the new statute in mind, how must we regard the orders of the learned circuit judge in the *Kerfoot* suit? The appointment of the receiver was made without notice to, or any hearing of, the

defendants. They had no opportunity to offer the facts which they assert, tending to prove that the demand for any sort of receivership was without foundation. The learned judge's order fixed a time, three months distant, at which they might show cause why the receivership "should not be continued, and the property kept by the said receiver, pending a hearing upon the merits." The details of the order plainly contemplate that meanwhile the railroad was to be operated and managed by the receiver; at least, until the next term of court, then three months off. The receiver was directed, for instance, to perform existing contracts "until the further order of the court." The whole framework of the order suggests that the receivership was established for at least a three-months term. The facts which justify the appointment of a receiver, without notice to the party whose possession is disturbed, are exceptional, at best. Nothing but the plainest showing of an imperative necessity for such an order, to prevent a failure of justice, should move a court to grant a motion to that end, though there is no hard and fast rule, that we can give, prescribing when the discretionary power to make such an order may or may not be used. But of this proposition we feel sure: that under our existing law no temporary receivership can rightly be set up, to last three months, without affording first a hearing to the party whose possession of property is determined by such an order. If the court had been in session, so as to permit immediate application to modify the order, the relief then possible might affect the applicability of a prohibitory writ. But the facts here are different. In vacation, at least, a party should not be obliged to hunt up the judge for a correction of an order made in excess of his power in the premises. The right to appoint a temporary receiver in vacation is limited by the necessity from which alone the right to make such appointment springs. *Larsen v. Winder* (1896; Wash.) 44 Pac. 123. No court in Missouri may, without notice, declare a receivership, pending suit, for a longer time than is fairly and reasonably requisite to allow the defendant, whose possession is invaded, to show cause against a further continuance of the receivership. What is such reasonable time will depend on the circumstances of each case. But we have no doubt that three months is beyond (and very far beyond) any reasonable day for the showing of cause. The statute allowing appeals from interlocutory receivership orders must be given due force. It contemplates that an early opportunity shall be allowed to combat, and, if desired, to review, the appointment. The courts must yield to that obvious purpose, and permit no receivership to stand without a summary opportunity to review the equity of it. When a judge in vacation deems the exigency sufficiently great to warrant an ex

parte order for a receivership of property, such as that in question here, he should by the same order appoint a very early day for the showing of cause against the order by defendants, so that the latter may then have opportunity for the motion to vacate which the statute permits. Our law confers, indeed, power to appoint a receiver in vacation, but it also allows an appeal from an order refusing to vacate an interlocutory appointment. A reasonable construction of the latter act would appear to permit in vacation a motion to revoke the appointment in vacation; otherwise one of the chief remedial objects of the appeal statute on this subject would be frustrated. It has been held by some courts that a power to do a certain judicial act out of term implies a power to undo that act, if justice appears to require that move. *Railroad Co. v. Sloan* (1877) 31 Ohio St. 1; *Walters v. Trust Co.* (1892) 50 Fed. 316. We hold that the learned judge's order in the case on the circuit was in excess of the limitations on the power of appointment without notice, which we think the law imposes by the clearest implication.

4. But another patent infirmity is noticeable in the proceedings in question. Had the first order fixed a reasonable date to show cause against it, the question of the jurisdictional validity of the second order (the order to the sheriff) would demand serious attention. That order was made after the refusal of the superintendent of the new Kennett road to surrender possession to the receiver. The petition itself gave notice that the property over which the receivership was sought to be established was in possession of the new company by virtue of the alleged consolidation. The old Kennett Company and its directors were parties defendant in the petition. The new company was not a party to it, for the list of directors shows that only the old company was pointed out as defendant. The receivership asked of and granted by the court reached for the property of the old Kennett Company, and of the Pemiscot Railroad Company. The directions to the receiver exhibit that meaning of the order quite clearly. Then it was evidently beyond the power of the learned judge to order a seizure of property in the possession of the new company without at least giving the latter an opportunity to show cause against the proposed order. By that order the learned judge virtually decided that the transfer to the new company was invalid, and the union of the two old companies merely nominal. That ruling was made without any but an ex parte hearing, as against a stranger to the case in court. The order to the sheriff was in the nature of a writ of assistance, as known to the chancery practice. Such a writ could not rightly be issued, even on a final decree (and, for stronger reason, not upon an ex parte interlocutory order), as against one not a party to the suit, without a chance to the latter to show cause against the order therefor. Peo-

ple v. Rogers (1830) 2 Paige, 103; Howard v. Railroad Co. (1879) 101 U. S. 848; State v. Ball (1892) 5 Wash. 387, 31 Pac. 975. The summary writ, issued from another county, to seize the property and deliver it to the receiver, was beyond the jurisdiction of the learned judge, so far as it concerned or affected the rights of the new Kennett Company; and, as to the latter company, the effect of the writ should be checked by the prohibition now invoked.

5. The fact that no objection was made on the circuit to the want of jurisdiction is no barrier to a prohibition, where the order complained of was entered in vacation, ex parte, and the defect of jurisdiction appears on the face of the papers. Nor can the want of an exception to the objectionable order have any weight where no opportunity to except was had by reason of the ex parte nature of the order.

6. Assuming that the learned judge was without jurisdiction to require the immediate delivery of the property of the new Kennett Company to the receiver without a hearing, then the disobedience of the order by Mr. Houck, as superintendent of that company, involves no contempt. It is always permissible to show, upon process for contempt, that the order disobeyed was beyond the jurisdiction of the authority from which it emanated. If that showing is successfully made, no punishable contempt has been committed. In re Sawyer (1888) 124 U. S. 200, 8 Sup. Ct. 482; Smith v. People (1892) 2 Colo. App. 99, 29 Pac. 924; Schwartz v. Barry (1892) 90 Mich. 267, 51 N. W. 279; State v. Winder (1896; Wash.) 44 Pac. 125.

7. It is insisted by the plaintiffs in this court that the action of the learned circuit judge was void because the appointee named as custodian of the property could not lawfully be appointed receiver of their railway line. The constitution declares that: "No railroad or other corporation, or the lessees, purchasers or managers of any railroad corporation, shall * * * in any way control, any railroad corporation owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as an officer of any other railroad corporation owning or having the control of a parallel or competing line. The question whether railroads are parallel or competing lines shall, when demanded, be decided by a jury, as in other civil issues." Const. 1875, art. 12, § 17. Two sections of the statute law, in furtherance of the purpose of the organic law quoted, are as follows: "It shall be unlawful for any railroad company, corporation or individual owning, operating or managing any railroad in the state of Missouri, to enter into any contract, combination or association, * * * or in any way whatever to any degree exercise control over, any railroad company, corporation or individual owning or having under his or their control or management a parallel or competing line in this

state, but each and every such railroad, whether owned, operated or managed by a company, corporation or individual, shall be run, operated and managed separately by its own officers and agents, and be dependent for its support on its own earnings from its local and through business in connection with other roads, and the facilities and accommodations it shall afford the public for travel and transportation under fair and open competition." Rev. St. 1889, § 2569. "It shall be unlawful for any officer of any railroad company or corporation, or any individual owning, operating or managing any railroad in this state as a common carrier, to act as an officer of any other railroad company or corporation owning, operating or managing, or having the control of a parallel or competing line, and the question whether railroads are parallel or competing lines shall be decided by a jury, when so demanded." Id. § 2570. At various points in the state statutes concerning railroads, receivers are mentioned among other managing operators of such lines. Rev. St. 1889, §§ 2631, 2644, 2645. So that it is obvious that the president of a parallel or competing railroad, however high his business qualifications, is not eligible to appointment as receiver of the competing railway line, in Missouri. The fact is alleged in this court that Mr. Fordyce is the president of the Cotton Belt Route, and that it is a railway in competition with the new Kennett road. The fact stands admitted by the pleadings here, in their present form. But, to make it available as the groundwork of a prohibition, the fact should appear in some way in the proceedings on the circuit. It does not appear in the record of those proceedings. Nor does it appear that the learned circuit judge was aware of the fact when the appointment was made. Hence we are not called upon to say whether or not the fact would furnish of itself a cause to prohibit the execution of the order of appointment.

8. The summary order for the seizure of the property in possession of the new Kennett road was, we think, in excess of the rightful power of the learned circuit judge in vacation. We hence consider that the rule in prohibition should be made absolute, and direct that judgment for a peremptory writ be entered, prohibiting the circuit judge from enforcing any order heretofore made in the Kerfoot case, under which said receiver has taken possession, or is attempting to take possession, of some part of the railway or other property of the St. Louis, Kennett & Southern Railroad Company, or of the Pemiscot Railroad Company, and prohibiting him from making any order (upon the pending petition of said Kerfoot in said cause) directing or permitting any receiver to take possession of any property of said companies without first allowing the present St. Louis, Kennett & Southern Railroad Company an opportunity to be duly heard; and by the writ the said receiver will be prohibited from attempting to

take or hold possession of any property of said railroad companies by virtue of said order, and the receiver will further be ordered to restore forthwith any and all property of the new Kennett road that may be in his possession by reason of his said receivership.

BRACE, C. J., and GANTT, MacFARLANE, BURGESS and ROBINSON, JJ., concur. SHERWOOD, J., dissents.

MEYER v. SOUTHERN RY. CO.

(Supreme Court of Missouri, Division No. 1.
June 23, 1896.)

DEATH BY WRONGFUL ACT—STATUTORY ACTION—PLEADING—TRIAL—INSTRUCTIONS.

1. In an action to recover the statutory forfeiture of \$5,000 for the death of a person occasioned by the negligence of a driver of a street car, under the provisions of Rev. St. 1889, § 4425, the setting out in the petition of a city ordinance regulating the running of street cars, and prescribing the duties of those in charge of them, together with an allegation that the death of plaintiff's decedent was caused by a failure to observe such ordinance, is not a statement of a separate cause of action based upon a violation of the ordinance, but the pleading of such violation as furnishing proof of the negligence of the driver, the consequence of which, when resulting in a death, is fixed by the statute.

2. The giving of an instruction at the request of one party, which correctly states the law so far as it goes, but is misleading because of the omission of other statements in connection, is not ground for reversal where another instruction, given at the request of the adverse party, supplies the omission.

Appeal from circuit court, St. Louis county; Randolph Hitzell, Judge.

Action by August Meyer, administrator of Christian Senn, against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Lubke & Muench, for appellant. Dodge & Mulvihill, for respondent.

MACFARLANE, J. This is the third appeal. The suit was originally prosecuted in the names of Christian Senn and his wife to recover damages for the death of their infant son, Charles, who was killed by being run over by a car of defendant street-railway company in the city of St. Louis. Pending the first appeal, the wife died, and the suit was continued in the name of Christian Senn, the father of the child. On the second appeal the judgment was reversed, and a retrial ordered. The case was again tried, and resulted in a verdict for plaintiff, and defendant again appealed. Pending this appeal, Christian Senn has died, and the suit has been revived and is now prosecuted in the name of his administrator. The pleadings and evidence are substantially the same as upon the former appeals, which will be found reported in 108 Mo. 146, 18 S. W. 1007, and 124 Mo. 623, 28 S. W. 66. A statement of the facts accompanied the first opinion,

which need not be repeated. An ordinance of the city, which had been accepted by defendant, required the conductor and driver of each car to keep a vigilant watch for all vehicles and persons on foot, especially children, either on the track or moving towards it, and on the first appearance of danger to such persons or vehicles to stop the car within the shortest time and space possible. The petition contained these charges: "That the failure of said driver of said car of defendant to keep such proper and vigilant watch ahead for all persons on foot, and especially for the said Charles C. Senn, and the failure of said driver to stop said car within the shortest time and space possible, and failure of the defendant to keep the provisions of said ordinances as it had agreed to do, directly contributed to cause the injuries hereinafter complained of. That on said 1st day of May, 1888, at said point on South Broadway, the said driver of said car negligently and carelessly allowed his team to run against and knock down the said Charles C. Senn as he was crossing said track, and negligently failed to stop his said car in the shortest time and space possible, and negligently drove over him, the wheel of said car passing over his limbs, and greatly mangled and crushed his leg about the knee joint, and otherwise bruising his body, so that afterwards, to wit, on the 3d day of May, 1888, said Charles C. Senn died."

On the question of the contributory negligence of the parents of the child the court gave to the jury these two instructions; the first at the request of plaintiff, and the second at that of defendant: "No. 3. The court instructs the jury that in determining whether or not the plaintiff and his former wife, Mary, contributed by their negligence in the custody and care of their child, C. C. Senn, to its injury and death, you are to consider whether or not they exercised that degree of care, caution, and watchfulness over their said child, C. C. Senn, in sending him across the street for the cows, which was reasonable and proper for parents in their circumstances in life, as shown by the evidence." "No. 8. The court also instructs the jury that plaintiff is not entitled to recover in this case if from the evidence the jury believe that the plaintiff, upon his part, at and immediately preceding the injury of his child, failed to exercise that reasonable care and caution to protect his child from injury which a reasonably prudent parent would have exercised under the like circumstances. Therefore, if from the evidence the jury believe that with plaintiff's knowledge and consent the child, Charles Senn, was sent out upon and over the public street and over the track of defendant company, to help bring home some cows; that plaintiff saw the boy returning from the opposite side of the street, helping to drive the cows over defendant's track; that plaintiff also saw the car passing down towards

the place where the cows and boy were about to cross the track, that plaintiff was then standing at a point from which he had a full view of the car, the cows, and the boy, and was near enough to have given warning of danger to the boy or to the driver of the car; and if from the evidence you further believe that the boy was then in peril, or likely to become so immediately, and that plaintiff knew this, or by the exercise of ordinary care on his part could have so known; and if you believe further that plaintiff gave no warning as aforesaid, and also believe that a reasonably prudent parent, under like circumstances, would have given such warning; and if you also believe that, had such warning been given, the injury would have been avoided,—then you should find for defendant company on the ground of contributory negligence." On the measure of damages the court gave this instruction: "If the jury find from the evidence that the plaintiff is entitled to recover, you will assess his damages in the sum of five thousand (\$5,000) dollars." A verdict and judgment were rendered for plaintiff for \$5,000, and defendant appealed.

1. Counsel argue with much ingenuity and force, and with much plausibility also, that plaintiff states and undertakes to recover on two causes of action; one for negligence of the driver in managing the mules and car, and the other for failure to observe the city ordinance mentioned in the statement. They insist that the former is grounded upon section 4425, Rev. St. 1889, which allows a recovery of \$5,000 in the nature of a forfeiture; while the other is based upon sections 4426 and 4427 of said statutes, and allows a recovery of compensatory damages not exceeding \$5,000. On these assumptions it is claimed that the direction to the jury to assess the damages at \$5,000 was error. Defendant's position would be invulnerable if two causes of action were stated, one under a section allowing \$5,000 absolutely, and the other under a section allowing compensatory damages only. There would be no means of knowing upon which cause of action the verdict was found. *Crumpley v. Railroad Co.*, 98 Mo. 34, 11 S. W. 244; *King v. Railway Co.*, 98 Mo. 235, 11 S. W. 563. But we do not think the argument built upon sound premises. The ordinance requiring a street-car driver to keep a vigilant watch for children upon or approaching the track, and to stop promptly on the first appearance of danger, is a mere regulation in respect to the running of the car, and a failure to perform the duties required does not create a cause of action, but furnishes evidence of negligence in operating the car. So much of the statute as is applicable to this case reads as follows: "Whenever any person shall die from any injury arising from or occasioned by the negligence, unskillfulness, or criminal intent of * * * any driver of any stage coach or other pub-

lic conveyance whilst in charge of the same as a driver * * * the corporation, individual or individuals in whose employ any such driver shall be, at the time such injury is committed, or who owns any such * * * public conveyance at the time any injury is received, resulting from or occasioned by any * * * unskillfulness, negligence or criminal intent above declared, shall forfeit and pay for every person or passenger so dying, the sum of five thousand dollars." Rev. St. 1889, § 4425. The cause of action arises under the statute when the death of a person results from the negligence, unskillfulness, or criminal intent of the driver of a street car. The ordinance merely prescribes certain duties the driver is required to observe while in charge of and operating a car. A failure to discharge those duties will be at most merely negligence in the management of the car, the consequences of which are fixed by the statute. A statute requires a bell to be rung or a whistle to be sounded when a train approaches a public crossing. It also provides that the corporation shall be liable for all damages which any person may sustain at such crossing when such bell shall not be rung or whistle sounded. Hence the effect of a disobedience of the statute is prescribed. But, when the death of any person is caused by a failure to observe these statutory requirements, an action may be maintained for the forfeit, under section 4425, by one entitled to sue. The reason is that the requirements of the statute are regulations for conducting and managing trains, and a failure to observe them is negligence in these respects. Police regulations in cities, such as limiting the rate of the speed of trains or cars, giving signals at crossings, requiring cars to be lighted, etc., all pertain to the management of trains and cars, and a failure to observe them is negligence in operating the train or car. *King v. Railway Co.*, 98 Mo. 239, 11 S. W. 563. These requirements are very different from those statutory duties which have no connection with the operation of trains and cars, such as maintaining road crossings and sign boards, and keeping the track clear of weeds. *Crumpley v. Railroad Co.*, 98 Mo. 34, 11 S. W. 244; *King v. Railway Co.*, supra; *Rapp v. Railroad Co.*, 106 Mo. 423, 17 S. W. 485. In one case the duty is required of those in charge of public conveyances, while in the other the duty is required of the corporation itself. The penalty provided by section 4425, except in case of the death of a passenger, is for neglect in the operation of trains, cars, and other public conveyances. Our opinion is that the ordinance is a mere regulation of the duties of street-car drivers when in charge of cars, and a neglect of such duty is such negligence in operating the same as makes a cause of action for the recovery of the statutory damages of \$5,000. The petition only charged one cause of action, viz. the death of the child.

caused by the negligence of the driver of the car while in charge of it. To state and prove his case, plaintiff was not confined to one negligent act. He had the right to state and prove either statutory or common-law negligence or both, and, both relating to the duty of the driver, the damages are fixed at \$5,000. We find no objection to the instruction on the measure of damages.

2. The correctness of the instruction given plaintiff on the question of the contributory negligence of the parents of the child is earnestly challenged by counsel for defendant. It is said that the instruction is erroneous in that it limited the question of the parents' contributory negligence to their conduct in sending the boy across the street for the cows. The instruction is certainly open to the criticism urged against it. It entirely ignores the evidence which tended to prove that the father of the child knew of the danger into which he was going, and failed to use any efforts to warn him or the driver. But it will be observed that the court does not direct or declare a conclusion of law from the imperfect consideration of the facts which the instruction requires of the jury. The jury might certainly have drawn an inference from the instruction that, if the parents exercised that degree of care and watchfulness over their child, in sending him for the cows, which was reasonable for parents in their circumstances in life, they were not guilty of contributory negligence in the mere fact that they sent him. We think no objection can be found to the instruction as far as it goes. An examination of the instruction given by the court at the request of defendant will show that the facts omitted from the one given plaintiff are fully covered. Taking the two instructions together, the law is fully and fairly declared. They are not inconsistent, but each is proper as applied to the facts on which it is predicated. We are unable to see how defendant could have been prejudiced. The other questions discussed have been passed upon in the former appeals. There have been three jury trials, all resulting in verdicts for plaintiff. This one seems to have been fair, and the judgment is affirmed.

BARCLAY and ROBINSON, JJ., concur.
BRACE, C. J., absent.

MARTIN v. BAKER et al.

(Supreme Court of Missouri, Division No. 1.
June 23, 1896.)

DEED—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.

A widow, who owned 400 acres of land, worth \$10,000 or more, and had \$3,000 in notes and money, and who was 80 years old and feeble in body and mind, went to live with B., a married daughter, who had no children, on the "home place," containing 160 acres, worth \$5,000 or \$6,000. Within a month she deeded

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such place to B. and husband, reserving a life estate, in consideration of her support during her life, but giving the grantees possession and the use of the property. Its rental value was \$375. About the same time she assigned to the grantees a \$1,500 note drawing 8 per cent. interest. The deed was drawn by the husband's lawyer, to whose house the grantor was taken, and where she was left by the husband; but, before being executed, it was taken to B. to ascertain if she would accept it. Soon afterwards M., another married daughter, who had five children, and was the grantor's only other child, began proceedings to have the grantor declared incapable of transacting her business, etc., but they were dismissed before trial. Nine months after such deed was made, B.'s husband took the same lawyer to the farm, 14 miles distant, where he drew and the mother executed a deed of 120 acres of the remaining land to each of the daughters. The land deeded to M. was timber land worth about half as much as the land deeded to B. M.'s deed gave her a life estate only, and prohibited her from cutting or selling the timber. It was understood that M. would not accept the deed to her, and she did not. Two months afterwards B.'s husband took the same lawyer to the farm, where B. and her husband arranged an equal division of the property between them, and she made a will, giving all her property to her husband if he survived her; and, if not, to a stranger. At the same time the mother deeded to such lawyer the 120 acres refused by M., and made a will giving her remaining property to B., appointing B.'s husband executor, and reciting that she had disposed of her land and provided for M., though M. had received but \$300. B.'s husband selected the officers who took the acknowledgments to the deeds, and the witnesses to the wills, and the mother never left home except in his or B.'s company. The fact that M. applied for the appointment of a guardian for her mother incensed her somewhat, and it was used to keep in existence a prejudice against M. Before the first deed was made, the grantor had made two wills, which showed that she understood that mode of disposing of her property, and that she desired her daughters to share equally in it. *Held*, that the deeds to B. and husband were procured by undue influence.

Appeal from circuit court, Andrew county;
William S. Herndon, Judge.

Action by Mary E. Martin against Martha A. Baker and Henry Baker, her husband, to set aside conveyances to defendants by Lydia L. Baker, mother of plaintiff and defendant Martha A., on the ground that they were procured by undue influence, etc. From a judgment for plaintiff, defendants appeal. Affirmed.

Plaintiff and defendant Martha Baker are sisters, the only children of Lydia L. Baker, deceased, and defendant Henry Baker is the husband of the said Martha. On the 18th of August, 1890, the said Lydia L. Baker, then a widow, executed and delivered to defendants a quitclaim deed conveying 160 acres of land, known as the "home place" of the grantor. The consideration expressed in this deed was one dollar and an agreement on the part of the grantees to support and maintain the grantor during her life. The grantor retained a life estate in the land. The grantees were to have the possession and use of the land unless the contract of maintenance was not kept, in which case the grantor reserved

the right to resume possession and control. The said contract is declared in the deed to be the real consideration. On the 10th day of March, 1891, the said Lydia L. Baker executed and delivered to defendant Martha Baker a deed to 120 acres of additional land, situate in section 31, township 59, range 36. The consideration in this deed was one dollar and love and affection. A life estate was also retained by the grantor in this land. On the 25th of May, 1891, defendants conveyed all of said land, and other land belonging to the wife, to one William Herren, who, on the same day, conveyed it back to them in joint tenancy. The said Lydia Baker died in December, 1891, and this suit was commenced in February, 1892, the object of which is to set aside and annul these deeds on the ground that they were procured by fraud and undue influence of defendants, and that the grantor was at the time of unsound mind and memory and incapable of making them. The answer of defendants contained a specific denial of each charge of fraud, and affirmative allegations to the effect that the deeds were made without solicitation, fraud, or influence on the part of defendants, and that the grantor was at the time of sufficient mental capacity to make the deeds. The evidence shows that the said Lydia Baker owned in her own right the home farm at the death of her husband, which occurred in 1879, and received in her own right from her husband's estate 240 acres of land additional. Of this, 120 acres was conveyed to defendants by the deed of March 10, 1891. The estimated value of all the land was \$10,000, and of the home place \$5,000 or \$6,000. The said Lydia, after the death of her husband, continued to reside on the home farm until 1890. The first six or seven years of this period defendants lived with her. At the end of that period they moved to and continued to reside on the farm of the wife in the same neighborhood. Plaintiff first married a man by the name of Brown, and in 1873 moved with her husband to Colorado. Her husband died in 1878, and in 1886 she married Martin. In 1890 she and her husband returned to Missouri to live. In 1881 the said Lydia took one of the daughters of Mrs. Brown to live with her, where she remained until she married in 1890. Soon thereafter the said Lydia went to the home of defendants, where she lived until her death. The first of the deeds was made in a month or two after she went to the home of defendants. Plaintiff has five children, some of whom are minors. Defendants are childless. The evidence shows that the said Lydia was, at the death of her husband, a woman of good physical health, strong mind, and good business capacity, but that, some years before her death, she had suffered from slight attacks of paralysis, and was quite feeble physically. At her death she was about 80 years old. In the year 1885 or 1886 deceased made a will, by which she devised the "home place" and about 40 acres of the re-

maining land to plaintiff, and the rest of the land, consisting of 200 acres, she devised to defendant Martha for life, "and, should she die without leaving children to inherit, said land shall descend to" plaintiff, or "her heirs in case of her death." The will also gave to the five children of plaintiff \$150 each. Another will was made about 12 or 18 months after the first. By this will she devised the home place to defendant Martha with the same limitation as contained in the first. The other land she devised to plaintiff. The personal property was disposed of about as in the first. No copy of this will was preserved, and its exact provisions could not be recalled by the witnesses. In March, 1891, deceased made to defendant Martha Baker the deed to 120 acres of land. On the same day she made a deed to plaintiff for the other 120 acres. This deed contained certain restrictions on account of which plaintiff refused to accept it. On the day the deed to the home place was made to defendants, August 19, 1890, the grantor assigned to defendant Henry Baker a note for \$1,481. On the 25th day of May, 1891, Judge William Herren, at the request of Henry Baker, went out to the home of the latter, and while there prepared the following deeds, which were afterwards executed and delivered: Deed from Lydia L. Baker to William Herren for 120 acres of land. This included all the land she owned not theretofore deeded to defendants. The consideration was one dollar. Deed from defendants, as husband and wife, to William Herren, conveying 360 acres, being the same land previously conveyed to the grantors by Lydia L. Baker. Deed from William Herren to defendants in joint tenancy, conveying the same land. Defeasance, which recited the deed from Lydia Baker to William Herren, that the grantee held the land for sale, and that on demand he should convey the same or pay the proceeds thereof to defendant Martha Baker. On the 26th of the same month Judge Herren prepared wills for all three of the parties. The will of Lydia L. Baker recited that she had disposed of all her real estate and provided for her own support during her life. It recited, also, that she had already fully provided for her daughter Mary Martin, plaintiff, and gave her five dollars. All the rest of her property she gave her daughter defendant Martha Baker. The personal property was estimated at about \$3,000. The will of Martha Baker gave all her estate to her husband, defendant Henry Baker, and provided that what should remain at his death should go to one Otto Bly. The will of Henry Baker gave all his real estate to his wife, should she survive him. A great deal of evidence was introduced by each party bearing upon the mental capacity of Mrs. Baker to make the deeds in question. As is usual in such cases, the evidence was very conflicting. It is too voluminous to be given in detail. That deceased was old and

physically feeble is not disputed. That her mental powers were much impaired is well established. It may also be said that there was no direct evidence that defendants, or either of them, exercised any undue and improper influence over her in order to secure the deeds. The court was requested to find and state in writing the conclusions of fact from all the evidence. Pursuant to this request the court found, and so declared, that, at the date of the respective deeds, the said Lydia L. Baker did not have sufficient mental capacity to transact her business, or to intelligently execute the deeds, and was not of sufficient mind to take into consideration the nature, extent, or value of her property, or the property transferred. The court also found that the deeds were executed by her by reason of undue influence on the part of defendants, and were not her free act and deed. To these conclusions of fact defendants duly excepted. Judgment was for plaintiff, and defendants appealed.

Casteel & Haynes, for appellants. Booher & Williams and David Rea, for respondent.

MACFARLANE, J. (after stating the facts). There may be some doubt whether the conclusion of the court that the grantor was not possessed of sufficient mental capacity to make the deeds in question was sustained by the weight of the evidence of the expert and other witnesses who testified on the question. But, considering the oral evidence in connection with the undisputed facts and circumstances, we entertain no doubt whatever of the correctness of the conclusion that the deeds were the result of the exercise of improper influence of the grantees. Mrs. Baker had the undoubted right, if possessed of sufficient mental capacity, to dispose of her property as she did by the deeds in question, though the effect may have been to put it out of her power to make provision for one of her daughters, who appears to have been most in need of assistance. But her acts must have been her own, and not those of others. It may be said further, that if the acts were her own no one has the right to inquire into the motives which may have controlled her in making the deeds or to question them because inequitable and unjust. *Carl v. Gable*, 120 Mo. 296, 25 S. W. 214. But, in an inquiry whether the execution of the deeds was the free and voluntary act of the grantor, or was the result of improper influence of the defendants, the character of the transaction, the physical and mental weakness of the grantor, and the relationship of the parties to each other cannot be ignored. Indeed, "wherever two persons stand in such a relation as that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage

at the expense of the confiding party, the person so availing himself of the position will not be permitted to retain the advantage, although the transaction could not have been impeached if no confidential relation existed." 2 *White & T. Lead. Cas. Eq. p. 1156*; *Hamilton v. Armstrong*, 120 Mo. 615, 25 S. W. 545; *Cadwallader v. West*, 48 Mo. 496. Another well-recognized principle may be stated in this connection, which is that one may be capable of making a will and yet incapable of making a contract. In making the latter his mind and will power necessarily come in contact with that of the other contracting party, and may be unduly influenced or entirely overcome by it. A contract, therefore, by one of impaired mental and will power with one standing in confidential relations with him should be closely scrutinized to see that no improper advantage has been taken or undue influence exerted. The exertion of undue influence in such case may be pronounced from the nature of the contract and from an unfair and unreasonable advantage secured by it. The deed to the "home place," which was worth \$5,000 or \$6,000, was made on the 18th of August, 1890, within a month or two after the grantor moved to the home of the grantees. Previous to that time the grantor had disposed of her property by will under which a fair and equitable division between her two daughters had been made. By these wills two facts are conclusively shown: (1) That the testator understood that mode of disposing of her property, and (2) that she desired her daughters to share equally in it. It is undisputed that, when the old lady went to the home of the defendants, she owned about 400 acres of land, worth \$10,000 at a low estimate, and some \$3,000 in personal property, consisting chiefly of money and notes. She was, at the time, about 80 years old, and feeble in mind and body. In these circumstances the first contract was made, and a conveyance of the home place was secured. Her income from rents and interest was abundantly sufficient for her support. Now, the deed recites that the real consideration was that the grantees should support the grantor during her life. The deed further provides that the grantees should have the possession and use of the property, but a failure to perform the conditions should operate as a forfeiture, and the title should revert to the grantor. At or about the date of this transaction the grantor assigned and transferred to defendants a note for about \$1,500, which was bearing interest at 8 per cent. per annum. The rental value of the land was \$375 per year. The transaction can only be regarded and treated as a contract between these parties. The life of Mrs. Baker was limited at most to a very few years. She was feeble and helpless, and seeking the care and affection of a daughter. Her mental condition and will were unequal to those of defendants, and she was depend-

ing on them for a home and proper treatment. That the contract thus secured was most unreasonable and unfair cannot be doubted. From the character of the contract, the relationship of the parties, and the mental condition of the grantor, considered alone, we would be bound to draw the inference that improper influences were brought to bear in securing the deed.

But defendants insist that the evidence shows that the proposition came from her voluntarily, and she acted under the advice of counsel. This contention makes necessary an examination of all the evidence. It appears from the testimony of Judge Herren that, on the day the deed was made, defendant Henry Baker brought the old lady to his home, and left her there while he went out to transact some business. The witness said: "She told me she was living with her daughter and her son-in-law, and wanted to arrange her property so as to secure herself in a living certain, and to compensate the parties that took care of her." She then told him what she wished to do, and asked him if it could be done legally. The deed was then drawn under her direction. The witness further testified that she told him, at the time, that she had made no contract with defendant, and he told her that the deed would not bind them unless they accepted it; that, when defendant Henry Baker returned, the deed was read over to him, and he agreed to it, and it was then taken out to be read by defendant Martha. In a few days afterwards Mrs. Lydia Baker, in company with Henry Baker, returned to his office with the deed and told witness that both parties were willing to accept the deed. She then delivered it to defendant, and told him to have it recorded. This evidence shows that the deed was intended solely to compensate defendants for the support of the grantor, that she was not certain of securing "a living" unless she made provision by which defendants would be compensated, and unusual precautions to preserve evidence that the transaction was free and voluntary. Soon after the execution and delivery of this deed Mrs. Martin commenced proceedings in the probate court, the object of which was to declare the old lady incapable of transacting her business and to have a guardian appointed for her. This proceeding was dismissed before coming to a trial. The evidence tends to prove that the old lady was much incensed at her daughter for this effort to have her declared of unsound mind. Prior to moving to the home of defendants, Castle, who had married her granddaughter, had been acting as agent of the old lady, under power of attorney, in the transaction of her business. Soon after this power of attorney was revoked, and the business was taken out of his hands. Certain notes he held for collection were placed in the hands of Judge Herren. Who took charge of her other business does not definitely appear.

The second deed was made on March 10, 1891. On that day defendant Henry Baker took Judge Herren from Savannah out to his home, about 14 miles. At that time two deeds were prepared, one for each of the daughters, which were signed and acknowledged by the old lady the next day. The land conveyed to defendants was much more valuable than that conveyed to plaintiff. The latter was unimproved, and was estimated at \$10 or \$15 per acre. The former was improved, and was estimated at from \$20 to \$25 per acre. It appears that the land described in the deed to plaintiff was timber land, and a life estate only was given her, and she was not permitted to cut or sell the timber. It seems to have been understood at the time that plaintiff would refuse this deed. It was afterwards offered her, and she did decline to accept. On the 25th of May following defendant Henry Baker again took Judge Herren out to his farm, when a disposition of all the remaining property of the old lady was made, at which time, also, defendants arranged an equal division of the property between themselves, as has been heretofore stated. At that time a will was prepared for the old lady by which all her remaining property was given to defendant Martha Baker. This will recited that the testatrix had disposed of all her real estate, and that she had fully provided for her daughter Mary Martin, plaintiff herein. Defendant Henry Baker was appointed executor. The will of Martha Baker recited that her mother and sister were her only heirs at law; that she and her husband had provided by contract for the support of her mother during her life, and she needed nothing; that her sister Mary Martin had received a good estate from her father, equal to what she herself had received. The will then contained this statement: "I desire to state here that I have no ill will, hatred, malice, or hard feeling towards my said sister Mary, nor any of her children, but bear towards her only a sister's love and good feeling, and the same for all her children; but, for reasons not necessary to state, my will and devise is that no property, either real or personal property, of which I may die the owner, or shall be entitled to in any manner, shall go to my sister Mary Martin, or any of her children, after my death." She then devised to her husband all of her property, and, in case he should die first, to one Otto Bly absolutely. Judge Herren was and had long been counsel for defendant Henry Baker, and was greatly trusted by the old lady Baker. Judge Herren sold the land Mrs. Baker conveyed to him, and defendant Sarah Baker canceled the defeasance. Herren says the land was retained by himself and partner as fee for legal services in defending this and other suits, the amount he received being \$600. A deed from Herren recited a consideration of \$3,600, and the grantee borrowed \$2,200 on it.

The evidence shows conclusively that defendants and Judge Herren, in these transactions, got from the old lady property worth \$15,000, and left her with nothing but a bare agreement for support during life. The evidence tends strongly to prove that old Mrs. Baker never left home, except in the company of one or both of the defendants. It shows that defendant Henry Baker not only selected the attorney who should prepare the deeds and wills, but chose the officer before whom the deeds should be acknowledged and the witnesses to the wills. It shows that the circumstance of plaintiff having made application to the probate court for the appointment of a guardian for Mrs. Baker was used to keep in existence a prejudice against her. The transactions themselves, in their details, show such care to preserve evidence and to show fairness as to create almost a conclusive inference that an unfair advantage was being taken. Take the first transaction,—that of August, 1890. Mrs. Baker was taken by defendant to Judge Herren's home in Savannah, and left with him. He is the only witness of what transpired there. She told him she wished to so arrange her property as to secure to herself a living, and to compensate the parties who took care of her. Her counsel proposed the plan by which this could be done. That seems fair enough. After he had written the deed and contract, he read it over to her two or three times to be certain that she understood it perfectly. When defendant came in he read it to him, to see if he would accept it. She was then told to take it to her daughter for her examination and approval. In a few days Henry brought her back with the deed signed and acknowledged. She reported that her daughter accepted. Her attorney then read it over to her again, to be sure she understood it, and, finding that she did, he told her it could be delivered to her son-in-law, which was then done. Now, when we consider that this deed conveyed land worth \$5,000 or \$6,000, and which was then renting for \$375 per year, for the support of a lady enfeebled by age and sickness, when her income was abundantly sufficient for her support; when we consider the assiduous care used in order to make it appear to be her own free act,—we are irresistibly forced to the conclusion that the attorney was acting in the interest of defendants in carrying forward their purpose of securing this property. Defendants had previously lived with their mother on the home farm, and left it and her, as she stated to others, because she would not convey it to them. Mrs. Baker, whose age and infirm health appealed to her daughter for sympathy, was not certain of a permanent home with defendants, for she said she wanted the advice of her attorney as to how she could arrange her property so as to secure one. There can be no doubt that securing a home was conditioned upon making this deed, and

she had been so informed. It must be remembered that this transaction took place before the effort of plaintiff to have her mother declared incapable of attending to her own business. Up to that time Mrs. Baker's equal love for her daughters, and her desire to treat them impartially in the distribution of her estate, appears from the wills she had previously executed. By this deed nearly one-half her estate goes to one daughter. This transaction, in the circumstances, shows not only the exercise of undue influence, but the exercise of moral duress equivalent to physical force. This transaction may well be taken as the key to those that follow, by which defendants secured the remaining property. The deed to the timber land was made to plaintiff. It could not be improved or cultivated without clearing off the timber, yet the deed contained such restrictions that no timber could be cut, either for sale or for preparing the land for cultivation. So it was perfectly useless to plaintiff, and the parties understood it would not probably be accepted, for the officer was directed to read it over to plaintiff, and, if she refused to accept it, to return it to the grantor. Plaintiff did refuse to accept, but the officer did not return it, and defendant Henry Baker went for it. The execution of this deed was only to show a pretense of fairness. The transactions of May 25th established very conclusively that defendants intended that all the property should be enjoyed between them, and that neither plaintiff nor her children should ever come into possession of any of it. Defendant Martha, while possessing a true love and devotion to her sister, and her sister's children, expressly declared that none of them should receive any part of her estate, and, in case she survived her husband, that her entire estate should go to a stranger in preference. The old mother, in her will is made to recite that she had fully provided for her daughter Mary Martin, when it was only shown that she had furnished her \$300 to assist in defraying the cost of some litigation in Colorado long prior to the execution of the wills heretofore mentioned. The evidence shows that the testatrix, when in good health and uninfluenced, was a noble, just, fair, and truthful woman. But, finally, one tract of the land went to Judge Herren himself, the attorney who she had reason to suppose represented her in all these various transactions, and in whom she confidently relied. The land was conveyed to him, and he gave back a defeasance, not to the grantor, but to defendant Martha, by which he declared, in effect, that he held the title for defendant Martha Baker. This defeasance was afterwards surrendered by said defendant to the counsel who, we are satisfied, represented the defendants in all these transactions. We will not comment further. The relation of deceased to the defendants, her dependence on them and the character of these transac-

tions convince us that the deeds in question were secured, directly or indirectly, by the improper and undue influence of defendants. The judgment is affirmed. All concur, except BRACE, C. J., who is absent.

VASTINE v. LACLEDE LAND & IMPROVEMENT CO.

(Supreme Court of Missouri, Division No. 1.
June 23, 1896.)

EJECTMENT—WHEN LIES—POSSESSION UNDER TAX DEED.

Revenue Act 1872, § 222 (Rev. St. 1889, § 7698), providing that the filing of a tax deed for record shall be deemed to be a claim of title by the grantee, against whom the owner may maintain an action of ejectment for the possession of the lands, refers only to the collector's tax deed authorized by such act, and does not apply when the title is based on a sheriff's deed given on the sale of lands for delinquent taxes under the revenue act of 1877.

Appeal from circuit court, Reynolds county; J. F. Green, Judge.

Ejectment brought by J. P. Vastine against the Laclede Land & Improvement Company. There was judgment for plaintiff, and defendant appeals. Reversed.

Dinning & Byrns, for appellant. W. L. Beyersdorff, for respondent.

ROBINSON, J. This is an action of ejectment to recover the possession of certain lands in Reynolds county, named in plaintiff's petition. The petition is in the usual form, alleging defendant's entry into and withholding of same since August 2, 1887. The answer, after admitting defendant's corporate existence, is a general denial. Plaintiff then offered in evidence deeds from the government, by mesne conveyance, to himself, all of which, so far as the determination of this appeal is involved, may be taken as having invested him with the title to the land. It was then agreed that this was wild, uncultivated land, in the actual occupancy of no one. Plaintiff further offered in evidence two sheriff's deeds to J. B. White, including this and other lands, based upon judgments in the circuit court of Reynolds county, rendered against J. H. Duckman and J. P. Vastine, for delinquent and back taxes due on said lands, containing all the necessary recitals required to be done and performed by the statute, and duly acknowledged and recorded; then deeds from White to the Reynolds Land Company, and from the Reynolds Land Company to defendant, including same lands, all duly acknowledged and recorded,—for the purpose of showing his right to maintain this action against defendant, as the constructive possessor of the lands in controversy, as provided by section 7698, Rev. St. 1889, which reads that "any person hereafter putting a tax deed on record in the proper county shall be deemed

to have set up such title to the lands described therein as to enable any party claiming to own the land, named in the tax deed, to maintain an action for the possession against the grantor in said tax deed, or any person claiming under him, whether said grantee or person, is in actual possession or not." Then, for the purpose of showing want of jurisdiction in the court to render judgment against him in the tax suit, and to avoid the force of the sheriff's deed made to defendant's grantor by sale under execution issued on such judgment, which plaintiff had offered in evidence to show that defendant had set up such a title to the land named therein as entitled plaintiff to maintain this action of ejectment against defendant as the constructive possessor thereof, plaintiff read in evidence an order of publication in a suit for delinquent taxes against J. H. Deickman and J. P. Vastine, for back taxes due on the land in controversy, then belonging to himself, contending that the published notice to J. P. Vastine was not sufficient to authorize a valid judgment against the lands of Joseph P. Vastine, and, as no valid judgment could be rendered, the sheriff's deed based thereon would not operate to divest him of title, or invest same in defendant or its grantors, so as to make it a shield against this, his action of ejectment. Here plaintiff closed his case, and the foregoing was all the evidence introduced at the trial, so far as the same relates to the land in controversy. The defendant introduced no evidence, but asked the court to give this instruction, "that under the pleadings and evidence the plaintiff is not entitled to recover," which was refused, and the court then rendered its judgment for plaintiff for the possession of the land, and for costs against defendant; and, on refusing to set same aside on defendant's application, this appeal has been duly prosecuted to this court, after the usual preliminary steps taken.

Appellant's first contention is that the placing upon record, by its grantors, of the two sheriff's deeds read in evidence, founded upon judgment for delinquent taxes, purporting to convey the interest of plaintiff in the land in controversy to defendant's grantor, neither placed the defendant or its grantor in such possession of the land as would authorize plaintiff to maintain this action of ejectment against it; and, secondly, that plaintiff, by the introduction of the sheriff's deed, has shown himself deprived of all title to the land in suit; and that for either or both reasons he cannot maintain this action. If appellant's first contention is correct, then the action of ejectment cannot be maintained against it, on account of a want of proof to show its possession of the land, and the discussion of the other question, as to the effect of the sale of the land under a judgment for delinquent taxes against plaintiff on publication notice, in the initials of his Christian name, need not be considered. In

the case of Childers v. Schantz, 120 Mo. 305, 25 S. W. 209, Black, P. J., in discussing the effect of section 7698 as applying to parties holding sheriff's deeds made pursuant to a sale under an execution issued on a judgment in a suit to enforce the state's lien for delinquent taxes, holds that it does not apply, and says that it is confined to the "collector's deed" mentioned in the revenue act of 1872, wherein section 7690 of the present statute first appeared. The "tax deed" referred to in section 222 of the revenue act of 1872 (now section 7690, Rev. St. 1889) was a designation given by section 217 of the act itself to deeds made by collectors only. Section 217 of that act reads, "Deeds made by the collector shall be called 'tax deeds' * * *"; thus showing that only a particular and statute-defined instrument was to have the effect to give to its holder, who should put it upon record, the anomalous attitude of being in constructive possession of lands at the same time and along with the owner of the land, who might hold the permanent title by conveyance, so that suit might be instituted by the owner of the paramount title against the apparent owner and constructive possessor under a collector's deed, designated by statute as a "tax deed." Whether we consider section 7698 as a provision conceived and enacted for the benefit of the holder of a collector's or tax deed, or as conferring upon the holders of the paramount title to lands that are sought to be clouded by the placing upon the record of worthless collector's or tax deeds (purporting to affect them) the right by ejectment to test their merits, it certainly confers by construction a possession in one case, and a right of action in the other, not recognized at common law; and its provisions will not be extended beyond the strict terms of the act, so far as to make it comprehend in its effect lands embraced in other deeds than the exact and particular deed named and designated in the act,—that is, tax deeds made by the collector,—and will not be so construed and held to affect lands conveyed by a sheriff's deed founded upon a judgment for delinquent back taxes. Whether section 7698, Rev. St. 1889 (formerly section 222, Revenue Act 1872), was not, by necessary implication, repealed by the adoption of the delinquent tax act of 1877, might be a question to seriously consider, if it was thought necessary to avoid the force of its operation by that means alone. The entire mode and manner provided for the collection of delinquent taxes, as provided by the act of 1872, was changed by the provisions of the act of 1877, and the collector was no longer required or permitted to make sales of lands for delinquent taxes, or make his tax deed therefor; but in lieu and substitution of the sale by the collector, and the making of the collector's tax deed, as provided by the act of 1872, the act of 1877 provided, as a means for the enforcement and collection of the de-

linquent taxes charged against the lands of the state, that the collectors of the different counties, through an attorney appointed respectively by them, with the approval of the county court, must cause suit to be instituted in the courts of competent jurisdiction in their respective counties to enforce the state's lien for the taxes, penalties, and costs, and to satisfy the judgment obtained therein the sheriff is required, under a special fieri facias, to advertise and sell the property, or so much as may be necessary to discharge said tax-lien judgment and costs, the same as he might do under ordinary execution, and make his deed therefor to the party or parties purchasing said delinquent tax land. Since 1877 the collectors of this state have had no authority to make sales of land for delinquent taxes; hence could make no deeds denominated (by the act giving the authority to sell) "tax deeds." And as no deeds of the collectors, denominated "tax deeds," were to be, or could be, made, the filing of record of which authorizes suits of ejectment against the grantees therein, as provided by section 7698, the section was practically repealed for want of a condition of facts on which it was possible for it to operate. Clearly, the defendant, nor its grantor, through whom it received deeds to the land in controversy, was never in the constructive possession thereof, by the mere placing upon record of this sheriff's deed to the land. And as, by the agreed statement of facts, the land was shown to be in the actual possession of no one, plaintiff cannot maintain his action on the proof made. As plaintiff cannot maintain his action of ejectment, for the above reason, it will be unnecessary to discuss the effect of the sheriff's deed to the land under sale upon the tax judgments rendered by default on notice of publication to J. P. Vastine of land recorded in the name of Joseph P. Vastine. The judgment of the circuit court will be reversed, and cause remanded, with directions that the trial court enter judgment for defendant.

MACFARLANE, J., concurs. BARCLAY, J., concurs in result. BRACE, C. J., absent.

COCKRILL et al. v. HUTCHINSON et ux.
(Supreme Court of Missouri, Division No. 2.
June 16, 1896.)

HUSBAND AND WIFE—MORTGAGE OF WIFE'S REALTY—VALIDITY—FORECLOSURE—PURCHASE BY TENANT BY CURTESY—REDEMPTION BY REVERSIONERS—LACHES—ESTOPPEL—PLEADING.

1. A joint mortgage by husband and wife of land not held to her separate use is valid, though given to secure a note of the wife which is void because of her coverture.

2. The purchase of land, at mortgage foreclosure sale thereof, by a life tenant, will be deemed to have been made for the benefit of the remainder-men, if they, within a reasonable time, pay their share of the purchase price.

3. Recitals in a mortgage executed by a wife, jointly with her husband, of land not held to her separate use, and also in her acknowledgment, that the land is her separate estate, will not estop her heirs from asserting their right to redeem from the mortgage.

4. An estoppel in pais, to be available as a defense, must be pleaded.

5. The right of reversioners to contribute their share of the purchase price paid by the life tenant for the land, at a mortgage sale thereof, and have his purchase inure to their benefit, after the lapse of 14 years becomes a stale demand, as against a bona fide purchaser claiming by mesne conveyances from the life tenant who has placed valuable improvements on the land, though an action of ejectment by the reversioners against the purchaser for the same land was pending for the greater portion of the 14 years.

Appeal from circuit court, Jackson county; John W. Henry, Judge.

Action by Mary F. Cockrill and husband against W. W. Hutchinson and wife to redeem land from a sale under a mortgage. From a judgment for defendants, plaintiffs appeal. Affirmed.

Jas. W. Coburn and Roland Hughes, for appellants. Kagy & Bremermann, for respondents.

BURGESS, J. On the 3d day of June, 1872, Houston McFarland and Sue B. McFarland were husband and wife; living together as such at Weston, Platte county, Mo. On that day she borrowed from one John E. McFarland the sum of \$450, for which she executed her personal note, payable in three years from its date, with interest at 10 per cent. per annum. On the 25th day of June, 1872, Sue B. McFarland purchased from George G. Rounds the land in controversy, and received a deed therefor, conveying to her the fee-simple title thereto. On June 28, 1872, she mortgaged said property (her husband joining with her) to John E. McFarland to secure the payment of said note. By the mortgage, power of sale was vested in the mortgagee, John E. McFarland. There is recited on the face of the mortgage, with respect to the land, the following, to wit: "The same being the sole and separate estate of the said Sue B. McFarland." And in the certificate of acknowledgment the following, to wit: "And the said Sue B. McFarland, being by me first made acquainted with the contents of said instrument, upon an examination separate and apart from her said husband, acknowledged that she executed the same freely, and without fear, compulsion, or undue influence of her said husband, and desires to convey her separate estate therein." There were born to Houston McFarland and wife two children only, Mary and Maggie, who were 14 and 16 years of age, respectively, in 1872. On March 8, 1877, Sue B. McFarland died, leaving her husband, tenant by the curtesy, and said daughters, surviving her, her only heirs at law. On June 13, 1878, John E.

McFarland, the mortgagee in said mortgage deed, sold said property under the power of sale therein contained, authorizing him to sell, at which sale Houston McFarland became the purchaser at the price of \$300, and on said day he received a deed for said land from said mortgagee. On September 6, 1879, Houston McFarland conveyed said land to Charles A. Hazen, who on February 15, 1887, conveyed the land to the defendant M. W. Hutchinson. Houston McFarland died June 8, 1888. Maggie McFarland married Arthur G. Meads, and died prior to the institution of this suit, without having issue born alive; leaving her sister, Mary F. Cockrill, who intermarried with C. B. Cockrill, her only heir at law. When Hutchinson bought the property, he had no knowledge of any claim by plaintiffs thereto. It was then practically vacant; no improvements being on it, except a house of but little value. Since then he has put lasting and valuable improvements thereon, of the aggregate value of about \$10,000. On the 31st day of December, 1892, plaintiffs instituted this suit to redeem from the sale under said mortgage, on the ground that the title acquired by Houston McFarland by virtue of his purchase and deed under said mortgage sale was for the benefit of himself and his two daughters then living; he being tenant for life in possession, and his daughters remainder-men. The court below dismissed the bill, and rendered final judgment against plaintiffs, in favor of defendants, for costs. From the judgment, plaintiffs appealed.

There is nothing in the deed from Rounds to Mrs. McFarland which can be construed as creating in her a separate estate to the land in question, nor is any such contention made by defendants. Nor could she by any act of her own, or by any statement made in the mortgage, create a separate estate in the land in herself. The same is true with respect of the recital in the certificate of acknowledgment to the mortgage in which it is stated, "and she desires to convey her separate estate therein,"—that is, in the mortgage. Such recitals were inoperative to create a separate estate in her. At the time she executed the note to John E. McFarland, she did not own the land, nor does it appear that she owned any separate property; but, notwithstanding such was the case, she subsequently acquired the land by purchase, and the mortgage executed by her and her husband, Houston McFarland, thereon, to secure the payment of her debt, was a valid and binding mortgage. It has been repeatedly held by this court that a mortgage executed by a married woman, her husband joining with her, although on land not her separate estate, is valid and binding, notwithstanding the note, the payment of which is secured by the mortgage, is void because of her coverture. *Comings v. Leedy*, 114 Mo. 454, 21 S. W. 804; *Hager-*

man v. Sutton, 91 Mo. 519, 4 S. W. 73; Wilcox v. Todd, 64 Mo. 388; Meads v. Hutchinson, 111 Mo. 620, 19 S. W. 1111. But in this case it makes no difference whether it was her separate property. The effect of the sale under the mortgage, the purchase by Houston McFarland of the land at the sale, and the execution of the deed to him by the mortgagee, was to pass the legal title of the land to said McFarland; and the purchase by him must be deemed to have been made for the benefit of himself and the remainder-men, if the latter had seen fit to pay their share of the purchase money within a reasonable length of time thereafter. Thus, in 1 Washb. Real Prop. (5th Ed.) 129, it is said: "If a tenant for life purchase in an outstanding incumbrance upon the estate it is regarded as having been done for the benefit of the revisioner as well as himself, if the latter will contribute his proportion of the sum paid therefor." Allen v. De Groodt, 105 Mo. 442, 16 S. W. 494, 1049; Meads v. Hutchinson, supra; Hinters v. Hinters, 114 Mo. 28, 21 S. W. 456; Dillinger v. Kelley, 84 Mo. 561. It follows from what has been said that the plaintiff Mrs. Cockrill has the right to redeem from the mortgagee's sale, unless she is estopped from so doing by reason of the recitals in the mortgage, and the certificate of acknowledgment heretofore quoted, or she has forfeited her right to redeem by reason of her own laches, or that she should not be permitted to do so, against defendants who claim to be innocent purchasers in good faith without any notice of her equity, if any she had. Of these in their order:

While it is conceded by defendants that as a general rule a married woman is not estopped by matters in pais, it is contended that this does not license her to commit a fraud, to the injury of others, and that her acts and representations which do deceive others, to their injury, will preclude her from asserting her claim against those who have acted on her representations and admissions. We have already said that Mrs. McFarland did not own a separate estate in the land in question. Therefore she was not estopped, nor is plaintiff, who claims under her, estopped by the recitals in the mortgage from claiming the land. It has been held that recitals in a deed made by a married woman do not estop her, or those claiming under her. Crenshaw v. Creek, 52 Mo. 98; Hempstead v. Easton, 33 Mo. 142. Moreover, estoppel is not pleaded in the answer, which is absolutely necessary when relied upon in pais as a defense. Throckmorton v. Pence, 121 Mo. 50, 25 S. W. 843, and authorities cited. The legal title to the land passed to Houston McFarland by the mortgagee's deed of June 13, 1878 (Meads v. Hutchinson, supra), at which time the cause of action of plaintiff and her sister, Maggie, accrued. One of them was then about 20, and the other about 22, years of

age,—both of legal capacity to sue (Gen. St. 1865, p. 406, § 1),—yet this suit was not instituted for about 14 years thereafter, to wit, December 31, 1892. Since Hutchinson's purchase of the property, he has greatly improved it, and its value has largely increased. Would it be equitable to allow plaintiff, who has for so long a time slept upon her rights, to now come in and redeem the property by paying a part, or even all, of the purchase money, with interest, paid for it by her father at the mortgagee's sale, and wrest it from defendants, who purchased it and have improved it in good faith? It is true that from August 1, 1881, to October, 1892, there was an action pending for the possession of the land, in which plaintiff and her sister, Maggie, were plaintiffs, against these same defendants; but even that does not impress us with the justness of plaintiffs' claim, or relieve it of the unfavorable impression that its staleness is calculated to create upon a court of equity. In Mandeville v. Solomon, 39 Cal. 125, it is said: "Equity does not deny to a tenant in common the right to purchase in an outstanding or adverse claim to the common property. It, however, deals with the tenants after such a purchase is made. While it will not permit one of them to acquire such a title solely for his own benefit, or to the absolute exclusion of the other, it at the same time exacts of that other the exercise of reasonable diligence in making his election to participate in the benefit of the new acquisition; and having, upon its own principles of fair dealing, compelled the purchasing tenant to allow his co-tenant this opportunity, the latter will not be permitted to equivocate or trifle with the position thus afforded him, or to make it a means of speculation for himself, by delaying until the rise of the land, or some event yet in the future, shall determine his course. Unless he make his election to participate within a reasonable time, and contribute, or offer to contribute, his ratio of the consideration actually paid, he will be deemed to have repudiated the transaction and abandoned its benefits." See note to Keech v. Sandford, 1 White & T. Lead. Cas. Eq. 73; Lee v. Fox, 6 Dana, 176; Weaver v. Wible, 25 Pa. St. 270; Lloyd v. Lynch, 28 Pa. St. 419. The application of this just rule must be invoked in this case, and, when this shall have been done, is decisive thereof. After plaintiff has for so long slept upon her rights, without any manifestation of a desire to share the burdens of the purchase by her father at the mortgagee's sale, and thereby avail herself of its possible benefits, until the property has been improved and greatly enhanced in value, it would be inequitable to now permit her to do so. We therefore affirm the judgment.

GANTT, P. J., and SHERWOOD, J., concur.

McCADDEN v. SLAUSEN.

(Supreme Court of Tennessee. May 9, 1896.)

JUDGMENTS—RES JUDICATA—MERGER.

1. A foreign judgment on a note is not res judicata in an action on the note in Tennessee, where such judgment has by a circuit court of Tennessee been declared void.

2. A cause of action does not merge in a void judgment, and a new action may therefore be brought on the original cause of action when the former judgment has been declared void by a court of competent jurisdiction.

Appeal from circuit court, Shelby county; L. H. Estes, Judge.

Action by Samuel Slausen against P. McCadden on a note. From a judgment for plaintiff, defendant appeals. Affirmed.

W. G. Weatherford, for appellant. Myers & Banks, for appellee.

McALISTER, J. The defendant in error, Samuel Slausen, recovered a judgment in the circuit court of Shelby county against the appellant, McCadden, for the sum of \$2,731.32 upon the following note: "Ottawa, Ohio, Oct. 14, '84. \$2000.00. Sixty days after date we, or either of us, promise to pay to the Ottawa Exchange Bank (Samuel Slausen) or order two thousand dollars, value received, payable at said bank; if not paid at maturity, to bear 8 per cent. interest. And we hereby authorize and empower any attorney at law of any court of record in Ohio or elsewhere in the United States, at any time after this obligation becomes due, to appear before any court of record in such state of Ohio or elsewhere in the United States, and waive the issuing and service of process and confess a judgment against us in favor of above payees, or their assignees, executors, or administrators, for above sum, with interest due thereon, cost of suit, and attorney's fees, and thereupon to release all errors, and waive all rights and benefits in our behalf. Witness our hands and seals this 14th day of October, A. D. 1889. No. 1,240. [Signed] Richards & Co. [Seal.] P. McCadden. [Seal.]" From the judgment aforesaid, McCadden appealed, and has assigned errors.

On the trial below McCadden relied upon the plea of res adjudicata, and the further defense that said note had been merged in a judgment recovered by defendant in error against plaintiff in error in the state of Ohio. The defense thus interposed is based upon the following facts: In February, 1890, Samuel Slausen, the payee of said note, brought suit in the court of common pleas of Putnam county, Ohio, against Richards & Co. and P. McCadden to recover the amount of said note; and thereafter, in pursuance of the cognovit contained in said note, one George H. Knapp, an attorney of said court, appointed in behalf of defendants, waived service of process and confessed judgment thereon, which was duly rendered and entered upon the minutes of said court. Executions were

duly issued upon said judgment, which were returned nulla bona. Thereupon, in May, 1892, the said Slausen brought suit upon the Ohio judgment against McCadden in the circuit court of Shelby county, and upon the hearing the court adjudged said Ohio judgment void, and pronounced judgment in favor of defendant McCadden. The record does not recite the particular grounds upon which said Ohio judgment was pronounced void, nor does the record disclose any of the proceedings in that case excepting the judgment of the court. This court will presume that upon said trial the Ohio law was duly proved, and that said Ohio judgment was adjudged void because it contravened said law, since a domestic judgment, if valid where rendered, would be valid everywhere. The judgment of the circuit court was not appealed, and is, of course, conclusive upon these parties, upon whatever ground it was predicated. *Gee's Adm'r v. Williamson*, 27 Am. Dec. 630. In the case last cited it was said: "It is well established that whatever has been once established in this court between the same parties in the same case continues to be the law of the case, whether orthodox or not, so long as the facts of which such legal principles were predicated continue to be the facts of the case." The record further shows that on the 18th day of September, 1892, the defendant in error, Samuel Slausen, commenced this suit against McCadden in the circuit court of Shelby county upon the original note. McCadden pleaded that the judgment of the Ohio court merged the note in question, and that no suit can be maintained upon the latter in the court of a sister state. The replication of plaintiff is that the prior judgment in the circuit court of Shelby county adjudging said Ohio judgment void estops and precludes the defendant from relying upon this defense of merger. The general rule undoubtedly is that a recovery upon a cause of action bars a new suit upon it for the same reason that the execution of a note in settlement of an account is a defense to a suit upon it, namely, the cause is merged into one of a higher nature. 1 *Van Fleet*, Former Adj. pp. 95, 96. Says Mr. Black in his work on Judgments (volume 2, § 864): "As between the several states of the American Union (contrary to the rule in regard to judgments from foreign countries) it is well settled that the recovery of a judgment in one state, in a court having jurisdiction, merges the original cause of action so that it cannot thereafter form the basis of a fresh suit in another state." "But," continues the author, "if the judgment is not extraterritorially valid for want of jurisdiction, as where it has been obtained against a nonresident without service upon him, or appearance, such judgment, if unsatisfied, will constitute no bar to a subsequent action against him in the state of his domicile on the original demand." *Whitaker v. Wendell*, 7 N. H. 257; *Fitzsimmons v. Marks*, 66 Barb. 333; *Bank v. Beebe*, 53 Vt.

177. We are of opinion that the doctrine of merger is only applicable in a case where a valid judgment has been rendered, and, it having been determined in a litigation between these parties that the Ohio judgment was void, there could be no merger of the note, and the plaintiff is entitled to maintain his suit upon the original cause of action. The circuit judge so held, and we affirm his judgment.

EDGAR v. STATE.

(Supreme Court of Tennessee. June 8, 1896.)

MOTION TO QUASH INDICTMENT—REQUISITES—FALSE PERSONATION—INDICTMENT—EVIDENCE—SUFFICIENCY.

1. A motion to quash an indictment which does not state the grounds on which it is based is properly overruled.

2. Under Mill. & V. Code, § 5621, providing that any person who shall personate another in any legal proceeding, and shall in his assumed character do any act whereby the interest of the party personated is affected, shall be guilty of a criminal offense, an indictment which charges that defendant falsely personated a party in a civil suit by accepting service of process therein, and which sets out the facts connected therewith, is sufficient, though it does not show how such false personation would or could affect the right or interest of the party personated.

3. Conviction on an indictment for false personation under such statute is supported by evidence that defendant falsely personated the defendant in an action for divorce by accepting service of process therein in his stead, that the petition in the divorce action contained all the averments essential to confer jurisdiction, and that the process on the face of the officer's return was served on the right person; and it is immaterial that the divorce action was dismissed before final judgment, or whether a judgment therein would have been void, or only voidable.

Appeal from criminal court, Shelby county; L. P. Cooper, Judge.

J. F. Edgar was convicted of falsely personating the defendant in a civil suit by accepting service of process in his stead, and appeals. Affirmed.

Peters, Roberts & Norfleet, for appellant. Atty. Gen. Pickle, for the State.

BEARD, J. The indictment in this case charges that plaintiff in error, in a certain proceeding instituted in the Second circuit court of Shelby county, by Annie C., against her husband, R. B. Davidson, for divorce, "did falsely, fraudulently, and feloniously personate the said R. B. Davidson, and accept and receive, from the officer charged with the execution of process, service of the same, together with a copy of the bill filed in said cause, with the intent then and there to prejudice the interest of said R. B. Davidson." On the trial he was found guilty of the offense charged, and was sentenced to confinement for a term of five years in the penitentiary of the state. He has appealed to this court, and has assigned a number of errors upon the action of the trial judge.

1. It is insisted that his motion to quash the indictment should have been sustained. To this it is sufficient to say that this motion, failing, as it did, to state the ground on which it was rested, was properly overruled.

2. After the trial, a motion in arrest of judgment was made and overruled. This, it is urged, was error. The indictment in this case was founded on section 5621, Mill. & V. Code,¹ and it is argued that it failed to set out the statutory offense, in omitting, as it did, to state how the false personation by plaintiff in error would or could affect the right or interest of R. B. Davidson. This offense is complete with the false personation of a party in a suit instituted in a court of competent jurisdiction; and, when the state charges the act itself, and all the facts connected therewith, in the indictment which is preferred, it has done everything that good pleading requires, or the defendant has a right to demand. This was done in the indictment in question.

3. It is assigned as error that the lower court declined to grant a new trial on the facts disclosed in evidence, as, it is insisted, they failed to make out a crime under this statute. These facts are briefly as follows: Mrs. Davidson, the plaintiff in the divorce suit, some months prior to its institution, deserted her husband in Lexington, Ky., where they had lived for a number of years. Soon thereafter she migrated to Oklahoma, thence to Kansas City, and from that place came to Memphis, in this state, reaching there about two weeks prior to filing her divorce petition in the Second circuit court of Shelby county. About the same time, and by some unexplained coincidence, the plaintiff in error, who was also a citizen of Lexington, Ky., appeared in Memphis, and began his suit for divorce against his wife in the same court. In the petition of Mrs. Davidson, she alleges her marriage to her husband in 1884, and that immediately thereafter they moved to Chattanooga, where they lived together until two years prior to the institution of her suit, when she came to Memphis, where she had continuously resided since. She also alleged a number of grounds which, under the statute, if proven, and her averment of citizenship had been true, would have entitled her to a divorce a vinculo. This petition was verified by the oath of Mrs. Davidson, as is required by our statutes, and it was the process issued in accordance with its prayer which was served by the sheriff on the plaintiff in error. Within a few weeks after its institution, the circuit judge, discovering that in this proceeding a fraud on the jurisdiction of the court had been perpetrated, ordered it

¹ Mill. & V. Code, § 5621, provides that any person who shall personate another in any legal proceeding before a court of competent jurisdiction, and shall in his assumed character do any act whereby the right or interest of the personated party is any way affected, shall be guilty of a criminal offense.

to be, and it was, dismissed. It is now urgently contended that these facts fail to make out a crime under the statutes in question, because in no way would any right or interest of Davidson be affected by any decree that might have been rendered in that cause. In other words, it is insisted that, as the decree pronounced in that cause would be void, as held in *Gettys v. Gettys*, 3 Lea, 260, it cannot be properly said that it would in any way touch the interests of the husband. It may be conceded that the decree would be void, so that, in any collateral proceeding, the husband might show it; yet it does not follow that it would nowise affect him. Upon its face it would be a good decree. The court in which the suit was brought had jurisdiction over divorce causes, the petition contained all proper jurisdictional averments, and the process, upon the face of the officer's return, was served upon the right defendant. It is true that Davidson might contest the decree therein rendered by showing the fraud on the jurisdiction of the court in procuring it (*Chaney v. Bryan*, 15 Lea, 589); yet, *prima facie*, it would be a regular and legal judgment, and the onus would be on him to show its invalidity. This being so, we cannot agree to the proposition that such a decree would not be prejudicial to the husband when it pronounced him a divorced man, and when, to escape from its apparent effect, the burden is placed upon him to show that it was the result of a gross fraud perpetrated on him as well as upon the court pronouncing it. But this argument is greatly strengthened if such a decree is held to be only voidable, as it is by a great many courts. 2 Bish. Mar. & Div. § 1544, and note 5. In such jurisdictions, Davidson would not be permitted to show collaterally, either by pleading or proof, that the decree was procured by fraud, but it would be held as conclusive until it was vacated in a direct proceeding instituted for the purpose in the court in which it was pronounced. *Id.* § 1563, and notes. Whether, therefore, the decree in such a case be absolutely void, or only voidable, yet it is clear that the right or interest of the husband would have been to some extent affected, and that the false personation by the plaintiff in error of the husband in that suit, which made possible such a decree, was a crime within the law. We think the trial judge was right in his construction of this statute, and that the verdict of the jury was fully warranted by the evidence. The judgment, therefore, is affirmed.

JOHNSON v. HUDSON, Clerk.

(Supreme Court of Tennessee. May 21, 1896.)
CONSTITUTIONAL LAW—CLERKS OF COURTS—UNCLAIMED FUNDS—PARTIES ENTITLED—COLLECTION—COMMISSIONS.

Mill. & V. Code, §§ 577-581 (Code 1858, §§ 520-524), require the judge or chairman of

the county court, in making settlement with clerks of chancery courts, to ascertain what amounts of money due to witnesses and others have remained in their hands longer than two years, and that such sums shall be paid into the county treasury as revenue; that a list of the names of such persons, and the amount due each, shall be placed on record in the county court, and on demand of such person the judge or chairman shall issue his warrant on the county treasury for the amount. Acts 1895, c. 137, §§ 2, 3, so amended such provisions that attorneys appointed by the state comptroller were authorized, among other things, to ascertain and collect the amounts due from clerks of the courts, and to turn the same over, less 15 per cent. commission, "to the parties entitled thereto," and permitted the county court to enforce the provisions as before only in case the comptroller or his attorneys, on request of the judge or chairman of the county court, should fail to do so. Held that, under the provisions relating to funds in the hands of clerks of the chancery courts, "the parties entitled thereto" were those to whom the accounts were due, and that Acts 1895, §§ 2, 3, allowing commissions for collecting and paying over such funds, without the consent of the parties entitled thereto, or due process of law, were in violation of the bill of rights (Const. art. 1, § 8), which provides that no man shall be deprived of his property but by the judgment of his peers, or the law of the land.

Appeal from chancery court, Benton county; A. G. Hawkins, Chancellor.

Agreed case by Thomas B. Johnson, for use of Benton county, against Dorsey G. Hudson, clerk and master in chancery. From a decree in favor of complainant, defendant appeals. Reversed.

Johnson & Vertrees and Eli T. Morris, for appellant. Sidney J. Peeler, for appellee.

ALLEN, Special Judge. This is an agreed case, by which the parties, in accordance with sections 4187, 4188, Mill. & V. Code, submitted the facts upon which the controversy depends to the chancery court of Benton county, in which county the defendant resides. The defendant is clerk and master of the chancery court of said county, and has been such for three years. The complainant is the attorney appointed by James A. Harris, comptroller of the state, under chapter 137 of the Acts of 1895; the object being to clothe said attorney with the powers heretofore vested in the judge or chairman of the county courts of the state, under sections 578-581, Mill. & V. Code. It is agreed: That the defendant, as such clerk and master, had received and collected, and now has in his hands, certain sums of money due and going to certain parties, known and unknown, as follows: First, fees due certain parties as witnesses in the chancery court, amounting to \$20; second, fees due certain parties and officers for services rendered, amounting to \$12; fourth, amounts due certain parties for legacies unknown; fifth, amounts due persons as creditors in insolvent estates, and where land has been sold for the payment of debts, amounting to \$26; sixth, amounts due certain parties from the sale of real estate for partition, amounting to \$9; seventh, and

perhaps other sums from other sources, and for other causes not known or remembered, such as printer's fees, surveyor's fees; and such fees as arise from the due course of litigation in the chancery court. That said sums have been in the hands of defendant, as such clerk and master, for more than two years. That said Johnson, as such attorney aforesaid, has called upon defendant, at his office, to turn over all these sums of money to him as provided in chapter 137 of the Acts of 1895, which defendant declined to do. And defendant assigned 15 reasons for declining to pay said funds over to said Johnson as such attorney, all of which are stated in the record; but it is deemed important or material to mention but one of the reasons assigned by defendant, which is as follows: "The said act of 1895 directs the comptroller to appoint an attorney to collect the money of the citizen, when he has not requested it, and take 15 per cent. of his money as pay for the services of the attorney, when the citizen has neither asked, requested, nor desired the same. This act takes from the citizen 15 per cent. of his property, without his consent or his day in court." And it is insisted, for this reason, that said act violates section 8 of the bill of rights,¹ and is therefore void. On the other hand, it is insisted by complainant that the statute means that the attorney collecting said funds shall pay them over to the county, and that the county is the party entitled to said funds, on the ground that said funds go to the county, in the nature of escheats, and that the citizen is not deprived of any part of his property by virtue of said act.

Section 577, Mill. & V. Code (being section 520 of Code of 1858), empowers the judge or chairman of the county court to act as the financial agent of the county, and says what his duties are as such financial agent, in subsections 1 to 10, inclusive. Section 578, Mill. & V. Code (being section 521, Code 1858), requires the judge or chairman of the county court, in making settlements with the clerks, to ascertain what amounts of money are in their hands, due to witnesses, officers, and others, which may have been collected by them from suitors, or from the state and county treasury, and which have been in the hands of the clerks for more than two years, and provides that such sums of money shall be paid into the county treasury, as other county revenue. Section 579, Mill. & V. Code (being section 522, Code 1858), requires the clerks, upon oath, to report to the judge or chairman the items so collected by them and remaining in their hands, as mentioned in the last section; and the judge or chairman is required to examine the books minutely, and interrogate the clerks with reference to

the facts, and to report thereon to the county court. Section 580, Mill. & V. Code (being section 523, Code 1858), requires the judge or chairman to accompany his report with a list of the persons to whom money remaining in the hands of the clerk is due, and that the county court shall spread the same in full in a record book kept for that purpose. Section 581, Mill. & V. Code (being section 524, Code 1858), says: "The person to whom any money paid into the county treasury is due, may apply to the judge or chairman of the county court for a warrant for the amount due him, and on presenting this warrant to the county trustee he shall pay the amount, as in other cases, out of any money in the treasury."

In the case of Deaderick v. County Court of Washington Co., 1 Cold. 202,—that being a motion against Deaderick, as clerk and master, to compel him to pay over money to the county treasury which had lain in his office, unclaimed, for more than two years,—Judge McKinney, delivering the opinion of the court, said: "We are of opinion that the act of 1845, the substance of which has been incorporated into the Code (sections 521-524), is free from any constitutional objection. Moneys in greater or less amounts are constantly paid into the clerk's office, which are never called for by the persons to whom they belong, and consequently fall to the clerk. The law in question transfers these moneys to the several county treasuries. This law is based upon the familiar principle of the doctrine of escheat, by which the lands of persons dying without heirs, or for which no owner can be found, go to the state; or witnesses, to the common-school fund. The same principle, we suppose, may be applied to personalty. What objection can there be to such a provision? The rights of the persons to whom the moneys were due, should they ever appear to demand them, are carefully protected by the statutes. No injury is done to them by the transfer of the fund from the clerk's office to the county treasury. The payment of the money, if ever called for, is at least as amply secured to them. Nor is any injury done to the clerk, of which he can be heard to complain. He has no right or claim to the money, and the authority of the statute is full indemnity to him against all future liabilities, as regards the persons to whom the moneys may belong, in event they should ever appear or demand payment." In cases of escheat, as regulated by our statute (sections 2961-2968, Mill. & V. Code), the title of the escheated property vests absolutely in the state, for the use of the common-school fund; and there is no provision for the payment of any escheated property to any claimant, after it has been paid into the state treasury. But by the law in question (sections 578-581, Mill. & V. Code) the rights of the persons to whom the funds in the clerk's hands are due are carefully preserved. A list of the names of such

¹ The bill of rights (Const. art. 1, § 8) provides "that no man shall be * * * deprived of his life, liberty or property, but by the judgment of his peers, or the law of the land."

persons, and the amount due each, is placed on record in the county court, and upon demand of such person the judge or chairman of that court issues his warrant upon the county treasury for the amount. In no sense can it be said that funds thus paid into the county treasury become the property absolutely of the county. The county is simply the custodian of the fund, to preserve it until called for by the rightful owner. This was a very wise provision of the law, in view of the fact that the term of office of the clerk expires, and the funds due to such claimants, if allowed to remain in the hands of the clerk, are liable to be lost to the owners, after the lapse of time, either by the clerk and his bondsmen becoming insolvent, or by the bar of the statute of limitations. But after the funds are transferred to the county treasury they become trust funds in the county treasury, and, without reference to the length of time said funds remain in the county treasury, the rightful owner or owners are amply protected, if they should ever demand the same. In the case of *Massey v. Gleaves*, 1 Tenn. Ch. 150-153, a petition was filed for instruction from the court as to what disposition should be made of the funds that had remained in the hands of the clerk and master several years, due witnesses, officers, litigants, etc.; and Judge Cooper ordered publication to be made for the claimants entitled to said funds to make application for said funds within six months, and held that sections 521-524, Code 1858, regulated the disposition of said funds, but until said funds were paid over into the county treasury the chancery court had jurisdiction to order said funds paid out to the parties, upon their application. And the funds in question in that case were paid to the parties entitled thereto, under the orders of the court. These sections of the Code came before this court again in the case of *Head v. Barry*, 1 Lea, 753. That was a suit by the chairman of the county court against the clerk and master at Gallatin, to collect and transfer to the county treasury funds that had remained in the hands of the clerk and master more than two years. And the court in that case quote said sections of the Code, and say, "The language of the act of 1845 is so comprehensive that we see no way in which to restrict its operation, were we disposed to do so." It is manifest from the reading of said sections of the Code, and the construction put upon them by the courts in the cases referred to, that the parties entitled to said funds are the persons to whom said funds are due.

Chapter 137 of the Acts of 1895 is as follows:

"Section 1. Be it enacted by the general assembly of the state of Tennessee, that sections 520 to 524, inclusive, of the Code of 1858, be, and the same is hereby, amended so as to apply to clerks of the supreme court, and they are hereby required to pay over to

the judge or chairman of the county court of the county in which the suits originated, as other county revenue, on the 1st day of January, April, July, and October, of each year, all moneys in their hands due to witnesses, officers, litigants, and others, which may have been collected by the clerk from suitors or from the state and county treasury, and which have been in court for more than two years.

"Sec. 2. Be it further enacted, that the attorneys appointed by the state comptroller, as now provided, or which may hereafter be provided by law, or such attorneys as the state comptroller may deem necessary to appoint for the purpose of enforcing the provisions of the above named sections and of this act (which is hereby authorized) are required and empowered to investigate all of the books, dockets, ledgers, receipts, notes, etc., of the various clerks and other officers of the state, or of the clerks and other officers of the various counties of the state, and to collect any and all revenue, money or funds of any character whatsoever found due therefrom, together with interest and penalties, and pay the same over (less the compensation provided for attorneys in chapter 218, Acts of 1879,) as other revenue collected by them, to the parties entitled thereto.

"Sec. 3. Be it further enacted, that sections 520 to 524, inclusive, of the Code of 1858, and all other laws relative to the powers and duties of the judge or chairman of the county court in conflict with this act, be, and the same are hereby modified, so as to conform to same, and all other laws in conflict with this act are hereby repealed: provided, that nothing in this act shall be construed so as to prevent the county judge or chairman from enforcing the provisions of said sections, and of this act, if the state comptroller or his attorneys, upon request of said judge or chairman, fail to do so."

This act does not make any change in the sections of the Code amended, in respect to giving the counties any better right to said funds than was given under said sections, but the act leaves the funds to belong to the persons to whom the funds are due. Nor does the act provide expressly for said funds to be transferred from the clerks to the county treasuries, through the attorneys of the comptroller of the state, nor can that be inferred from the act. It empowers the attorneys of the comptroller of the state to collect said funds from the clerks, due such individuals, and to pay the same over (less 15 per cent. commissions to the attorney) to the parties entitled thereto, who are officers, litigants, and others, to whom said funds are due, as shown by the clerk's books and records in his office. The judge or chairman of the county court has no power to collect and turn these funds into the county treasury until the comptroller of the state, or his attorneys, have failed to collect said funds from the clerks after

having been requested by such judge or chairman to do so. The act provides for transferring said funds from the hands of clerks, who are under bond to account for said funds, to said attorneys of the comptroller of the state, appointed to collect said funds, who are not required to give any bond, for such attorneys to pay said funds over (less their commissions of 15 per cent. to the parties entitled thereto), not "upon the familiar principle of the doctrine of escheat," nor for the purpose of better preserving said funds for the persons to whom said funds are due, as against the contingency of the clerk's going out of office, and he and his bondsmen becoming insolvent, or said claims being barred by the lapse of time, which were the object and intention of the act of 1845, sought to be amended by said act of 1895. But on the contrary the state comptroller is empowered by said act of 1895 to employ attorneys to represent these persons to whom funds are due which have remained in the hands of the clerk for more than two years, without the consent of such persons; and the attorneys thus appointed and employed are allowed to deduct out of the funds of these persons, when collected, 15 per cent. commissions for collecting and paying over said funds to the parties entitled thereto, without the consent of the said parties entitled to said funds, or due process of law. We hold, therefore, that sections 2 and 3 of said act of 1895 are obnoxious to section 8 of the bill of rights, and that the same are unconstitutional and void. *Reynolds v. Baker*, 8 Cold. 228, 229; *Knox v. State*, 9 Baxt. 207. The decree of the chancellor is reversed.

WARREN v. SCUDDER-GALE GROCERY CO.

(Supreme Court of Tennessee. May 6, 1896.)

APPEAL FROM JUSTICE — DEMAND FOR JURY —
DOCKETING — SUBSEQUENT CHANGE
TO NONJURY CAUSE.

On appeal to the circuit court, where plaintiff has duly demanded a jury, and the cause has been placed on the jury docket as provided by Mill. & V. Code, §§ 3603, 3604, defendant's right to a jury is also thereby determined, and the cause cannot be subsequently changed to a nonjury cause without the consent of both parties, as required by section 3605.

Appeal from circuit court, Gibson county; John R. Bond, Judge.

Suit by the Scudder-Gale Grocery Company against Jonathan Warren on account. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Hill & Jones, for appellant. Deason & Rankin and Walker & Biggs, for appellee.

McALISTER, J. This is a suit on account, commenced before a justice of the peace of Gibson county. On appeal to the

circuit court the cause was tried by the circuit judge without the intervention of a jury, and judgment pronounced in favor of the Scudder-Gale Grocery Company against the defendant, Warren, for the amount of the account. Among other assignments of error, it is insisted that the circuit judge erred in trying the cause without the aid of a jury. The record shows that on the 1st day of the January term, 1895, to which term the cause had been appealed, the plaintiff demanded a jury, and thereupon the court ordered the cause transferred to the jury docket. A continuance was had from time to time until the September term, 1895, when the cause was called for trial upon the jury docket, and, the defendant's application for a continuance having been overruled, plaintiff's counsel announced to the court that the jury heretofore demanded by the plaintiff would be waived; and thereupon, over the objection of defendant, the court proceeded to try the cause without the aid of a jury. This assignment of error is well made. The act of 1875¹ provides that when any civil suit is brought in any of the courts of this state, whether such suit comes to such court by summons, appeal, certiorari, or otherwise, and which is now triable by jury, either party desiring a jury shall, in case of original suits, demand a jury in his first pleading tendering an issue triable by jury. In the case of all other suits the demand for a jury shall be made within the first three days of the trial term, and, if no such demand is made as aforesaid, the clerk shall place such cause on the docket to be styled the "Nonjury Docket." It is further provided by said act that a failure to demand a jury as aforesaid shall be deemed and held conclusively an agreement of the parties to submit all issues and questions of fact to the decision of the judge without a jury, and, if such demand is made as aforesaid, then the clerk shall place the cause wherein the demand is made upon a docket to be styled the "Jury Docket." Said act further provides that at any time any cause on either of said dockets may, by consent of both parties, be changed from a jury cause to a nonjury cause, and vice versa, and shall be docketed according to the change. It was held by this court in *Coulter v. Machine Co.*, 3 Lea, 115, that in appeal cases a demand for a jury, made after the first trial term, comes too late. The legislature in 1880 amended the act of 1875 so as to provide that "hereafter all suits now pending in the courts of this state or which may hereafter be brought, either party desiring a trial by jury, shall be entitled to a jury, provided he call for the same on the first day of any term at which the suit stands for trial and have an entry made on the trial docket, that he calls for a jury, and unless such demand

¹ Mill. & V. Code, §§ 3602-3605.

is made and the entry thereof on the trial docket, it shall be the duty of the court to try the cause without a jury." "The legislature," says Mr. Elliott, "may rightfully provide for trial by the court in civil proceedings, where the parties agree to waive a jury, and may, within limits, regulate the mode of asking a jury trial. Where there is a statute authorizing trials by the court, and a waiver of a jury, express or implied, the court may try the case, and where it does so it decides all questions of law and fact. It is competent for the legislature to provide that if the party does not ask a jury in proper season, or in an appropriate mode, he shall be deemed to waive a right to a jury trial. * * * But while the legislature has a broad discretion in regulating the mode of asking jury trials, and the like, it cannot unreasonably hamper or impair the right of trial by jury." "It is perhaps proper to say," says the author, "in order to avoid misunderstanding, that there is an essential and far-reaching difference between a statute regulating the mode of asking and obtaining a jury trial, and a statute assuming to compel parties to submit issues of fact to a court for trial; and so there is between a statute providing for an agreement as to the mode of trial, and a statute making trial by the court compulsory." 2 Elliott, Gen. Prac. § 950, citing *Dole v. Wooldredge*, 135 Mass. 140; *McInerney v. City of Denver*, 17 Colo. 302, 29 Pac. 516. The waiver may be implied as well as express. *Petri v. Bank*, 84 Tex. 212, 20 S. W. 777; 2 Elliott, Gen. Prac. § 508. Says Mr. Thompson in his work on Trials (section 2), viz.: "It may be premised that the right of trial by jury may be waived in civil cases. * * * This may be done, under various constitutions, statutes, and judicial holdings, by not demanding a jury [citing *Heacock v. Hosmer*, 109 Ill. 245]; by not filing a notice, under a statute, of a desire for a jury [citing *Bailey v. Joy*, 132 Mass. 356]; by failing to advance the jury fee required by statute," etc. The act of 1875 was declared constitutional by this court in the case of *Garrison v. Hollins*, 2 Lea, 684. It was held that "this legislation only declares what voluntary acts of the parties shall be deemed an agreement on their part to waive a trial by jury." In this case no presumption of an agreement between the parties to waive a trial by jury can legitimately arise, for the reason that plaintiff, in the mode prescribed by law, demanded a trial by jury. It was, of course, not incumbent upon the defendant, in view of the plaintiff's demand, to make a similar demand; for upon the demand of the plaintiff the cause was required by the act to be transferred to the jury docket, and could not be remanded to the nonjury docket without "the consent of both parties." Any other construction of the statute would convert it into a snare whereby the litigant might

easily be entrapped, and deprived of his constitutional guaranty of trial by jury. The jury in this case had been demanded by plaintiff. The cause was upon the jury docket, and had been called for trial. It was then too late for the defendant to have demanded a jury, and the court, by permitting the plaintiff to waive the jury, over the objection of defendant, unwittingly deprived the defendant of the benefit of a jury trial. For this error the judgment is reversed, and the cause remanded for a new trial.

BRASFIELD v. BRASFIELD.

(Supreme Court of Tennessee. May 6, 1896.)

RIGHT OF HUSBAND TO USUFRUCT OF WIFE'S GENERAL ESTATE—EFFECT OF STATUTE—CREATION OF SEPARATE ESTATE—DIVORCE—TAXATION OF COSTS.

1. Act 1849-50, forbidding the sale of a wife's interest during her life to satisfy the husband's debts, and forbidding him to sell such interest without the consent of the wife, does not affect the husband's common-law right to the usufruct of the general property of the wife during coverture.

2. Act 1879, exempting the rents and profits of the estate of a married woman, whether separate or general, from debts or contracts of her husband, unless by her consent, does not create a separate estate in such rents and profits.

3. By express provision of Mill. & V. Code, § 3329, on dissolution of marriage at the suit of the husband, his common-law right to the usufruct of her general estate during coverture remains intact.

4. Under Mill. & V. Code, § 3334, providing that the court may tax costs against either party, except a woman in whose favor a decree is rendered, costs in a divorce case brought by wife against husband, and in which the original bill was dismissed and judgment was rendered on defendant's cross bill praying for divorce, were properly taxed against the wife.

Appeal from circuit court, Weakley county; W. H. Swiggart, Judge.

Action by Emma Brasfield against Vernon G. Brasfield for divorce. From a judgment for defendant on his cross bill, also seeking divorce, plaintiff appeals. Affirmed.

Jones & Hull, for appellant. Chas. M. Ewing, for appellee.

McALISTER, J. Complainant, Emma Brasfield, filed this bill in the circuit court of Weakley county for a divorce from her husband, Vernon G. Brasfield, upon the ground of cruel and inhuman treatment. The defendant answered, denying all the allegations of the original bill, and by cross bill sought a divorce from complainant, his wife, upon the ground of adultery. Upon final hearing the court dismissed the original bill and decreed a divorce in favor of the husband, giving him the custody of his minor daughter; adjudging, also, that the husband was entitled to the rents and profits, as well as the possession, of certain property, part of

the wife's general estate, and taxing the wife with the costs of the cause. The wife, who was the original complainant, appealed, and has assigned errors. It is conceded by counsel that there was no error in the decree of the circuit judge in dismissing the original bill, and it is admitted that the court was fully warranted in pronouncing a decree in favor of the husband upon the allegations and proof of his cross bill in respect of the adultery of the wife. Nor is any exception taken to the action of the court in awarding the custody of the minor daughter to the father.

The first assignment of error is that the circuit judge erred in allowing the husband the rents and profits of 30 acres of land belonging to the wife, because it is alleged that the said Vernon G. Brasfield, husband, had no marital rights in his wife's real estate under the facts of this case. The circuit judge decreed the rents and profits of the land to the husband, upon the ground that it was the wife's general estate, and that such a decree is expressly authorized by section 3329, Mill. & V. Code, which provides, viz.: "Where a marriage is dissolved at the suit of the husband, and the defendant is the owner in her own right of lands, his right to and interest therein to the rents and profits shall not be taken away or impaired by the dissolution, but the same shall remain to him as though the marriage had continued." "At common law the husband was entitled to the usufruct—the rents and profits—of his wife's lands during the existence of the marriage relation, and, upon birth of issue, to tenancy by the curtesy after his wife's death." *Lucas v. Rickerich*, 1 Lea, 726. It has several times been held by this court that this interest of the husband in his wife's lands was not changed by the act of 1849-50, which only forbids the sale of her interest during her life for his debts, and disables the husband from selling such interest unless his wife joins in the conveyance. *Coleman v. Satterfield*, 2 Head, 264; *Taylor v. Taylor*, 12 Lea, 490; *Lucas v. Rickerich*, 1 Lea, 726. In the latter case this court, in speaking of the act of 1849-50, said, viz.: "This we have several times held was the only effect of the statute, and that it did not create a technical separate estate in the wife. This being so, it follows the rights of the husband as to rents and profits are not affected by the statute, and remain as before its passage; that is to say, as they existed at common law." In that case the court further said: "We need not discuss the question of reduction of rents to possession, as the right to them is not dependent on this, but on his right in the land by virtue of the relation of husband, and the principle referred to has no application." In that case

the rents arising from the wife's general estate were subjected to payment of the husband's debts.

In 1879, obviously for the purpose of remedying this decision, the legislature passed an act exempting rents and profits of a married woman's property, whether separate or general estate, from the debts or contracts of her husband, except by the wife's consent obtained in writing, and "provided that this act shall in no manner interfere with the husband's tenancy by the curtesy." It is insisted by counsel in argument that this act has changed the common-law rule, and has converted rents and profits of the wife's general estate into a separate estate, and, the husband having no interest, now, in such rents and profits by virtue of the marital relation, the circuit court was in error in decreeing such rents and profits to the defendant. The act of 1879 was before this court for construction in the case of *Ables v. Ables*, 86 Tenn. 333, 9 S. W. 692. In that case the husband brought forcible entry and detainer to dispossess a tenant to whom his wife, without his consent, had leased a part of her general estate. This court held that, "while the act of 1879 protects the rents of the wife's realty from the husband's creditors, still it was not intended by the legislature to interfere in any other respect with the husband's ancient right, as governor of the family, to control his wife's lands so held for the benefit of the family." Proceeding a step further in the construction of this statute, we are of opinion that the legislature did not intend, by exempting such rents and profits from seizure for the debts of the husband, to thereby create a separate estate in such rents and profits in the wife. The whole purpose of the legislature was to prevent the seizure by the creditors of the husband of the usufruct of the wife's land, and thereby divert it from the support of the family. In the opinion of the court the husband is still entitled to the rents and profits of his wife's general estate, and the decree of the court in this case, preserving that interest notwithstanding the dissolution of the bonds of matrimony, was expressly authorized by the statute. Mill. & V. Code, § 3329.

The next assignment is that the court erred in taxing the wife with the costs. The argument is that, defendant being a married woman, no personal decree could be rendered against her for costs. At the recent term at Nashville, this court held, in *Payne v. Payne*, 96 Tenn. —, 33 S. W. 613, that under section 3334, Mill & V. Code,¹ such costs were properly taxed against the wife.

¹ The statute provides that the court may tax costs against either party, except a female in whose favor judgment is rendered.

**PIONEER SAVINGS & LOAN CO. v.
CANNON et ux.**

(Supreme Court of Tennessee. May 10, 1896.)

**FOREIGN BUILDING AND LOAN ASSOCIATIONS —
LOAN TO MEMBER—VALIDITY OF CONTRACT—
LAW OF PLACE—PAYMENTS—USURY.**

1. The contract between a foreign building and loan company and a borrowing member is not affected by the subsequent act of 1891, relating to the filing of such company's charter in the state, and an abstract thereof in the county in which it transacts business.

2. A note executed in Tennessee to a building and loan company incorporated under the laws of, and having its office and principal place of business in, Minnesota, and made payable at such office, is a Minnesota contract, and governed by the laws of the latter state.

3. A note and mortgage executed to a building and loan company by a borrowing member, stipulating for payment by the latter of 5 per cent. interest, and 5 per cent. premium, per annum, are not usurious under the laws of Tennessee.

4. A stockholder in a building and loan company is not entitled to apply stock payments as credits on a loan.

Appeal from chancery court, Shelley county; Sterling Pierson, Chancellor.

Bill by the Pioneer Savings & Loan Company against H. E. Cannon and wife to recover possession of real estate. From a judgment in favor of complainant, defendants appeal. Affirmed.

F. P. Paston, for appellants. Malone & Malone and J. J. Du Bose, for appellee.

McALISTER, J. This is an action of ejectment to recover the possession of a tract of land comprising about 12 acres situated near Memphis. The complainant is a building and loan association incorporated under the laws of the state of Minnesota, with its office and principal place of business at Minneapolis, in said state. The record discloses that on July 25, 1890, the defendant H. E. Cannon, a citizen of Memphis, made application to complainant association to purchase 26 shares of its stock, of the par value of \$2,600. This stock was accordingly issued, subject to the rules and regulations of the company. It further appears that on the 29th July, 1890, the defendant Cannon made application to said company to borrow the sum of \$2,000. This application was forwarded to the home office of the company, at Minneapolis, and after some delay the application was granted. As evidence of this indebtedness, Cannon and wife, September 1, 1890, executed their joint note to said company for the sum of \$2,000, payable 76 months after date. This note was dated and made payable at Minneapolis, and provided for the payment of 5 per cent. interest per annum, and 5 per cent. premium per annum, monthly, on or before the last Saturday of each month, and stipulating further that "any failure to pay interest or premium when due shall, at the election of the payee, make the principal, interest, and premium at once due." A provision of 10 per cent. at-

torney's fees was also embraced in the note, in the event default was made in the payment of the note. For the purpose of securing the payment of this note at maturity, Cannon and wife executed a trust deed to one R. J. Black, conveying the 12 acres in question, and providing for the payment of the interest and premium evidenced by the note. The trust deed further provided that, "in case of any failure or default on the part of the parties of the first part to keep and perform any of the covenants or agreements herein contained, such failure or default shall, at the option of the holder of said note, have the effect of at once maturing the whole indebtedness secured herein," etc. Cannon continued to pay his interest and premium until November 1, 1892, when he made default, and thereupon the company, in pursuance of the terms of the note, declared the whole indebtedness due, and directed a foreclosure of the deed of trust. The trustee, J. Black, after due advertisement, on January 27, 1894, offered the property for sale at public vendue, when the complainant, the Pioneer Savings & Loan Company, became the purchaser, at the price of \$1,200. Cannon and wife having refused to vacate the property, the present bill was filed to recover the possession. The chancellor adjudged that the sale of the land to complainant was valid and communicated a good title, ordered a writ of possession to issue, and pronounced a personal decree against defendant for the sum of \$1,184.98, the balance due on the note after crediting same by the amount bid at sale. Cannon appealed, and has assigned errors.

The first assignment of error is that complainant company is a nonresident corporation, and cannot maintain this action for the enforcement of property rights in this state, for the reason that at the time of these transactions it had not filed its charter with the secretary of state, and an abstract thereof in Shelby county, as required by the act of 1891. It is a sufficient answer to this assignment of error to say that the original loan from the company to Cannon was made September 1, 1890, and the trust deed to secure the loan was executed on the same day. This was prior to the passage of the act of 1891, and, of course, said contract is not affected by the provisions of the latter act. It is true, the foreclosure of the trust deed and the purchase of the property by complainant occurred subsequently to the passage of said act; but, the original transaction being valid, the mere collection of the debt is not within the prohibition of the statute.

The second assignment of error is that the note and mortgage were both usurious on their faces, and nonenforceable. As already stated, the note stipulates on its face to pay 5 per cent. interest per annum, and 5 per cent. premium per annum, at the office of the company, at Minneapolis, Minn. It may be remarked, in the first place, that this con-

tract is a Minnesota contract, and is expressly authorized by the charter of the company and the laws of that state, which have been distinctly proved, and appear in the record. Moreover, such a transaction is not usurious under the laws of this state. *Patterson v. Loan Ass'n*, 14 Lea, 677.

The third assignment is that the court erred in not allowing defendant a credit of \$1,108.06. It will be remembered that Cannon occupied towards this association a two-fold relation,—that of a borrower and stockholder. The proof shows that Cannon, as debtor to the company, had paid on his loan note, in the way of interest and premium, the sum of \$450, and that, as stockholder, he had paid on his stock the sum of \$596.70. In the decree pronounced by the chancellor, Cannon was credited with interest and premium paid up to November 1, 1892, amounting to \$450, and charged with interest and premium accruing after that date. So that the only question under this assignment is whether defendant is also entitled to a credit on his loan note of stock payments made by him amounting to \$596.70. The stock certificate issued by the company to Cannon provides that "fines shall be imposed upon the shareholders upon default in payment of dues, and if such monthly, quarterly, and withdrawal installments, and all such interest, premiums, and fines, be not fully paid within 90 days after such first delinquency, this certificate shall wholly lapse, and this contract shall wholly cease, and become null and void, as to any promise or obligation of the union, and the union shall not be liable for any sum whatever under this certificate, and all the payments made on this certificate shall thereupon be and become the absolute property of the union." The certificate required the payment of monthly dues of 60 cents per share of the stock held by the member, and each quarter a payment on dues of 25 cents per share, and for every month in which there are no quarterly dues a withdrawal payment of 25 cents per share; all of these dues being payable on the last Saturday in each month. Section 2 of the certificate provides for fines for nonpayment of these dues. By section 6, the borrower is required to pay interest at 5 per cent., and a premium of 5 per cent. per annum on the loan. By section 11 of the by-laws, it is provided that the whole debt shall mature upon default in payment of the premium and interest. By section 6, the borrower is required to pay attorney's fees. The record shows that after October, 1892, Cannon wholly defaulted in payments of any kind, and thereafter on the 29th of June, 1893, the company declared the stock certificate lapsed, and all payments made thereon forfeited to the union. These forfeited payments made by Cannon on his shares were credited on the books of the corporation, to the lapsed-shares account, and were thereafter distributed among other shareholders in good standing.

The question arising upon these facts is whether a stockholder in a building and loan association is entitled to apply stock payments as a credit upon a loan. In some jurisdictions such a transaction has been received as an actual loan of money, and the aggregate amount of payments upon stock as partial payments on the loan by the borrower. *Overby v. Loan Ass'n*, 81 N. C. 56; *Reynolds v. Pool*, 84 N. C. 38. The supreme court of Alabama, however, in the case of *Southern Building & Loan Ass'n v. Anniston Loan-Trust Co.* (decided at its November term, 1893-94) 15 South. 123, says, viz.: "It is a correct principle, as has been held, that there is no connection established between the stock held by the stockholder, and the bond [or note] held by the company, such as that payments made on stock are to be treated as payments on the bond, so that one is steadily offset against the other, or the one merges in the other,—a fallacy sometimes indulged, arising from a failure to observe the separate existence of the stock, on the one hand, and the bond, on the other; the separate relation borne to the company, on the one side, by its stockholder, and on the other, by its borrower. The payment on the one is not necessarily a payment on the other,"—citing *Loan Ass'n v. Hornbacker*, 42 N. J. Law, 635; *End. Bldg. Ass'n*, § 452. After a review of the authorities, Mr. Endlich says: "It has therefore become a well-recognized doctrine that payments of dues upon stock are not payments on the mortgage debt, and do not, ipso facto, work an extinguishment of so much of the mortgage. The fact that the borrower has assigned his shares to the society as collateral security for his debt makes no difference, for this is a recognition of the distinct standing of the member as a member and as a debtor." *End. Bldg. Ass'n*, § 452. See, also, *Rogers v. Margo*, 92 Tenn. 35, 20 S. W. 430. The chancellor held that defendant Cannon was not entitled to an abatement of his indebtedness by a credit for stock payments, which ruling was in accord with the established doctrine on the subject. Affirmed.

CHISM et al v. FIRST NAT. BANK OF NEW YORK et al.

(Supreme Court of Tennessee. May 23, 1896.)

NEGOTIABLE INSTRUMENTS—INDORSEMENT OF DRAFT
TO FICTITIOUS PERSON—LIABILITY OF DRAWER.

The indorsement of a bank draft by the payee to the order of a fictitious person in good faith, and believing him to be real, is not in law an indorsement to bearer, such not being the intention of the indorser; and the indorsement of the name of the fictitious indorsee by a third person without authority is a forgery, and does not protect the bank in payment of the draft.

Appeal from chancery court, Shelby county; John L. T. Sneed, Chancellor.

Action by Chism, Churchill & Co. against the First National Bank of New York and

the Mercantile Bank of Memphis as garnishee. Decree for complainants and defendants appeal. Affirmed.

Scruggs & Henderson, for appellants. Surley & Wright, for appellees.

BEARD, J. The complainants are cotton factors in the city of Memphis. On the 13th day of July, 1894, they purchased from the First National Bank of Memphis a draft for \$3,000, payable to their order, and drawn on the defendant, the First National Bank of New York. After getting this draft, they indorsed it, "Pay to H. C. Hamilton or order," and then placed it in the hands of one Weems, to be delivered to the indorsee, Hamilton. The drawing, indorsement, and delivery of this draft were the result of a fraudulent scheme, which Weems practiced upon complainants. They were induced by him (at that time a man of fine reputation in the community) to think Hamilton was a real person, who had consigned to him as warehouseman, for storage and sale, a large lot of cotton, and this draft represented the advance which complainants agreed to make to the supposed consignor upon this cotton, upon an understanding that they were to sell same and earn the commissions accruing therefrom. It turned out, however, that Hamilton was nonexistent, and that Weems had no such cotton under his charge. But the record discloses that complainants neither knew nor had occasion to suspect such to be the facts, but, believing that Hamilton was a real personage, and with the view of carrying out this agreement with Weems, they purchased this draft, and turned it over to him, indorsed as is stated above, for delivery to their indorsee. Immediately after its receipt, Weems indorsed it to himself or order, using for this purpose the name of Hamilton, and then carried it to the Mercantile Bank of Memphis, and that bank, without any suspicion of the bad faith of the transaction, or of the right of Weems to transfer title, upon his indorsement, paid him full value for it, and then forwarded it to its correspondent in New York, by whom in due time it was presented to the drawee, who, equally ignorant of the want of title in Weems, and in perfect good faith, paid it. Discovering within a few days the fraud practiced upon them, and at the same time that the draft had already been paid, this bill was filed by complainants, the payee, against the drawee, the First National Bank of New York, and the Mercantile Bank of Memphis; against the first upon an assumpsit implied from the wrongful appropriation of the draft and a refusal to account for its proceeds, and against the latter as a garnishee holding funds of the former subject to attachment. Two defenses are made: First, that complainants were guilty of such carelessness in their dealings with Weems as to estop them from setting up the present claim; second,

that the indorsement by Chism, Churchill & Co. of this draft to a fictitious indorsee was in law an indorsement to bearer, and the result was that its payment through the usual channels of trade, without notice of the alleged defect, discharged the drawee.

As to the first of these grounds, it is sufficient to say that the record fails to show any recklessness or carelessness upon the part of complainants in this transaction to prevent a recovery, if for any sound reason this suit is maintainable. It is the second ground, however, upon which the defendants rest largely their defense to this claim. What is the effect of indorsing a bill to a fictitious person, the indorser not knowing that the indorsee was fictitious, but, on the other hand, believing him to be a real person, is a question of first impression in this state. There is no doubt it is true, as a general proposition, that the holder of commercial paper, payable to order, must trace his title through a genuine indorsement, including that of the payee. 2 Rand. Com. Paper, § 988; 1 Daniel, Neg. Inst. § 731; 1 Edw. Bills & N. § 519; Mead v. Young, 4 Term R. 28-30. And it is equally true that where a banker pays a draft or check drawn upon him, he, at his peril, pays it to any one but the payee, or to one who is able to trace his title back to the payee through genuine indorsements. The mere possession of the check or bill under apparent title does not necessarily imply the right to demand or receive payment, and when it is paid to such holder the drawer has put upon him the risk of seeing that the apparent is the real title to the paper; for the banker holds the funds of his depositor under an obligation to pay them to him or to his order, and if he pays them otherwise he cannot treat such a payment as a discharge of his liability. *Shipman v. Bank*, 126 N. Y. 318, 27 N. E. 371; *Roberts v. Tucker*, 16 Q. B. 575; *Dodge v. Bank*, 30 Ohio St. 1. It is otherwise as to his payment of a check or bill payable to bearer. In such a case, in the absence of knowledge that the party presenting the paper is wrongfully in possession of it, he can safely pay, because in so doing he is complying with the positive demand of his depositor. *Tied. Com. Paper*, § 312. And it is insisted for the defense that this was the legal effect of the indorsement by Chism, Churchill & Co. to Hamilton, the fictitious indorser. It seems from a note by Byles, Bills, p. 79, that the controversy over the effect of indorsement of bills to fictitious persons grew out of the bankruptcy of Linsay & Co. and Gibson & Co., who negotiated bills with fictitious names upon them to the amount of nearly a million sterling a year. A great many cases grew out of these indorsements in the various courts of England, one of which (*Minet v. Gibson*, 3 Term R. 481) was carried to the house of lords. 1 H. Bl. 569. Mr. Chitty, in his work on Bills (page 178), says: "The result of the discussion seems to be that a bill payable to a ficti-

tious person or his order is, in effect, a bill payable to bearer, and may be declared on as such in favor of a bona fide holder ignorant of the fact against all the parties knowing that the payee was a fictitious person." In other words, whether such a bill was collectible by the holder, as if payable to bearer, depended upon the fact that the party against whom it was sought to be enforced, at the time he assumed liability upon it, knew that the payee was fictitious. Where he possessed such knowledge he was estopped from saying to a bona fide holder that he was not bound; otherwise he would be a party to the circulation of commercial paper, apparently good, yet with an inherent vice which rendered it worthless, at least as to him, though it fell into the hands of an innocent purchaser. Subsequently the bill of exchange act of 1882 was passed, the effect of which was in fact that a bill might be treated as payable to bearer when the party named as payee was a real person, but has not and was not intended by the drawer to have any right arising out of it. *Bank v. Vagliano* [1891] App. Cas. 107. In this country, among the text writers, Mr. Daniel states the rule as general, and says that: "In the case of a note payable to a fictitious person it appears to be well settled that any bona fide holder may recover on it against the maker as upon a note payable to bearer. It will be no defense against such bona fide holder for the maker to set up that he did not know the payee to be fictitious." Mr. Daniel rests the rule upon the ground of estoppel, but Mr. Randolph, in his work on Commercial Paper (volume 1, § 164, note 4), suggests that the cases cited by him to support his text "apply this rule only when the maker has by his words or conduct raised any estoppel against himself," and this latter author falls in his text, as we understand it, to give the sanction of his approval to the rule as announced by Mr. Daniel.

The questions presented in this case have arisen and been discussed in but few of the American courts, and the conclusions reached by them have been variant. *Blodgett v. Jackson*, 40 N. H. 21, relied upon by the defendants in this case, we think is not authority for the rule contended for by them. There a note payable to a firm of Whitney, Shaw, Lent & Hawes was in the possession of Lent, and was sold and transferred by him for value to the plaintiff in the action. The defendant, the maker of the note, denied the genuineness of the indorsement. To the issue made by this denial the court said: "The bare possession of this note by this person was competent evidence to be submitted to the jury, that he (the party transferring) was the Lent named in the note, and of course a member of the firm, and authorized to indorse it in the manner he did." "Here was a note which the evidence tends to show was genuine, payable to Whitney, Shaw, Lent & Hawes; a thing of value, and

likely to be in the possession of the owners. Such possession therefore raised a presumption of ownership." *Kohn v. Watkins*, 26 Kan. 691, does raise the precise question here presented, and is a direct authority for the contention of defendants. In that case it was held that the drawer of a bill, who makes it payable to a fictitious person, and transmits it to a third person for delivery to the payee, is bound to a bona fide purchaser from that third party who indorses it with the name of the payee, though the drawer, when he issued the bill, believed that the payee was a real person, and intended it to be delivered to him only upon the receipt of a valuable consideration from him. The court rested its opinion on the text of Mr. Daniel, which has already been adverted to, and certain cases which were regarded as authorities, to sustain the rule adopted. *Lane v. Krekle*, 22 Iowa, 389, one of these cases, while it contains a dictum which is in harmony with the conclusions reached by the court citing it, was confessedly not an authority on the real point in controversy, as in that case the note sued on was payable to bearer. Another of these cases is *Phillips v. Imthurn*, 114 E. C. L. 694. There the signature of the drawer, as well as the indorsement, was a forgery, but the acceptor was held liable upon the ground that he had misled the holder. The ground of the decision, as stated by Keating, J., in the final disposition of this case reported in L. R. 1 C. P. 463-472, was that: "Upon the facts stated in this special case, it was not competent for the defendant to deny the genuineness of this bill. He knew that the plaintiffs were willing to advance money upon the bill only upon his vouching, by his acceptance of it, the authenticity of the drawing." *Forbes v. Espy*, 21 Ohio St. 474, was also relied upon in *Kohn v. Watkins*, supra. In that case E. & Co. issued a bill on New York to the order of C. H. & Co., its purchasers, who indorsed it to one Charles Clark, whose real name, however, was Maro. This was not a case of a fictitious payee, but of a man with an alias, or an assumed name, taking title in this assumed, rather than his real, name. So the court held that the indorsement and delivery of this bill to Clark must be regarded as an affirmation to all persons not otherwise informed that there was such a person as Charles Clark, and that Maro was that person. We do not think, upon these facts, that this case can be said to support the general rule to which it was cited, and this was evidently the view of the supreme court of Ohio in a case to be referred to at length hereafter. Upon the other hand, we have at least two well-considered cases, which, in effect, adopt the English rule, to wit, that only such paper as is issued to a fictitious payee or indorsee by the party sought to be bound, with full knowledge of the fact, shall be treated as payable to bearer. In one of these cases,—that of *Armstrong v. Bank*, 46

Ohio St. 512, 22 N. E. 866,—after a careful review of the authorities, it is said: "If the drawer of a check, acting in good faith, makes it payable to a certain person or order, supposing there is such person, when in fact there is none, no good reason can be perceived why the banker should be excused if he pay the check to a fraudulent holder upon any less precautions than if it had been made payable to a real person; in other words, why he should not be required to use the same precautions in the one case as in the other,—that is, determine whether the indorsement is a genuine one or not. The fact that the payee is a nonexistent person does not increase the liability of the bank to be deceived by the indorsement." The case of *Shipman v. Bank*, 126 N. Y. 318, 27 N. E. 371, involved over \$200,000, was argued by counsel of research and ability, and was determined by a court of deserved reputation. In that case it appeared that the plaintiffs were depositors in the defendant bank. They drew checks for large sums to fictitious payees, supposing them to be real persons. These checks were given to a trusted employé, to be turned over to the respective payees. Instead, however, this employé indorsed the names of the payees upon them, and had them presented to the drawee, when they were paid without inquiry or suspicion of the genuineness of the indorsements. Suit having been instituted by the drawer to recover the sums so paid out, it was resisted upon the ground that these checks were in law payable to bearer. The court, however, speaking through O'Brien, J., say: "The maker's intention is the controlling consideration which determines the character of such paper. It cannot be treated as payable to bearer, unless the maker knows the payee to be fictitious, and actually intends to make the paper payable to a fictitious person." We think the rule thus limited is reasonable, while to eliminate the element of knowledge or intent would leave it harsh and unreasonable. In addition, with this limitation, the law of negotiable paper, so far as it involves the question of forgery, is consistent; for it is universally conceded that the payment of a check or a bill drawn to the order of a real person upon a forged indorsement of the payee's name will not protect. In such a case the banker is still liable to the owner for the funds in hand as though no payment had been made. 3 Rand. Com. Paper, § 1739. And this would be so even if the forger should personate an intended payee of the same name. *Com. v. Foster*, 114 Mass. 311. Then, in a case where the drawer has been guilty of no wrong, but innocently issues or indorses his check or bill to a fictitious person, believing him to be real, and a third party without authority writes the name of this fictitious payee or indorsee upon it, and by this fraud succeeds in collecting it, why should the drawee, by payment of such indorsement, discharge himself from

liability to the drawer? The writing of the name of the nonexistent payee under such conditions is forgery at common law (4 Bl. Comm. p. 247; 2 Whart. Cr. Law, § 653) and under Mill. & V. Code, § 5492. In the present case, without fault on the part of the complainants, the drawee has paid upon a forged indorsement, to a party not entitled to collect it, a bill of which Chism, Churchill & Co. were owners, and which no one had a right to collect save upon their order, and now has it, and declines to account for its value. Under these circumstances, we think the chancellor was right in holding the drawee liable, and we therefore affirm his decree.

STATE v. LAYNE.

SAME v. SPRIGGS.

(Supreme Court of Tennessee. May 28, 1896.)

CRIMINAL LAW—PLEAS—FORMER CONVICTION.

1. A regular and proper conviction under the act relating to "small offenses" (Mill. & V. Code, § 5819), which provides that "any person brought before a justice of the peace for a misdemeanor may plead guilty, whereupon the justice shall hear the evidence, and fine the offender * * * not less than two nor more than fifty dollars," may be pleaded in bar of an indictment for the same offense.

2. Such plea must aver that defendant was brought before a justice of the peace on the same charge, by regular process duly issued and served; that the justice heard the evidence, and that defendant pleaded guilty and was fined, naming the amount of the fine, which must appear to be such as the justice was authorized to impose in the particular case.

3. Under the "small offense" act (Mill. & V. Code, § 5819), providing that "any person brought before a justice of the peace for a misdemeanor may plead guilty, whereupon the justice shall hear the evidence and fine the offender * * * not less than two nor more than fifty dollars," a person who pleads guilty of the offense of disturbing public worship, the minimum fine for which is \$20 (Mill. & V. Code, § 5663), but who is fined a less sum, cannot plead such conviction in bar of a subsequent indictment for the same offense; the judgment of the justice being void.

Appeal from circuit court, Obion county; W. H. Swiggart, Judge.

Brandon Layne and Walter Spriggs were indicted separately for disturbing public worship, and, their plea of former conviction being sustained, were discharged. The state appeals. Reversed.

The Attorney General, for the State. J. W. Burney, for appellees.

CALDWELL, J. Brandon Layne was presented for disturbing public worship. He pleaded former conviction before a justice of the peace, under the small offense law. The district attorney moved to strike out the plea, and, upon his motion being disallowed, he admitted the truth of the facts pleaded. Upon that admission the circuit judge sustained the plea, and discharged the defendant. The state appealed in error.

In the year 1801 the legislature enacted a

law declaring "that if any person shall interrupt a congregation assembled for the purpose of worshipping the Deity, such person shall be dealt with as a rioter at common law." Acts 1801, c. 35; 1 Scott's Laws, 721; Caruthers & Nicholson's St. 558. In 1815 it was made the duty of all justices of the peace, sheriffs, coroners, and constables to put forth prompt and active efforts for the apprehension and punishment of all persons who, "either by words or gestures, or in any other manner whatever," should violate that law, or any published rule for the government of the congregation, in the presence of such officials or of others giving them information thereof. Acts 1815, c. 60, §§ 1, 2; 2 Scott's Laws, 208, 209; Caruthers & Nicholson's St. 558; Hollingsworth v. State, 5 Sneed, 519. The aforesaid provisions of the two enactments of 1801 and 1815 were consolidated by the compilers and carried into the Code of 1858 in the following language: "All justices of the peace, sheriffs, coroners, and constables are required to arrest immediately any person, in their knowledge or observation, disturbing a congregation assembled for public worship, or violating any rule or regulation adopted by such denomination for their own government, or the preservation of good order. Such person shall be fined by the justice before whom brought, not exceeding five dollars, or bound over for his appearance at court, to be proceeded against as a rioter, for the offense." Code, § 1511 (Mill. & V. Code, § 2010). At the same time the compilers introduced into the Code of 1858 another section in these words: "If any person wilfully disturb or disquiet any assemblage of persons met for religious worship, by noise, profane discourse, rude or indecent behavior, or any other act, at or near the place of worship, he shall be fined not less than twenty nor more than two hundred dollars, and may also be imprisoned not exceeding six months in the county jail." Code, § 4853 (Mill. & V. Code, § 5663). Confessedly, the presentment in this case was framed under the latter section. The charge is that the defendant "then and there unlawfully did disturb and disquiet a congregation or assembly of persons met together for religious worship by loud talking, profane swearing, quarrelling, being drunk, and other rude and indecent conduct, at or near the place where said congregation or assembly of persons had met for religious worship." The principal provision of what is known as the "small offense law" is as follows: "Any person brought before a justice of the peace for a misdemeanor, may plead guilty, whereupon the justice shall hear the evidence, and fine the offender according to the aggravation of his offense, not less than two nor more than fifty dollars, together with all costs." Acts 1847-48, c. 55, § 1; Code, § 4994 (Mill. & V. Code, § 5819); Nicholson's St. Laws, 18, 19. A regular and

proper conviction under this statute may be successfully pleaded by the defendant in bar of an indictment against him for the same offense. McGinnis v. State, 9 Humph. 43; State v. Chaffin, 2 Swan, 493; State v. Clenny, 1 Head, 270; Rose v. State, 9 Lea, 389. Great strictness, however, is to be observed in presenting the matter of former conviction. A party seeking the benefit of that defense must aver all facts essential to the validity of the former proceeding and conviction. He must aver that he was brought before a justice of the peace on the same charge, by regular process duly issued and served (Mill. & V. Code, § 5819; State v. Colvin, 11 Humph. 601; State v. Atkinson, 9 Humph. 677); that the justice heard the evidence (Mill. & V. Code, § 5819; State v. Spencer, 10 Humph. 431; State v. Colvin, supra); that he pleaded guilty, and was fined (Mill. & V. Code, § 5819); and the amount of the fine (State v. Atkinson, 9 Humph. 679). The plea filed by defendant in the present case is in good form, and contains all the essentials just enumerated. Nevertheless it is clearly bad, in that it discloses at least one fatal defect in the proceeding before the justice; that defect being shown by the statement in the plea that the justice fined the defendant only "four dollars." The plea, to be good, must not only aver that the defendant was fined, and the amount of the fine, but the amount of the fine must appear to be such as the justice was authorized to impose in the particular case. The reverse appears in the plea before us. The minimum fine authorized by the statute (Code, § 4853; Mill. & V. Code, § 5663), which the defendant confessed he had violated, and under which it seems he was arrested and tried, is \$20; hence the judgment for a less sum was *coram non iudice* and void. There was no authority whatever for the judgment actually rendered, and as a consequence that judgment was an absolute nullity, and, being so, could afford the defendant no advantage or protection in a subsequent prosecution for the same offense. It is true that section 4994 of the Code, already quoted herein, authorizes the justice of the peace trying the cases contemplated to "fine the offender, according to the aggravation of his offense, not less than two nor more than fifty dollars"; but that authorization was not intended to change the minimum or maximum fines prescribed by other statutes for particular offenses. The discretion conferred upon the justice as to amount of fines to be imposed by him was intended to be exercised within the limits prescribed by the particular offense being tried, if there be any such limits. In each particular case, he must observe the peculiar law of the offense to be punished, and in no case can he impose a fine of less than \$2 or more than \$50. Within the latter limits he may impose any fine authorized by the peculiar law of the offense

to be punished, but in no event can he lawfully impose any fine not authorized by that peculiar law.

This record does not justify the insistence of counsel that the defendant was tried and fined under section 1511 of the Code, which, as has already been seen, authorizes the justice of the peace trying the case to impose a fine "not exceeding five dollars." Pretermitting all questions as to whether or not the offenses embraced in that section and in section 4853 are the same, and as to whether or not, if they are the same, the provision of the former section that the justice may fine the offender "not exceeding five dollars" was superseded by the subsequent provision of the latter section that "he shall be fined not less than twenty nor more than two hundred dollars," etc., it is entirely sufficient for the refutation of that insistence and for all present purposes to say that the former provision is not applicable, and cannot be made available under the pleadings in this case. If the offenses contemplated by the two sections are in reality the same, and all the provisions of both sections are to be considered in full force, it is nevertheless and undeniably true that the punishment to be imposed under the one section is different from that to be imposed under the other, and, consequently, that the jurisdiction of the justice as to amount of fine imposed by him in a given case depends upon the question whether the prosecution is under the one section or the other. The punishment administered by him must be appropriate to the section under which the prosecution is conducted. A prosecution under one will not authorize punishment under the other. The presentment in the present case is undoubtedly founded under section 4853, as we have already seen, and not under section 1511; and the defendant is proceeded against with reference to the punishment prescribed in the former, and not as a rioter at the common law under the latter. It is almost as certain that the proceeding before the justice was under the same section. The defendant does not show or claim in his plea that he was arrested, tried, and fined under section 1511. On the contrary, the true meaning of his plea, as we understand it, is that he was arrested, tried, and fined under section 4853; the justice assuming the right and power under section 4994 to impose the fine. The averments of the plea are, in substance, that the defendant was arrested on the general charge of disturbing public worship, that he appeared before the justice issuing the warrant, and pleaded guilty as under the small offense law, and was thereupon tried and convicted under that law for the offense upon the plea, and with the imposition of the fine stated. It is fair to assume that both the defendant and the justice knew that a plea of guilty was not essential to the power of the justice to impose a fine under section 1, c. 60, Acts 1815 (Code, § 1511), as it was under Code, §

4853, and therefore that they acted advisedly, and attempted to conduct the proceedings before the justice with reference to the latter law, and the punishment therein prescribed, and not otherwise, though the justice erroneously supposed he had the power under the small offense law (Code, § 4994) to commute that punishment, and accordingly imposed a fine of only four dollars. A fine for so small a sum was not authorized in a proceeding under section 4853; hence the judgment imposing it was void, and of no virtue in law for any purpose. This is no less true because a judgment imposing such a fine would have been authorized and valid if rendered in a proceeding under section 1511. A judgment void where rendered cannot be validated by referring it to another proceeding, in which it would have been valid. The defect mentioned being fatal to the plea of former conviction, and as such conclusive of the case on this record, it is not necessary to decide whether or not the offense of disturbing public worship, as contemplated by section 4853 of the Code, falls within the provisions of the "small offense" law, and may be finally tried and punished under that law by a justice of the peace. Reverse and remand.

Enter same judgment as to Walter Spriggs, whose case is the same as that of Brandon Layne.

LOUISVILLE & N. R. CO. v. TENNESSEE BREWING CO.

(Supreme Court of Tennessee. May 30, 1896.)

CONNECTING CARRIERS—INJURIES TO GOODS—BURDEN OF PROOF.

1. To exonerate the last of connecting carriers from liability for injuries to goods in transit, the burden is upon it to show that the injuries did not occur on its line.

2. Where injuries to goods in transit over several connecting lines occur, before the goods reach the last carrier, by reason of a defective car being furnished by a preceding carrier, the last carrier is not liable therefor.

Appeal from circuit court, Shelby county; L. H. Estes, Judge.

Action by the Tennessee Brewing Company against the Louisville & Nashville Railroad Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

J. P. Houston and McCorry & Bond, for appellant. F. Zimmermann and H. F. Dix, for appellee.

McALISTER, J. The defendant in error recovered a verdict and judgment in the Second circuit court of Shelby county against the railroad company for the sum of \$438.30, damages to a car load of hops. The railroad company appealed, and has assigned errors. The record shows that on November 1, 1889, S. & F. Uhlman shipped from Pratt's station, Oneida county, N. Y., a car load of hops, consigned to the Tennessee Brewing Company, at Memphis, Tenn. A through bill of

lading was issued by the New York, Ontario & Western Railroad Company, the receiving carrier; and, after passing through the hands of a series of connecting carriers, the shipment was delivered to the consignee, at Memphis, by the Louisville & Nashville Railroad Company. The defendant in error proved that when the hops were shipped at Pratt's station, N. Y., they were sound and sweet, but when delivered at Memphis they were wet and musty. It was a much-controverted question of fact upon what line the damage occurred. As already observed, the present suit is alone against the delivering carrier. It is well settled in this state that, although the initial carrier may be responsible for the entire transportation, any subsequent and auxiliary carrier is equally liable for any default occurring upon its line. *Railroad Co. v. Weaver*, 9 Lea, 38; *Railroad Co. v. Holloway*, 9 Baxt. 188. And in the latter case it was held that the last of a series of connecting lines over which freight is transported is liable for loss or damage, subject to the limitations contained in the contract of shipment with the first line, unless it appears that the loss did not occur on the road, and that the burden of proof is upon said road to show that the loss did not occur on its line. *Transportation Co. v. Bloch*, 86 Tenn. 416, 6 S. W. 881. Says Mr. Hutchinson, in his work on Carriers (section 761): "But a connecting carrier who has completed the transportation and delivered the goods to the consignee in a damaged condition, or deficient in quantity, will be held liable in an action for the damage or deficiency, without proof that it was occasioned by his fault, unless he can show that he received them in the condition in which he has delivered them. The condition and quantity of the goods when they were delivered to the first of the connecting carriers being shown, the jury has the right to infer that they continued in that condition to the time of their delivery to the carrier completing the transportation and making the delivery to the consignee, and that the injury or loss occurred while they were in his possession. And it has been held that the presumption which applies to the last of a line of connecting carriers, that the goods were delivered to it in the same condition as they were delivered to the first carrier, applies also to any intermediate carrier, and in such cases the receiving carrier will be regarded as the agent of the succeeding connecting carriers for the purpose of accepting the goods for transportation over the connecting lines, and the receipt or bill of lading given by such receiving carrier will be competent evidence, in an action against any of the succeeding carriers into whose possession the goods may have come, to show the delivery for transportation, the condition of the goods at the time of such delivery, and the terms of the shipment."

The circuit judge charged the jury, correctly, "that in this state the last of a connecting line of carriers is liable for the loss or damage

to the freight, if lost or damaged while in transport over such last connecting line, and the burden of proof is upon the last connecting line to show that the loss or damage did not occur through the negligence of the officers or agents of the said last connecting line of road." It is not controverted that this charge was in entire accord with our authorities, but it is assigned as error that the trial judge submitted to the jury the following instructions, to wit: "If you find from the evidence that the safe transportation of hops required rain-proof cars, and if you find, further, that the loss occurred to plaintiff through the failure of the first or any connecting carrier to furnish such cars, then the defendant is liable." Again, the following instruction is assigned as error, for the reason that it embodies the same objectionable feature, to wit: "If the proofs satisfy you as to those two points, the plaintiff has made out a prima facie case, and you should find for it, unless the defendant has proven to your satisfaction that it was in no way negligent, and that the damage to the hops did not occur on its line, or did not occur through means of a defective car furnished by itself, or connecting carrier." The proof showed that the hops in question had been transferred to several cars during the transit, and it was a disputed question where and how the damage occurred. If the injury to the hops occurred before the car reached the territory of the delivering carrier, and in consequence of a defective car furnished by the initial or any intermediate carrier, it is manifest, the delivering carrier would not be liable. If, however, the loss occurred on the line of the delivering carrier, in consequence of a defective car furnished by any preceding carrier, the delivering carrier would be liable. *Railroad v. Dies*, 91 Tenn. 181, 18 S. W. 266; *Pennsylvania Co. v. Roy*, 102 U. S. 452. The circuit judge, however, charged the jury, without limitation or qualification, that, if the loss to plaintiff occurred through the failure of the first or any connecting carrier to furnish rain-proof cars, the defendant company would be liable. The jury must have inferred from this instruction that it was an indispensable condition of defendant's exoneration from liability that it show, not only that the loss did not occur on its line, but that it was not occasioned by a defective car furnished by itself or any connecting carrier, regardless of where the damage actually occurred. For the error indicated the judgment is reversed, and the cause remanded for a new trial.

SCHMALZREID et al. v. WHITE.

(Supreme Court of Tennessee. June 13, 1896.)

LANDLORD AND TENANT—DEFECTIVE PREMISES—COMMON-LAW LIABILITY OF LANDLORD—FAILURE TO PROVIDE FIRE ESCAPES—CITY ORDINANCE—REPEAL.

1. In an action by a tenant against his landlord for injuries received by the tenant in jumping from the building while it was on fire,

and alleged to be due to defendant's failure to provide fire escapes, a charge that at common law a landlord was required to disclose to the tenant any hidden defects in the construction of the building which rendered it unsafe, regardless of the landlord's knowledge of such defects, or diligence in searching therefor, was erroneous; the common-law rule being that there is no implied warranty on the part of a landlord that the leased premises are fit for occupation, or fit for the use for which they are let. *Hines v. Wilcox* (Tenn. Sup.) 33 S. W. 914, distinguished.

2. At common law a landlord is not obliged to furnish fire escapes.

3. Ordinances 1880, § 166a, of the city of Memphis, providing that owners of buildings within the taxing district must provide fire escapes, and requiring them to be constructed "under the supervision and to the entire satisfaction of the district engineer and the chief of the fire department," was repealed by the subsequent Ordinances 1890, subsec. 271, controlling generally the erection of all buildings, public or private, within the city limits, and declaring that their construction shall be under the control of the building inspector.

Error to circuit court, Shelby county; L. H. Estes, Judge.

Action by C. R. White against Wilhelmina Schmalzreid and others. Plaintiff had judgment, and defendants bring error. Reversed.

Turley & Wright and Morgan & McFarland, for plaintiffs in error. James M. Greer and C. D. M. Greer, for defendant in error.

BEARD, J. The plaintiffs in error were the owners of a four-story building in Memphis, which was burned in November, 1893. At that time the Young Men's Christian Association occupied the second and third floors, under a contract of subtenancy. The defendant in error was a member of the association, and, when the fire occurred, was on the second floor. In attempting to escape, he leaped to the ground, and was seriously injured. This suit was instituted by him against the owners of the property to recover damages for this injury. The gravamen of his declaration is that the building was negligently constructed, in that, contrary to law and the ordinances of the city, it was not provided with fire escapes, and that this neglect was the proximate cause of his injury. Upon issues properly made, there was a verdict and judgment for the plaintiff below. The case is before us upon assignments of error to the charge of the trial judge. Two of these will be noticed:

1. In his instructions to the jury, he said: "Under the common law, when a landlord leased or rented a house to a tenant he was bound to deal fairly with such tenant. He was required to disclose to the tenant any hidden defects in the construction of the building, or any secret conditions or surroundings that contributed to render the building unsafe to life, limb, health, or property, so that if the landlord fails to make such disclosures as would apprise the tenant of the condition of the premises before he became his tenant, and the failure to make

such disclosures caused the tenant, or some one there on his invitation, to be injured or suffer loss, then such act of the landlord was held to be fraudulent, and made him liable for whatever injury resulted." It will be seen that in this paragraph the circuit judge, in effect, tells the jury that the common law placed on the landlord the duty of disclosure to the tenant of hidden defects and secret conditions that contribute to make the demised property unsafe, and made him liable for any injuries resulting therefrom, not only to his tenant, but to any one on the premises by the invitation of his tenant, though the landlord was ignorant of these defects and conditions, without fault or negligence on his part. The common law imposes no such responsibility on the landlord. It does not make him an insurer to the tenant. On the contrary, in the ordinary contract of letting, it does not imply any warranty on the part of the landlord that the leased premises are in a safe and habitable condition, since the tenant ordinarily has it in his power to inspect the premises, and so accepts them at his own risk. *Busw. Pers. Inj.* § 82. In *Edwards v. Railroad Co.*, 98 N. Y. 245, it is said, "It is a universal rule, to which no exception can be found in any case now regarded as authority, that upon the demise of real estate there is no implied warranty that the property is fit for occupation, or suitable for the use or purpose for which it is hired." In *Jaffe v. Harteau*, 56 N. Y. 398, it was held that "the lessor of buildings, in the absence of fraud, or any agreement to that effect, is not liable to the lessee, or others lawfully upon the premises for their condition, or that they are tenantable, and may be safely and conveniently used for the purpose for which they are apparently intended." In *Francis v. Cockrell*, L. R. 5 Q. B. 501, *Kelly, C. B.*, said that there was no implied warranty by the lessor that the demised real estate "shall be reasonably fit, or fit at all, for the purpose for which it is let." And in *Keates v. Cadogan*, 10 C. B. 501, the rule is stated to be that "no action lies by a tenant against the landlord on account of the condition of the premises leased, in the absence of an express warranty, or active deceit." In *Bowe v. Hunking*, 135 Mass. 380, the court said: "In the case at bar there was no express or implied warranty, and no actual fraud or misrepresentation. If the action can be maintained, it must be on the ground that it was the duty of the defendants to inform the tenants of the defect in the staircase. This duty, if it exists, does not arise from the contract of the parties, but from the relation between them, and is imposed by law. If such a duty is imposed by law, it would seem that there is no distinction, as a ground of liability, between an intentional and unintentional neglect to perform it, but in such a case there can be no such duty without knowledge of the defect." The same doctrine is announced in *Viterbo*

v. Friedlander, 120 U. S. 712, 7 Sup. Ct. 962, and it is elaborated with great research and ability in *Doyle v. Railroad Co.*, 147 U. S. 413, 13 Sup. Ct. 333; it is also recognized by this court in *Banks v. White*, 1 Sneed, 614, and *Oil Works v. Bickford*, 14 Lea, 657. In laying down, as the rule of the common law, one so widely different from that announced in the foregoing cases, the trial judge was guilty of manifest error, the effect of which was not cured in the subsequent part of his charge. What is here said in discussing this subject is not intended to conflict with the case of *Hines v. Wilcox*, 33 S. W. 914, 96 Tenn. —. In that case it was announced that the landlord was liable, not only for what he knew of the defects in the premises let, but for what he might have known by the exercise of reasonable care and diligence, while in this, under the instructions of the trial judge, the rule, as announced by him, would make the landlord liable for hidden defects from which injuries were received, without regard to the question of diligence and reasonable care.

2. But the plaintiff below not only rested his right of recovery upon what he claimed was common-law negligence of the owners of the property destroyed, but also upon their violation of certain ordinances, as to fire escapes, of the city of Memphis, which were given in evidence. Independent of statute or ordinance, we do not think that the duty is imposed upon the owner of leased property to provide such appliances for the safety of the tenant, or for any one on the premises by the latter's invitation or permission. It is held that there is no common-law obligation resting on the master to provide means of escape from fire for his employes. *Jones v. Granite Mills*, 126 Mass. 84; *Keith v. Same*, Id. 90; *Pauley v. Lantern Co.*, 131 N. Y. 90, 29 N. E. 999. And we do not think that it can be insisted that the common law would place a higher duty upon the landlord, in this regard. There were two ordinances of the city given in evidence to the jury, which the plaintiff contended had been violated. The first of these was passed in 1880, and is as follows: "Sec. 166a. The proprietor, lessee, occupant, or person in charge of each and every hotel, theatre, public hall or public building in the taxing district, or any building where manufactories, dress-making, millinery or any other kind of work whatsoever, in the third story, or any story above the third story of said building, is done, is hereby required to provide safe and sufficient fire escapes from each and every story of the same; to be constructed under the supervision and to the entire satisfaction of the district engineer and the chief of the fire department, and each day's failure to provide the same, or any part thereof, or to keep the same, or any part thereof, in good repair, shall be deemed a distinct and separate offense." In 1890 the municipal authorities of of Memphis passed an ordinance entitled

"Building ordinance of the taxing district of Shelby county" (city of Memphis), consisting of many sections and subsections, in which the whole subject of the erection of private and public buildings within the city limits is provided for and regulated. Subsection 271 of this general ordinance is as follows: "Subsec. 271. All buildings now erected, or that may hereafter be erected, three or more stories in height, occupied or built to be occupied by three or more families above the first floor, and every building already erected or that may hereafter be built three or more stories in height, occupied or used as a hotel, lodging house or boarding house, having more than fifteen rooms, and every factory, mill, office building, manufactory or workshop, hospital, asylum or institution for the care or treatment of individuals, and every building in whole or in part occupied or used as a school or place of instruction or assembly, shall be provided with such good and sufficient fire escapes, or other means of egress in case of fire, as shall be directed by the inspector of buildings, and said inspector shall direct such means of egress to be provided in all cases where he shall deem the same necessary." The trial judge gave both in charge to the jury as existing ordinances bearing on the issues in this case. In this he again committed an error, as it is clear that the later ordinance (that is, that of 1890), by necessary implication, repealed the earlier. The ordinance of 1880 was simply directed to the subject of fire escapes, and provided for their construction "under the supervision and to the entire satisfaction of the district engineer and the chief of the fire department," while that of 1890 places the exclusive control of this matter in the hands of the inspector of buildings. To this extent they are inconsistent. In addition, as before stated, the latter is a subsection of a general ordinance covering the whole subject of the erection of buildings within the city, and regulates it down to minute details. It is well settled that a subsequent statute "revising the whole subject-matter of a former one will operate as a repeal of it, though it contains no express words of repeal (1 Beach, Mun. Corp. § 521, and cases cited in note 3), especially if it contains provisions inconsistent with the earlier statute (*Poe v. State*, 85 Tenn. 495, 3 S. W. 658). And this is so even if material parts of the former statute are omitted. *Terrell v. State*, 86 Tenn. 523, 8 S. W. 212. See, also, *State v. Butcher*, 93 Tenn. 679, 28 S. W. 296. And there is no reason why this rule should not apply to city ordinances. 1 Beach, Mun. Corp. § 521; *City of Providence v. Union R. Co.*, 12 R. I. 473; *Booth v. Town of Carthage*, 67 Ill. 102. But it is insisted that the ordinance of 1890 imposed no duty upon the owners of this building, for a breach of which a civil action can be maintained by any one sustaining an injury from such breach, and that, therefore, the trial judge was in error in letting it go

to the jury. It is conceded that for a violation of a general statute a civil action will lie, at the instance of a party injured thereby. *Queen v. Iron Co.*, 95 Tenn. 458, 32 S. W. 460. But it is insisted that this is not true with regard to a violation of a municipal ordinance. An examination of the authorities will show much diversity of judicial opinion on this question. The cases of *Bott v. Pratt*, 33 Minn. 323, 23 N. W. 231; *Osborne v. McMasters*, 40 Minn. 103, 41 N. W. 543; *Hayes v. Railroad Co.*, 111 U. S. 228, 4 Sup. Ct. 369; and *Salisbury v. Herchenroder*, 106 Mass. 458,—hold that for the violation of a municipal ordinance an action can be maintained by a private individual injured thereby. The cases of *Railroad Co. v. Ervin*, 89 Pa. St. 71; *Flynn v. Canton Co.*, 40 Md. 312; *Heeney v. Sprague*, 11 R. I. 456; and *Vandyke v. City of Cincinnati*, 1 Dism. 532,—take the contrary view. We do not think we are called upon to settle this question in this case, however. The trial judge simply told the jury that, if they found that plaintiffs in error had failed to comply with the ordinances of the city as to fire escapes, they might look at that fact, "in connection with the other facts and circumstances" shown, on the question of negligence. We do not think that plaintiffs in error can complain of this instruction. For the errors pointed out the case must be reversed and remanded.

CHARLES v. CARTER.

(Supreme Court of Tennessee. May 18, 1896.)
SALE—BILL OF LADING TO SHIPPER'S ORDER—CUSTOM—INSPECTION ON ARRIVAL.

1. Where goods are shipped by bill of lading running to the order of the shipper, title does not, in the absence of a contract to the contrary, pass to the person who has ordered the goods, so as to make him liable for deterioration during transit; and evidence of custom to the contrary is not admissible.

2. Where goods ordered are shipped by bill of lading running to the order of the shipper, and the bill of lading, with draft on the person who had ordered the goods, is sent to a bank, with directions to turn over the bill of lading on payment of the draft, the person so ordering the goods may refuse to take them unless he is allowed to inspect them within a period of time which is reasonable, considering the nature of the property and the surrounding circumstances.

Error to circuit court, Shelby county; J. S. Galloway, Judge.

Action by M. E. Carter against A. L. Charles. Judgment for plaintiff. Defendant brings error. Reversed.

Edgington & Edgington, for plaintiff in error. F. J. Byrne, for defendant in error.

MCALISTER, J. The defendant in error, M. E. Carter, recovered a verdict and judgment in the circuit court of Shelby county against the appellant, A. L. Charles, for the sum of \$291, damages for the breach of a contract. Charles appealed, and has assign-

ed errors. The record shows that on the 15th June, 1893, M. E. Carter & Co., wholesale produce merchants at Memphis, sold by telegraph to A. L. Charles, a merchant engaged in the produce business at Kansas City, Mo., one car load of Irish potatoes. Under the terms of the contract the potatoes were described as "Choice Triumph; large, fresh, dry stock," and were to be delivered free on board the cars at Memphis at two dollars per barrel. The contract was embodied in two brief telegrams, viz.: "Memphis, Tenn., June 14, 1893. One car choice Triumph to-morrow shipments two dollars per barrel f. o. b. here. M. E. Carter & Co." Charles replied as follows: "Kansas City, Mo., June 15, 1893. Ship car immediately. Your quotations, choice, large, fresh, dry stock. [Signed] A. L. Charles." Carter shipped the potatoes same day by bill of lading, payable to his own order, with draft on Charles for the purchase price attached. These papers were forwarded to the National Bank of Commerce of Kansas City, Mo., with directions to collect the draft, and then turn over the bill of lading to the purchaser, Charles. It further appears that, on the same day the car load of potatoes were shipped, the purchaser, Charles, addressed the following letter to Carter, which was received about the time the potatoes reached Kansas City, viz.: "Kansas City, Mo., June 15, 1893. M. E. Carter & Co., Memphis, Tenn.: Gentlemen: Your T/D received, and I telegraphed you to ship your car immediately. Your quotations, choice, large, fresh, dry stock. You can draw bill lading attached, but want choice stock. No old, held goods, as they rot fast, even for the best of them. Yours, truly, A. L. Charles." The car of potatoes reached Kansas City on Saturday, June 17th, when Charles, having been apprised of their arrival, made an effort to examine the stock, but, having no bill of lading, the railroad company refused the right of inspection. At a later hour in the day the draft was presented for payment, but payment was refused by Charles upon the ground that he had no bill of lading, and was not permitted to inspect the potatoes. The bank declined to surrender the bill of lading to Charles without the payment of the draft. Carter was immediately notified of the situation, and he thereupon telegraphed the bank to let Charles have bill of lading. Carter also advised Charles of this instruction to the bank, but this communication did not reach Charles until Saturday evening after business hours. It further appears that on Monday, June 19th, Charles procured the bill of lading from the bank, and made another effort to inspect the potatoes. The company again declined to permit an inspection upon the ground, as stated by Charles, that, the bill of lading having been drawn to the order of the consignor, Carter, and not having been indorsed to Charles, the latter had no right of inspection. The agent of the

company stated the ground of refusal as follows: "Charles called with the original bill of lading, but first made the statement that he had borrowed the bill of lading from the bank, and would not, therefore, leave it with us. As he would not give us possession of said bill of lading, we declined to allow," etc. The agent also testified that some railroads allow inspection and some do not; that his road—the road over which these potatoes were shipped—did not allow inspection in cases where the bills of lading were made out to the consignor or his order. He further testified that in all cases where the bill of lading was made out to the consignee the railroad would permit the inspection of the goods by the consignee, etc. Charles states that he then returned the bill of lading to the bank, and declined to have any further connection with the matter. It appears that the bank then turned the potatoes over to a firm of commission merchants, who inspected them, and found them in a very unmerchantable condition. The net proceeds of sale by this firm amounted to \$102.75, which was remitted to M. E. Carter. The contract price of the car load of potatoes was \$350, and the measure of recovery claimed by Carter & Co. is the difference between the contract price and the amount realized from the sale. The principal controversy arising upon the record is in respect of the title to the potatoes after their shipment from Memphis. The contention of counsel for Carter is that under the terms of the contract the delivery of the potatoes free on board the cars at Memphis immediately vested the title in the purchaser, and, if the potatoes at the time were sound and merchantable, and of the description purchased, the shipper would not be liable for any deterioration in the shipment subsequently occurring. Counsel for plaintiff in error, while conceding the general rule, insists that Carter violated the contract by not consigning the potatoes by bill of lading directly to Charles, and that by shipping them by bill of lading to the order of himself the title still remained in the consignor until they might be inspected and received by the purchaser. It is further insisted on behalf of Charles, the purchaser, that Carter, by consigning the potatoes to his own order, prevented any inspection or examination of the stock until they had decayed. Defendant in error sought to avoid the effect of consigning the goods to his own order by undertaking to show that he had been authorized to do so by the purchaser, and to that end introduced the letter written by the purchaser after the contract had been consummated by telegram, and after the potatoes had been forwarded, in which the purchaser, Charles, stated, viz.: "You can draw bill lading attached." Evidence was introduced by defendant in error, which the court permitted to go to the jury, tending to show that the words, "You can draw bill lading attached," in above letter, meant, ac-

cording to commercial usage or customs long established, that the shipper was to have the bill of lading made out to his own order, and indorsed by him, with a notation in it to notify the purchaser, and that a draft was to be attached for the price of the goods. The court also permitted testimony to the effect that when goods were shipped f. o. b. Memphis the custom is that the title to the goods, after being put on board the cars at Memphis, was in the purchaser, and that they were at the purchaser's risk during the transit, and that they were at the purchaser's risk even though the bill of lading was made out to the consignee, and had the draft attached, which were sent to a third party for collection of draft before delivery of goods. It should be stated in this connection that one witness introduced by defendant in error denied the custom, and stated that the title to the goods in the case last supposed would remain in the consignor. Exceptions were interposed to all proof of custom as tending to overthrow the well-settled law on the subject.

With this preliminary statement, we notice briefly some of the assignments of error. The first assignment is that the court erred in permitting witnesses to testify concerning any custom or usage tending to prove that the title to the potatoes became vested in said Charles, the purchaser, when placed on board the cars at Memphis, and that as such they were at the risk of said Charles while in transit, from decay and all other causes, although bill of lading was payable to consignor, and was not to be delivered to purchaser until payment of draft; second, the court erred in permitting proof that it was the custom of merchants to make bill of lading to their own order with draft attached; third, the court erred in overruling the exceptions made by counsel for plaintiff in error to all the various testimony concerning custom or usage. We are of opinion that all testimony on the subject of custom or usage should have been excluded by the court. "Proof of custom or usage known to both parties to a contract, either in fact or presumptively from its long continuance, notorious character, or otherwise, if it is not in conflict with the law or its policy, if it is reasonable, and as to the place, business, or person uniform and universal, will be accepted, like the general law, not in contradiction of written stipulations, but as explaining what is indistinct in them, and furnishing the rule where they are silent." *Bish. Cont.* § 449. A custom or usage regulating dealings between certain merchants and their customers, contrary to or different from the law of the land, cannot be allowed. *Cooper v. Sanford*, 4 Yerg. 452. Again, it was held that, a bill of lading having a definite legal meaning, the liability of the carrier fixed by law cannot be changed by the custom of a particular place among a certain class of shippers. *Turney v. Wilson*, 7 Yerg. 340.

Usage cannot make a contract where there is none, nor prevent the effect of the settled rule of law. *Burnard v. Kellogg*, 10 Wall. 390; *Wilson v. Knott*, 3 *Humph.* 473. The law is well settled that, in the absence of a contract providing otherwise, the delivery of goods to a carrier for shipment vests title immediately in the purchaser, subject to the seller's right of stoppage in transitu, or avoidance for fraud. *Brooks v. Paper Co.*, 94 *Tenn.* 710, 31 *S. W.* 160. But where goods are shipped deliverable to the order of the consignor for and on account of the consignee, the carrier cannot deliver them to such consignee except upon the production of the bill of lading, properly indorsed by the consignor, for this is notice to the carrier that the shipper intends to retain in his power the ultimate disposition of the goods. *Hutch. Carr.* § 130. The fact, says the author in a note, of making the bill of lading deliverable to the order of the shipper is, when not rebutted by evidence to the contrary, decisive to show his intention to reserve the *jus disponendi*, and from preventing the property from passing to the vendee. See, also, to the same effect, *Benj. Sales*, §§ 540-590; *Railroad Co. v. Nelson*, 1 *Cold.* 272. We are of opinion that all the evidence admitted on the trial below on the subject of custom, so far as it contravened these well-settled principles of law, was wholly inadmissible.

The second assignment of error is that the court charged the jury, viz.: "If you believe from the evidence that plaintiff wired defendant the price per barrel of a car load of potatoes to be shipped to Kansas City, Mo., said potatoes to be of a certain grade and quality, and to be put upon the cars 'f. o. b. here,'—that is, at Memphis,—and that the defendant wired back to plaintiff accepting the terms and conditions as set out in plaintiff's telegram, and that it was the universal custom and usage and understanding among merchants handling and selling such goods to have bill of lading made out to the order of the consignor, and attach draft for the proceeds of sale thereto, and that the parties in this instance contracted with reference to such custom, and the plaintiff did so consign the goods to his own order, to be delivered to defendant upon payment of draft, under this universal custom and usage, and that the defendant, upon being notified of the arrival of the goods, bill of lading, and draft at Kansas City, refused to pay the draft and take the goods; and you further find that the potatoes were in grade and quality such as were ordered by defendant, when loaded upon the cars at Memphis, and were merchantable and marketable when so loaded upon the cars,—then I charge you that plaintiff is entitled to recover of defendant the contract price of the goods so shipped." We think this instruction erroneous, for the reason that it is based largely upon the proof of custom, which we hold was in contravention of

well-established rules of law, and should have been excluded from the jury. The following instructions, submitted by counsel for Charles after the general charge was delivered, should have been given in charge to the jury, viz.: "(2) The court further charges you that, if you find the fact to be that the plaintiff consigned these goods to his own order at Kansas City, then it follows that there was no delivery of the goods to the defendant, Charles, when they were put on board the cars at Memphis; and when the goods were in transit to Kansas City, Mo., they were the property of the plaintiff, and they were at his risk, while in transit, from all the casualties of the transit, including that of the loss and depreciation of the value of the property by reason of the perishable nature of the property itself. (3) The court further charges you that if you find that these goods were shipped by plaintiff to his own order at Kansas City, Mo., the railroad over whose line the property was shipped was the agent of the plaintiff, and not of the defendant. (4) The court also charges you that if you find the fact to be that plaintiff sent a draft for the amount of these goods to Kansas City, Mo., to a bank there, then said bank would be the agent of plaintiff, and its acts and doings in the premises would be the acts and doings of the plaintiff. (5) The court further charges you that when these potatoes arrived at Kansas City, Mo., the defendant, Charles, had a legal right to a reasonable time to inspect the potatoes, to ascertain if they were in a good, merchantable condition, and to see if they otherwise fulfilled the provisions of the contract of sale and purchase; and if they did not fulfill the contract of sale and purchase, and were not in a good, merchantable condition, then the said Charles had a right to reject the said potatoes, and refuse to take them. (6) If you find that the conduct of plaintiff and his agents at Kansas City was such that they declined and refused to permit an inspection of the potatoes by the defendant within a reasonable time after their arrival in Kansas City, and an inspection thereof was in consequence not made, then it was no longer the duty of the defendant to take such potatoes, and you must find for the defendant. (7) The court further charges you that it becomes a question of fact for you to determine what would be a reasonable time for the defendant to inspect these potatoes, and in determining what was a reasonable time you will consider the perishable nature of the property itself, the length of time it had been barreled up and confined in a railroad car, as well as the season of the year, and the condition of the weather at the time." The court holds that the foregoing instructions embodied sound propositions of law applicable to the facts of the case, and should have been submitted to the jury. For the errors indicated the judgment is reversed, and the cause remanded for a new trial.

PETERS et al. v. STATE.

(Supreme Court of Tennessee. June 8, 1896.)

GAME LAWS—FISH—CONSTITUTIONAL LAW.

1. A body of water covering 1,040 acres, 1,000 of which are owned by defendant, and 40 by another person, is not a "private pond," within the meaning of Acts 1895, c. 127, providing that the act, which prohibits the destruction or capture of fish except in a certain manner, shall not apply to private ponds.

2. Act 1895, c. 127, providing for the protection of fish, which does not apply to lakes having an area of 15 square miles, and those subject to overflow or backwater from the Mississippi river, does not violate Const. art. 11, § 8, in that the exception is arbitrary and unnatural.

3. Const. art. 11, § 13, empowering the legislature to pass laws for the protection of game and fish, and providing that such laws may be applied and enforced in particular counties or districts, does not prevent the legislature from enacting a law applicable throughout the state generally.

4. Act 1895, c. 127, prohibiting the destruction or capture of fish except by certain methods, does not violate Const. U. S. amend. 14, § 1, in that it deprives persons of their property without due process of law.

Error to circuit court, Lauderdale county.

L. C. Peters and others were convicted of violating the fish laws, and they bring error. Affirmed.

Thos. Steele and Jas. Oldham, for plaintiffs in error. Atty. Gen. Pickle, W. E. Lynn, and J. P. Graves, for the State.

BEARD, J. The plaintiffs in error were indicted for, and upon trial were found guilty of, a violation of section 1, c. 127, Acts 1895. This act is entitled "An act for the protection of fish in the state of Tennessee," and, by its first section, makes it "unlawful for any person or persons to catch, kill or wound any fish in any of the streams, lakes, rivers or ponds in this state, by seine," etc., or "in any way," etc., "except by rod or line, or trot line." It is provided, however, that "this section shall not apply to private ponds." The few facts necessary for the determination of the questions presented by the plaintiffs in error on this appeal are as follows: There is in Lauderdale county, in this state, a large body of water, properly called "Open Lake" or "Big Lake," which covers an area of 1,040 acres, lying in the lowlands contiguous to the Mississippi river, and supplied by periodic overflow therefrom. Of this lake the plaintiff in error Peters owns 1,000 acres, while the remainder, consisting of 40 acres, called the "Arm," is the property of another. The plaintiffs in error have been for several years engaged together in seining this lake, and capturing fish in that way for foreign market, and have continued this practice since the passage of the act in question. When called upon to answer the indictment in this case, their defense was that this was a "private pond," within the meaning of the proviso of the first section of that act. While it would be impossible to definitely fix a di-

viding line between a pond and a lake, yet that a distinction does exist is recognized, not only in the language of the common people, but by Mr. Webster who defines a "pond" as "a body of water naturally or artificially confined, and usually of less extent than a lake," and a "lake" as "a large body of water contained in a depression of the earth's surface." And we think it clear that this distinction was understood by the parties, who have given to this sheet of water the name of "Big" or "Open" Lake. Conceding, however, that it may be called either a pond or a lake without doing violence to the rules of language, still it is not a "private pond," within the terms of this proviso. While it was the purpose of the legislature to preserve the fish in our lakes, water courses, etc., as a food supply for the public, and, to accomplish this, it placed an interdiction on those methods that result in their wholesale destruction, yet this could be done without interfering with the owners of a "private pond." With the fish in such a pond the owner might do as he willed. To exercise this unlimited control, however, the property must be essentially private. It must be a sheet of water covering exclusively his own land, and such as no one could forbid him its use, any more than the cultivation of the soil underneath, if it was free of the water. Lacking this element of exclusive proprietorship, we think it clear that plaintiffs in error cannot avail themselves of the protection of this provision. As before stated, while Peters is the owner of 1,000 acres of this lake, the remaining 40 acres belongs to another person. If the former is the owner of a private pond, then so is the latter, and we would thus have one body of water constituting two distinct private ponds. If the contention of plaintiffs in error is correct, then, under the protection of this proviso, the proprietor of this "arm" of 40 acres, if he could invite all the fish of the lake into it, might, by the use of destructive methods, exterminate them, and yet be guilty of no wrong of which the public, or any individual member of it, could complain. This is equally true as to the owner of the 1,000 acres, whose methods of capturing fish are much more likely to result in their final extermination. In the words of the supreme court of Pennsylvania in *Reynolds v. Com.*, 93 Pa. St. 458, cited in 12 Am. & Eng. Enc. Law, p. 627, this body of water "must be treated as an entirety, and either the whole or none is private." Treating it as an "entirety," we hold that it is in no legal sense a "private pond."

But it is said that, even if plaintiffs in error are wrong in the above contention, yet they cannot be punished, because of the unconstitutionality of the act.

(1) It is insisted that it violates section 8 of article 11 of the state constitution. This objection is directed to section 5 of the act, which provides that it "shall not apply to lakes in this state having an area of fifteen square miles and over, and subject to over-

flow or backwater from the Mississippi river," etc. It is argued that this exception is "arbitrary and unnatural." *Stratton Claimants v. Morris Claimants*, 89 Tenn. 497, 15 S. W. 87. We do not think so. This exception from the operation of the statute of lakes covering such large areas, and whose waters and fish supply are periodically replenished from the Mississippi river, was rested upon the natural and reasonable idea that they would not be liable to suffer a material waste or destruction of their stock of fish, though some of the exhaustive methods forbidden to lesser lakes, and to streams, etc., should be applied to them. As the evil consequences which this legislation sought to avert were not likely to occur in these large lakes, so fortunately located for constantly receiving supplies, they were exempted from the operation of this statute, which was wisely directed to the preservation of the fish in the smaller lakes, streams, and ponds of the state.

(2) Again it is argued that it is void because violative of section 13 of article 11 of the state constitution. As we understand this instance, it is this: that, while the legislature may pass laws for the protection and preservation of fish and game, yet these laws shall not be general, but must be confined to particular counties or geographical districts. We do not think this contention warranted by any sound rules of construction. By the first clause of this section it is provided that "the general assembly shall have power to enact laws for the protection and preservation of game and fish within the state." Under the terms of this clause, and in view of other provisions of the constitution which prohibit class legislation, the legislature might very well have deemed itself restrained from passing any other than general laws, and yet there might be localities where the protection of restraining statutes was very much needed, and other localities where it was not required, and might be oppressive. Hence, as if to meet all emergencies, and at the same time to put every constitutional objection to rest, it is provided in the enacting clause of this section that "such laws may be enacted and applied and enforced in particular counties or geographical districts designated by the general assembly." In other words, these laws may be general or special as the wisdom of the legislature may from time to time suggest.

(3) Finally it is insisted that this act is void because violative of the first section of the fourteenth amendment of the constitution of the United States, in that it unwarrantably interferes with the property rights of the owner of the lake. We think this contention equally unsound. It overlooks the fact that "fish in streams or bodies of water have always been classed by the common law as *feræ naturæ*, in which the riparian proprietor, or the owner of the soil covered by the water, even though he may have the sole and exclusive right of

fishing in said waters, has at best but a qualified property, which can be rendered absolute only by their actual capture, and which is wholly divested the moment the fish escape to other water." 2 Bl. Comm. 392; *People v. Bridges*, 142 Ill. 30, 31 N. E. 115. But, in addition, the power of the legislature to enact laws for the protection and preservation of game in the forests, and fish in the waters, of the state, has been so frequently exercised, and, when challenged on constitutional grounds, has been so uniformly maintained, that the question has now passed beyond the realm of debate. On this point we need only refer to the following among the very many authorities: *Maney v. State*, 6 Lea, 218; *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499; *Magner v. People*, 97 Ill. 320; *Tied. Lim.* §§ 125, 127; *People v. Bridges*, *supra*. The judgment of the circuit court is affirmed.

BASSETT et al. v. SHERROD et al.

(Supreme Court of Texas. June 18, 1896.)

SUPREME COURT—JURISDICTION.

To give the supreme court jurisdiction of an appeal from a judgment of the court of civil appeals on the ground that the decision is in conflict with prior decisions of the supreme court, there must be a well-defined conflict of opinions.

Application for writ of error to court of civil appeals of Third supreme judicial district.

Action by C. N. Bassett and others against N. B. Sherrod and others. There was a judgment of the court of civil appeals (35 S. W. 312) reversing a judgment for plaintiffs, and they apply for a writ of error. Dismissed.

Wilkinson & Rice, for applicants.

GAINES, C. J. In this case the judgment of the district court was reversed, and the cause remanded. Although the cause is sent back with instructions, the decision of the court of civil appeals does not settle the case; nor is it so averred in the petition for the writ of error. But in order to show jurisdiction in this court it is alleged that the decision of the court of civil appeals is in conflict with certain decisions of this court on two propositions announced in the opinion. We have examined the cases cited in support of the averment, and, while we find that there may be some apparent inconsistency between the propositions stated in the opinion in the present case and those announced in the cases referred to in the petition, we think that the present case is distinguishable from either of those cited, and that there is not that well-defined conflict between them which is necessary to give this court jurisdiction of a remanded cause. Therefore the application is dismissed for want of jurisdiction.

CITY OF DENISON et al. v. FOSTER et al.

(Supreme Court of Texas. June 18, 1896.)

MUNICIPAL CORPORATIONS—POWER OF TAXATION—
EXTRA LEVY—PRE-EXISTING INDEBTEDNESS.

The charter of the city of Denison (section 118) provides that the city council may levy a tax of $1\frac{1}{2}$ per cent. on all taxable property, and an additional tax of 1 per cent. for any purpose the accomplishment of which is authorized by the charter, if approved by two-thirds of the taxpaying voters. Under section 46, the council may provide by ordinance for the payment of existing indebtedness, and section 118 gives the council power to appropriate from the general revenue to discharge accrued indebtedness. *Held*, that the council has no power to levy the extra tax for the payment of a pre-existing debt, and mandamus will not lie to compel a submission of an extra tax levy to defray such indebtedness to the taxpayers.

Certified question from court of civil appeals of Fourth supreme judicial district.

Foster & Wilkinson applied for writ of mandamus to compel the city council of Denison, Tex., to submit to the taxpayers the question of an extra tax levy in order to provide for the payment of a judgment previously recovered against the city. There was judgment for plaintiffs, and, defendants having appealed, the court of civil appeals certified to the supreme court the question whether an extra tax could be levied to defray a pre-existing debt.

G. T. Harris and N. H. L. Decker, for appellants. Foster & Wilkinson, pro se.

BROWN, J. The court of civil appeals for the Fourth supreme judicial district has certified to this court the following statement and question:

"The city of Denison, chartered by special act (Sp. Laws 1891), has the right to levy and collect a tax not exceeding $1\frac{1}{2}$ per cent. of the assessed values of property in the city; also, to levy an additional tax of 1 per cent. on the assessment, provided, in the latter case, that this tax of 1 per cent. shall not be levied except on a two-thirds vote of all taxpaying voters of said city, at an election to be held for that purpose.

"Question. If the proceeds of the $1\frac{1}{2}$ per cent. tax and other income of the city is consumed in meeting the current annual expenses of the city, which for the purposes of this question we assume is the case, will the writ of mandamus lie to compel the council to submit to a vote of the taxpayers the question of a levy in reference to the extra 1 per cent., in order to provide for the payment of plaintiffs' judgment, it being a judgment recovered against the city on an attorney's fee, recovered several years previous to the commencement of this proceeding?"

The city of Denison was incorporated by special act of the 22d legislature, and section 118 of its charter is in this language: "The city council shall have the power, and it is

hereby authorized to annually levy and collect a tax not to exceed one and one-half per centum on the assessed value of all real and personal property in said city not exempt from taxation by the constitution and laws of the state, out of which taxes so levied the city council may set apart annually not exceeding one-half of one per centum on the assessed value on all property subject to taxation in said city, for the support and maintenance of public free schools and for the purchase of ground upon which to erect school buildings, and repairs and furnishings of such buildings for said free schools. And said council may levy and collect an additional tax not to exceed one per centum on the assessed value of all property in said city subject to taxation for any purpose, the accomplishment of which is authorized by this act, which tax last named shall not be levied except upon a vote of two-thirds of the tax paying voters of said city, at an election ordered and held for that purpose, which order shall state the amount of taxes to be levied and the purpose for which the same is to be used."

The question presented for our consideration is, can the city of Denison, under the foregoing section of its charter, submit to the voters thereof a proposition to levy a tax to pay an antecedent debt against the said city? Article 6, § 3, of the constitution of this state is in this language: "All qualified electors of the state as herein described who shall have resided for six months immediately preceding an election within the limits of any city or incorporated town, shall have the right to vote for mayor and all other elective officers; but in all elections to determine expenditure of money or assumption of debt, only those shall be qualified to vote who pay taxes on property in said city or incorporated town." The latter part of the above-quoted section of the charter of the city of Denison was evidently enacted in conformity with this provision of the constitution, and to accomplish the purposes therein named; that is, that in all instances where it was proposed to inaugurate a measure which would involve the expenditure of money or the creation of a debt, which could not be accomplished by the use of $1\frac{1}{2}$ per cent. tax on the property of said city, it should be approved by a vote of the taxpaying voters in the city before the city incurs the liability; and this section of the charter, construed in the light of the constitutional provision above quoted, limits the right to submit the question to measures to be carried out in the future. By the charter the city of Denison is authorized and empowered, under section 46, "to provide by ordinance for the payment of any existing and outstanding indebtedness and for the payment of any bonds that may from time to time be issued." Section 113 provides that "the city council shall have power to appropriate so much of the general revenue

of the city for the purpose of retiring and discharging the accrued indebtedness of the city * * * as the city council may from time to time deem expedient." And for the accomplishment of this purpose, with others named, the city is also authorized to borrow money and issue coupon bonds therefor. It will be seen, from these provisions of the charter, that the city council is empowered by ordinance to set apart so much of the general revenue of the city as it may think necessary to discharge accrued indebtedness, or to borrow money upon the credit of the city for that purpose. The first part of section 118 refers especially to the disposition to be made of the general revenue of the city,—that is, that which is raised by the levy of $1\frac{1}{2}$ per cent. upon the taxable values thereof, which tax may be levied by the council of the city without any reference to approval by the voters thereof,—and includes the payment of indebtedness of the city as well as any new enterprise to accomplish which the general revenue is sufficient. The latter part of section 118 undertakes to provide for doing those things by the city which cannot be effected by means of the taxing power before conferred. The object of the latter part of that section is to enable the city of Denison to levy the additional 1 per cent. of tax upon the property of its citizens in order to accomplish any purpose which is authorized by the charter and which cannot be effected by the power of taxation conferred upon the council. The word "purpose," as used, means any object or measure for the public good which the city is authorized to inaugurate and carry out; for instance, furnishing water for the city by the erection and maintenance of waterworks, the erection of public buildings for the use of the city, and other like things named in the charter. The object of the legislature in requiring that the proposition to levy such tax should be submitted to the taxpaying voters of the said city, and approved by them, was that, before the adoption of such a policy, which involved the expenditure of money, both the purpose to be accomplished and the amount of money to be used should be judged of and approved by two-thirds of those who must bear the burden of the enterprise. The payment of a debt already incurred cannot be properly said to be the "accomplishment" of a purpose authorized by the charter of the city. It would be the performance of a duty by the discharge of an obligation already incurred, and it would be useless to submit to the voters the question whether or not the city should pay its debts already contracted; but it is a wise and just policy which allows the taxpayers to determine the question of incurring the debt. The language employed indicates that the liability which is to be discharged from the tax voted should be incurred after the

vote was had, and that the purpose to be accomplished is the carrying into effect of some one or more of the powers conferred upon the city to provide for the public wants of its people, and not the discharge of an obligation already existing, which was fully provided for in the sections before quoted.

We have been referred to the case of *U. S. v. City of Sterling*, 2 Biss. 408, Fed. Cas. No. 16,388, as bearing upon this question. That case is somewhat similar in many of its features to the case as presented by this statement, but the language construed is so unlike that under consideration as to make it inapplicable as authority upon this question. The charter of the city of Sterling contained this provision: "The said city council may, however, levy and collect a tax for city purposes greater than one per cent. provided the same be done with the consent of a majority of the legal voters of said city voting at a general or special election ordered for such purpose." It will be observed that the council of that city had authority to submit to the voters of the city a proposition to levy additional taxes for city purposes, which means for the general purposes of the city, and therefore includes the payment of any indebtedness or current expenses of the city, while the charter under consideration limits the proposition to a specific purpose to be named, and to such purpose as is authorized by the charter of the city. Judge Blodgett, of the circuit court for the Northern district of Illinois, in delivering the opinion in that case, uses language which might sustain such a proceeding as indicated by the question in this case. He said: "It seems, then, clear to me that, if the tax of 1 per cent. was not sufficient to raise the amount needed to meet this liability, it was the duty of the city authorities to call an election and require its voters to vote a sufficient tax for the purpose." But he finally decided the case upon the proposition that the payment of the debts of the city has precedence over its current expenses, and that, if more tax be needed to carry on the city government and to accomplish the purposes authorized by its charter, they must be raised by a vote of the people for that purpose. We express no opinion as to the correctness of any proposition announced in the opinion, but cite the case to distinguish it from this.

We conclude, therefore, that if the proceeds of the $1\frac{1}{2}$ per cent. tax and other income of the city is consumed in meeting the current annual expenses thereof, the city council has no power to submit to the taxpaying voters of the said city a proposition to levy a tax for the payment of any existing indebtedness thereof, and therefore that no writ of mandamus could be issued to the city council to require it to submit such proposition to the taxpaying voters thereof.

FAULK et al. v. SANDERSON et al.

(Supreme Court of Texas. June 15, 1896.)

STATE LANDS—VOID PATENT—DECREE OF ANNULMENT—NEW LOCATION.

1. Const. art. 14, § 2, providing that land certificates should thereafter be "located, surveyed or patented only upon vacant and unappropriated public domain, and not upon any land titled or equitably owned under color of title from the sovereignty of the state," did not inhibit the bringing of a suit by the state against the holder of such title to cancel the same and recover the land; and, when the land is recovered in such a suit, it ceases to belong to the class of prohibited lands, and is again subject to location.

2. Where a decree has been rendered in favor of the state, annulling a patent as void, it fixes the status of the land as a part of the public domain; and a holder of a certificate may at once locate upon such lands, subject to the contingency of the decree being set aside by some legal proceeding. 35 S. W. 400, reversed.

Error to court of civil appeals of the Second supreme judicial district.

Trespass to try title by J. J. Faulk and another against J. R. Sanderson and others. From a judgment of the court of civil appeals (35 S. W. 409) reversing a judgment in favor of plaintiffs, plaintiffs bring error. Reversed.

Ward & James, for plaintiffs in error. Bomar & Bomar, for defendants in error.

DENMAN, J. In 1835 the government of Texas issued to Leona a colonial grant of a league of land, which is a valid and subsisting grant, in Angelina county, Tex. In 1838 the board of land commissioners of Nacogdoches county issued to Leona a certificate for one labor of land. Leona died in 1840. Some one forged a transfer of said certificate from Leona to Cooper, dating the same 1847. On December 4, 1874, Cooper procured from the commissioner of the general land office the issuance of a duplicate certificate to Leona for a league and labor of land, when in fact there never was any original certificate issued to Leona for a league and labor. In 1875 said duplicate certificate was located on the land in controversy, and in 1883 Cooper conveyed said duplicate certificate, and the land located thereby, to Purinton, to whom in 1884 the land was patented; said patent being in 1884 regularly recorded in the land office, and in Wichita county, Tex., where the land is situated. There is a regular chain of title from the patentee, Purinton, to defendants in error herein. In July, 1890, one Lee, claiming the rights of the heirs of Leona, sued defendants in error herein, in trespass to try title, in the district court of Wichita county, Tex., to recover the land in controversy herein, it being included in said patent. In that suit the state of Texas intervened, and sought to cancel said patent on the ground that the duplicate certificate under which it was located and patented was issued without authority, and that, therefore, it and the patent were void. The district court of

Wichita county on the 21st of November, 1891, rendered a judgment in said cause in favor of the state, canceling the patent, and decreeing the land to the state, from which judgment the losing parties prosecuted an appeal to the court of civil appeals, which court affirmed such judgment on December 13, 1892. Texas Land & Mortg. Co. v. State, 23 S. W. 258. Pending such appeal, on January 20, 1892, De Cordova located a valid land certificate owned by him on a part of the land included in said Purinton patent, and caused the field notes to be returned to the general land office, in accordance with law, and afterwards, De Cordova having conveyed the land and certificate thus located to J. J. Faulk, a patent was issued to the latter therefor on December 21, 1892. On the 28th day of December, 1892, defendants in error herein, being the owners of a valid land certificate, located the same on the land included in the patent to Faulk, and caused same to be regularly surveyed, and the field notes returned to the land office, in the time provided by law, but no patent has been issued thereon. Relying upon said patent issued to him, J. J. Faulk and his co-plaintiff in error herein sued defendants in error herein, in trespass to try title, to recover the land included in said patent to Faulk, and in said survey made by defendants in error December 28, 1892; and upon the facts above stated the district court of Wichita county rendered judgment in favor of plaintiffs in error against defendants in error for the land included in said patent to Faulk, which judgment being appealed from by defendants in error the court of civil appeals reversed same, and rendered judgment that plaintiffs in error take nothing by this suit, and that defendants in error go hence without day, and recover of plaintiffs in error all costs expended herein. In reversing and rendering the judgment, the court of civil appeals proceeded upon the theory that the location made by De Cordova was void because section 2, art. 14, of the constitution of Texas, providing "that all genuine land certificates heretofore or hereafter issued shall be located, surveyed or patented only upon vacant and unappropriated public domain, and not upon any land titled or equitably owned under color of title from the sovereignty of the state, evidence of the appropriation of which is on the county records or in the general land office," prohibited location upon the land covered by the patent to Purinton, though such patent had been held void by said decree of the district court of Wichita county in favor of the state, until such decree was affirmed by the court of civil appeals as aforesaid. Plaintiffs in error have brought the case to this court, assigning as error the action of the court of civil appeals in reversing the cause and rendering judgment against them.

It is conceded by both parties that under the authority of Winsor v. O'Connor, 69 Tex.

571, 8 S. W. 519, the land covered by the void patent to Purinton was "land titled," and not subject to location under said constitutional provision, prior to the rendition of the judgment by the district court of Wichita county canceling said patent. But it is contended by plaintiffs in error that upon the rendition of such judgment it ceased to be "land titled," and became immediately subject to location, notwithstanding the appeal. Defendants in error contend that the location by De Cordova was unauthorized, because said constitutional provision withdrew the lands therein mentioned from location, and, since the facts show that the land in controversy once belonged to the class so withdrawn, they could not, without a change in the constitution, be made subject to location by a decree of the court canceling the Purinton patent, and awarding the lands to the state. It was not the purpose of the constitution to validate, or affect in any manner, the class of titles therein mentioned, as between the holders thereof and the state, but merely to prevent such holders from being disturbed by new locations so long as they continued to hold under such titles. It did not inhibit the bringing of a suit by the state against the holder of such a title to cancel same and recover the land; and we are of opinion that, when the land is recovered by the state from such a holder in such a suit, it ceases to belong to the class of lands contemplated by said provision, and its location is no longer prohibited thereby.

It is next contended by defendants in error that if the decree of the court canceling the Purinton patent, and awarding the land to the state, removed it from the class of lands protected from location by said constitutional provision, still such decree did not have that effect until it was affirmed on appeal, and, since the De Cordova location was made before that date, it was prohibited by said provision, and void. It seems to be the general if not the universal rule that, where a decree of a court of competent jurisdiction fixes the status or title of property, strangers to the decree may safely deal with same upon the assumption that such decree, unless it should be in some legal proceeding set aside, correctly fixed, as between the parties thereto, such status or title at the date of its rendition. The rendition of the decree of the district court of Wichita county in favor of the state having fixed the status of the land as not being "land titled," within the purview of said constitutional provision, and established the title as being in the state, De Cordova, holding a certificate whereby the state authorized him to locate upon such lands, if such decree spoke the truth, had the right to deal with the land upon that assumption, subject, of course, to the contingency of the decree's being set aside by some legal proceeding. It may be true that if De Cordova, relying upon his location, had undertaken to recover the land from defendants in

error pending the appeal from the judgment in favor of the state, he could not have used such judgment, pending such appeal, as evidence of the facts therein recited; but the rule of evidence would have been equally harsh upon him if no appeal had been taken, and he had located upon the land before the expiration of the time allowed for writ of error, and a writ of error had thereafter been sued out. *Railway Co. v. Jackson*, 85 Tex. 605, 22 S. W. 1080. In either case the rule of evidence might have resulted in the loss to him of his right to the land, if he allowed his case to go to trial before the determination of the appeal or writ of error, but that does not establish that the right does not exist. Before the passage of the law authorizing the correction of the certificate of acknowledgment of a married woman by suit, such acknowledgment, though in fact formally made, could not be established by any evidence except the certificate of the notary; and therefore the purchaser would lose the land, not from any want of title, but because the law allowed only one mode of proof. Therefore, after the statute was passed, certificates previously made could be corrected by suit, since such suit only gave new evidence of a pre-existing right. Article 4057 of the Revised Statutes of 1895 has no application to a case where, as here, the title is forfeited by a decree against the parties claiming that they are entitled to the notice therein mentioned. The judgment is notice to them, and it would be absurd to so construe the statute, if it has any application to this class of titles at all, as to require the commissioners to give them further notice. From what has been said, it results that we are of opinion that the judgment of the court of civil appeals should be reversed, and the judgment of the trial court be here affirmed, and it is so ordered.

WARREN v. CITY OF DENISON et al.
(Supreme Court of Texas. May 28, 1896.)

SUPREME COURT—JURISDICTION—REVIEW OF
QUESTION OF FACTS.

In an action against a city for personal injuries caused by the alleged negligence of the city in failing to properly guard the street, which was claimed to have been in a dangerous condition, the facts were undisputed. The court of civil appeals reversed a judgment for plaintiff, on the ground that "the evidence fails to show negligence on the part of the city." *Held*, that the decision of the court of civil appeals was upon a question of fact, and therefore was not reviewable by the supreme court.

Error to court of civil appeals, Fifth supreme judicial district.

Action by Anna Warren against the city of Denison and another. There was a judgment of the court of civil appeals reversing a judgment for plaintiff, and she brings error. Dismissed.

Harris & Knight, I. M. Standifer, J. C. Edmonds, and R. R. Hazlewood, for plaintiff in

error. Maughs & Peck, G. T. Harris, E. F. Brown, R. C. Foster, and A. E. Wilkinson, for defendants in error.

GAINES, C. J. The plaintiff in error brought this suit to recover of the city of Denison and the Denison Light & Power Company damages for personal injuries alleged to have been caused by the negligence of the city in the construction of certain sidewalks, and of the light and power company in failing to keep the streets of the city lighted as it had contracted to do. The city pleaded over against its co-defendant, asking judgment against it in the event the city was found liable. The jury returned a verdict in plaintiff's favor against the city, but in favor of the light and power company as against her. Judgment was rendered in favor of the plaintiff against the city, and in favor of the light and power company against both the plaintiff and the city. The city having appealed to the court of civil appeals, that court reversed the judgment and remanded the cause. 36 S. W. 296. The court, in their opinion, make the following statement of the case: "The city of Denison is a municipality duly incorporated under the general incorporation act of the state of Texas, by which it had 'full power and authority to grade, gravel, repair, pave and otherwise improve any avenue, street or alley, or any portion thereof within the limits of said city.' In pursuance of the power authorized by its charter, it had graded Woodard street below the level of the private lots abutting thereon. Woodard street crossed Armstrong avenue. The two run at right angles with each other. At the intersection of these streets the surface of the streets and abutting lots was level. The grade of Woodard street east from Armstrong avenue gradually became lower than abutting lots, until, at the point where Mrs. Warren, appellee, was injured, the street and sidewalk were about two or three feet lower than the level of abutting lots. Mrs. Warren was a physician. The substance of her testimony as to how she was injured, taken in part from her counsel's brief, is as follows: 'She was detained on professional business until after dark on the night that she was injured. That when she started home she found that it was very dark. That when she got onto Woodard street, which was her nearest and best way home, she crossed from the south to the north side of same, just west of its intersection with Armstrong avenue. That Woodard street had been excavated eastward from said Armstrong avenue to a depth of about two feet below the adjoining north-side lots on said street, but that there was no excavation in said Armstrong avenue, and that there was a gradual incline eastward on the north side of Woodard street, and on the east side of Armstrong avenue, leading up onto the lots on the north side of Woodard street, from

which she fell. That the incline led up onto the lot on the northeast intersection corner of said street and avenue. That there was no fence on the north side of said Woodard street, and the fence on the east side of said avenue was removed for about twenty feet back from said northeast intersection corner, along the east side of Armstrong avenue. It was so dark that I could not see where I was going, and I walked up this incline from said avenue, going east, thinking that I was on the sidewalk on said Woodard street, and did not know where I was until I walked against a bush, and stepped back, fell over the embankment caused by the excavation of Woodard street to a depth of about two feet, and onto the sidewalk of said street, and was injured.' She further testified: 'I lived about four blocks northeast of the place where I was hurt. I knew that some work had been done at the point where I fell, and I had been along there a few days before I was hurt; but I did not know the condition of the place, for I had never paid any attention to it, or had my attention called to its condition, and I did not go that way very often, and I had not paid any attention to the place. There was an electric light at the first street crossing north of where I was hurt, being about 300 feet away, but it was not burning. If it had been burning it would have thrown a light on Armstrong avenue, where I went upon the lot, and I could have seen where I was, and would not have gone upon the lot, but would have kept in Woodard street, and then I would not have been hurt.' The mayor of the city of Denison testified: 'The grading on Armstrong avenue, on the east side thereof, where it intersects the north side of Woodard street, had been graded in such a way that a person walking east along Woodard street, on the north side thereof, could walk up onto the lot east of Armstrong avenue, and on the north side of Woodard street, without knowing that they had left the street or avenue, if it was dark.' There is no contention that there was any negligence on the part of the city in grading said street, further than making said street lower than the abutting lot at the point where appellee was hurt, and leaving it on a level at the intersection of the two streets. The street was in good repair, and was not dangerous to travel. Plaintiff's injury was occasioned by her starting from the street, and walking some thirty feet over a private lot before she fell and was injured." Upon the case so stated they announced the following conclusions: "We are of the opinion that the evidence fails to show that there was such a dangerous place contiguous to the street as to warrant a finding that there was negligence in the construction of the street, or in failing to erect barriers to prevent travelers from walking up onto the private lot. Nor does the evidence show negligence on the part of the city in not having the street lighted on

this particular night. Therefore plaintiff is not entitled to recover from the city."

This court has jurisdiction to determine questions of law only. Section 3 of amended article 5 of the constitution. Article 940 of the Revised Statutes of 1895 provides that "the supreme court shall have appellate jurisdiction coextensive with the limits of the state, which shall extend to questions of law arising in all civil cases of which the courts of civil appeals have appellate but not final jurisdiction." Article 941 also provides that "all causes shall be carried to the supreme court by writs of error upon final judgment and not upon judgments reversing and remanding causes except" in certain cases. Among the exceptions are cases in which "the judgment of the court of civil appeals reversing a judgment practically settles the case, and this fact is shown in the petition for writ of error, and the attorneys for petitioners shall state that the decision of the court of civil appeals practically settles the case." Rev. St. 1895, art. 941. In such a case, therefore, this court has jurisdiction, provided the question presented is a question of law. The legislature had no power, nor was it its purpose, to authorize this court to review the ruling of the court of civil appeals upon any question of fact. What is the nature of the point determined by the court of civil appeals in this case? The question presented in the trial court was that of the negligence of the city. Whether or not there was any evidence tending to show that it was negligence, was a question of law. Whether or not, admitting there was some evidence of negligence, the evidence, taken all together, was such as to warrant the finding of the jury, is a question of fact. It is the province of the trial judge to set aside a verdict which in his opinion is against the great preponderance of the evidence. In case the trial court refuses, upon a proper motion, to grant a new trial upon the ground that the verdict is against the great weight of the evidence, it is the duty of the court of civil appeals, upon a presentation of the question, to review the ruling of the trial court; and it may reverse that ruling, and remand for a new trial. So when the case has been tried without a jury the appellate court may revise the action of the trial judge in passing upon a question of fact, upon which different minds may have reached different results, and may, if satisfied that his finding is against the great preponderance of the evidence, reverse or set it aside. Such we understand to be the jurisdiction of the court of civil appeals over questions of fact. In this case there seems to be no controversy as to the facts relating to the condition of the streets of the city, and the circumstances which led to the accident. But it was the peculiar province of the jury to determine whether, under the facts, the city was negligent or not. In other words, the question for their determination was, would a pru-

dent man have used more care than was exercised by the city in order to prevent injury to persons passing along the streets? This question was to be determined by them from their own knowledge of human nature and human conduct, and their decision upon the point was the subject of review both by the trial court and the court of civil appeals. If satisfied, as a matter of fact, that the city had exercised all the care a prudent man would have exercised under the circumstances, the trial judge, upon motion, should have set aside the verdict. Failing to do so, it was the duty of the court of civil appeals, if satisfied an ordinarily prudent man would have done no more than was done by the city, to have reversed the judgment. This is what the court of civil appeals have done. The substance of their opinion is that "the evidence fails to show" negligence on part of the city. It is not that there was no evidence of negligence. We construe the opinion to mean that, while there may be evidence from which the jury might have found against the city, yet, in the light of all the facts actually proved, that finding is so strained as to require the court to set it aside. This is the determination of a question of fact, upon which the decision of the court of civil appeals is made final by the constitution. We have no power to review their determination of the question, and have no jurisdiction of the case, although it is averred in the petition for the writ that the decision of the court of civil appeals practically settles the case. Accordingly the case is dismissed for the want of jurisdiction.

CHASE et al. v. YORK COUNTY SAV. BANK.

(Supreme Court of Texas. March 9, 1896.)

ATTACHMENT—PROPERTY SUBJECT—EQUITABLE INTERESTS.

Rev. St. 1895, art. 200, provides that writs of attachment may be levied on such property as is subject to levy under execution. Article 2375 provides that, when a sale on execution has been made, and the terms thereof complied with, the officer shall execute and deliver to the purchaser a conveyance of all the "right, title, interest, and claim" which the defendant in execution had in and to the property sold. *Held* that, where the absolute title to land, the purchase price for which had been paid by several persons, was conveyed to one person, to be resold by him, and the proceeds divided among those furnishing the purchase price, the equitable interest of such persons was not attachable.

Error to court of civil appeals of Fifth supreme judicial district.

Proceeding to wind up a trust. There was a judgment of the court of civil appeals reversing a judgment holding invalid an attachment by the York County Savings Bank, and M. V. B. Chase and others bring error. Reversed.

R. C. Foster and A. E. Wilkinson, for plaintiffs in error. I. M. Standifer and Dillard & Muse, for defendant in error.

DENMAN, J. The agreed case in the records shows that W. P. Rice, having furnished \$14,000, H. C. Young, \$6,000, O. D. Baker, \$6,000, M. H. French, \$6,000, C. N. Seidlitz, \$3,000, J. M. Ford, \$6,000, P. E. Fairbanks, \$6,000, J. J. Frey, \$2,000, G. B. Weightman, \$1,000, J. J. Fairbanks, \$3,000, and P. P. Lang, \$1,000 of the consideration for the purchase of nine tracts of land situated near Denison, Tex., caused the same to be conveyed to said P. E. Fairbanks, trustee, by deeds from various parties; that said land was so conveyed to the said P. E. Fairbanks, trustee, for the purpose, and with the intention, of vesting in him, the said trustee, the absolute title thereto, and in order that the same might be by him disposed of and conveyed without the necessity of the others joining in said conveyances, and without intending in the use of the word "trustee" in the deed made to him any limitations of the titles to said lands in the said P. E. Fairbanks, or his absolute right to sell the same, or any part thereof, he to be trustee, as between himself and parties furnishing the money, "for the purpose only of accounting for the proceeds arising from any sale or sales of said lands, or any part thereof"; that, in consideration of one dollar, paid by said Fairbanks to each of the parties furnishing said consideration, they "did severally remise, release, and convey unto him, the said P. E. Fairbanks, and to his successors and assigns, forever, all and singular their right, title, and interest in and to said lands, and every part thereof, to have and to hold the premises above described, together with, all and singular, the rights and appurtenances thereto in any way belonging unto the said Fairbanks, his successors and assigns"; that it was agreed that, as between the parties furnishing the consideration and said Fairbanks, trustee, he "should not be released from his personal obligation to account to each of them, and to their assigns, for the proceeds of any sale or sales of said lands, or any part thereof, according to their respective interests in such proceeds"; that thereafter, with the consent of all said parties, said trustee caused a large portion of said lands to be laid off and platted into lots, blocks, streets, avenues, and alleys, such plats and maps being duly recorded, said lands not being within the corporate limits of the city of Denison, but adjoining and designated and platted, as above stated, as an addition thereto, the streets and alleys of said city being extended and duly opened and dedicated through said addition to the public use; that said trustee, after said subdivision was made, conveyed to different parties portions of said lands, the deeds thereto being duly recorded, but the quantity of lands and the number of purchasers and prices paid are not stated. The York County Savings Bank caused

an attachment to be levied on said lands as the property of French and Rice, who had transferred their respective interests in said trust to other parties, of which transfers the bank had no notice at the time of the levy. In a proceeding to wind up said trust, and divide the proceeds and unsold property among the parties entitled, the bank claimed the interest of French and Rice under said attachment proceedings, and their said transferees claimed same by virtue of said transfers. It is unnecessary to state the circumstances showing how the question arose in the court below, but it will suffice to say that the principal and only question we deem it necessary to determine is whether the respective interests of French and Rice in said trust were subject to levy under a writ of attachment. The trial court decided the question in the negative, and rendered judgment in favor of said transferees, but the court of civil appeals decided it in the affirmative, and reversed the judgment of the trial court, and rendered judgment for the bank. The transferees assign as error here this ruling of the court of civil appeals.

Article 200, Rev. St. 1895, provides that "the writ of attachment may be levied on such property, and none other, as is or may be by law subject to levy under the writ of execution." In order, therefore, to determine whether the interest of French and Rice in the trust was subject to levy under the attachment, we must ascertain whether it was subject to execution. That equitable interests were not subject to execution at common law is elementary. In order to enable creditors to subject to the payment of their debts such interests of their debtors in lands as were held by others in trust for them, the statute of 29 Car. II. c. 3, provided "that * * * it shall and may be lawful for every sheriff or other officer to whom any writ or precept is or shall be directed, * * * upon any judgment," etc., "to do, make and deliver execution unto the party in that behalf suing, of all such lands, tenements," etc., "as any other person or persons * * * shall be seised or possessed in trust for him against whom execution is so sued," etc. In *Doe v. Greenhill*, 4 Barn. & Ald. 684, Abbott, C. J., in construing this statute, said: "This statute made a change in the common law, and, up to a certain extent, at least, made a trust the subject of inquiry and cognizance in a legal proceeding. We think the trust that is to be thus treated must be a clear and simple trust for the benefit of the debtor; the object of the statute appearing to us to be merely to remove the technical objection arising from the interest in lands being legally vested in another person, where it is so vested for the benefit of the debtor." In construing the same statute enacted in New York, Spencer, C. J. (*Bogert v. Perry*, 17 Johns. 351), said: "It cannot admit of a doubt that the statute embraces those cases only where the entire estate out of which the

use arises vests in the cestui que use in consequence of his having paid the whole consideration money; and I have met with no case or dictum countenancing the doctrine of a divided use vested in the vendor and vendee;" and held that the interest of the vendee in a contract for the sale of land, who had paid only a part of the purchase money, was not subject to execution.

In *Lynch v. Insurance Co.*, 18 Wend. 236, Lynch devised his estate to executors in trust: (1) To pay debts; (2) to raise \$60,000, and invest same in securities, and out of the income thereof to pay his wife an annuity of \$3,000, and reinvest the surplus; (3) to raise \$10,000, to be divided between two persons named; (4) to divide the residue, real and personal, equally between his son, James Lynch, and seven others. In passing upon the same statute, Nelson, C. J., said: "I do not entertain a doubt that the estate of Lynch under the will is an interest that could not have been sold on execution within the statute. It is settled according to several authorities, and one of them in this court, that the statute only extends to clear and simple trusts for the benefit of the debtor. *Bogert v. Perry*, 17 Johns. 351, 1 Johns. Ch. 52; *Doe v. Greenhill*, 4 Barn. & Ald. 684, 4 Bing. 96. In *Bogert v. Perry*, Spencer, C. J., said that it was intended to subject to execution the real estate or hereditaments of a person having the entire interest therein, but which was nominally and formally vested in another. The case in *Bingham* is not unlike the present one. There the lands were vested in trustees in trust for the judgment debtor, subject to £10,000 to be raised for another, and which had not yet been raised. The court held that the interest of the cestui que trust was not liable within the statute, as it was not simply the debtor's, but held jointly with another,"—the person entitled to the portion of £10,000.

In *Bristow v. McCall* (1881) 16 S. C. 545, the testator devised his real estate to executors in trust for his son and daughter, stating: "I hereby direct my executors to divide my lands equally between my son, E., and daughter, D., and permit each to use, possess, and enjoy his or her half in severalty during his or her natural life, and, after the death of either, that they divide the share of each among his or her children equally." The executors divided the land, as directed, between E. and D., and each went into possession of the share thus allotted. Thereafter E.'s interest was levied upon and sold under execution. The court held that the purchaser took no title by such sale, under a statute similar to the one above quoted, saying: "The trust interest referred to, it is true, is not very distinctly defined in the act, nor is it clearly pointed out in the decisions. But it is concluded that it must be a clear and simple trust, and for the benefit of the debtor alone; the object of the statute being merely to remove the technical objection arising from the

interest in the land being legally vested in another person, where it is so vested for the benefit of the debtor. *Doe v. Greenhill*, 4 Barn. & Ald. 684; *White v. Kavanagh*, 8 Rich. Law, 395. A simple trust is said by the authorities to be (*Lewin, Trusts*, 21; *Bouv. Inst.* § 1900) a trust corresponding with the ancient use, and it exists where property is simply vested in one person for the use of another; and the nature of the trust, not being qualified by the letter, is left to the construction of the law. A trust of this kind, for the benefit of the debtor alone, and not jointly with others, would fall under this section; but, if others were interested, that fact would exclude the application of the statute."

In *Love v. Smathers* (1880) 82 N. C. 369, A., having paid part purchase money for lands, gave his note for the balance, with B. and C. as sureties, and had the title made to B., who agreed to pay the balance purchase money. It was held that A.'s interest was not, under a statute similar to the ones above, a pure trust, subject to execution, but was mixed with the interest of B.; the court saying: "A trust estate of a debtor in land could not be levied on and sold under execution until the act of 1812, nor under that act, if it was to be raised by construction of a court of equity by reason of fraud, or being an express or implied trust in an honest transaction, unless the debtor, at the time of the sale, was in such situation as to have the legal title decreed to him if he were to sue for it." See *Freem. Ex'ns* (2d Ed.) §§ 187, 188; *McIlvaine v. Smith*, 96 Am. Dec., and notes 308 to 315.

We have no statute in Texas similar to the ones discussed in the above cases expressly authorizing the sale of trust estates under execution. Our statute in reference to executions, however, does provide that "when a sale has been made, and the terms thereof complied with, the officer shall execute and deliver to the purchaser a conveyance of all the right, title, interest, and claim which the defendant in execution had in and to the property sold." Rev. St. 1895, art. 2375. In construing this statute in 1854, in the case of *Daugherty v. Cox*, 13 Tex. 209, this court, through Lipscomb, Justice, say: "They insist that under the broad terms used of 'interest' and 'claim,' an equitable interest would be included. This may be correct in part. It may be that an equitable claim to title, or a resulting trust, may be sometimes subject to sale by execution, and yet every equity not be subject to sale. If, for instance, a purchaser had paid for the land, and taken a bond for title, the land would be subject to execution against the purchaser, because there would be nothing uncertain, nothing to be done on the part of the purchaser, nor on the part of the vendor, but to make title. If, however, other things were to be done by the parties,—as in this case, a selection was to be made out of a particular, but large, tract,—until these things were done, there

would be no such equity to any particular land as would make it subject to the levy of an execution against the holder of such equity. * * * Citing *Bogert v. Perry*, supra. It could not be contended that our statute, in the article cited, went further than the statute of 29 Car. II. in subjecting equities and trust estates to execution, and perhaps its terms would go as far, but that would not be far enough to subject such an equity as the one claimed to be subject to execution in this case."

In *Hendricks v. Snediker*, 30 Tex. 307, this court questioned the validity of an execution sale of the equitable interest of a person in lands, growing out of a right to specific performance of a voluntary agreement to convey, followed by valuable improvements made relying upon such agreement; saying, through Moore, C. J.: "Would the equitable rights of the party making improvements under such circumstances be subject to levy and sale under execution? The rights of such a party are more or less indefinite and uncertain, until they have been fixed by the decree of the court. They seem much more in the nature of an uncertain and undetermined claim or demand against the holder of the title to the land, than a title or interest directly in it. If uncertain interests of this sort are subject to sale under execution, evidently they must be made at ruinous sacrifices to debtors, and without effecting the purpose of the law in satisfying the claims of creditors. The position of such party is not like that of one holding under a contract, with specific and definite conditions and stipulations. The right to a decree in each case of this kind must depend on its own peculiar circumstances. An equitable interest in lands may, no doubt, be the subject of execution sale, but this is not the case in respect to every equitable interest." On the authority of this case, a similar sale was held void in *Edwards v. Norton*, 55 Tex. 410.

In *Moser v. Tucker*, 87 Tex. 94, 28 S. W. 1044, this court, through Stayton, C. J., say: "It is not, however, every interest in property a debtor may have right to, or to acquire, that may be subjected to sale under execution, or otherwise, for payment of his debts; for in many instances his right is so remote and contingent that it is deemed more likely to subserve the ends of justice not so to subject it than to take the risk of sacrifice of contingent right by procedure, which will most likely be of no practical benefit to the creditor, or may be ruinous to the debtor."

Thus we see that this court, being called upon at an early day to determine whether our statute authorized the levy of an execution upon all equitable interests in land, held in *Daugherty v. Cox*, supra, that it did not, and that it went no further than the English statute. This is in accord with the construction placed upon a similar provision elsewhere. *Goodwin v. Anderson*, 5 Smedes & M. 730. While this court has never under-

taken to lay down any general rule by which it might be determined whether a given equity could, under the statute, be subjected to execution, it is believed that its decisions of the particular cases which have come before it are in harmony with the current of authority elsewhere, unless it be different in allowing the interest of a purchaser under a contract for sale of land, where only a part of the purchase money has been paid, to be thus subjected. *Mooring v. McBride*, 62 Tex. 309; *Bogert v. Perry*, 17 Johns. 351; *Hopkins v. Carey*, 23 Miss. 59; *Hinsdale v. Thornton*, 74 N. C. 167. The principle upon which the decisions limiting the operation of the statute to "a clear and simple trust for the benefit of the debtor" rests is fully recognized by our decisions, and is thus well stated by Chief Justice Moore in the case above cited: "If uncertain interests of this sort are subject to sale under execution, evidently they must be made at enormous sacrifices to debtors, and without effecting the purpose of the law in satisfying the claims of creditors."

According to the agreed case before us, the parties furnishing the money to purchase the land, in the exercise of their legal rights to make such contracts and disposition of their property as they deemed proper, there being no claim of an intent to injure creditors in the creation of the trust, caused to be vested in the trustee, Fairbanks, the "absolute title" to the property, with full power of sale, and provided that the word "trustee," used in the deed, with reference to him, should not have the ordinary effect of limiting his title or right to sell, but that he was to be trustee "for the purpose only of accounting for the proceeds arising from any sale or sales of said lands, or any part thereof," and that he "should not be released from his personal obligation to account to each of them, and to their assigns, for the proceeds of any sale or sales of said lands, or any part thereof, according to their respective interests in such proceeds." It is clear that it was the intention of all parties to so place the entire title, legal and equitable, to the land in the trustee that it would be absolutely beyond the control of either of the cestuis que trustent, such cestuis que trustent to have only the right to demand an accounting of the trustee. The legal effect of the arrangement was to leave in each cestui que trust, not any title, legal or equitable, in the land, but a mere right in equity to demand an accounting of the proceeds of the sales of the land. Doubtless a court of equity would, in certain contingencies not contemplated by, or provided for in, the agreement of the parties,—such as fraud on the part of the trustee, or a total failure of the objects contemplated by the trust, such as inability to sell the land for sufficient to defray probable expenses, or any other state of facts justifying the dissolution of the trust,—treat this mere equitable right of demanding an accounting

under the agreement as entitling each cestui que trust to a participation in the division of the trust property itself upon such dissolution; but, in the absence of such a contingency, equity could not recognize the cestui que trust as having any interest in the land, as such, without doing violence to the lawful agreement by which the cestuis que trustent and the trustee, respectively, restricted and regulated the rights of each party interested in the trust, and without which it probably would not have been created. We have found no case holding such an interest subject to execution, and to so hold would be going beyond the authorities. It is not claimed that any such contingency had arisen at the time of the levy. We are therefore of the opinion that the equitable interests of French and Rice in the trust were not subject to the levy, and that they could have been reached only by an equitable proceeding for that purpose. *Hinsdale v. Thornton*, 75 N. C. 382; *McIlvaine v. Smith*, 42 Mo. 45, 97 Am. Dec. 295, and note. We are not called upon to determine whether the levy would have been valid if such a contingency as would have justified a court of equity in dissolving the trust had arisen before the time of the levy. We have only considered the case presented. We regard article 2291, Rev. St. 1879, as restricting the right of levy on such trusts as would be otherwise liable, and not as granting any additional rights to levy. The judgment of the court of civil appeals will be reversed, and the judgment of the trial court will be affirmed.

BROWN, J., not sitting.

TEXAS & P. RY. CO. v. BREADOW et al.
(Supreme Court of Texas. June 18, 1896.)
RAILROAD COMPANIES — INJURIES TO PERSON ON TRACK.

The contributory negligence of a pedestrian, in placing himself in a dangerous position, by walking upon a railway track, will prevent a recovery for his death, caused by being struck by a train, provided those in charge of the train did not actually see his danger, though they could have done so, by the exercise of reasonable diligence, in time to have avoided injury to him.

Error to court of civil appeals of Fourth supreme judicial district.

Action by Johanna Breadow and others against the Texas & Pacific Railway Company. From a judgment of the court of civil appeals (35 S. W. 490) affirming a judgment for plaintiff, defendant brings error. Reversed.

Alexander, Clark & Hall and T. J. Freeman, for plaintiff in error. Leake, Henry & Reeves, W. C. Kimbrough, and Dudley G. Wooten, for defendant in error.

DENMAN, J. Defendant in error sued plaintiff in error to recover damages for in-

juries inflicted upon her husband, Fred Breadow, March 7, 1892, resulting in his death. So far as it bears upon the question, we give the substance of the testimony. Paul Lake testified for plaintiff: "Breadow left me directly after the switch engine passed. He went straight across to the main track, and walked down the middle, between the main track and passing track. At the time I was working there, that was all level, and people used to walk between the two tracks. The path was like a snake, you know,—just wherever they walked. It would go along in the center a piece, and then go to the side. It is all level around about the depot, on both sides. There is a towpath commences up there at the shanty, and it goes from one track over to the other, just like a snake, between main and passing track. At the time,—the time that Breadow got killed,—the towpath was right close to the rail there, next to passing track. Right opposite where I was the path ran in the center. Below where I was standing the path ran over close to the rail of the passing track. Just about on top of the ends of the ties— The ends of the ties are about a foot outside the rail, and the dirt was just as high as the rail, and people would walk along there. When Breadow left me he went right down that way. He went straight across to the path when he left me. After he left me a freight engine, and some cars behind it, went by me; and I was kneeling on the rail on the rip track, looking under some cars, and about the time I looked under I heard a yell, and I looked around and I saw Breadow falling. After Breadow left me I kneeled down on the rail to look under the cars. The freight engine that passed me after Breadow left came from Ft. Worth, and after she had passed about a minute or so I heard a yell, and looked around and saw Breadow falling. The freight engine came from the west, and was going east. It was on the passing track. It was about a half a minute after it passed that I heard the yell,—probably not so long. When I heard the yell I ran down there. I was kneeling down when I heard the yell, and then I looked down to where Breadow was, east of there, and saw Breadow falling down. The cause of Breadow falling was that the beams of the engine struck him in the back,—the front timber of the engine struck him in the back. When I saw Breadow fall down he was facing east. At the time it struck Breadow the engine was going pretty fast,—about twelve miles an hour. The fireman and a brakeman were on the engine at the time. The brakeman's name was Weller. * * * When Breadow left me, and started down east, he was going home. He went in the path I have described. I did not see him walking in the path, but I think he did, though. The last time I saw him he got right over here between main and passing

tracks, in the path, and then I did not pay any attention to him until I heard him yell. The last time I saw him, he had gotten over in the path; but, between that time and when I heard him yell, I don't know where he went. It is about 18 or 20 feet from where I was over to that path. * * * That was a broad way between the main and passing track,—nine or ten feet wide. About three people could stand abreast in that space when a train was passing. * * * I did not halloo to Breadow, or give him any signal. I did not know he was in any danger. He had plenty of room there to keep out of danger, and I supposed he would keep out of danger. When the engine that struck Breadow passed me the men on it were looking out the window, with their faces to the south. One of them was standing facing south in the gangway. The gangway is the place between the cab and the tender. The other man was on the box, and he was also facing south. That was before they struck Breadow,—about a half a minute before." Calvin Wilson, for plaintiff, testified: "Breadow was walking between the passing track and the main track. I was noticing Breadow before the engine got ten feet from him, and then I saw it was going to strike him, and before I could halloo it struck him. It was just a small jump between the rails of the two tracks. Breadow was walking tolerable close to the rail next to the passing track. That towpath is just a footpath, and everybody passes up and down on it. I have seen thousands and thousands of people walking on that path. I cannot tell who was on the engine that struck Breadow. I never did notice but one man on that engine, and he was standing between the engine and the tender, in the gangway. That is where he was when I noticed him. He had his face over towards Katie Thomas' house, south of there. * * * The towpath is between the main track and the passing track. Breadow was closest to the passing track. At that time that path was not straight, but they have straightened it now. It ran first in, and then out. The path was not a straight line. * * * I was on Indiana street at the time of the accident. * * * From the time I first observed Mr. Breadow, he was going east. I saw him all the time from the time I first saw him until he was struck. * * * I did not see him look back in the direction of the engine. He could have seen it if he had looked back. * * * As near as I can come, the distance from rail to rail, from the passing track to the main track, where that path was, was something like seven or eight feet at that time. I don't know that the width of that path has been changed any, but it is straightened up now, and it is level. That space between those tracks was level and smooth, just like that floor out there. There was plenty of room for Breadow to stand in there, with trains passing in

both directions. I have seen people standing in there, with trains going in both directions. That path was smooth, and about even with the rails. I did not give Breadow any signal. The reason I did not is simply because the engine struck him before I had time. I had no idea the engine was going to strike him until it did. When it got about ten feet from him I was just fixing to halloo, when it struck him. * * * The engine was about 50 or 60 feet above the water tank when I first observed it; that is, the engine was west of the water tank when I first saw it, and Mr. Breadow was above the water tank. * * * The space between the main track and the passing track is about 8 or 9 feet wide. When I say 'towpath,' I mean that there is a main track and a passing track, and between these two tracks is what I call the 'towpath.' That path is eight or nine feet wide. People walk all in between there, and they ride these bicycles in there. There is a beaten track there, near the end of the rail, about six or seven feet wide, it looks to me like. It is six or seven feet wide between the tracks. It has been straightened up since, but at that time it was not straight. It is nearer at some places, and further out at others. I mean to say that the path was zigzag. The entire track has been straightened up,—the road-bed, and everything of that kind. At the time of this accident the space between those tracks was eight or nine feet. The place where people usually walked was about six feet wide. The place where Breadow was walking when he was struck was the place where people usually walked." Weller, the only employé of defendant in charge of the engine who is claimed to have seen Breadow before he was struck, testified for defendant by deposition: "As we were going east on the passing track, Breadow was struck by the engine a few feet east of the water tank. When I first saw Breadow he walked around the east end of some cars that were standing on the rip track, not far west from the water tank. He walked onto the rip track and the main track, walking on the main eastward. When I last saw him from our engine, on the passing track, he was about forty or fifty feet ahead of us, walking on the main track. I did not see him walk from the main track to the passing track, where he was struck. I heard some one calling from the south, and looked in that direction, and just about that time I went over to the south side of the engine to see if the switch had been properly thrown; and just after that, from the hallooing, I discovered that some one had been struck by the engine. I did not know Breadow was in danger of being struck until after he was struck. I thought he was on the main track, and did not know he had passed over to the passing track, that we were running on. No one on the engine knew of Breadow's danger of being struck until after

he was struck. I did not observe his danger, because I was looking to the south, as to one of the switches and he was on the north side of the track upon which we were running. * * * Breadow was injured by going from the main track to a point so near the passing track that our engine struck him, the tracks being about ten feet apart. His foot was mashed off, and his back was hurt. I saw him immediately after he was injured. As soon as we found that some one had been struck, we stopped the engine. I jumped off, and ran around, and found Breadow on the ground injured, as already stated. He was conscious, and could talk. When I went to him, I asked him how in the world he got run over, and he stated that he thought our engine was on the main track, and stepped over towards the passing track to get out of the way of the engine, when it struck him. * * * I did see Breadow step out from behind the cars onto the rip track, and then onto the main track. He was in no danger of being run over when I last saw him on the main track."

The court, among other things not necessary to mention, after defining contributory negligence, charged the jury as follows: "If you believe from the evidence that such contributory negligence directly contributed to the accident, then plaintiff could not recover herein, unless you further believe from the evidence that the persons in charge of the engine at the time saw the dangerous position of Breadow in time to have avoided the accident, and failed to make any effort to do so, in which case the plaintiff would be entitled to recover." Plaintiff in error complains here, by proper assignment, that the court of civil appeals erred in overruling its assignment of error in that court to the effect that the trial court erred in giving such charge, because the evidence did not justify it.

If defendant, through the parties in charge of the engine, knew of Breadow's peril in time to have avoided same, such knowledge imposed upon it the new duty of using every means then within its power, consistent with the safety of the engine, to avoid running him down; and a failure so to do would render it liable, notwithstanding he may have been guilty of contributory negligence in being exposed to the peril. This new duty and liability for its breach is imposed, upon principles of humanity and public policy, to prevent what would otherwise be, as far as civil liability is concerned, the licensed destruction of persons negligently exposing themselves to peril. The same principle of law which, on grounds of public policy, will not permit a person to recover when his own negligence has proximately contributed to the injury, will not permit the party who has inflicted the injury in violation of such new duty to defend upon the ground of such negligence. The principle, however, has no application in the absence of actual knowledge, on the part of the person inflicting the injury,

of the peril of the party injured in time to avoid the injury by the use of the means and agencies then at hand. If he had no such knowledge, the new duty was not imposed, though it be clear that by the exercise of reasonable care he might have acquired same. The burden of proof was upon plaintiff in this case, in order to recover for a breach of such new duty, to establish, not that the employees might, by the exercise of reasonable care, have acquired such knowledge, but that they actually possessed it. We are of the opinion that there is no evidence in this record from which the jury could have rightfully found that they had such knowledge. Lake admitted that he "did not see him walking in the path," and said: "The last time I saw him he got right over here between the main and passing tracks in the path, and then I did not pay any attention to him until I heard him yell. The last time I saw him, he had gotten over in the path, but, between that time and when I heard him yell, I don't know where he went." The evidence of this witness would clearly not authorize the jury to find that when Weller afterwards saw Breadow, 40 or 50 feet in front of the engine, the latter was walking so near the passing track as to be in danger of being struck by the engine. They would have no right to presume that he continued to walk in the crooked path which this witness speaks of until he reached the point where Weller saw him, 40 or 50 feet in front of the engine, when the whole space between the ties was smooth and level, or that at such point such path ran so near the track as to place him in imminent danger of being struck by the engine. The testimony of plaintiff's other witness, Wilson, also fails to give the jury any ground for finding that when Breadow was 40 or 50 feet in front of the engine, which is the only place the evidence tends to show that the employees operating the engine saw him, he was so near the track as to be in danger of being struck. He discards the theory advanced by the witness Lake of the path being narrow, as if made by pedestrians walking continuously over the same route, but says, "When I say 'towpath,' I mean that there is a main track and a passing track, and between these two paths is what I call the 'towpath.' That path is eight or nine feet wide. People walked in between there, and they ride these bicycles in there. There is a beaten track there at the end of the rail, about six or seven feet wide, it looks to me like," etc. According to this witness, who placed himself "75 or 80 yards" from Breadow, the latter might have been anywhere between the two tracks at the time the engine was "40 or 50 feet" behind him, when Weller claims to have seen him. Thus we see that there is nothing in the testimony of these two witnesses authorizing the jury to find that, at the time Weller claims to have seen Breadow, he was in dangerous proximity to the track, and therefore that he was then in peril. If, as all the evidence shows, the employees then ceased to observe him, and were looking south when

Breadow and the engine, creeping upon him, were going east, it follows that there was no testimony authorizing the jury to find that they had actual knowledge of his peril, and therefore the court erred in submitting that issue to the jury. We have discussed the question upon the proposition submitted by defendant in error, that the jury had the right to accept as true the testimony of Lake and Willson, which, however, does not tend to show, but to negative the fact, that any employé on the engine ever saw Breadow, for they say they were looking south all the time, and to reject all of the evidence of Weller, except the isolated statement that he saw Breadow 40 or 50 feet in front of the engine.

It is not necessary to discuss the various other assignments, as the questions will many of them not probably arise on another trial, and the special charges will probably be reformed to avoid the objections urged thereto as justifying their refusal. *Railway Co. v. McGlamory* (recently decided by this court) 35 S. W. 1058. For the error above indicated the judgments of the court of civil appeals and the trial court are reversed, and the cause remanded.

SHELDON v. MILMO et al.

(Supreme Court of Texas. June 18, 1896.)

SPANISH GRANT—APPROVAL OF INTENDENTE—NECESSITY—DECREE OF THE CORTES—ANNULLMENT—PUBLIC OFFICERS—PRESUMPTION OF AUTHORITY.

1. By virtue of the royal ordinance of Spain issued on December 4, 1786, intendencias were created in New Spain and the intendentes were given exclusive power over the sale, composition, and distribution of the royal lands. Mexico was divided into 12 intendencias, within one of which Texas was afterwards included. By a decree of the cortes (page 56) dated January 4, 1813, enacted for the express purpose of reducing public lands to private dominion, provision was made for the sale and distribution of such lands, and their distribution was placed under the control of the ayuntamientos of the respective municipalities, with the approval of the provincial deputations. In 1814, upon his restoration, the king, Ferdinand VII., issued a manifesto declaring the constitution and decrees of the cortes void, but provided that, in relation to political and administrative matters, the ayuntamientos should remain as they were then until the restoration of the system prevailing before the recent innovations. *Held*, that the approval of an intendente was not necessary to a grant of public lands in Mexico in 1816.

2. The royal cedula of August 22, 1814, placing *propios* under the jurisdiction of the king's council, and annulling the decrees of the cortes in so far as the administration of that branch of the public service was thereby affected, did not annul the decree of the cortes of January 4, 1813, relating to the sale and distribution of public lands, as the word "*propios*," means the productive lands, the usufruct of which had been set apart to the several municipalities for the purpose of defraying the charges of their respective governments. The unappropriated royal domain is designated as "*baldios* a *realengos*."

3. Nor was said decree of the cortes of

January 4, 1813, abrogated by the royal cedula of July 8, 1814, "by which," as its title declared, "is explicitly annulled the seventh article of the decree of the cortes of September 13, 1813, and the ancient municipal arbitrios are commanded to be re-established, with whatever else is expressed, and wherein the king declared, 'I have deemed proper to annul explicitly article 7 of the decree of the cortes of the 13th of September, 1813, and to command that the ancient municipal arbitrios conceded to the towns in order to provide for their urgent demands be re-established on the footing on which they were in the year 1808, with the inclusion of that awarded [or provided as a resource] upon the *baldios* which, by the other decree of the same cortes, of the 4th of January of the same year, 1813, were directed to be sold and distributed."

4. A Spanish grant to land in Texas was executed in 1816 by the justice of Palafox pursuant to the decree of the governor of *Monclova*. *Held*, that it will be presumed that the officers executing and directing the execution of the same had authority to do so.

5. The documents evidencing the grant sufficiently established the extension of the final title where it appeared that the applicant prayed the governor that he might be placed in lawful juridical possession of the lands, and that the governor directed the justice to issue to him the documents for which he made application, and that, pursuant to said order, the officer adjudicated to him, and gave him possession of, the land, and ordered that "he be not despoiled of it," and that "he may make such use thereof as he deems proper, unto him, his children and assigns," though the document was not written on stamped paper, as that merely affected the proof of its execution.

Error to court of civil appeals, Fourth supreme judicial district.

Trespass to try title by Thomas C. Sheldon against Daniel Milmo and others. A judgment for defendants was affirmed by the court of civil appeals (29 S. W. 832), and plaintiff brings error. Reversed.

Bethel Coopwood and Walton & Hill, for plaintiff in error. J. O. Nicholson, for defendants in error.

GAINES, C. J. This was an action or trespass to try title, brought by the plaintiff in error against defendants in error to recover a portion of a tract of land claimed by the former under an alleged Spanish grant. The defendants claimed title by virtue of certain patents issued by the state of Texas. The case was tried without a jury, and resulted in a judgment in favor of the defendants. There was an appeal to the court of civil appeals upon the conclusions of fact and law filed in the trial court, no statement of facts having been prepared and made a part of the record. The court of civil appeals rendered a judgment of affirmance, and to reverse that judgment the writ of error from this court has been applied for and obtained.

In his conclusions, the trial judge found, among other facts not necessary to recite:

"(1) That in 1816 Jose Manuel Garcia obtained a grant from Jose Rafael Enriquez, the justice at Palafox, to two sitios of land, said grant being as follows, to wit:

Two Reals.

[Seal of Third Stamp—Two Reals—Years, Spain.] eighteen hundred and fourteen and fifteen.

"To His Honor the Governor: Don Manuel Garcia, captain of militia, and a resident of the town of Palafox, with the greatest due respect and submission would appear before you and say that I have, for about fourteen years, claimed and possessed as my own two sitios of pasture lands, of about one league, at a distance of a quarter of a league from said town, on an eastern course, where I have opened a rancho, with dwelling houses, pens, and fence, within a pasture ground formed by the bends of the Rio Grande, where I raise crops according to the seasons; and inasmuch as it is not my intention to abandon it, notwithstanding the enormous damages I have experienced from the savage Indians, and wish to secure it as a lawful possession, I request that you be pleased, if you consider it just, to order that I be placed in the lawful juridical possession of said lands, and that the proper testimonio of it be given to me. Therefore, I request and pray that you be pleased to accede to my petition, wherein I shall receive favor and justice. I swear that I do not act maliciously, and the requisites, etc.

"City of Monclova, the 20th of February, 1816. Jose Manuel Garcia.

"Monclova, February 22, 1816.

"In consideration of the merit acquired by the petitioner by improving and settling the tract of land which he mentions, and having possessed it several years, notwithstanding the evident risk from savage Indians, the justice of Palafox will issue to him the respective documents for which he makes application. Adam.

"Town of San Jose de Palafox, April 20, 1816.

"In conformity to the superior decree of the governor of Monclova, Don Francisco Adam, extended on the margin of the petition, let there be given to the petitioner the sitios of pasture land which is formed by the bends of the Rio Grande, where he raises his respective crops, to which effect, I, the subdelegate of this town, Jose Rafael Enriquez, will proceed to the examination and survey of the same, as is stated by the party in his petition. This I have ordered by this decree, signed by me, the said judge, and my assisting witnesses, with whom I act in default of a notary public, there being none according to law, which I certify. In the same town, same day, month, and year, I, the same judge, and my assisting witnesses, jointly with the party interested, Don Manuel Garcia, proceeded to the tract of land indicated, in which I placed him in possession,—the boundaries whereof run from the town tract (egidos) on the west, from the narrows (la angostura), and on the east to the Llave creek; on the south it adjoins the

bends (ancones), which I did also adjudicate to him, and gave him possession thereof without leaving any room to be occupied by another; and on the north to Santa Isabel creek, giving him likewise possession of the dwelling houses and pens situated on the high ground on the same valley (vega) where the said bends exist. By virtue of what has been practiced in the name of the king, our lord, whom God save, I order that he be not despoiled of said tract of land without a previous hearing and having forfeited it by due course of law, to be protected in it without prejudice of a third party or another representing a better right thereto, as being entitled to the same for his meritorious services, and henceforth and forever, he may make such use thereof as he deems proper, unto him, his children and assigns. And for its perpetuation, I give him the present original title of possession, with assurance of transcribing a literal testimonio of it whenever the proper paper is on hand, there being none at present in the revenue office; I, the said judge, and my assisting witnesses signing hereto in default of a notary public, there being none according to law, which I certify.

"Jose Rafael Enriquez.

"Assisting: Francisco de Errera.

"Assisting: Jose Maria Gongalez.

"(2) That in 1818 the said Garcia conveyed this land to Don Rafael Enriquez by a conveyance written on the same sheet as the grant.

"(3) That Rafael Enriquez conveyed this land to F. Gilbeau and Volney E. Howard, and that plaintiff by good and valid deeds derives title thereto through said Gilbeau and Howard.

"(4) That both said grant and deed were archived in the general land office of Texas in December, 1846.

"(5) That the deed from Garcia to Enriquez could not be detached or separated from the grant without leaving evidence that there was some other paper wanting belonging to said original grant.

"(6) That Garcia and Enriquez had possession of a portion of the lands described in plaintiff's petition in the bends of the river south of the town of Palafox from about 1813 to 1820; that the town of Palafox as well as the rancho were destroyed by the Indians about 1820; that there has been no possession of said lands since said date.

"(7) That this grant was not platted as described in plaintiff's petition, and so as to include any portion of the lands in controversy, until August, 1880; that prior to that time it was platted about 10 miles north of its present location, and at a point that would not include any portion of the lands now claimed as shown in the following plat: [Here follows the plat.]

"(8) That the defendants claim to have patents from the state of Texas to six sections of the land in controversy, described

in their answers, all of which were located after this land was platted in August, 1880, except survey No. 233.

"(9) No evidence to support the three years' limitation or stale demand.

"(10) That to run the course north, the last call in the grant, the line would not reach the Santa Isabel creek; that the Santa Isabel creek could be reached by running the course N., 28 E., but in doing so the survey would conflict with an older grant in the name of Joaquin Galan. I find that the course on which the northern line of the present location is run is N., 70 E., to Santa Isabel creek, and is on what was vacant land at the time of its location as shown in the following plat: [Here follows plat.]"

Upon the facts so found, the learned special judge who tried the case concluded the grant required the approval of the intendente of the province, and that for want of such approval it was void. The court of civil appeals first held the grant valid, but upon a motion for a rehearing set aside their former judgment, and in an able and learned opinion concurred with the trial court, and declared it void. The question which first suggests itself to our minds is, was the approval of an intendente necessary to a grant of land in Mexico at the date of the alleged title in this case, to wit, in the year 1816?

The intendencias were created in New Spain by virtue of the royal ordinance for the establishment of intendentes, issued on the 4th day of December, 1786. With the exception of certain northern and eastern provinces, which were put under the rule of commandants general, Mexico was divided into 12 intendencias. Texas was at first within the excepted territory but some years afterwards was included within the Intendencia of San Luis Potosi. By article 81 of the ordinance mentioned above, the intendentes are given exclusive power over the sale, composition, and distribution of the royal lands. Hence it must be conceded that, so long as that article remained in force, in the absence of some special authority emanating from the king, no lawful title could issue without the approval or confirmation of that officer. But by a decree of the cortes of the date of January 4, 1813, enacted for the express purpose of reducing the vacant and other public lands to private dominion, provision was made for the sale and distribution of such lands, and their distribution was placed under the control of the ayuntamientos of the respective municipalities, with the approval of the provincial deputations. Decrees of the Cortes, p. 56. Of the decrees passed by that body, a Mexican writer says: "The revolution of 1808 in Spain gave rise to the installation of the extraordinary cortes of Cadiz in 1811, which, dissolved in 1814, was re-established in 1820, and the laws which they enacted from the date of their installation until the 27th of September, 1821, in which the independence of Mexico was established, form likewise part of the legislation which rules it to-day." *Novisimo Sala Mexi-*

cana, p. 18. In 1814, upon his restoration, the king, Ferdinand VII., issued a manifesto in relation to the constitution which had been established by the cortes, declaring it his "royal purpose not only not to swear or accede to the said constitution or to any decree of the general and extraordinary cortes, or the ordinary cortes, already issued,—that is, such as deprived him of the rights and prerogatives of his sovereignty, established by the constitution and laws under which the nation had for a long time continued,"—and further declaring that constitution and those decrees void. But the manifesto contained this further declaration: "In order that there may be no interruption in the administration of justice in the interval before the restoration of order, and of the observance in the kingdom of the system prevailing before the recent innovations, in relation to which, without loss of time, there will be suitable provision, it is my will that, until such time, the ordinary justices in the towns which are found in office, the judges de letras wherever they may reside, and the audiencias, intendants, and other tribunals of justice in the exercise of their judicial powers, and, in relation to political and administrative matters, the ayuntamientos of the towns shall remain as at present, and in the interim whatever is proper to be preserved shall remain, and until the cortes which I shall convene shall, having examined into the matter and the permanent arrangement in this branch of the government of the kingdom, shall be established." 1 *Decretos del Rey Ferdinand VII.* p. 1, translated in Rockwell's *Spanish & Mexican Laws*, p. 404. This left in effect the decrees of the cortes affecting the ordinary administration of the government.

But it is claimed that the decree in relation to the distribution of the vacant lands was annulled by subsequent royal edicts. In the case of *U. S. v. Clarke*, 8 Pet. 455, Chief Justice Marshall, speaking for the court, says that the decree in question "seems to have been repealed on the 22d of August, 1814." But the royal cedula of the date mentioned relates only to the proprios of the several municipalities of the kingdom. It purports to place these proprios under the jurisdiction and control of the king's council, and to annul the decrees of the cortes in so far as the administration of that branch of the public service was thereby affected, and to restore that administration to the state in which it existed in the year 1808, the time the king was deposed by the French invasion. What the proprios were is not a matter of doubt. They were productive lands, the usufruct of which had been set apart to the several municipalities for the purpose of defraying the charges of their respective governments. *Escrache*, Dict. words "Proprios y Arbitrios." The vacant lands—that is to say, the unappropriated royal domain—are designated as "baldios o realengos." See the words in *Escrache*. It is quite clear, we think, that the royal cedula of August 22.

1814, did not affect the decree of January 4, 1813, in so far as it provided for the sale and distribution of the vacant lands. But it is asserted, that the "decree was abrogated by a royal cedula of the 8th of July, 1814." Hall, Mex. Law, 48. Practically the same assertion is found in a note to the *Novísima Recopilación*, found in the eighth volume of *Los Codigos Españoles* at page 520. This presents a much more difficult question. The title of that cedula, as we translate it, reads as follows: "Royal cedula of his majesty and lords of his council, by which is explicitly annulled the seventh article of the decree of the cortes of the 13th of September, 1813, and the ancient municipal arbitrios are commanded to be re-established, with whatever else that is expressed." Whether the title was the act of the king or of his council we have no means of determining. But it is found in the official publication (1 *Decretos del Rey Don Ferdinand VII.* 114). Omitting the long preamble, the decree, as translated to the best of our ability, reads as follows: "I have deemed proper to annul explicitly the said article of the decree of the cortes of the 13th of September, 1813, and to command that the ancient municipal arbitrios conceded to the towns in order to provide for their urgent demands be re-established on the footing on which they were in the year 1808, with the inclusion of that awarded [or provided as a resource] upon the baldios, which by the other decree of the same cortes of the 4th of January of the same year, 1813, were directed to be sold and distributed." The participial phrase which we have given a double translation is "lo arbitrado." The meaning of the verb "arbitrar," as given in the dictionaries, is to "adjudge or award," or "to strike out means or expedients." The noun "arbitrios" has a well-defined technical signification. Escribche gives its meaning as "the taxes which, in default of proprios, a town imposes with competent authority upon certain articles of merchandise." As indicating the sources of revenue of a municipality, the words "proprios" and "arbitrios" are usually found linked together, and when so connected they are sometimes used as meaning "ways and means." That the inhabitants of the towns had been granted some rights in the vacant lands is shown by the section 2 of the royal regulation of October 15, 1754. That section reads in part as follows: "The judges and officers, to whom jurisdiction for the sale and composition of the royal lands [realengos] may be subdelegated, shall proceed with mildness, gentleness, and moderation, with verbal and not judicial proceedings, in the case of those lands which the Indians shall have possessed, and of others when required, especially for their labor, tillage, and tending of cattle. But, in regard to lands of community, and those granted to the towns for pasturage and commons, no change shall be made. The towns shall be maintained in the possession of them." 2 White, Re-

copilacion, 63. See, also, Hamilton, Mex. Law, 77. That the word "arbitrios" was sometimes used in a general sense, as meaning the resources of the towns, and included their privileges in the royal lands as well as the taxes, is indicated by the decree of the 4th of January, 1813, itself. The object of the decree as expressed in the preamble is to reduce the common lands (los terrenos comunes) to private ownership. The lands, the subject-matter of the decree, are described in the first article as "todos los terrenos, baldios o realengos y de proprios y arbitrios," etc.,—all the lands vacant or of the royal domain and of the proprios and arbitrios. The *exidos* or the commons of the towns—that is to say, the parks, common pleasure grounds and the like—are excepted. The mention of the arbitrios suggests that there were lands subject to some municipal privileges other than the proprios. But we do not feel warranted in hazarding any opinion upon the question. But, when we look to the entire cedula of July 8, 1814,—the title, the preamble, and the order of the king,—we incline to think, at least, that it was not one of its purposes to annul the entire decree of January 4, 1813, and to restore the power of the intendentes over the vacant lands. The title which has been already quoted names the decree of September 13th, but does not mention that of January 4, 1813. The preamble, as seems to have been usual in matters of great importance, sets forth in great detail the reasons which, in the opinion of the king, justified his action. He states, in substance, that the effect of the decree of September 13, 1813, which removed the taxes upon articles of consumption, with a view to set free the internal commerce of the realm, was to leave the nation deprived of the bountiful resources resulting from its ancient and agreeable (suaves) indirect taxation by the substitution of another system which had filled the people with bitterness and discontent, and also to deprive the municipalities of the means to defray the ordinary expenses of their government. Upon the predicate so laid, the king founds his decree, annuls the laws which had changed the method of taxation conferred upon the towns, and restores their privileges as they existed in 1808. There is nothing in the long and labored preamble to indicate that it was the royal purpose to interfere in any manner with the disposition of the vacant land, except in so far as the municipalities or their inhabitants might have some direct interest in such lands. Confessing our inability to reach any satisfactory conclusion upon the matter, we are of the opinion that, giving the cedula in question its widest scope under reasonable rules of construction, it did not have the effect to repeal the decree of January 4th to such an extent as to restore the jurisdiction of the intendentes over the vacant lands.

Our conclusion is fortified by the opinion of a recent Mexican author, who has written

an extended treatise on the subject of the vacant lands in his country. After quoting the decree of January 4, 1813, he says: "This decree is the last legislative act, of which we know, that has emanated from the Spanish state, and which is occupied with the matter of the vacant lands. We shall not detain ourselves in long commentaries upon this law, eminently clear in its construction and design, and which we should probably obscure by attempting to expound it. We shall merely admonish the reader that, by articles 11 and 17 of this decree, the cortes commit to the ayuntamientos of the towns the power of issuing titles in full property, which have to be given of common, royal, or vacant lands, and to the provincial deputations the power of approving or disapproving the relative concessions. From the promulgation of this law, the intendentes were prohibited from extending titles of proprietorship for sales or compositions of the lands, and if they went so far as to issue any one after that promulgation, such title would be radically null, and insufficient to gain by prescription the proprietorship in an immovable." 1 Orozco, Terrenos Baldios, 113. The author then proceeds to point out that the provincial deputations were never established in Mexico, and that in his opinion no valid titles could have issued there under the decree for the want of the provincial deputations, whose approval was essential to their validity. He is probably correct in saying these deputations were never established because, shortly after his return to power, the king promptly suppressed them. 1 Decretos del Rey Don Ferdinand VII. pp. 74, 95. What Orozco means by saying that this was the last decree concerning the vacant land emanating from the Spanish state we do not fully understand. By royal decree issued in 1818 the sale of these lands was again ordered to pay the public debt, and in 1819 rules were passed for putting the decree in execution. Again, in 1820, upon the re-establishment of the cortes, the distribution of the lands was a second time ordered by that body. Owing to the condition of the country then existing, and to the short time which elapsed from the promulgation of these decrees until the independence of Mexico was assured, it is probable that they were never put into effect; and this may be what the author means by saying that the decree of January 4, 1813, was the last upon the subject. But again, in another place, in speaking of the decree of the 4th of January, 1813, he says: "This decree committed the power of confirming the grants of lands in the colony to the provincial deputations, of which the same decree speaks. In this state the legislation upon the royal, now called the 'natural' or 'vacant,' lands remained until the consummation of our independence." 2 Orozco, Terrenos Baldios, 770. We do not know to what weight the opinion of this writer is entitled, but we do know that he has the

merit of expressing his views with remarkable clearness and intelligence, and that he speaks in no uncertain voice. If Orozco be correct, as we incline to think, then there was no general law for the disposition of the vacant lands in force in Mexico from the date of the decree in question until after its independence was established; and, even if the jurisdiction of the ayuntamientos over such lands was taken away by the royal cedula of July 8, 1814, it may be gravely doubted whether it was intended to re-establish the authority of the intendentes in that particular. We incline to think that, by reason of the disorders which had grown out of foreign domination, war, and internal dissensions, it was deemed best to promulgate no general decree upon the subject. Such a consideration would have especial weight when applied to Mexico, where one formidable insurrection had just been suppressed, and preparations were doubtless being made to accomplish a revolution, and to establish the independence of the country. We hardly think, however, there was any well-defined intention to depart from the ancient policy of alienating the lands for the purpose of settling the country and of the promotion of agriculture and other industries. This especially applies to that portion of Texas in which the land in controversy is situated, where the savages of that frontier, as we know historically, as well as from the evidence in this case, had not at the time ceased to contest with Spain the possession of the country. It may have been deemed best, under the existing circumstances, to control the matter by special authority, issued to the governors of provinces or other officers, and to regulate each grant of authority according to the exigencies of the particular territory. Coahuila and Texas were what was known as "distant provinces," and, as we shall hereafter see, by the royal regulation of October 15, 1754, it had been found necessary to authorize a sub-delegation of authority as to the lands in such provinces. 2 White, Recopilacion, 63.

Such being the state of the Spanish laws applicable in Mexico at the date of the purported title in controversy, as we can best determine it in the obscurity which surrounds the question, we think the rule, as frequently announced in this court and in the supreme court of the United States, in regard to the presumption of authority in the officer who has issued a grant, is strictly applicable in this case. The case of *U. S. v. Peralta*, 19 How. 343, involved the validity of a grant issued by the governor of California a few years after the independence of Mexico. The title was attacked upon the ground that the governor had no authority to extend it. In their opinion the court say: "We have frequently decided that 'the public acts of public officers, purporting to be exercised in an official capacity and by public authority, shall not be presumed to be usurp-

ed, but that a legitimate authority had been previously given or subsequently ratified.' To adopt a contrary rule would lead to infinite confusion and uncertainty of titles. The presumption arising from the grant itself makes it prima facie evidence of the power of the officers making it, and throws the burden of proof on the party denying it. The general powers of the governors and other Spanish officers to grant lands within the colonies in full property, and without restriction as to quantity, and in reward for important services, were fully considered by this court in the case of *U. S. v. Clarke*, 8 Pet. 436. The appellants, on whom the burden of proof is cast to show want of authority, have produced no evidence, either documentary or historical, that the Spanish officers who usually acted as governors of the distant provinces of California were restricted in their powers, and could not make grants of land. The necessity for the exercise of such a power by the governors, if the crown desired these distant provinces to be settled, is the greater, because of their distance from the source of power. By the royal order of August 22, 1776, the northern and northwestern provinces of Mexico were formed into a new and distinct organization, called the 'Internal Provinces of New Spain.' This organization included California. It conferred ample powers, civil, military, and political, on the commandant general. The archives of the former government also show that, as early as 1786, the governors of California had authority from the commandant general to make grants, limiting the number of sitios which should be granted. In 1792 California was annexed to the viceroyalty of Mexico, and so continued until the Spanish authority ceased. An attempt to trace the obscure history of the various decrees, orders, and regulations of the Spanish government on this subject would be tedious and unprofitable." So, in the case of *U. S. v. Clarke*, supra, which involved the question whether the governor of East Florida had exceeded his power in the extent of the grant, Chief Justice Marshall says: "A grant made by a governor, if authorized to grant lands in his province, is prima facie evidence that his power is not exceeded. The connection between the crown and the governor justifies the presumption that he acts according to his orders. Should he disobey them, his hopes are blasted, and he exposes himself to punishment. His orders are known to himself, and to those from whom they proceed, but may not be known to the world. Such a grant, under a general power, would be considered as valid, and, if the power to disavow it existed, until actually disavowed. It can scarcely be doubted, so far as we may reason on general principles, that, in a Spanish tribunal, a grant having all the forms and sanctions required by law, not actually annulled by superior authority, would be received as evidence of title." The same rule

has been frequently announced in this court. *Jones v. Garza*, 11 Tex. 186; *Hancock v. McKinney*, 7 Tex. 384; *Holliman v. Peebles*, 1 Tex. 699; *Jenkins v. Chambers*, 9 Tex. 167. In *Jones v. Garza*, Judge Lipscomb, speaking for the court, says: "What credit should be accorded to the acts of an officer, assuming to discharge an official attribute, in the absence of all evidence to show what are his precise powers, has been too well settled in this court, to allow a discussion on the subject. We have held, and do hold, that he is presumed to act within the scope of his legitimate powers." *Jones v. Muisbach*, 26 Tex. 235, was a second action of trespass to try title, brought, under the statute then in force, on the same grant that was held void in the case from which we have last quoted, and there is nothing in the opinion in the second suit in conflict with the doctrine so distinctly announced in the first. In *Jones v. Muisbach* the court state that "it has frequently been held, by this and other courts, that where an officer of a former government assumes to act in discharge of an official attribute, in the absence of all evidence to show what are his precise powers, he will be presumed to act within the scope of their legitimate extent." The court then proceed to say that, if the officer be one whose powers are known and well defined, and the authority exercised be such as does not ordinarily pertain to the office, the burden rests upon the party asserting it to prove it by affirmative testimony. It was held in both suits that parol testimony was admissible to show whether the officer had the power to extend the title or not. In the first action the testimony of a witness that the power did not exist was admitted. The court quote his testimony, and hold it sufficient to prove the want of authority. In the second suit, the testimony of three witnesses was admitted, one testifying against the existence of the power, and the others in its favor. The testimony of the witness to show the want of the authority was held more trustworthy than that of the other two, and, the trial court having decided against the validity of the title, we do not see how the court could have reversed the judgment upon that point. It is true that, in both opinions, the court say that the powers of the political chief are well known and defined by written law, and that by virtue of his office he did not have authority to grant lands; but in *Norton v. Mitchell*, 13 Tex. 47, it is intimated that he may have had special authority. The grant in that case, which was made by the same officer who extended the title to the Baron de Bastrop passed upon in *Jones v. Garza* and *Jones v. Muisbach*, was sustained; but the decision proceeds upon the ground that the record did not show that the point was presented in the lower court.

It may be that the ordinary powers of a political chief are so definitely ascertained that a grant by him should be held void, in

the absence of affirmative proof of special authority. It does not follow that the same may be said of the governor of a province. The royal regulation of October 15, 1754, which relieved the subjects of the realm from applying to the king in person for grants of land, authorized the viceroys to appoint subdelegate judges, with jurisdiction over the disposition of the royal domain, and these were empowered "to subdelegate their commissions to others for the distant parts and provinces of their stations." See section 2 of the decree in 2 White, *Recopilacion*, 63. The third section speaks of "the judges and officers to whom jurisdiction for the sale and composition of royal lands may be subdelegated." 2 White, *Recopilacion*, 63. So much of the decree was doubtless repealed by the ordinance establishing the intendencias in New Spain; but when, by the decree of the cortes, the jurisdiction of the intendentes over the vacant lands was taken away, we see no reason why the power to make grants may not have been temporarily conferred upon the governors of the distant provinces. Numerous titles emanating from the governor of East Florida during the period in question have been held valid by the supreme court of the United States. *U. S. v. Clarke*, 8 Pet. 436; *U. S. v. Clarke*, 9 Pet. 168; *U. S. v. Huertas*, Id. 171; *U. S. v. Levy*, 13 Pet. 81; *U. S. v. Clarke's Heirs*, 16 Pet. 228, and many others. However, it is well understood that the governors of that province, unlike the governor of West Florida, had the power to grant lands without the approval of the intendente. We cite the fact of his authority merely to show that it was a power which was sometimes conferred upon and exercised by the governor of a province. It is not inconsistent with our views that, during the same period, grants in West Florida required the approval of the intendente. The *Intendencia* of Cuba, to which the Floridas were subject, was not one of those established by the ordinance of the intendentes, and it is not surprising the regulations should be made in reference to the former which were not made applicable to the latter intendencias. Accordingly we find that the king, on the 8th of June, 1814, issued an order to the intendente of Habana, commanding that, notwithstanding the decree of the cortes of the 4th of January of the previous year, he should observe the laws of the *Indias* and the ordinance of the intendentes in relation to the disposition of the royal lands. We find from the report of the case of *Sabariego v. Maverick*, 124 U. S. 261, 8 Sup. Ct. 461, that in 1817 the intendente at San Luis Potosi directed a sale of certain lands situate in the jurisdiction of Bexar alleged to have been confiscated on account of the rebellion of its owner. That the intendente at that date asserted jurisdiction over confiscated lands is not inconsistent with the theory that he had none

over the vacant domain. The latter was the king's special prerogative, to be sold or to be granted as a reward of merit or as a matter of pure favor. The confiscated lands belonged to the royal treasury, the administration and superintendence of which was ever a peculiar function of the intendente. In view of the obscurity in which the whole matter is involved, we conclude that it should be presumed that the governor who caused the title in controversy in this case to be extended did not usurp the authority. At the time Spain was an absolute monarchy. The will of the king, promulgated as such, in whatever form expressed, was the law of the realm. The government was substantially that of a military regime, and it is not to be presumed that the governor of a province who stood second in authority under the king assumed the power to make a grant of the royal domain without being authorized to do so.

But it is insisted on behalf of the defendant in error, that the documents relied upon do not evidence an extension of the final title to the lands. We do not think that this contention can be sustained. The applicant prays the governor that he may be placed in lawful juridical possession of said lands, and that the proper testimony be given to him. The governor directs the justice of Palafox to issue to him the documents for which he makes application. In pursuance of this order, the officer delegated adjudicates to him, and gives him possession of the lands, orders that "he be not despoiled of it," and that "he may make such use thereof as he deems proper, unto him, his children, and assigns." This is a final title. It is not dependent upon any condition, and there is nothing on the face of it to indicate that it is subject to the approval of any higher authority. We attach no importance to the fact that the document is not written upon stamped paper. The want of a stamp may have made proof of the instrument necessary. *Jones v. Montes*, 15 Tex. 351. But there is no question of proof in this case. So far as the record shows, the instrument was admitted without objection. The contention that the document is neither a protocol nor a testimonio cannot be maintained. The language upon which this contention is based is: "And for its perpetuation, I give him the present original title of possession, with assurance of transcribing a literal testimonio of it whenever the proper paper is on hand, there being none at present in the revenue office; I, the said judge, and my assisting witnesses signing hereto in default of a notary public, there being none according to law, which I certify." Under the Spanish system of conveyancing, "a public instrument is divided into three classes: the original draft, register or protocol (*registro*), the original, and the copy. The register is the original draft or writing, which is delivered, and remains

in the possession of the escribano, which we also call 'protocol,' by which doubts are determined that may be offered with respect to the instruments which are copied from it. The deed which is immediately copied from the protocol is the original, which causes faith, inasmuch as it is authorized by the public escribano, before whom it passed, or by him to whom the protocols of the latter have passed; but if another escribano copies it, with the authority of the judge and citation of the party, it is valid. The traslado is called the 'copy' which is taken from this original, which ought to be done with the same circumstances of the latter." *Azo & Manuel's Institutes*, 1 White, 297. What we understand the officer to mean is that he issues to Garcia the instrument as present original evidence of title, and that when stamped paper can be procured he will issue a testimonio upon such paper. The sole advantage of the stamped paper was that, when the instrument was executed upon such paper, in due form, and with the necessary number of witnesses, proof of its execution was dispensed with. *Jones v. Montes*, supra. We deem it a matter of no moment what the instrument may be called. In *Downing v. Diaz*, 80 Tex. 436, 16 S. W. 49, the court say: "And we may be permitted here to say that, after so great a lapse of time, with our restricted means for acquiring correct information, it would not be just to assume that what was deemed sufficient evidence of right by the officers of the former government, who must be presumed to have been familiar, not only with the general laws then in force, but with the special laws and usages of the time, as well as the facts attending a particular transaction, is now entitled to no consideration."

For the reasons given, we think the plaintiff in error showed title to the land in controversy, and therefore the judgment of the court of civil appeals and that of the district court are reversed, and judgment here rendered for him.

MALONE et al. v. WRIGHT.

(Supreme Court of Texas. June 22, 1896.)

TENDER—CONTRACT OF PLEDGE—CONSTRUCTION.

1. A tender to the attorneys of a pledgee of the amount necessary to redeem the pledge, on condition that the pledge be immediately surrendered, is not good, where the party making the tender knows that the attorneys have not the pledge in their possession, and the attorneys are justified in doubting whether the party making the tender is entitled to redeem. 34 S. W. 455, affirmed.

2. A contract for the pledge of two borrowed notes, each for \$1,200, as security for a note of \$5,500, to secure an extension of the time of payment, gave the pledgor the right to redeem the notes by payment of \$1,000 on the debt before the extension of payment expired, and also provided that payment of the note first becoming due, by the maker, should operate as

a release of the other note from pledge. *Held*, that the right to redeem not having been exercised, nor the first note paid by the maker, the pledgee, though entitled to collect both the notes, was only entitled to receive from their proceeds, for application on his debt, a sum equal to the principal and interest due on the first note, and the pledgor the balance, and, if the first note was paid without enforcement of the lien securing it, then the pledgor should be entitled to the other note, discharged of the lien of the pledge. 34 S. W. 455, modified.

Error from court of civil appeals of Third supreme judicial district.

Action by Annie L. Malone and husband against James A. Wright. From a judgment of the court of civil appeals (34 S. W. 455) affirming a judgment for defendant, plaintiffs bring error. Modified.

Chas. L. Lauderdale, for plaintiffs in error. Rector, Thomson & Rector, for defendant in error.

BROWN, J. Mrs. Annie L. Malone and her husband, F. R. Malone, instituted suit against James A. Wright, in the Fifty-Third judicial district court, of Travis county, to recover the value of two notes, for \$1,200 each, executed by F. J. and H. J. Semple, dated March 13, 1894, bearing 10 per cent. interest per annum from date, and alleged to be of the value of \$1,200 each, with the interest and attorney's fees thereon. Plaintiffs alleged that Annie L. Malone was the owner, in her own right, and as her separate property, of the said two notes, and that she loaned the said notes to the Texas Trading Company, to be used by it as a pledge to the extent of \$1,000 to secure that amount on its note for \$6,000 in favor of the defendant, and for the purpose of securing an extension of the last-named note. She also alleged that the said notes were by the said trading company pledged to the defendant, James A. Wright, in accordance with the loan made by her to it, to secure the sum of \$1,000, and that she had made a valid tender of \$1,000 as a payment upon the note due to the trading company, which tender was by the said James A. Wright refused, and which, she claimed, extinguished the lien upon the said notes, which were her separate property as aforesaid, and that the defendant, James A. Wright, converted the said notes to his own use. The defendant answered by general denial, and, specially, that the two notes described in the petition were pledged to him to secure a note of \$6,000 from the Texas Trading Company to him, upon which was a credit of \$500, with the condition that upon the payment of \$1,000 on or before January 30, 1895, the said trading company should have the right to receive the said notes so pledged, in return, from this defendant. He alleged the failure to pay the \$1,000 as agreed, and that the \$6,000 note due from the Texas Trading Company had matured, by reason of the failure to pay interest thereon; and he prayed that he have judgment fore-

closing his lien upon the said two notes made by F. J. and H. J. Semple, for the full amount of the note due from the Texas Trading Company to him. The facts found by the court of civil appeals, necessary to be stated, are, in substance, as follows: That on March 13, 1894, the Texas Trading Company was indebted to James A. Wright in the sum of \$5,500 and interest, by promissory note executed by said company to Wright, and on that day the following agreement was entered into between the said Texas Trading Company and the said Wright. The first part of the agreement recites the existence of the debt due by the trading company to James A. Wright, and the fact that the said trading company desired to secure an extension for the payment of the said note for one year, after which the following terms of the agreement are expressed: "The Trading Co. delivers to said James A. Wright, as additional security, for the purpose of better securing him in the payment of the said deed of trust note, two certain promissory notes, dated September 4th, 1893, both for the sum of \$1,200.00 each,—one due September 1st, 1894, and the other one due September 1st, 1895,—both bearing interest at the rate of 10 per cent. per annum from maturity until paid, and both signed by Helena J. Semple and Frank J. Semple, and being secured by vendor's lien and deed of trust upon the 60 acres of land improvements known as 'Annie Lillian Malone's Homestead'; both of said notes being made payable at Llano, Texas, to the order of Annie Lillian Malone, and both bearing the indorsement on back thereof of said Annie Lillian Malone and F. R. Malone, and Texas Trading Company. It is understood and agreed that said James A. Wright shall hold and keep the two said Semple notes as additional security as hereinabove explained, but with the express agreement that the said Texas Trading Company, its assigns or nominee, may at any time thereafter before the 30th day of January, 1895, demand and receive back from said James A. Wright the said two Semple notes, by paying to him the sum of \$1,000.00 cash, the said \$1,000.00 cash so paid to be applied by him as a credit upon the said Texas Trading Company's note to said Wright; and it is further agreed that the payment by Helena J. Semple and Frank J. Semple of the first note, due Sept. 1st, 1894, the amount of same being \$1,200, shall entitle the said Texas Trading Company, its assigns or nominee, to demand and receive back from said Wright the other unpaid Semple note, and the proceeds of the one collected shall be properly applied as a credit upon the said original note held by said Wright against said Texas Trading Company." Here follows an agreement on the part of the trading company to make certain payments upon the note due from it to James A. Wright, amounting to \$1,250,

which payments were made; and it is unnecessary to notice that part of the contract further. A modification of this agreement was entered into at a subsequent date, which is as follows: "It is agreed by and between the parties hereto that section No. 1 of this contract is so modified and changed that it shall not give the Texas Trading Company the right to demand and receive the Semple notes upon the payment of \$1,000 as therein stipulated, or upon the payment of the first of said notes falling due as therein stipulated, unless the sums mentioned in section 2 of this contract to be paid weekly be all first paid, and paid at the times agreed to be paid. It is further agreed that if said sums of money agreed to be paid weekly, mentioned in sec. 2 of this contract, be not paid when due, then said Wright's agreement to extend the time of the payment of his said note shall be void, and he can proceed at once to collect it." The first contract, and the modification thereof, were both signed by the Texas Trading Company, by F. R. Malone, secretary, and by James A. Wright. August 30, 1894, F. R. Malone, the husband of Mrs. Annie Malone, as the nominee of the Texas Trading Company, made a tender of the \$1,000 mentioned in said contract, being the amount that the Texas Trading Company was permitted to pay in order to redeem said notes to Rector, Thomson & Rector, on the condition that they would then and there deliver to said Malone the two notes of \$1,200 each, before described. Rector, Thomson & Rector did not have possession of said notes, and then and there so informed said Malone, and told him that James A. Wright had them, and they could not then and there deliver them; but Rector, Thomson & Rector had in their possession, for collection, the note due from the Texas Trading Company to James A. Wright, to secure which the said \$1,200 notes belonging to Mrs. Malone had been pledged. In September, 1894, a few days after the tender made by Malone to Rector, Thomson & Rector, James A. Wright tendered to Malone, the husband of Mrs. Annie Malone, and offered to deliver to him, the two notes, if he would pay the \$1,000, which he refused to do, and which he has never done. When the notes were loaned by Mrs. Malone, to the Texas Trading Company, she and her husband indorsed them in blank. The Texas Trading Company likewise indorsed them in blank before delivering them to James A. Wright, who had no notice that the Texas Trading Company was limited in the amount for which it could pledge the notes. In April, 1895, Wright recovered judgment against the Texas Trading Company, on the note due from it to him, for the sum of \$5,530.25, which is unpaid. Upon trial in the district court the judge instructed the jury to return a verdict for the defendant upon the claim of the plaintiffs against him, and also to return a verdict for the defendant upon his cross ac-

tion against the plaintiffs. The verdict was returned in accordance with the instructions. The court entered judgment that the plaintiff Annie Malone take nothing in that action, and also entered judgment in favor of James A. Wright against the plaintiff Annie Malone, that he should have and hold the said two collateral notes as collateral security to secure the payment of all of said \$6,000 note, and foreclosed the lien of the said Wright upon the said two notes, authorizing him to proceed to collect the same and apply the proceeds to the payment of the balance due upon the judgment in his favor against the Texas Trading Company. Annie Malone and her husband appealed to the court of civil appeals of the Third supreme judicial district, which affirmed the judgment of the district court; and the said Annie Malone, joined by her husband, applied to this court for a writ of error upon the following grounds: "First. That the district court erred in instructing the jury that the alleged tender of \$1,000 to defendant was ineffectual, and that there was no evidence of a conversion of the notes by the defendant, and that no facts proved show that defendant lost his lien on the two \$1,200 notes, and in charging the jury to return a verdict for the defendant on plaintiff's action against him. Second. The district court erred in instructing the jury that there was no evidence tending to show defendant's knowledge of the limited right of the Texas Trading Company to use the two \$1,200 notes; that the failure to pay or tender the \$1,000 before January 30, 1895, entitled the defendant, under the contract under which the notes were delivered to him by the Texas Trading Company, to hold both of the \$1,200 notes as absolute security for the whole amount remaining due on the note from the Texas Trading Company to the said Wright, and in charging the jury to return a verdict for the defendant on his cross action."

It is unnecessary for us to discuss the question as to what would be the effect of a proper tender of the amount for which the lien was given upon the notes in question, if such tender was improperly refused, because the facts do not show the tender in this case by the plaintiff's husband to have been made in such manner that a forfeiture of the lien would result from a refusal, or that the refusal of the defendant was such as to work a forfeiture of the lien upon the notes. In order for a tender to have the effect claimed, it must have been made in good faith with the intention to pay the money upon the debt, and must have been refused by the defendant without any just or reasonable cause for so doing. *Waldron v. Murphy*, 40 Mich. 668; *Post v. Springsted*, 49 Mich. 90, 13 N. W. 370; *Balme v. Wambaugh*, 16 Minn. 116 (Gil. 106); *Moore v. Norman*, 43 Minn. 428, 45 N. W. 857; *Id.* (Minn.) 53 N. W. 809; *Union Mut. Life Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. 286.

When F. R. Malone made the tender to Rector, Thomson & Rector, as the attorneys of Wright, he knew that they did not have possession of the Semple notes, and he made the tender upon the express condition that those notes should be "then and there delivered to him." The terms of this condition precluded the possibility of an acceptance by Rector, Thomson & Rector, and necessarily denied to them, as attorneys, any time in which to procure the notes for the purpose of delivering them to him. The tender was not made with the intention or expectation that it would be accepted, but with the purpose of defeating Wright's lien upon the notes by a legal technicality. In the case of *Waldron v. Murphy*, *supra*, the court said: "In the present case, upon a review of the facts, we think the tender was not made under circumstances entitling it to be enforced in this way, if at all, * * * but the conduct of St. John [the party who claimed the forfeiture], if it had succeeded, would have had the practical effect of very sharp practice. He knew Mr. Waldron's bodily infirmity, and both he and Ashbaugh evidently contemplated that Waldron might not accept the money. He knew that the mortgages were not in Waldron's personal possession, and that it would be unreasonable to expect him to close any redemption without a personal examination, or one made for him." The facts in this case are much stronger against the claim of the plaintiffs to a forfeiture of the lien, because they show that F. R. Malone knew absolutely, when he made the pretended tender, that it would not and could not be accepted, and the facts justify the conclusion that the condition upon which the tender was made was so framed as to insure its refusal. The refusal by Rector, Thomson & Rector cannot be considered as a refusal to receive the money. They stated to Malone that they had not possession of the notes, and therefore could not deliver them, and that they thought their client could not deliver the notes, on account of the fact that the trading company was in the hands of a receiver, and he might be held responsible for the notes by the receiver. Two good reasons were given for not accepting the tender at the time. It was a sufficient reason that they had not the possession of the notes, and the terms of the tender did not allow them time to obtain possession of them. Besides, it was not unreasonable that they should hesitate to deliver the notes upon the tender made, when they were not sure that the party claiming the possession had the right to receive them from their client. In the case of *Waldron v. Murphy* the court said: "It has been held in this state that a willful and absolute refusal to accept a lawful tender discharges a lien; but there is no equity in attempting to avoid both lien and debt, and the security should not be discharged by any action in which the conduct

of the creditor is not unjustifiable. If the refusal of a tender is not unreasonable or absolute, we do not think a mortgage is cut off by it." This position is well sustained by the authorities, and we think that the facts of this case not only fail to show that the refusal was unreasonable or unjustifiable, or that there was any improper motive on the part of the defendant or his attorneys in the transaction, but they do show that as soon as the defendant could do so he offered to deliver to Malone the Semple notes, upon payment of the \$1,000, which Malone refused, and this offer was carried by the defendant into the court upon the trial, and he there again proposed to deliver the notes upon payment of the \$1,000, which was not accepted by the plaintiffs. There was no error in the court's charge, so far as it directed the jury to find against the plaintiffs upon their action against the defendant, Wright, because the evidence showed that Wright was lawfully entitled to the possession of the notes, and the plaintiffs had no right to recover them from him.

The written agreement between the Texas Trading Company and James A. Wright provided, in general terms, that the two notes made by Helena and F. J. Semple should be held by Wright as security for the debt due from the trading company to him, but in the said agreement is embraced the following language: "It is understood and agreed that said James Wright shall hold and keep the two said Semple notes as additional security, as hereinabove explained, but with the express agreement that the said Texas Trading Company, its assigns or nominee, may at any time thereafter before the 30th day of January, 1895, demand and receive back from the said James A. Wright the said two Semple notes, by paying to him the sum of one thousand dollars in cash"; the \$1,000, when paid, to be applied as a credit upon the notes. It was further expressly stipulated in the said agreement that the payment by Helena J. Semple and Frank J. Semple of the first note, due September 1, 1894, for \$1,200, should entitle the Texas Trading Company, or its nominees, to receive from Wright the unpaid Semple note. The effect of this qualifying clause was explicitly to limit the lien of Wright upon the two notes to the amount of one,—that is, \$1,200,—with the interest that might accrue thereon; for there was no time limited in which the Semple note should be paid in order to give the right to the Texas Trading Company, upon its payment, to receive the other note from Wright. Whenever the first note might be paid by Semple and his wife, or collected from them by law, either by subjecting the property upon which the notes were held as a lien, or otherwise, the Texas Trading Company, or its nominee, would have the right to have the other returned, or to receive whatever amount of money should be collected upon the said notes after paying the

first one. The Texas Trading Company had the right at any time before January 30, 1895, to redeem both of the notes, upon the payment of \$1,000, but that right ceased at the expiration of the time stated. It did not, however, affect the other stipulation,—that upon the payment of the first Semple note the other note should be returned to the Texas Trading Company, or its nominee. The district judge who tried this case assumed in his charge that the two Semple notes were made security for the entire debt due from the trading company, and upon that basis charged the jury to find for the defendant upon his cross bill. In this respect the charge of the court was erroneous. Upon the cross bill filed by the defendant the judgment should have been entered that the defendant be decreed the right to hold and collect both of the Semple notes, and, upon the payment of the amount of \$1,200 and interest on the first note, the amount collected upon said notes, over and above that which was necessary to satisfy the first, and interest thereon, be paid over to Mrs. Annie Lillian Malone, or if the first of the said Semple notes shall be paid, without sale of the property on which they hold a lien, and without the necessity of enforcing both of the said notes in the collection thereof, then that the last of the two Semple notes be delivered to the said Annie Lillian Malone. For the error in the charge of the district court as above indicated, and because the court of civil appeals erred in not reversing and reforming the said judgment, it is ordered that the judgments of the district court and the court of civil appeals be affirmed, in so far as they affect the plaintiffs' right to recover in their original suit, and that the judgment upon the cross bill of the defendant be, and the same is hereby, reversed, and such judgment be here entered as should have been entered in the district court, to wit: It is ordered and decreed that J. A. Wright be permitted to hold and collect the two notes executed by Helena and F. J. Semple to Annie Lillian Malone, for the sum of \$1,200 each, dated March 13, 1894, bearing 10 per cent. interest per annum from date, with a lien upon certain property described in a deed of trust referred to in the said petition, and that out of the proceeds of the said notes so collected he shall retain a sufficient amount to pay off and discharge the one of the said notes first due, with interest thereon, and the excess, if any, he shall pay over to the said Annie Lillian Malone as her separate property; and if the said Helena and Frank J. Semple shall, without legal proceeding, pay off the first of the said notes, then the said James A. Wright shall deliver the other note to the said Annie Lillian Malone as her separate property, and that plaintiffs in error pay the costs of the district court, and that defendant in error, pay the costs in this court and in the court of civil appeals.

VINEYARD et al. v. O'CONNOR.

(Supreme Court of Texas. June 22, 1896.)

DEED—DESCRIPTION—SUFFICIENCY—FAILURE TO NAME GRANTEE.

1. A deed by a father to his son, for a nominal consideration, describing the land conveyed as "all my right, title, and interest in the estate of J. W. B., purchased by me at administrator's sale in behalf of my son," is not bad for want of a sufficient description, as the words "purchased by me at administrator's sale in behalf of my son," will be construed as expressing a motive for the conveyance of all the interest purchased at the sale, and not as limiting the interest conveyed to that purchased in behalf of the son. 35 S. W. 1084, affirmed.

2. A deed recited that "I [grantor] for the sum of one dollar, and out of the affection for my son, S. H. V., do hereby grant, release, and convey, to have and to hold forever, all my right, title, and interest in the estate of J. W. B., purchased by me at administrator's sale in behalf of my son, S. H. V., and heirs of S. C. [grantor] and Anna W. V.; hereby reserving the right to control, as guardian, said estate for the benefit of S. H. V. and heirs of S. C. and Anna W. V. And I, the said S. C. V., for and in consideration of the sum of one dollar to me in hand paid, do hereby bind myself by these presents to warrant, defend, and protect unto the said S. H. V. and heirs of S. C. V. all the possessions hereunto conveyed." *Held*, that the deed was not void for failure to name a grantee, as the recitals showing that the conveyance was in consideration of love and affection for S. H. V., and that the land was purchased in behalf of S. H. V., and the warranty of title to S. H. V. and heirs of the grantor, are sufficient to designate S. H. V. as the grantee. 35 S. W. 1084, reversed.

Error to court of civil appeals of First supreme judicial district.

Action by S. C. Vineyard and another, as guardians of Lillian Vineyard, against Dennis M. O'Connor. There was a judgment of the court of civil appeals (35 S. W. 1084) affirming a judgment for defendant, except as to the lands by him disclaimed, and plaintiffs bring error. Reversed.

Ward & James, for plaintiffs in error.
Glass, Callender & Carsner, for defendant in error.

GAINES, C. J. This was an action of trespass to try title, brought by Lillian Vineyard, a minor who sued by her guardians, to recover of Dennis M. O'Connor, the defendant in error, certain tracts of land. The defendant, in an amended answer, disclaimed as to some of the tracts sued for, but pleaded not guilty, and set up title, as to the others. There was a judgment for defendant for the lands claimed by him in his answer, which judgment was affirmed by the court of civil appeals.

Upon the trial the plaintiff introduced in evidence patents to one James W. Byrne for six of the tracts in controversy, and also a patent to one Isaac C. Robertson for the seventh. It was agreed between the parties that Byrne, who was then dead, was the owner at the time of his death of the tract patented to Robertson. The plaintiff then introduced the proceedings of the probate court of Aransas

county in the matter of the estate of James W. Byrne, deceased, showing an order for the sale of the lands, and an order confirming a sale of the same to S. C. Vineyard, together with a deed by the administrator conveying to such purchaser the lands so sold. The plaintiff then offered a purported deed, of which the following is a copy: "State of Texas, County of Aransas. Know all men by these presents, that I, Samuel C. Vineyard, of the state of Texas and county of Aransas, for the sum of one dollar, and out of the affection for my son, Samuel Harvey Vineyard, do hereby grant, release, and convey, to have and to hold forever, all my right, title, and interest in the estate of James W. Byrne, purchased by me at administrator's sale in behalf of my son, Samuel Harvey Vineyard, and heirs of S. C. Vineyard and Anna W. Vineyard, hereby reserving the right to control as guardian said estate for the benefit of S. H. Vineyard and heirs of S. C. Vineyard and Anna W. Vineyard; and I, the said Samuel C. Vineyard, for and in consideration of the sum of one dollar, to me in hand paid, do hereby bind myself by these presents to warrant, defend, and protect unto the said Samuel H. Vineyard and heirs of S. C. Vineyard all the possession hereunto conveyed this eighth day of October, 1873, A. D. In testimony whereof, I have hereunto signed my name, and affixed my scrawl for seal, on this eighth day of October, A. D. one thousand eight hundred and seventy-three. S. C. Vineyard. Witness: Eustace Hatch." The instrument was duly acknowledged. The introduction of the paper in evidence was objected to on three grounds, but we need only consider two of them. The first was that it was void because it contained no sufficient description of the property intended to be conveyed; and the second, that the grantee was not named therein. In connection with the instrument, the plaintiff offered to prove by her mother that she (the proffered witness) was the wife of S. C. Vineyard, and that Samuel Harvey Vineyard was their son, and that he was the only child born to them at the date of the purported conveyance, but that subsequently she bore to her husband the plaintiff and another child. The plaintiff also offered in evidence a deed executed by Samuel Harvey Vineyard, conveying to her all his "entire interest in the conveyance from S. C. Vineyard to me, Harvey S. Vineyard, A. D. 1873; the same tracts being purchased from the estate of James W. Byrne," etc. The first deed was excluded by the court upon the objection already stated, and the second was objected to upon the ground that, since the first deed had been ruled out, the second was irrelevant. This latter was also excluded. We are of the opinion that neither ground of objection to the instrument executed by S. C. Vineyard is tenable. The majority of the court of civil appeals held that the description of the property intended to be conveyed was sufficient, and we think that ruling correct. If the de-

scription had ended with the words, "purchased by me at administrator's sale," it is quite too clear for argument that it would have been sufficient. *Bowles v. Beal*, 60 Tex. 322; *Cattle Co. v. Chisholm*, 71 Tex. 523, 9 S. W. 479; *Wilson v. Smith*, 50 Tex. 365; *Kingston v. Pickins*, 46 Tex. 99; *Ragsdale v. Robinson*, 48 Tex. 379. If the purpose of the use of these words, "in behalf of my son," etc., was to limit the conveyance to a part of the lands bought at the administrator's sale, and the whole of the descriptive language should be construed as if it had read, "all that portion of the property bought by me at administrator's sale, which was purchased in behalf of my son," there might be some question as to its sufficiency. But we think such was not the purpose of the grantor, but that the object in the use of the words just quoted was merely to declare that he had purchased all the lands bought by him at the sale of Byrne's estate for the use of his children, and thus to make more manifest the motive which prompted the conveyance. At all events, the language fairly admits of that construction; and when words in an instrument are capable of two constructions, one of which will make it void, and the other of which will make it valid, the latter must prevail.

This brings us to the second ground of objection, which is that there was no grantee in the deed. Every deed of conveyance must have a grantee. But it is a mistake to suppose that any mere formalities are necessary to its validity. Lord Coke says: "I have teamed the said parts of the deed formal or orderly parts, for if such a deed be without premises, habendum, tenendum, reddendum, clause of warrantie, the clause of in cuius rei testimonium, the date and the clause of his testibus, yet the deed is good. For if a man by deede give lands to another and to his heirs without more saying, this is goode if he put his seale to the deede, deliver it, and make livery accordingly. So it is if A. give lands to have and to hold to B. and his heires, this is good, albeit the feoffee is not named in the premises." 1 Co. Litt. 7a. In a deed, as in all other written instruments, it is the duty of the court to determine the intention of the parties to it; and when the instrument itself makes it manifest that it was the purpose of the grantor to convey the property to another, who in the deed itself is designated with reasonable certainty, it will take effect as a conveyance. The grantee need not be named. He may be described. A deed to the heirs of a person who is dead is good, for the reason that the heirs may be definitely ascertained. That is certain which may be made certain. So if the deed do not express to whom the property is conveyed, yet, as we have seen, if the grantee be named in the habendum, the deed is sufficient,—not because the habendum says expressly who the grantee is, but because the inevitable presumption is that the person who is "to have and to hold" the property is the party to whom it

was intended to be conveyed. The case of *Newton v. McKay*, 29 Mich. 1, is similar to the case before us, and the remarks of the court in their opinion are quite pertinent to the question we have under consideration. There the instrument, neither in the granting clause, nor in the habendum, nor in the warranty, named the grantee, though it began, "This indenture, made and agreed to between Jacob Sammons, of the first part, and F. H. Genereaux, of the second part," etc. The court, in their opinion, say: "It is undoubtedly true that to constitute a valid conveyance the grant must in some way distinguish the grantee from the rest of the world. But it is equally true that if, upon a view of the whole instrument, he is pointed out, even though the name of baptism is not given at all, the grant will not fail. The whole writing is always to be considered, and the intent will not be defeated by false English or irregular arrangement, unless the defect is so serious as absolutely to preclude the ascertainment of the meaning of the parties, through the means furnished by the whole document and such extrinsic aids as the law permits. It is not indispensable that the name of the grantee, if given, should be inserted in the premises. If the instrument shows who he is,—if it designates him, and so identifies him that there is no reasonable doubt respecting the party constituted grantee,—it is not of vital consequence that the matter which establishes his identity is not in the common or best form, or in the usual or most appropriate position in the instrument. The grant before us is very awkward and unskilled. It was evidently drawn by a person unacquainted with the principles of conveyancing, and yet having some knowledge of the phraseology commonly used in deeds. But, notwithstanding its infelicity of arrangement and its numerous shortcomings, it seems to me that it is not invalid for the uncertainty alleged against it. True, no one is expressly named or described as grantee in the premises or subsequent parts of the instrument. But no person can escape the impression that the paper was meant to be an actual and lawful grant to Genereaux. It was not prepared, executed, acknowledged, and delivered as an idle ceremony. It describes Sammons as being the party of the first part, and Genereaux as being the party of the second part. The nature of the act to be consummated, and the writing got up as an instrument of conveyance to effect the consummation, explain the sense in which Sammons is called the 'party of the first part,' and Genereaux the 'party of the second part.' When we reflect that the parties were by this paper seeking to effect a transfer of land from one to the other, these expressions of party 'of the first part' and party 'of the second part' very plainly convey the idea that the former was grantor and the latter grantee." After referring to another peculiarity of the deed, the court conclude: "Without pausing to elaborate the point, it is

sufficient to say that the instrument imports upon its face to be a grant from Sammons to Genereaux." The case of *Doe v. Hines*, Busb. 343, was decided upon the same principles. Let us then apply the rules announced to the instrument before us. Treating the recital of the consideration of one dollar as formal, we see that the true consideration of the deed is the affection of the grantor for his son. It declares that the property had been purchased at the administrator's sale in behalf of (that is, for the benefit of) his son and the "heirs" of the grantor and his wife, and also reserves control of the property, as guardian, for the benefit of the son and such "heirs." And finally the grantor covenants to warrant the title to his son and the "heirs" of himself and wife. So the deed expressly shows who is to have the beneficial interest in the property, and to whom the title was to be warranted. Can there be any reasonable doubt, from the face of the deed itself, to whom the grantor intended to convey the land? If the grantor may be pointed out in the habendum, why not in the covenant of warranty? The whole instrument is consistent with the theory that Samuel Harvey Vineyard was intended to be a grantee therein, and no other possible construction can reconcile its peculiar provisions. We therefore conclude that the instrument in question was a valid conveyance, and that it passed to him the legal title in the land. For the error of the trial court in excluding the deed from S. C. Vineyard to Samuel H. Vineyard, and the court of civil appeals in affirming that ruling, their judgments are reversed, and the cause remanded.

MORRISON v. LAZARUS.

(Supreme Court of Texas. June 22, 1896.)

MORTGAGE—VENDOR'S LIEN AS COLLATERAL—ENFORCEMENT AGAINST HOMESTEAD.

The owner of a tract of land which included his homestead, and who owed a part of the purchase money, evidenced by a note reserving a vendor's lien, borrowed from a mortgage company, securing the loan by a trust deed on the land exclusive of the homestead; the company taking up the purchase-money note from the proceeds of the loan, under an agreement contained in the trust deed that it should retain such note as collateral, together with the lien securing it. The company foreclosed the trust deed, taking judgment against the mortgagor for the full amount of the loan, and sold and bought in the property covered thereby for a part only of the debt, the amount being credited on the judgment. It afterwards transferred the purchase-money note to plaintiff, who brought suit against a purchaser of the homestead from the mortgagor, to enforce against it the vendor's lien. *Held*, that if the sale under the foreclosure by the mortgage company, which was then the owner of such lien, extinguished it as to the land other than the homestead, the proceeds of such sale operated, when applied on the judgment, as a satisfaction of the purchase-money debt; that, if the lien was not extinguished, it survived as to all the land, unaffected by the foreclosure of the prior lien, and could only be enforced, as to

the homestead part of the property, after the remainder had been exhausted. 35 S. W. 498, reversed.

Error to court of civil appeals of Third supreme judicial district.

Action by Sam Lazarus against Hiram Morrison and others. Judgment for plaintiff in the trial court was affirmed on appeal by the court of civil appeals (35 S. W. 498), and defendant Morrison brings error. Reversed.

J. D. Thomas, for plaintiff in error. Alexander, Clark & Hall, for defendant in error.

BROWN, J. W. N. George purchased from H. H. Rawlings 1,380 acres of land, for which he gave his note for \$8,047.50, dated November 19, 1885, due November 19, 1893. George occupied 200 acres of the tract as a homestead, and while he was so occupying it, on the 23d day of October, 1888, borrowed from the Western Mortgage & Investment Company \$16,500, giving his note therefor, which matured prior to the 26th day of December, 1891; and to secure this note George executed to the Western Mortgage & Investment Company a deed of trust on 1,180 acres of the land, not including his homestead. The principal and interest of the note given by George to H. H. Rawlings were embraced in the note given by George to the mortgage and investment company; and he received from the investment company the difference between the principal of the said note and unpaid interest up to date when he borrowed the money from the said investment company, and the amount of the note executed to it, being something over \$6,000. The mortgage and investment company, with the money borrowed by George, paid off the note to Rawlings, and received the same, with an indorsement thereon showing that it was transferred by Rawlings without recourse. The deed of trust included only the 1,180 acres of land, describing it by metes and bounds, and calling for the 200 acres as the homestead of George on two of its lines. No other land was described in the deed of trust than the 1,180 acres. In the deed of trust was a space thus designated: "This space is to be used to secure subrogation of the lien, and recite facts where a vendor's or other lien is paid off by the note secured hereby." In the space was written: "It is expressly agreed that the taking of this trust deed shall in no wise impair the vendor's lien existing upon the said land, as evidenced by the note of the said W. N. George for \$8,047.50, executed to H. H. Rawlings, and transferred to the Western Mortgage & Investment Company, Limited, and now owned by the said company." It was proved by J. B. Simpson, who was trustee in the deed of trust, that when the said transaction occurred it was agreed between him and George that the note made to Rawlings should be held

by the mortgage and investment company as collateral to secure the note made to it for \$16,500, which agreement was expressed in the deed of trust. To the admission of this testimony the defendant Morrison objected upon the ground that the deed of trust was the best evidence of the agreement; and, second, that the evidence tended to vary the terms of the agreement expressed in the deed of trust,—which objections were overruled, and the testimony admitted. December 26, 1891, the note made by George to the mortgage and investment company having fallen due and being unpaid, suit was filed upon it by the said mortgage and investment company against George, and praying a foreclosure upon the 1,180 acres of land, but not embracing the 200 acres, nor declaring any right against the 200 acres, nor asking any relief with regard thereto. During the pendency of the suit above stated, George and wife, on the 20th day of February, 1892, by warranty deed to appellant, Morrison, conveyed the 1,180 acres of land, expressing that it was conveyed subject to the deed of trust, and also conveyed to Morrison the 200 acres,—the homestead; the consideration of the conveyance of the lands being a note for \$1,500, and \$1,000 paid by Morrison for George. On March 29, 1892, the mortgage and investment company obtained a judgment against George for \$23,451.40, foreclosing the lien of the deed of trust upon the 1,180 acres of land; and in July, 1892, the 1,180 acres of land was sold under and by virtue of the said judgment, and bought in by the mortgage and investment company at the price of \$10,000, which was credited upon the judgment. Lazarus, the defendant in error gave his own note to the mortgage and investment company for the amount of the principal, \$8,047.50, of the note made by George to Rawlings, and took from the mortgage company a transfer of the latter note, and a guaranty that it would be paid. Suit was instituted in the district court of Dallas county upon the note made by George to Rawlings (George and Morrison, with others, being parties defendant); praying for judgment against George for the amount of the note, and a foreclosure of the vendor's lien upon the 200 acres of land, the homestead of George, which had been conveyed to Morrison. The deed of trust given by George to the mortgage and investment company was recorded in Dallas county prior to the sale made by George to Morrison. Trial was had before the court without a jury, and judgment was rendered against George, by default, for the full amount of the note sued upon, and interest; and against Morrison, foreclosing the lien upon the 200 acres of land aforesaid. Morrison appealed to the court of civil appeals, which affirmed the judgment of the district court.

Lazarus is in no better position in this case than the Western Mortgage & Invest-

ment Company would be if it were plaintiff herein. If he really owns the note sued upon, the manner in which he acquired it makes it subject in his hands to all defenses that could be made against it in the hands of the Western Mortgage & Investment Company, and imposes upon him the same requirements that the law would impose upon the mortgage and investment company as a condition precedent to enforcing the lien upon the homestead. For the purpose of this case, we will assume that Morrison must stand in the shoes of George, and is not entitled to make any defense that George could not make if he were still the owner of the land, and occupying it as a homestead. The effect of the transaction between George and the mortgage and investment company, as interpreted and enforced by the judgment of the district court in this case in connection with the judgment in the former suit foreclosing the deed of trust upon, and sale of, the 1,180 acres thereunder, is to give to the money borrowed by George from the mortgage and investment company, in excess of that which was used to take up the vendor's lien note, a lien upon the 1,180 acres of land, superior to that of the vendor's lien note made by George to Rawlings; and the money embraced in the \$16,500 note, which represents the vendor's lien note, is given but a secondary lien upon the 1,180 acres of land, and in that way the burden of the entire note for \$8,047.50 is imposed upon the homestead. Plainly stated, the agreement, thus construed, would be the equivalent of an arrangement as follows: Suppose that George had borrowed the \$16,500 of the mortgage and investment company, with a part of which sum it, at his suggestion, took up the vendor's lien note, with a transfer thereof to it, and instead of giving one note for the \$16,500, as in this case, the investment company held the original vendor's lien note, and took from George a note for the excess over the amount paid for the vendor's lien note; and, to secure the original note and the note given for such excess, suppose George had given a deed of trust upon the 1,180 acres of land, with the specific agreement that the vendor's lien of the \$8,047.50 note should be retained upon all the land, but that the note given for the money borrowed in excess of that which was used to take up the vendor's lien note should have a prior lien upon the 1,180 acres. The district court must have construed the agreement in this case to mean what is expressed in the supposed case stated above; otherwise it could not have allowed the proceeds of the sale of the 1,180 acres to be exclusively applied to the payment of the money embraced in the note given by George to the mortgage and investment company not used to discharge the lien, and at the same time refuse to require the vendor's lien to be foreclosed upon the 1,180 acres before subjecting the homestead to the orig-

mal note. If the district court held the 1,180 acres subject first to the purchase money embraced in the note, it must have applied the sum bid for it to the discharge of the purchase money, or that the land was still subject to the vendor's lien, and that it must be exhausted before the homestead can be resorted to. In so far as priority was given to the borrowed money over the vendor's lien note, the agreement, thus understood, would be in conflict with article 18, § 50, of the constitution, because it would virtually create a new lien upon the homestead, by adding a burden to which it was not before liable, in that the 200 acres would be made liable for the entire purchase-money debt, whereas it was in the first place only liable for its proportionate part thereof.

We do not understand that counsel for the defendant in error claim this to be the proper construction of the agreement, yet it cannot be denied that it is the effect produced by the construction placed upon the contract by the court. The best case which can be made for the plaintiff, Lazarus, upon the facts, is that the vendor's lien was to be preserved upon the whole 1,380 acres of land,—the 1,180 acres to be primarily liable for the \$8,047.50 as represented in the \$16,500 note,—and that the original note given by George to Rawlings should be held by the mortgage and investment company as collateral security for the payment of that sum by the 1,180 acres; the homestead being thus made secondarily liable for the purchase money of the land. By this arrangement the homestead became surety or a guarantor that the 1,180 acres would sell for a sum sufficient to discharge that portion of the note secured by the deed of trust which represented the purchase money of the entire tract. *Durrell v. Farwell*, 88 Tex. 98, 30 S. W. 539, and 31 S. W. 185, and authorities there cited; *Robinson v. Gee*, 1 Ves. Sr. 251. The homestead occupying towards the remainder of the tract the attitude of guarantor or surety, it would be necessary for the party seeking to enforce the lien to first exhaust the 1,180 acres before resorting to the homestead. At least, it would be required, if the primary security had not been first exhausted, that it should in this proceeding be brought before the court, and the lien foreclosed so as to subject the 1,180 acres first; and by the decree of the court the homestead might be sold, if the other land did not sell for enough to pay that part of the note, and thus be made secondarily liable. *Robinson v. Gee*, cited above; *Brandt*, Sur. §§ 98-100; *Evans v. Bell*, 45 Tex. 553. It follows that before Lazarus could subject the homestead to the payment of the vendor's lien debt, under the circumstances of this case, resort must first be had to the 1,180 acres, as the primary security, or he must have sought in this suit to subject it first; and, not having done so, the plaintiff shows no right, as against the defendant Morrison, to have a decree fore-

closing that lien upon the 200 acres which had been set apart as the homestead of George.

It is claimed on behalf of the defendant in error that by virtue of the foreclosure—in the prior suit against George—of the deed of trust upon the 1,180 acres, and the purchase of it by the mortgage and investment company, the vendor's lien was merged in the title which the investment company acquired by its purchase, and that, therefore, it cannot be now subjected to the payment of this note. If this be true, it must necessarily follow that by the manner in which the mortgage and investment company dealt with the primary security, in not foreclosing the vendor's lien thereon, it has put it in such a condition that it cannot be subjected to the payment of the debt for which the homestead stands as surety or guarantor; therefore the lien upon the homestead was discharged. *Durrell v. Farwell*, cited above. If, however, the vendor's lien for the amount of money embraced in the \$16,500 note, which represents the purchase money of the land, and which held a prior lien upon it, was foreclosed upon the 1,180 acres, the land having been sold for a sum more than sufficient to discharge the amount due upon the purchase money of the entire tract, the purchase-money part of the debt, and the lien upon the homestead, would be discharged.

Under no phase of this case can Lazarus enforce the vendor's lien upon the 200 acres, the homestead of George. We will restate our conclusions as follows: If the vendor's lien upon the 1,180 acres was not foreclosed or extinguished by the proceedings in the former suit, then Lazarus cannot have judgment of foreclosure against the homestead in this suit, because he has not made the mortgage and investment company a party, and sought to foreclose the vendor's lien first upon the 1,180 acres, and alternately upon the 200 acres, which he might have done, but has not sought to do, in this proceeding. If the vendor's lien upon the 1,180 acres was not foreclosed in the former suit, but by the foreclosure of the deed of trust, and the sale and purchase of the 1,180 acres under that judgment by the mortgage and investment company, the vendor's lien became merged in the title, and was thereby destroyed, then Lazarus cannot have judgment in this case foreclosing a vendor's lien upon the homestead, because the mortgage and investment company has, by its dealings with the 1,180 acres, the primary security, placed it in such a condition that the lien cannot be enforced thereon, and has thereby discharged the homestead, which only stood as surety for the other land. Again, if the vendor's lien which existed to secure that part of the note given by George to the mortgage and investment company, which represented the original note to Rawlings, was foreclosed upon the 1,180 acres of land in the former suit against George, then, upon the purchase

of the said 1,180 acres by the mortgage and investment company under that judgment, the amount of the bid, which was more than sufficient to have settled the original Rawlings note, must be entered as a credit to the purchase money, as represented in the judgment, and that part of the debt being paid which held a prior lien upon the land, and for which the homestead stood as surety, would discharge the 200 acres, and Lazarus would not be entitled to a judgment foreclosing the lien thereon. The court below erred in holding that the plaintiff showed a right to resort to the homestead for the payment of this debt, and the court of civil appeals erred in affirming that judgment. It appearing to the court that the plaintiff, under the facts of this case, has no right of recovery against the defendant Morrison, the judgments of the district court and the court of civil appeals are reversed as to Morrison, and such judgment will here be entered as should have been entered by the court of civil appeals. It is therefore ordered that the plaintiff, Lazarus, take nothing by his suit, as against Hiram Morrison, and that the defendant Hiram Morrison go hence without day, discharged, and recovery of the plaintiff, Sam Lazarus, all costs in this behalf expended in all of the courts.

HUME et al. v. SCHINTZ et al.

(Supreme Court of Texas. June 26, 1896.)

MANDAMUS—PETITION TO SUPREME COURT—VERDICT—EFFECT—RES JUDICATA.

1. A petition for mandamus will be examined by the supreme court when presented, and, unless probable grounds for issuance of the writ appear, it will be dismissed without citation.

2. A verdict of a jury, when the time has passed in which the court has power to set it aside, is an adjudication of the facts at issue in the case, and may be pleaded in bar of another suit on the same cause of action, though no judgment has been entered upon it.

Petition by J. L. Hume and others for a writ of mandamus against H. V. Schintz and others. Petition dismissed.

Walton & Hill and Geo. F. Pendexter, for petitioners.

GAINES, C. J. This is a petition for a writ of mandamus, and is an outgrowth of the same case which gave rise to the suit of Schintz v. Morris, in which a certificate of dissent from the court of civil appeals of the Third district (35 S. W. 516), was dismissed by this court for want of jurisdiction. We there held that it was not a case in which we had power, under the constitution and statutes, to revise the rulings of the appellate court. The nature of that proceeding appears from our opinion rendered at a former day of the present term.

It appears from the allegations of the present petition that in the original case upon one of the causes of action there was a ver-

dict for the plaintiff, and upon another the jury found for the defendant. Upon motion of the defendants, the verdict and judgment against them was set aside; the court holding, however, that the plaintiff was concluded as to the cause of action in which a verdict had been returned against him. Upon a petition for a mandamus by the plaintiff, the court of civil appeals, holding that the setting aside of the verdict in part set it aside as a whole, commanded the trial judge to proceed with the trial of the cause as if no verdict had been returned. Thereupon, as is alleged in the petition in the present case, the plaintiff dismissed his suit. This petition is filed for the purpose of obtaining a writ of mandamus to compel the judge who tried the case to enter a judgment for the defendants upon the cause of action upon which there was a verdict in their favor. It has been the practice of this court, since its organization under the recent amendments to the judiciary article of the constitution, to examine every petition for a writ of mandamus, with a view to determine whether good grounds for the writ are shown or not, and, unless probable cause appear from the allegations of the petition, to decline to order citation to issue, and to dismiss the case. Having carefully considered the petition before us, we are of opinion that process should not be ordered, and that it should be dismissed.

It is urged that the trial judge, by setting aside so much of the verdict as was in favor of the plaintiff, did not disturb that portion of it which was in favor of the defendants; and that, since the plaintiff has dismissed his suit, it is now the duty of the court to enter judgment upon that part of the verdict which was not formally set aside. If the contention that so much of the verdict as was in favor of the defendants remained in force after the court's action upon the other finding be correct, then it is clear that as to so much the plaintiff could neither take a nonsuit nor dismiss. That is settled by statute in this state. Rev. St. 1895, art. 1301. But the question remains, did the setting aside of the finding in favor of the plaintiff vacate the entire verdict? This question we have not found it necessary to decide, for, in the first place, if the whole verdict be vacated, clearly the petitioners in this court are not entitled to have a mandamus to compel the entry of a judgment upon a verdict which has been set aside; and, in the second, if the verdict in favor of defendants still stands, we still think the writ should be refused. But this second proposition is not so clear, and requires elaboration. A mandamus is an extraordinary writ, and will not issue, provided the applicant have an adequate remedy without it. In order to show the necessity for the writ, the petitioners in this case state, in effect, that they desire a judgment upon the verdict, so that they may plead the judgment in bar of another action.

It is evident that, if they may plead the verdict without a judgment upon it, there is no necessity for the writ that is sought, and we are of opinion that if not vacated it may be so pleaded. As is recognized in *Fowler v. Stonum*, 6 Tex. 60, this is a question upon which there is a conflict of authority. In that case the court say: "The better opinion would seem to be that, without the judgment, the verdict is not evidence of the fact found by it." It is evident that this is not an authoritative declaration of the law. We have not time to discuss fully the authorities upon the point. The text writers seem generally to assert that without a judgment the verdict is not conclusive, but they are sustained by a very few of the cases cited by them; while, on the other hand, we find well-considered cases which assert, in effect, the doctrine that, if the court have no power to set aside the verdict, the verdict itself is conclusive of the issues determined by it. This was the ruling in *Felter v. Mulliner*, 2 Johns. 181, by a very able court, presided over by Chief Justice Kent. The court say: "Being a verdict for the defendant, it was a bar to a further prosecution by the plaintiff below for the same cause. *Nemo debet bis vexari pro eadem causa*. The omission by the justice to render judgment according to the verdict did not prevent it from being a bar to a new suit. The justice was bound to render a judgment thereon, according to the finding. He had no discretion. The reason of the rule that the verdict or *postea* is no evidence until the entry of final judgment does not apply to the case, because we know that the justice has no authority to arrest a judgment or award a new trial." That ruling has been followed in subsequent cases in the same state. *Brockway v. Kinney*, Id. 210; *Kane v. Dulex*, 3 E. D. Smith, 127. See, also, *Henderson v. Kenner*, 1 Rich. Law, 474; *Deloach v. Worke*, 3 Hawks (N. C.) 36. While it is held, in some instances, that the verdict alone is not sufficient, we think it will usually be found, from an examination of such cases, that the ruling is put upon the ground that it may have been arrested or set aside. See *Fisher v. Klitchingman*, Willes, 367. When it is shown that the verdict has not been set aside, and when it appears that the court has adjourned for the term, and has lost its power to vacate it, we see no good reason why it should not be held conclusive of the issues determined, and we doubt if any very well-considered case can be found in which the contrary is held. Coke says: "An issue found by a verdict shall always be intended true, until it be reversed by attain" (*Co. Litt* 227b), and upon such a question there is no higher authority. When Coke wrote, attain was the usual method of impeaching and setting aside an improper verdict.

Upon principle, there ought to be no difficulty in deciding the question. The jury are the judges—the triors—of questions of fact.

Their award, until set aside, is conclusive, and it has been held by this court that it is the imperative duty of the court, in the first instance, to give judgment in accordance with the verdict. *Lloyd v. Brinck*, 35 Tex. 1. The judgment of the court determines no question of fact in a jury case. It is but the effect which should follow, as a matter of course, upon the verdict, and we think upon the question of *res adjudicata* to consider only the judgment, and to disregard the verdict, is to look to the form, and to reject the substantial effect, of the proceeding. In *Claiborne v. Tanner*, 18 Tex. 68, this court said: "There can be no clearer principle than that, where a jury has intervened, and all the issues have been submitted to their decision, their verdict must constitute the basis of the judgment. The court cannot look to the evidence on which the verdict was found in order to determine what judgment to render, but must look alone to the verdict; for it is upon that which the jury have found, not what they might or ought to have found, that the court proceeds to render judgment. The judgment is the conclusion of law upon the facts of the case, as found by the verdict of the jury." The verdict is the determination of the issues of fact, and, when the proceedings have reached that stage that the court is without power to set it aside without action having been taken upon it, we think it conclusive of the same issues in another suit between the same parties.

Not finding it necessary to decide whether the action of the trial court in setting aside the verdict of the original case in part vacated it as a whole, we intimate no opinion upon the point. We merely hold that in neither event are the petitioners entitled to the writ here prayed for. The application for a mandamus is accordingly dismissed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. EDWARDS.

(Supreme Court of Texas. June 25, 1896.)

NEGLIGENCE—DANGEROUS PREMISES—INJURY OF CHILD.

Defendant railroad company owned a yard fenced on three sides and open on the side next its track, in which it stored material used in the construction and repair of its road. Children sometimes entered the yard to play, but were uniformly ordered out by defendant's servants when seen. Plaintiff, a little girl eight years old, was playing in the yard, and was sent home by defendant's watchman, but returned as soon as he was gone, and while attempting to climb upon some ties, which were insecurely piled, one fell and injured her. Held, that defendant was not liable for the injury. 32 S. W. 815, reversed.

Error to court of civil appeals of Fifth supreme judicial district.

Action by Mollie Edwards, by her next friend, against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for

plaintiff, which was affirmed by the court of civil appeals (32 S. W. 815), and defendant brings error. Reversed.

Foster & Wilkinson, for plaintiff in error.
E. J. Smith and Wolfe & Hare, for defendant in error.

GAINES, C. J. Mollie Edwards, a minor suing by her next friend, brought this action against the Missouri, Kansas & Texas Railway Company of Texas to recover damages for personal injuries alleged to have been caused by the negligence of the defendant company. The negligence was alleged to consist in keeping a yard in which children were accustomed to play, and in piling a number of railroad bridge ties in such manner that they fell upon the plaintiff while playing upon them, and injured her. The facts disclosed by the testimony are as follows: The defendant company owned a lumber yard, which was used for the purpose of storing bridge material and other like lumber. It was fenced, except upon one side, along the company's railroad tracks. The plaintiff, at the time of the accident, was about eight years old, and lived, with her mother, just across an alley from the yard. Not being fenced along the track, the yard was easily accessible. It was shown that the plaintiff and other children were accustomed to resort there for the purpose of playing, but it was also shown that they were uniformly ordered out by the servants of the company. The parents of some of them were also warned to keep them away. It appeared, however, that, notwithstanding the persistent efforts of the servants of the company, the children would return. Just before the accident happened, the plaintiff was sent home by the watchman, and went out; but as soon as he was called away by other duties she returned. In attempting to climb upon the pile of bridge ties one of them fell down, and crushed her toes. There was evidence tending to show that the ties were insecurely stacked. The mother of the plaintiff testified in effect that she knew of the plaintiff's having visited the yard on former occasions and had punished her several times for it. There was a verdict and judgment for the plaintiff in the trial court, which judgment was affirmed in the court of civil appeals. 32 S. W. 815. The case comes to this court upon a petition for a writ of error, which has been granted.

The errors assigned in the court of civil appeals and which are insisted upon in this court are upon the charge of the court and upon the refusal to give certain special instructions requested in behalf of the defendant. But in the view we take of the case no critical examination of the charges is necessary. Two of the requested instructions were, in our opinion, statements of the law of the case, as applied to the facts in evidence, and should have been given. They

were as follows: (1) "Defendant was under no obligation to keep watch over its premises in order to exclude children therefrom. If the watchman of defendant discovered plaintiff, with others, playing in the yard, shortly before the accident, and requested them to leave, and plaintiff thereupon withdrew from the premises, but thereafter returned, without the knowledge of defendant's watchman or person in charge of its property, for the purpose of playing in the yard, and while so doing was injured, without such watchman having knowledge of her being then present, and while playing there pulled down upon herself or caused to fall a tie or portion of a pile of ties upon which she was climbing, defendant would not be liable to plaintiff by reason of any injury so received." (2) "Defendant was under no obligation to plaintiff to keep its lumber yard in safe or proper condition for plaintiff to play thereon. The yards were its property, and it was entitled, as to plaintiff, to use them for piling lumber, and to pile the same in such form as it found convenient, with due regard to the safety of such persons only as might properly use the yards. It was under no obligations to so pile or place its bridge ties as to prevent injury by a child climbing upon them, or to so pile, fasten, or brace the same that the child could not, in trying to climb thereon, pull one or more of them down upon herself; nor can it be held negligent for failing to so pile, brace, or secure them, if the injured person was at the time thereon without its knowledge or invitation." Ordinarily, the owner of property is not bound to keep it in such condition as to protect trespassers upon it from danger. Liability may be incurred by making an excavation upon one's own land sufficiently near a street or highway that another may, in the exercise of reasonable care, fall into it, or by exposing dangerous machinery or appliances in or near some public place, whereby one without fault on his part may be injured. Especially in the latter case may liability be incurred when children are the victims. Until they have learned some discretion, they cannot be held guilty of contributory negligence. *Lynch v. Nurdin*, 1 Q. B. Div. 29, is a case of this class. There the "defendant negligently left a cart unattended. The plaintiff, a child of seven, got upon the cart in play. Another child incautiously led the horse on, and the plaintiff was thereby thrown down and hurt. It was held that the plaintiff could recover." There are numerous American decisions which proceed upon the same principle. With reference to children, there is still another class of cases which go a step further, and hold that the owner of land may not place upon it dangerous machinery, which is alluring to children, without securing it, so as to protect them against injury while tampering with it. To this class belong what have become commonly known in legal parlance as "The Turntable Cases"; such as *Evansich v. Railway Co.*

(In this court), 57 Tex. 123, and *Railroad Co. v. Stout* (in the supreme court of the United States), 17 Wall. 657. This line of decision has not been uniformly followed, and has met with much adverse criticism, and it seems to us that with respect to the care which the owner of land is required to exercise in order to secure from injury children who may trespass upon it they go to the limit of the law. They proceed upon the ground that turntables are attractive to children. In both of the cases cited stress was laid upon this fact, and also upon the fact that the use of the turntables by children was known to the servants of the defendants. The ruling in these cases must be justified, we think, upon one of two grounds; either that the turntables possess such peculiar attractiveness as playthings for children that to leave them exposed should be deemed equivalent to an invitation to use them, or that, when unsecured, they are so obviously dangerous to children that, when it is discovered that they are using them, it is negligent on part of the owner not to take some steps to guard them against the danger. But when it is said that it is enough that the object or place is attractive or alluring to children, and when it is said, as has been intimated, that the fact that they resort to a particular locality is evidence of its attractiveness, the question suggests itself, what object or place is not attractive to very young persons who are left free to pursue their innate propensity to wander in quest of amusement? What object at all unusual is exempt from infantile curiosity? What place, conveniently accessible for their congregation, is free from the restless feet of adventurous truants? Here the language of an eminent judge in disposing of a similar case is appropriate: "There are streams and pools of water where children may be drowned; there are inequalities of surface where they may be injured. To compel the owners of such property either to inclose it, or fill up their ponds and level the surface so that trespassers may not be injured, would be an oppressive rule. The law does not require us to enforce any such principle, even where the trespassers are children. We all know that boys of eight years of age indulge in athletic sports. They fish, shoot, swim, and climb trees. All of these amusements are attended with danger, and accidents frequently occur. It is part of a boy's nature to trespass, especially where there is tempting fruit; yet I never heard that it was the duty of the owner of a fruit tree to cut it down because a boy trespasser may possibly fall from its branches. Yet the principle contended for by the plaintiff would bring us to this absurdity, if carried to its logical conclusion. Moreover, it would charge the duty of the protection of children upon every member of the community except their parents." *Paxson, J., in Gillespie v. McGowan*, 100 Pa. St. 144. We do not see that a yard

kept by a railroad company for the deposit of old ties and other rejected material, or new material for railroad repair and construction, possesses any greater attraction for children than any other place of deposit of any similar material kept by people pursuing other avocations. Is a pile of ties any more alluring than a pile of wood kept for fuel, or a pile of rails laid aside for making or repairing a farm fence? Children may injure themselves in playing upon either. In such a case we conclude that the law does not devolve the duty upon the owner of the yard to see that the ties are so placed that children may not injure themselves while playing upon them. It has been so held in effect in many cases. See *Vanderbeck v. Hendry*, 34 N. J. Law, 467; *McAlpin v. Powell* (Court of Appeals) 55 How. Prac. 163; *Railway Co. v. Cunningham* (Tex. Civ. App.) 26 S. W. 474; *Railway Co. v. Crum* (Tex. Civ. App.) 25 S. W. 1126. We refer especially to the able and elaborate opinion of Mr. Justice Sherwood in *Barney v. Railroad Co.* (Mo.) 28 S. W. 1069, which contains a thorough discussion of the cases bearing on the question.

Applying the principles announced to the facts of this case, we are of opinion that the plaintiff was not entitled to recover. There was no peculiar allurements about the yard of the defendant company. Though the ties may have been inartistically piled, we do not see that any danger should have been anticipated from the manner in which they were stored. A witness swore that children seemed fond of playing about the lumber. If any one ever tampered with the ties before, it does not appear from the testimony. The defendant could not, consistently with the use of its yard, fence it along its track. Children were persistently ordered out of the yard, and there is no ground for claiming an implied or constructive invitation to come upon the yard. In any possible aspect of the case the charge which was given by the court was erroneous in authorizing the jury to find for the plaintiff, without reference to the question whether the servants of the company had exercised ordinary care to keep children out of its yard. If, in the opinion of the jury, such care had been exercised, then the verdict should have been for the defendant. But the court should have gone further, and given the requested instructions which have been quoted above, and this is equivalent to saying that it should have directed a verdict for the defendant. The judgments of the district court and of the court of civil appeals are reversed, and the cause remanded.

TEXAS CENT. RY. CO. v. FRAZIER et al.
(Supreme Court of Texas. June 22, 1896.)

MASTER AND SERVANT—VICE PRINCIPALS.

The fact that the engineer, who, together with the brakemen on the train, is under

the control of the conductor, gives the signals upon which it becomes the duty of the brakemen to put on the brakes, does not make him the vice principal of the railroad company within the meaning of Act March 10, 1891, which provides that "all persons engaged in the service of any railway corporation who are intrusted by such corporation * * * with the authority to direct any other employé," are vice principals of such employer.

Error to court of civil appeals of Third supreme judicial district.

Action by Etta Frazier and another against the Texas Central Railway Company. There was a judgment of the court of civil appeals (34 S. W. 664) affirming a judgment for plaintiffs, and defendant brings error. Reversed.

Cotton & Roberts and Baker & Campbell, for plaintiff in error. Dewey Lankford, Lindsey & Goodson and Eldson & Allen, for defendants in error.

DENMAN, J. Mrs. Etta Frazier, in behalf of herself and minor son, sued the Texas Central Railroad Company to recover damages claimed to have been suffered by reason of the death of her husband, J. W. Frazier, alleging (1) that such death was the result of carelessness of the engineer upon the freight train, in running over some cattle, causing the wreck of the train upon which said Frazier was one of the brakemen; and (2) that at the time of the accident said engineer was intrusted by the defendant railroad with the authority to direct said Frazier in performance of his duties as brakeman, and was therefore a vice principal of defendant. The evidence showed that under the rules of the company the train crew consisted of the engineer, fireman, conductor, and two brakemen, of which the deceased, Frazier, was one; that as they were running along at about the rate of 20 miles per hour, the engineer, fireman, conductor, and Frazier being on the engine, cattle were discovered lying on the track a short distance in front of the engine, whereupon the engineer gave the signal for brakes, and Frazier went back onto the cars for the purpose of setting the brakes, and while he was performing that duty the train ran over the cattle, resulting in a wreck of some of the cars, and injuries to Frazier from which he died. Though it is earnestly disputed by plaintiff in error, let it be conceded, for the purposes of this opinion, that the evidence warranted the jury in believing that the engineer was guilty of negligence resulting in Frazier's death. The evidence showed that under the rules of the company (1) the entire train crew were under the direction and control of the conductor during the trip; (2) it was the duty of the engineer, whenever in his judgment, in the operation of the train, it was necessary to have the brakes applied, to give certain signals therefor from the engine, such signals being the only method by which he could order the application of the brakes;

(3) upon the giving of such signals by the engineer, it was the duty of the brakemen to apply the brakes. Mrs. Frazier recovered judgment against the railroad, which judgment being affirmed by the court of civil appeals, the railroad company, as plaintiff in error, has brought the case to this court, assigning as error that the court of civil appeals erred in not sustaining its assignment in that court to the effect that the court below erred in rendering judgment for plaintiff, because the verdict is without evidence in the record to support it; there being no evidence that the engineer was a vice principal of the defendant company, as claimed by plaintiff. The question, stated in a different form, is, were the engineer and the brakeman Frazier fellow servants, under the act of March 10, 1891, which was in force at the time of the accident? If they were, the judgment must be reversed. In *Railway Co. v. Warner*, 35 S. W. 364, this court held that under the act of 1893 (which seems to be the same as the act of 1891, as far as this case is concerned), in order to constitute two persons fellow servants, the following distinguishing characteristics must be found concurring and common to them: (1) They must be engaged in the common service; (2) they must be in the same grade of employment; (3) they must be working at the same time and place; and (4) they must be working to a common purpose. We do not understand that any question is made as to the correctness of the construction placed upon the statute in that case, nor do we understand it to be denied that the first, third, and fourth of said characteristics are shown by the evidence to be concurring and common to the engineer and Frazier in the case before us; but defendant in error denies that they "were in the same grade of employment," for the reason that, under the *Warner Case*, the test as to whether they were in the same grade of employment was decided to be whether one had authority over the other while engaged in the common service, and the evidence here shows that the engineer had authority over Frazier, in that he had the power, by signal, to direct him to apply the brakes. The purpose of the statute was to impute to the master the negligence of an employé upon whom he has conferred authority or power to influence the action or volition of another employé in the performance of his duties. Under the common-law rule, as settled in this state before the statute, the negligence of an employé would not have been imputed to the master unless he had the power to employ and discharge, it being assumed that such power was necessary to subject the will of the latter to that of the former. The statute, however, is based upon the theory that the authority or power in one employé to superintend, control, or command, or direct another employé in the performance of his duties, as effectually influences and subjects to the

former the will of the latter as does the power to employ and discharge. But it was not the purpose of the statute to impute to the master the negligence of an employé upon whom he had conferred no such power, but had merely imposed the duty, in certain contingencies arising in the course of his employment, of giving a signal whereby another employé would know that the occasion had arisen for him to perform some duty imposed upon him by the rules governing his employment, leaving such employé free to perform such duty in his own way under such rules. In such a case there is no subjection of the will of one to that of the other. Under the common-law rule, as established in Ohio, there is imputed to the "master the negligence of a servant to whom he has delegated authority over other servants." In the case of *Railway v. Ranney*, reported in 5 Am. & Eng. R. Cas. p. 533, the question before the supreme court of Ohio was whether an engineer who gave the signal for the brakemen to take off the brakes was, in so doing, exercising any authority over the latter. Upon this question the court say: "Indeed, the only pretense found in the testimony for the claim of defendant in error that brakemen are subordinate to the engineer of the train is found in the fact that it is the duty of brakemen to observe and obey certain signals given by the engineer, to wit (rule 18): 'One long blast of the whistle is the warning of the approach of a train; one short blast is a signal for putting down brakes and stopping the train; two short blasts, for releasing the brakes and starting the train; three, for backing the train.' It is contended that the signals are in the nature of orders or commands which the engineer is authorized to give to brakemen, which they are bound to obey, and hence the relation of superior and subordinate is created. A majority of the court do not so understand either the purpose or effect of the rule. These signals are so named properly, and are intended to notify all concerned of the thing signified. They are addressed to the conductor as well as brakemen, and it is the duty of the conductor to see that brakemen perform the duty signified. This duty is imposed upon the brakemen by force of the rule itself, and not by virtue of any authority vested in the engineer over the brakemen. The signal is a mere notice. The rule is the order of the company to the brakemen directly. Suppose a train is signaled by a station agent, as this train was, to stop for orders. It thereby becomes the duty of the conductor, as well as of each employé on the train, to stop for orders; and yet no one can contend that such station agent who gives the signal is the superior, and train crew subordinate employés of the company, within the meaning of the rule under consideration. A variety of signals, under a variety of circumstances, are required to be given by different employés of the company, to signify

that an occasion exists for the performance of a particular duty; but it would be absurd to hold that in each case the employé giving the signal is a superior servant, to whom all others to whom information is thus communicated are subordinated, so that the company would be responsible to them for any act of negligence of the employé who gave the signal, whether such negligence was in giving the signal, or in the performance of other duties." *Railroad Co. v. Camp*, 13 C. C. A. 233, 65 Fed. 953. We are of the opinion that the signal given by the engineer for brakes was a mere notice to the brakeman Frazier that the occasion had arisen for him to perform a duty imposed upon him by the rules; that the fact that the engineer was intrusted by the company with the discretion of determining when the brakes should be applied, and to signal therefor, did not give him any "authority of superintendence, control or command," or "authority to direct" Frazier in the performance of his duties; that Frazier, in attempting to set brakes in the performance of his duties, was governed and controlled by the direction and command of the rule, and not of the engineer; and that, therefore, under the statute, they were "in the same grade of employment," and fellow servants. It follows that the assignment of error was well taken, and that the judgments of the trial court and court of civil appeals must be reversed, and the cause remanded.

HUMPHREYS et al. v. EDWARDS et al.
(Supreme Court of Texas. May 25, 1896.)

APPEAL—SUPREME COURT—DECISION.

Under Rev. St. 1895, art. 941, providing that when the judgment of the court of civil appeals, reversing and remanding the case, practically settles the case, which fact is shown on the petition for a writ of error, the supreme court, on affirmance, shall render final judgment, the supreme court, on affirmance of a judgment of the court of civil appeals reversing a judgment for plaintiff in trespass to try title and remanding the case, will enter final judgment directing that plaintiff take nothing by his suit.

Error to court of civil appeals of Fifth supreme judicial district.

Trespass to try title by John S. Humphreys and others against A. H. Edwards and others. On appeal by defendants, the court of civil appeals reversed a judgment in favor of plaintiffs, and remanded the cause. 36 S. W. 333. On the ground that the decision of reversal practically settles the case, the original plaintiffs bring error. Decision affirmed, and final judgment rendered against plaintiffs in error.

Lee R. Stroud, for plaintiffs in error. R. E. Chandler and Word & Charlton, for defendants in error.

GAINES, C. J. This is a writ of error to a judgment which reversed the judgment of

the trial court and remanded the cause. In order to give this court jurisdiction, it was alleged in the petition for the writ of error that the decision of the court of civil appeals practically settles the case. We have carefully examined the case, and have found no error in the rulings of that court. We refer to the able opinion of the chief justice, who spoke for the court, for the grounds upon which our conclusions are based. When we acquire jurisdiction of a reversed and remanded case upon the allegation that the decision of the court of civil appeals practically settles the case, and we affirm the decision of that court, the statute requires us to render final judgment in accordance with that decision. Rev. St. 1895, art. 941. That is to say, this court must affirm the judgment of the court of civil appeals in so far as it reverses the judgment of the trial court, and render judgment against the plaintiffs in error, so as finally to settle the case. Accordingly the judgment of the court of civil appeals, in so far as it reverses the judgment of the district court, is affirmed; but in so far as it remands the cause it is set aside, and judgment is here rendered that plaintiffs in error take nothing by their suit, and that defendants in error go hence without day, with their costs.

COX v. STATE:

(Court of Criminal Appeals of Texas. June 27, 1896.)

CRIMINAL LAW—EVIDENCE ON PRELIMINARY EXAMINATION.

Where a witness is absent from the final trial, his testimony at the examining trial, which was there reduced to writing, cannot be introduced as original evidence against the accused, over his objection.

Appeal from district court, Hunt county; E. W. Terhune, Judge.

Ed. Cox was convicted of bringing stolen horses into the state, and appeals. Reversed.

Mann Trice, for the State.

DAVIDSON, J. Appellant prosecutes this appeal from a conviction for bringing stolen horses into this state from Oklahoma territory. The witness Glaser, one of the alleged owners of the stolen property, testified on the examining trial, and his evidence was reduced to writing. He resided then in Oklahoma territory, and did so at the time of this trial. His examining trial evidence was used by the state upon said final trial, over appellant's objection that this character of testimony could not be used against him for any purpose, under the laws of this state. The objection was well taken. This character of evidence, when properly objected to, cannot be used against an accused person as original evidence. See *Cline v. State* (decided at Austin term, 1896) 36

S. W. 1099. The judgment is reversed, and the cause remanded.

HENDERSON, J., absent.

MORALES v. STATE.¹

(Court of Criminal Appeals of Texas. June 26, 1896.)

WITNESS—CREDIBILITY—IMPEACHMENT.

Under Code Cr. Proc. 1895, arts. 770, 790, allowing defendant in a criminal case to testify in his own behalf, and providing that a confession made by a defendant while in jail cannot be used against him unless he was duly warned, the state cannot examine a defendant, when a witness in his own behalf, as to a confession made by him while in jail, without being warned, for the purpose of laying a predicate for his impeachment, and then show by witnesses that he made the confession. *Davidson, J., dissenting. Quintana v. State*, 16 S. W. 253, 29 Tex. App. 401, and *Ferguson v. State*, 19 S. W. 901, 31 Tex. Cr. R. 93, distinguished. *Phillips v. State* (Tex. Cr. App.) 34 S. W. 272, overruled.

Appeal from district court, Angelina county; James T. Polley, Judge.

Patronia Morales was convicted of murder in the first degree, and appeals. Reversed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death, and he prosecutes this appeal.

1. In this case the court gave a very lengthy charge. After defining murder in the first and second degrees, and malice, both express and implied, he then proceeded to charge on murder in the first and second degrees, manslaughter, and self-defense. No exception was taken to this charge, but, inasmuch as it is the duty of the court to correctly charge the law applicable to the case, it becomes our duty to review said charge. In order to present this matter properly, we will quote in extenso from the charge itself:

"(9) If, about the time and place charged in the indictment, the defendant went to the house of the deceased, and there stabbed and killed the deceased, and that such killing was in the perpetration of robbery, or in the attempt at the perpetration of robbery, then the defendant would be guilty of murder in the first degree; or if, about the time and place charged in the indictment, the defendant stabbed and thereby killed the deceased, and at the time he thus stabbed him the deceased had done nothing to or towards the defendant which, of itself, or by words accompanying it, made it reasonably appear to the defendant, viewing it from his standpoint, that he, the deceased, then intended to kill the defendant, or to inflict on him some serious bodily injury, and thereupon the defendant stabbed the deceased, and inflicted on him a wound or wounds from which he died, and the defendant thus inflicted said

¹ For dissenting opinion, see 36 S. W. 846.

wound on the deceased in the execution or in pursuance of a formed design to kill the deceased, and that such design was formed in the mind of the defendant when his mind was sedate and deliberate, and therefore with express malice, such killing thus done would also be murder in the first degree.

"(10) If, about the time and place charged in the indictment, the defendant intentionally and unlawfully stabbed and killed the deceased, and at the time he thus stabbed him the deceased had done nothing to or towards the defendant which, of itself, or by words accompanying it, made it reasonably appear to the defendant, viewing it from his standpoint, that the defendant then intended to kill the deceased, or to inflict on him some serious bodily injury, then such killing under such circumstances would be murder in the second degree, and, if you so believe beyond a reasonable doubt, you will convict the defendant of murder in the second degree, and assess his punishment at confinement in the penitentiary for any period of time you see fit, being not less than five years.

"(11) If, about the time and place charged in the indictment, the defendant went home with the deceased, and, after they had arrived at the deceased's house, the deceased cursed and abused the defendant, and in the dark made an assault upon the defendant, and the defendant stabbed and killed the deceased, and at the time he thus stabbed the deceased he was moved by anger, fear, or sudden resentment arising out of the provocation then offered to him by the deceased, then he would be guilty of manslaughter.

"(12) In connection with and bearing upon the law of self-defense, you are instructed if, about the time and place charged in the indictment, the defendant and the deceased went to the house of the deceased, and, after arriving there, the deceased made a violent attack upon the defendant, and cursed and abused the defendant, and from the acts and declarations of the deceased it reasonably appeared to the defendant that his life was in danger, or that serious bodily injury was then about to be inflicted upon him by the deceased, and, acting under such belief and apprehension, the defendant stabbed and killed the deceased, then the defendant would not be guilty of any offense, and, if you so believe, you will acquit the defendant on the ground of self-defense. And, in passing upon the question as to whether the defendant acted in self-defense, the facts and circumstances transpiring at the time of the killing must be viewed from the standpoint of the defendant, and from none other; and in connection with this portion of the charge, if you have a reasonable doubt as to what the real facts are, you will give the defendant the benefit of the doubt, and acquit him.

"(13) Keeping in view the foregoing rules of law, if you find, from the evidence, beyond a reasonable doubt, that the defendant, Patronia Morales, in the county of An-

gelina, and state of Texas, at any time before the 15th of October, 1895, did stab and thereby kill Juarez Hernandez, and that such killing was with malice aforethought, either express or implied, then you will convict the defendant of murder, and you will then inquire as to whether he is guilty of murder in the first degree or murder in the second degree; and in this connection you are instructed, if you believe, beyond a reasonable doubt, that defendant stabbed and killed the deceased, and that such killing was done in the perpetration of robbery, or in the attempt at the perpetration of robbery, or that he stabbed and killed the deceased in pursuance of a formed design to kill him, which design was formed when his mind was cool, calm, sedate, and deliberate, and thereby upon express malice, in either case you will convict the defendant of murder in the first degree, and assess his punishment at death or by confinement in the penitentiary for life.

"(14) If you have a reasonable doubt as to whether the defendant is guilty of murder in the first degree, you will acquit him of that offense, and inquire whether he is guilty of murder in the second degree. And in this connection, if you believe that the defendant unlawfully and voluntarily stabbed and killed the deceased with malice aforethought, as that term has heretofore been explained, but that such killing was not done in the perpetration or in the attempt at perpetration of robbery, or with express malice, as that term has heretofore been explained to you, then you will find the defendant guilty of murder in the second degree, and assess his punishment at confinement in the penitentiary for any term you see fit, not less than five years.

"(15) If you have a reasonable doubt of the guilt of the defendant of murder, you will acquit him of that offense, and inquire whether he is guilty of manslaughter; and in reference to manslaughter you are instructed that if you find, from the evidence, beyond a reasonable doubt, that the defendant, in the county of Angelina and state of Texas, at any time within three years before the 15th day of October, 1895, did stab and kill Juarez Hernandez, and that such killing was done under the immediate influence of sudden passion, arising from an adequate cause, as these terms have heretofore been explained to you, then you will convict the defendant of manslaughter, unless you acquit the defendant on the ground of self-defense, as the term 'self-defense' has heretofore been explained in this charge. If you should convict the defendant of manslaughter, you will assess his punishment at confinement in the penitentiary for any term of years you see fit, not less than two years, nor more than five years."

We will point out such defects in the charge as occur to us. Appellant was convicted of murder in the first degree, and, if the charge on first degree, and the charges

on less degrees of culpable homicide, and the charge on self-defense were of such a character as not to present the issues clearly and fairly to the jury, they were calculated to impair the rights of the defendant. It would appear that, in the first portions of said charges above copied, the court intended merely to state the legal principles governing the case, and then to apply the principles so laid down to the facts of the case. For instance, after the court states what he has to say on the law of self-defense, he then says, "Keeping in view the foregoing rules of law," and then proceeds to charge the jury, applying the law to the facts of the case. If this be true, then as to self-defense the court merely laid down the principles governing the law of self-defense, and has not applied the law to the facts on this subject. But it rather appears to us that the first portion of said charge was an attempt to charge the law as applicable to the facts of the case, and the last portion was but a reiteration in different form of the preceding charges on the same subject. If this be true, then the jury were charged on the law of self-defense. In the charge of the court on murder in the first degree (see paragraphs 9 and 13), the charge as to murder in the first degree in the perpetration of robbery or attempted perpetration of robbery appears to be in accordance with the approved forms. See *Sharpe v. State*, 17 Tex. App. 486. In said last-mentioned paragraphs, the court then proceeds further to charge on murder in the first degree committed upon express malice. The court combines with this charge something in the nature of a charge on self-defense, and, when analyzed, both of these charges in a roundabout way instruct the jury, in effect, that if they believe that the killing was not done in self-defense, but was done in pursuance of a previously formed design to kill, in a mind calm, sedate, and cool, that such killing was upon express malice. As stated, this is the effect of these charges, but it takes some analysis even of a legal mind to run out this result, and no doubt it presented to the jury a serious question for proper consideration. Paragraphs 10 and 14 contain the court's charge on murder in the second degree. In paragraph 10 no allusion is made to the state of mind in which the intent to kill may have been formed, unless we recur back to former portions of the charge. The court here merely tells the jury that if the defendant intentionally and unlawfully stabbed and killed the deceased, and that he did so not in his self-defense, and that he intended when he so stabbed deceased to kill him, then such killing under such circumstances would be murder in the second degree. No reference whatever is made to the state of mind in which the intent was formed. We would further observe, in connection with this portion of the charge, in that part referring to self-defense, that the words "de-

fendant" and "deceased" appear to be transposed, if the record is a correct copy of the original charge, and makes it appear, "If deceased was not doing some act which caused the defendant to believe that the defendant intended to kill deceased, or inflict on him some serious bodily injury," etc. This, of course, is not what the judge means; but if this expression was contained in the original charge it was liable to confuse the jury. However, in the fourteenth paragraph of the charge, the last error alluded to does not occur, and the jury are distinctly told that "if they believe the defendant unlawfully and voluntarily killed the deceased with malice aforethought, as that term has heretofore been defined, and that such killing was not upon express malice, or done in the perpetration or attempted perpetration of robbery, to find the defendant guilty of murder in the second degree." In paragraph 11 of the charge the court instructs the jury: "If the defendant went home with the deceased, and after they arrived there the deceased cursed and abused the defendant, and in the dark made an assault upon the defendant, and defendant stabbed and killed deceased, and at that time he was moved by anger and sudden resentment arising out of the provocation thus offered to him, the defendant would be guilty of manslaughter." And this same charge is in effect repeated in paragraph 15. This assault alluded to is not further described. In the charge on self-defense it is true that, if the jury would look back and investigate, they would see that the court had charged that if the assault endangered the life of the defendant, or threatened his person with serious bodily injury, he would be justifiable; but in our opinion the charge on manslaughter should have itself contained the character of assault which would merely serve to reduce the homicide to manslaughter, and the charge should also have shown, in order to reduce to manslaughter, that the passion engendered must render the mind of the defendant incapable of cool reflection. But this, perhaps, was to the defendant's benefit. As stated before, this charge was not excepted to; but we think this charge, viewed singly or as a whole, did not clearly present the issues in the case, and was calculated to confuse the jury, and in a case where the death penalty has been inflicted it becomes our duty to closely scan the provisions of the charge, and see that all of the salient features of the case were fairly, lucidly, and clearly presented to the jury. The learned judge who tried this case appears to have been selected as a special judge, and doubtless this was the first occasion of his presiding in this character of cases. While the charge itself manifests a comprehensive knowledge of the questions involved in the case, we do not think the various features of the case were as clearly presented as they should have been; and on a new trial of this case we appre-

hend, as the learned judge who tried this case now adorns that bench, that there will be no difficulty about a proper charge in this case.

2. When the appellant was on the stand in his own behalf, the state asked him if he had not told Spradley and Manchaca, the sheriff and deputy sheriff of Nacogdoches county, while he was in the jail of said county, as follows: "Didn't you tell Manchaca that you killed deceased for his money, and that the negro Dick Sherman got a part of the money, and you threw the other money away at the time you was arrested?" and "if he didn't tell Spradley he killed deceased for his money, but that he did not get any money." Counsel for the defendant objected to this testimony, because the defendant at the time was in jail, and had not been cautioned by the sheriff as the law requires. Counsel for the state insisted on this testimony for the purpose of laying a predicate to impeach said witness. The defendant answered that he had not made any such statements. The state was then permitted to prove by said Spradley that said defendant did tell him, while in the jail of Nacogdoches county, that he killed deceased for his money, and that he did not get any money; and by Manchaca that he killed deceased for his money, and that the negro Dick Sherman got a part of the money, and that he threw the money away at the time he was arrested. This testimony was also objected to on the ground that the statements were made in jail, and the defendant had not been duly warned before he made said statements. The objection was overruled, and the defendant reserved his bill of exceptions. Article 790, Code Cr. Proc. 1895, which brings forward the act of the 21st legislature passed in 1889, provides as follows: "Any defendant in a criminal action will be permitted to testify in his own behalf therein, but the failure of any defendant to so testify shall not be taken as a circumstance against him; nor shall the same be alluded to or commented on by counsel in the case; provided that, wherever there are two or more persons jointly charged or indicted and a severance had, the privilege of testifying shall be extended only to the person on trial." Article 789 of said Code Cr. Proc. 1895, provides as follows: "The confession of a defendant may be used in evidence against him, if it appear that the same was freely made, without compulsion or persuasion under the rules hereafter prescribed." Article 790 provides: "A confession shall not be used, if at the time it was made the defendant was in jail, or other place of confinement, nor while he is in the custody of an officer, unless such confession be made in a voluntary statement of the accused taken before an examining court in accordance with law, or be made voluntarily, after having been first cautioned that it may be used against him, or unless in con-

nection with such confession he make statement of facts, or of circumstances that are found to be true, which conduces to establish his guilt,—such as the finding of secreted or stolen property, or the instrument with which he states the offense was committed." In *Quintana v. State*, 29 Tex. App. 401, 16 S. W. 258, a construction of these statutes came before the court. In that case, however, it was said that the testimony upon which the predicate was laid while the defendant was in jail, and upon which he was impeached, was not a confession. In that case the charge was one of theft of a horse. "The defendant took the stand as a witness in the case, and testified that he had never had possession of the horse alleged in the indictment to have been stolen. The district attorney, on cross-examination of the defendant, asked him if he had not stated to the witness Bailey that he (defendant) had had possession of said horse, and that he had gotten the same from another Mexican in El Paso county, near Mundy's Springs. Defendant replied that he had not so stated, whereupon Bailey was brought on the stand, and testified that defendant had so stated to him in the presence of the defendant's counsel; and it further appeared that this statement was made while the defendant was in jail and when he had not been warned." In the opinion of a majority of the court as to this testimony they say: "Instead of being an admission or confession of guilt, the statement of the defendant was a denial of that fact. If he received the horse from another Mexican in El Paso county, he could not have been guilty of the theft of the horse in New Mexico, even if he knew that the horse was stolen when he received it." And said case was followed in the case of *Ferguson v. State*, 31 Tex. Cr. R. 83, 19 S. W. 901, which was similar as to the impeaching testimony, and the court also treated that as not a confession. The court, however, in the discussion of the question, appears to incline to the view that, regardless of whether or not the impeaching testimony was a confession, the same rule would apply, and that it would be permitted for the state to go into the jail, and lay the predicate for the contradiction of the defendant, when he is a witness on his own behalf, as to a confession made in the jail by him without having been warned, and then to contradict him as to such confession. It has also been followed in *Phillips v. State* (Tex. Cr. App.) 34 S. W. 272. As far as examined, none of the authorities cited in said Case of *Quintana* are exactly in point, and, with the exception of the *Phillips Case*, which follows the *Quintana Case*, it is not believed that any authority can be found which lays down the proposition that a defendant, when he becomes a witness in his own behalf, can be impeached as to confessions made by him while in jail, not having been warned. The decisions cited, how-

ever, do go to the extent of holding that, when a defendant becomes a witness on his own behalf, he is to be treated as any other witness, and his cross-examination is circumscribed only by the rules applicable to any other witness. He may be impeached by showing that he is unworthy of belief, and he may be impeached by showing that he has made contradictory statements to those testified by him on the trial; and he may be contradicted by showing that he has been arrested for or convicted of crimes showing moral turpitude, which go to his credit like any other witness.

The exact question here presented, however, is whether or not the defendant can be examined as to a confession made by him while in jail, not having been warned, and a predicate thus laid for his impeachment, and the state then be permitted to show by witnesses that he made a confession of the crime alleged against him while in jail; for, as to the fact that the matter inquired about in this case was a confession, there can be no question, and it is not necessary here to discuss the question involved in the cases above referred to, as to whether the statements there made by the defendants were in the nature of a confession or not. The statute says that a confession made by a defendant while in jail cannot be used against him unless he was duly warned. This statute is without limitation, and apprehends that the confession cannot be used against him for any purpose; and to use it for the purpose of impeaching him would certainly be using it against him. It is believed that article 770 was passed to enlarge the defendant's rights, and not in any sense to curtail them; and, if said article is to have the effect to authorize the state to lay a predicate for the impeachment of a defendant as to his confession made in jail without due warning, then its effect would be to repeal by implication so much of article 790 as guards a confession made by a defendant when in jail. A repeal by implication is not favored as a rule of construction, but the rule is that both statutes shall be permitted to stand if this can be done. And especially is this so where a construction would repeal by implication a statute intended for the benefit of a defendant. These two statutes, in our opinion, are susceptible of that construction which will permit both to stand. A defendant in a criminal case can become a witness for himself, and can be treated as any other witness, except as inhibited by some other statute. As we have seen, article 790 prohibits the use of a confession by a defendant while in jail, unless under certain circumstances stated in said article; and the fact that he may become a witness does not, in our opinion, repeal by implication or render nugatory the safeguard guaranteed him against the use of any con-

fession made by him while in jail, unless such confession is made in accordance with the forms prescribed in said article. It is true, in this case, the court limited the purpose of this testimony to the impeachment of the defendant as a witness. While, as stated, this was a limitation, yet it was an authority to the jury to use the confession for a purpose against the defendant. The confession itself was a direct confession of guilt made by the defendant while in jail and without proper caution. If it had been made out of jail, or under proper warning given, it could have been used as original evidence against the defendant of the most damaging character; and, however much the jury may have felt constrained to regard the testimony only as directed by the court, it would present to them an exceedingly difficult problem to do so. However that may be, in our opinion, the testimony could not be used against defendant for any purpose; and whatever is said in the cases above cited that indicates a contrary view is hereby overruled.

It is not necessary to discuss the other assignments of error, but, for the errors discussed, the judgment is reversed, and the cause remanded.

DAVIDSON, J., dissents.

RODRIGUEZ v. STATE.

(Court of Criminal Appeals of Texas. June 27, 1896.)

CRIMINAL LAW — CONFESSIONS MADE WITHOUT CAUTION—ADMISSIBILITY.

It is error to admit in evidence statements made by defendant to the sheriff in the nature of confessions over defendant's objection that he had not been cautioned at the time. *Morales v. State* (Tex. Cr. App.) 36 S. W. 435, followed.

Appeal from district court, San Patricio county; M. F. Lowe, Judge.

Yudalacio Rodriguez was convicted of placing an obstruction on a railroad track, and appeals. Reversed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of placing an obstruction on a railroad track, and given two years in the penitentiary, and he appeals. While under arrest appellant made statements to the sheriff in the nature of confessions. These were admitted in evidence over the objection of the appellant that he had not been cautioned at the time. Under the authority of *Morales v. State* (just decided) 36 S. W. 435, this was error for which the judgment will be reversed. The judgment is therefore reversed, and the cause remanded.

KEATON v. STATE.

(Court of Criminal Appeals of Texas. June 26, 1896.)

INTOXICATING LIQUOR — WHAT CONSTITUTES SALE — BARTER.

Where defendant delivered liquor to another to be paid for in other liquor at some future time, the transaction was a sale within the law prohibiting the sale of intoxicating liquors within a local option district.

Appeal from Parker county court; J. L. L. McCall, Judge.

John Keaton was convicted of selling intoxicating liquors in a local option precinct, and appeals. Affirmed.

Harry W. Kuteman, for appellant. Mann Trice, for the State.

HENDERSON, J. The only question in this case worthy of serious consideration is, do the facts show a sale, or did the transaction constitute a barter of the whiskies? The law prohibits the sale of intoxicating liquors in local option districts. If we put a strict construction upon the law, we must hold that there can be no sale, unless the price to be paid for the liquor is money. Benjamin says: "A sale may be defined to be a transfer of the absolute or general property in the thing for a price in money. Hence it follows that, to constitute a valid sale, there must be a concurrence of the following elements, to wit: (1) Parties competent to contract; (2) mutual assent; (3) a thing the absolute or general property in which is transferred from the seller to the buyer; and (4) a price in money paid or promised." See Benj. Sales, § 1. The question, therefore, for our decision is whether we shall place upon the statute a technical construction, to wit, that there is no sale unless the price is to be paid or promised to be paid in money. To put such a construction upon the local option statute would practically defeat its objects. It is a very difficult matter under the present law to prohibit its violations, giving it a very liberal construction. We have a great many cases presenting nice questions as to whether the sale was effected in the local option district or somewhere else. But to hold that there could be no sale unless the price was paid or promised to be paid in money would be an almost complete defeat of the objects of the law. We therefore conclude that the object of the statute was to prevent sales of the prohibited liquor, in its broadest acceptance. If A. should establish himself in the local option district, and retail intoxicating liquors, receiving pay in any and all property except money, the objects of the local option law would be defeated to a great extent. The purchasers would deal largely in oranges, bananas, candies, potatoes, chickens, and eggs, and all descriptions of property, and barter these things for whisky, and drunkenness would prevail in that dis-

trict to the same extent as if the whisky was paid for with money. In this case the proof shows beyond any controversy that the appellant delivered to the witness intoxicating liquors, the liquors being then in that precinct, the appellant to be paid in liquor at some future time. Now, the whisky delivered, of course, was consumed. It was not the intention of the parties that that particular whisky should be delivered back to the appellant. The title to that whisky delivered by the appellant passed and vested completely in the man to whom it was delivered. Now, let us suppose that the party to whom the whisky was delivered refused to pay for it in whisky as he agreed. The lender, so termed, would have a right of action for the value of the whisky that he loaned. "When the identical thing delivered, even in an altered form, is to be restored, the contract is one of bailment, and the title to the property is in it." The whisky delivered was not intended to be restored. "But when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed. It is a sale." *Mallory v. Willis*, 4 N. Y. 85, approved in *Foster v. Pettibone*, 7 N. Y. 435. "A miller agreed to take certain wheat and give one barrel of superfine flour for so many bushels of wheat, the flour to be delivered at a fixed time and as much sooner as he could make it. The wheat was delivered at the mill, and accidentally destroyed by fire. Held, that the miller's contract was satisfied by a delivery of flour from any wheat, and therefore the delivery of the wheat was not a bailment, but passed title to the miller, and left it at his risk." *Norton v. Woodruff*, 2 N. Y. 153; *Smith v. Clark*, 21 Wend. 83; *Carlisle v. Wallace*, 12 Ind. 252; *Ricketts v. Hays*, 13 Ind. 181. When the appellant delivered the whisky to the witness in this case, title passed to the party to whom it was delivered. He was not bound to return that particular whisky. He was at perfect liberty to drink and consume it, which we suppose he proceeded to do. Now, if the agreement had been between the parties that he was to return that same whisky, there would have been no sale in the broadest sense of the word, nor would there have been any violation of the local option law, for, under such an agreement, if kept, the party would not have been permitted to use the whisky. It would have been a mere bailment. In this view of the case, the testimony being conclusive, without contradiction on any part of the ground, the charge of the court was more favorable to the defendant than he was entitled to. The court seems to have been of the opinion that, if the parties had acted in good faith in this transaction, it would have been a sale. In this there was error, for, taking the transaction as testified to by the witnesses, there was a sale—an intentional

sale—of the whisky, as we construe this statute. There was evidence introduced tending to and proving similar transactions between appellant and other parties. This evidence was objected to. Under the facts, of this case, we deem it unnecessary to consider the admissibility of these other transactions. Appellant received the lowest punishment. The evidence did not injure him in this respect. There was no controversy or question raised as to the truth of the testimony of the state's witnesses in regard to this transaction. The transaction was not questioned, and is not now before us. While the admission in evidence of those other transactions may have been illegal, we can perceive of no injury to the appellant under the facts of this case. The judgment is affirmed.

Ex parte DAVIS.

(Court of Criminal Appeals of Texas. June 26, 1896.)

CRIMINAL LAW—APPEAL—DISMISSAL.

An appeal from an order in habeas corpus proceedings, remanding defendant to the custody of the sheriff to await the action of the grand jury, will be dismissed where, pending the appeal, the grand jury convened, and returned no indictment against him.

Appeal from district court, McLennan county; S. R. Scott, Judge.

Jeff Davis, who was arrested for a felony, applied for a writ of habeas corpus, and from an order remanding him to the custody of the sheriff he appeals. Dismissed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was charged with a felony alleged to have been committed in Falls county. After his arrest he applied for and obtained a writ of habeas corpus from Judge Scott while holding court in McLennan county, no indictment being then pending. On the trial of the habeas corpus proceeding he was remanded to the custody of the sheriff, and prosecutes this appeal. Pending the appeal to this court, the grand jury of Falls county convened and adjourned, and failed to return an indictment against defendant for the offense upon which the habeas corpus proceedings were had. This is shown by the certificate of the clerk of Falls county now on file with the papers. Under this aspect of the case, this appeal will be dismissed; the defendant being no longer detained in custody under said habeas corpus proceeding. This would be so whether an indictment was returned or not; for, if the indictment had been preferred, he would be held by virtue of said indictment. No indictment being returned, he was entitled to his discharge upon the adjournment of the grand jury. The case is stricken from the docket.

Ex parte HOLMAN.

(Court of Criminal Appeals of Texas. June 26, 1896.)

INTERSTATE COMMERCE—LICENSE TAX.

New Rev. Civ. St. 1895, art. 5049, requiring payment of a license for soliciting orders for photographs, pictures, etc., is unconstitutional, as an interference with interstate commerce, in so far as it applies to an agent soliciting for a foreign corporation.

Appeal from Grayson county court; J. H. Wood, Judge.

W. B. Holman, who was arrested for soliciting orders for pictures without a license, applied for a writ of habeas corpus, and from an order remanding him to custody of the officer appeals. Reversed.

Beaty & Culver, for appellant. Mann Trice, for the State.

HURT, P. J. The relator, Holman (upon complaint), was arrested in Grayson county for soliciting orders for photographs, pictures, etc., without paying the license required by article 5049, New Rev. Civ. St. 1895. He applied to the county judge of Grayson county for a writ of habeas corpus, and upon an order of that court was remanded to the custody of the officer, from which judgment he appeals to this court. The proof showed that he was operating this business as the agent of a corporation situated in the city of Chicago, Ill., and that said corporation had no place of business in Texas. The question arises as to whether the state of Texas could tax this business under the circumstances of this case. This precise question was decided in the case of *Brennan v. City of Titusville*, 153 U. S. 239, 14 Sup. Ct. 829. The facts in the *Brennan* case are substantially the same as the facts in this case. A unanimous court held that such a tax was a tax upon interstate commerce, and therefore unconstitutional. The judgment is reversed, and the relator discharged.

PHILLIPS v. STATE.

(Court of Criminal Appeals of Texas. June 26, 1896.)

On rehearing. Motion overruled.

For original opinion, see 36 S. W. 86.

HENDERSON, J. In this case appellant has filed a motion for rehearing, and insists that the charge of the court as presented in the first assignment of errors is not a proper charge on provoking the difficulty, because the same was made to depend on appellant's intent in going to the place, not connected with any act on his part after he got there manifesting an intention to provoke a difficulty. We think the charge of the court upon this proposition makes this question depend upon the act of the defendant, because

it expressly informs the jury that, not only must he have gone there intending to kill or inflict serious bodily injury upon Bates, but that he fired upon and shot L. Bates. This it seems to us was the act of provocation, and we think the charge asked by the appellant in this connection was not necessary. In the original opinion we thoroughly dissected this case, and we still entertain the view, notwithstanding the very able argument of counsel on motion for rehearing, that there are only two theories presented from the evidence,—an assault with intent to murder on the part of the state, and self-defense on the part of the defendant,—and that the court clearly gave these issues in charge to the jury, and that there was no aggravated assault in this case. Appellant has pointed out the error in the opinion of the court as to the name of the prosecuting witness. In the opinion he is called "Lenox Anderson," when it should be "Lennett Bates." This is his correct name, and is here inserted instead of the name "Lenox Anderson," appearing in the original opinion. The motion for rehearing is overruled.

COBURN v. STATE.

(Court of Criminal Appeals of Texas. June 26, 1896.)

INCEST—TESTIMONY OF ACCOMPLICE—CORROBORATIVE EVIDENCE.

Where the evidence in a prosecution for incest indicated that the act was committed without any attempt at resistance on the part of the prosecutrix, a failure to instruct that defendant could not be convicted on her uncorroborated testimony, in case the jury found that she was an accomplice, is ground for reversal, though no exception was taken by defendant.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

Ambrose Coburn was convicted of incest, and appeals. Reversed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of incest, and given 10 years in the penitentiary, and prosecutes this appeal. A number of bills of exceptions were reserved to the action of the court on questions arising during the trial of the case, but as the case will be reversed on a question not raised by the appellant, either in the court below or in this court, we deem it unnecessary to notice the questions raised by the bills of exception.

The only person who testified to any act of carnal intercourse between the appellant and Ada Coburn, his daughter, was the said Ada Coburn herself; and the record does not show any corroboration of her by any other witness as to any act of sexual intercourse between her and her father, the appellant. In her testimony she discloses that she was coerced by her father into having sexual intercourse with him, and she goes so far as to

state that the first act of sexual intercourse occurred between them when she was only six years old, but that it neither hurt her, nor drew any blood. However, circumstances surrounding her at certain times when she said the acts of sexual intercourse occurred between her and appellant, and to which she testified, were such as to indicate that she was consenting; at least, no objection or resistance was interposed when the least act of resistance or objection interposed by her would have prevented the acts of sexual intercourse. If she was not an accomplice, the circumstances at least raise the issue as to whether or not she was such accomplice, and this issue should have been presented to the jury in the charge of the court. They should have been instructed what it took to constitute an accomplice, and it should have been left to them to say whether or not she was an accomplice in the act charged against the appellant; and, in case they should find that she was such accomplice, then the jury should have been instructed that, before they could convict appellant, they must find that there was some testimony in the case, outside of the prosecutrix's, tending to connect appellant with the offense charged. We have examined the charge of the court, and we fail to find that he gave any instruction to the jury on the subject of accomplice's testimony. The facts of this case rendered such an instruction necessary, and a failure to give the same, though not excepted to, was error. See *Watson v. State*, 9 Tex. App. 237; *Freeman v. State*, 11 Tex. App. 92; *Mercer v. State*, 17 Tex. App. 452; *Stewart v. State* (Tex. Cr. App.) 32 S. W. 766. The judgment is reversed, and the cause remanded.

CUMMINGS v. STATE.

(Court of Criminal Appeals of Texas. June 26, 1896.)

MARRIAGE—LICENSE—EXCEPTIONS.

1. A marriage is valid, though the ceremony was performed in a county other than that from which the license issued.

2. The question of error in admission of evidence cannot be considered on appeal, exception not having been reserved.

Appeal from district court, Lamar county; E. D. McClellan, Judge.

R. E. Cummings appeals from a conviction. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of incest with his stepdaughter, and given three years in the penitentiary, and appeals.

1. The evidence shows that appellant married the mother of the prosecutrix in Bowie county. The marriage license under which this marriage occurred was issued from Marion county. Appellant asked a special charge to the effect that, if the jury believed

that the marriage license was issued in Marion county and executed in Bowie county, the marriage would be invalid, and, this being so, appellant could not be convicted of the crime of incest. We are referred to no authority by the appellant to sustain this contention, and we do not understand it to be the law. An analogous question was discussed by this court in the case of *Simon v. State*, 31 Tex. Cr. R. 187, 20 S. W. 399, 716. In that case the marriage license was issued from Victoria county, and the marriage was celebrated in Gollad county, and by a justice of the peace of Victoria county. It was held in that case that under this state of case the marriage was a legal and binding one; and we see no reason for overruling that decision, and believe it to be correct.

2. The motion for a new trial sets up two grounds, based upon the supposed erroneous ruling of the court with reference to the admission of testimony. Suffice it to say, in this connection, that no exceptions were reserved by appellant to the action of the court, and therefore a revision of the supposed errors is not authorized by this court. We think the evidence in the case amply sufficient to support the conviction, and the judgment is affirmed.

HORSKY v. STATE.

(Court of Criminal Appeals of Texas. June 26, 1896.)

INTOXICATING LIQUORS—SALE TO MINOR.

A minor, going to a saloon with money furnished by an adult, and having a written order signed by him, bought liquor, which he took to the adult, they and others drinking it. *Held* a sale to a minor.

Appeal from Baylor county court; J. G. Kenan, Judge.

Joe Horsky appeals from a conviction. Affirmed.

J. H. Glasgow, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of unlawfully selling liquor to a minor, and his punishment assessed at a fine of \$52.50, and prosecutes this appeal. One Burt Ingram, a witness in this case, went to the saloon of Charley Grads, and carried with him money furnished him by one Clarence Thompson, who was an adult person, and also carried a written order signed by him, and bought from appellant, at the saloon of Charley Grads, 25 cents' worth of beer. He carried the beer to said Clarence Thompson, and said witness, Thompson, and two other boys drank the beer. On this state of case, appellant contends that it was not a sale of the beer to the minor, Burt Ingram, but said Ingram acted merely as the agent of the adult, Clarence Thompson; and he asked special charges instructing the jury on this view of the case, and excepted to the charge of the

court which announced a contrary view. This question was before this court in the case of *Yakel v. State*, 30 Tex. App. 391, 17 S. W. 943, and 20 S. W. 205, and this court there held a contrary view to that insisted upon by the appellant. That case is decisive of the question raised by the appellant in this case, and the judgment of the lower court is accordingly affirmed.

HAWKINS v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1896.)

SELF-DEFENSE—PROVOKING DIFFICULTY.

A homicide is not justified where defendant provoked the difficulty with no intention of killing deceased, but simply to engage in an ordinary combat with him, and was forced to kill in self-defense.

Appeal from district court, Harris county; E. D. Cavin, Judge.

Jack Hawkins appeals from a conviction. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of manslaughter, and given a term of two years in the penitentiary. Appellant reserved a bill of exceptions to that portion of the charge which submitted the issue of self-defense, as also that portion of the charge which, in substance, instructed the jury that if the defendant provoked and brought on the difficulty with the deceased, then he could not avail himself of the right of self-defense, even if his life became endangered; and if he did provoke the difficulty with the intent and for the purpose of killing, then he would be guilty of murder in the second degree. The ground of objection stated to the charges mentioned was that there was no evidence adduced on the trial of the case to warrant such charge from the court. While it is a little indefinite, yet we suppose that the bill of exceptions was intended to be reserved to that phase of the charge which submitted the law applicable to provoking a difficulty with the deceased by the appellant. This phase of the case might be disposed of, perhaps, without going into the merits of it, as appellant was acquitted of murder in the second degree, and hence the question was eliminated from the case. But, aside from this, if it were necessary to consider the supposed error, an inspection of the statement of facts authorized the charge given in reference to provoking the difficulty, as well as the law of self-defense. Without stating the testimony, the statement of facts shows that there were two theories in this case, as usual in homicide. The state's case showed a determined purpose on the part of the appellant to bring on a difficulty, and a willingness on the part of the deceased to engage in a fair fight, which was declined by the

appellant, and when for the third time appellant declined to enter into a fair fight with the deceased, deceased turned, and was walking away, when the appellant struck him in the back of the head, and killed him. The evidence on the part of the defendant showed a desire on his part to avoid the difficulty, and also showed an insulting and overbearing course of treatment on the part of the deceased towards the appellant. Appellant shook his cane or walking stick over the head of the deceased, walked away, and upon further conversation he was in the act of approaching the appellant the second time, when he threw the missile which struck the deceased on the back of the head, and killed him. The evidence for the state shows a very insulting and provoking course of conduct on the part of the appellant towards the deceased, he being all the time armed with a large rock; and when the deceased had been provoked to approach the appellant for the third time, and as the deceased was in the act of turning, he dropped the rock, and picked up an iron wheel, and struck him in the back of the head, one of the spokes of the wheel entering the skull. Under this state of case the court charged the jury with reference to murder in the second degree, manslaughter, and self-defense. The charge on manslaughter was submitted upon adequate cause, and also upon the theory if appellant provoked the difficulty with no intention of killing the deceased, but simply to engage in an ordinary combat with him, and was forced to kill in self-defense, this would constitute manslaughter; and we are of opinion that under the state of case shown by the record these charges were correct. The judgment is affirmed.

WILLIAMSON v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1896.)

HOMICIDE—EVIDENCE—POSTPONEMENT— NEW TRIAL.

1. It is not error to refuse the postponement of a trial for arrival of a witness, no showing being made as to materiality of his testimony.

2. In a homicide case a witness testified to seeing the beginning of the difficulty, in which, very shortly after the firing of the first shot, deceased was killed at his house; that he saw deceased, defendant, and another in a field; that defendant rode in the direction of deceased, got behind a tree, and fired two shots at deceased before deceased fired, and, after an exchange of several shots, deceased came to witness, and asked who the person was that was firing at him, and, being told, said, "I guess you will believe now what I have been telling you about these parties." *Held*, that the admission of the testimony, after excluding the last remark of deceased, was not error.

3. A new trial will not be granted because a juror qualified by falsely stating on his voir dire that he was a householder in the county, and a freeholder in the state: it not being shown that defendant was not at the time

aware of the contrary, and further shown that probable injury resulted to defendant by reason of the service of such juror.

4. New trial for want of testimony of a person by whom defendant states that he can prove that his confession was induced by a promise to use influence for immunity is properly denied, affidavits of such person and another denying this being produced.

Appeal from district court, Wharton county; T. S. Reese, Judge.

Jim Williamson appeals from a conviction. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of murder in the first degree, and his punishment assessed at death, and prosecutes this appeal.

1. On the trial of the case the state proved by Sheriff Rich that the defendant, while in jail, stated to him "that he [defendant] was present, with Frank Martin and James Martin and John Rickard, at Emmett Colburn's house, at the time E. C. Crocker and his wife and child were killed, and that he was acting with them in the killing of said parties; that said Frank Martin killed Mrs. Crocker, John Rickard killed Wesley Crocker [the little boy], and that he [defendant] shot E. C. Crocker, through a hole in the door." This was objected to by the defendant on the ground that the defendant was in jail, and had not been warned according to law by the sheriff when he made said statement. The bill of exceptions shows conclusively that the defendant was fully warned before he made the statement, and that the same was freely and voluntarily made, and in our opinion there is no question as to the admissibility of the evidence.

2. The third bill of exceptions raises the question as to the action of the court in refusing to postpone the case to send to Colorado county for Sheriff Reese to testify on behalf of the defendant. It appears that on the examination of Sheriff Rich, of Wharton county, by the defendant, he asked him "if defendant was not in custody of Sheriff Reese, of Colorado county, who was assisting in the arrest, and that if said Reese did not promise the defendant immunity if he would make a confession?" The witness Rich, in response to this question, stated that the defendant was not in custody of Reese at any time, and that the only statement he knew of was made to him, as testified about, and that he did not know of any inducements ever having been offered by Sheriff Reese to defendant to make a confession. The defendant then applied for, and had issued, an attachment for Sheriff Reese as a witness, but no statement was made as to what said Reese would testify to as to any confession made to him by said defendant. The court refused to wait for said witness, as it was not shown that his testimony would be material. The defendant then excepted. The court, however, postponed the further hearing of the case until the next

morning, but, on suggestion of the defendant's counsel, went on with the argument that evening. The witness is not shown to have arrived, nor any further request made to postpone the case for his arrival, from Colorado county. In this action of the court we see no error. It is not shown that during the progress of the trial the defendant was taken by surprise at the testimony of Rich, and that the testimony of Reese then for the first time became necessary. If he was a material witness, he should have been attached before the trial of the case. However, no showing is made as to the materiality of this witness, and certainly the court should not be called upon to postpone the trial of the case until the arrival of said witness, when the testimony of said witness was not shown to be material. Looking to the motion for a new trial, we find Reese's controverting affidavit attached thereto, in which it is stated that Reese would not have sworn with regard to a confession by the defendant, as this bill of exceptions appears to indicate that he would have sworn, but that he fully warned appellant before his confessions were made.

3. The state proved by the witness Emmett Colburn that he saw the beginning of the difficulty; that he saw the deceased driving a yoke of oxen across the prairie towards his home, and saw the defendant and Gus Colburn riding across the prairie towards Henry Colburn's place, when said Colburn turned back, and the defendant turned and rode in the direction of the deceased, and got behind a tree, and pulled his gun and shot two shots at the deceased before the deceased fired a shot, and then there were several shots exchanged between defendant and deceased, and, when the shooting had stopped, deceased came to the house of the witness, and asked witness who that person was that was shooting at him, and witness told him it was defendant, and deceased said, "I guess you will believe now what I have been telling you about these parties, won't you?" This was objected to on the part of the defendant because he was not present, and that it was hearsay. The court, in approving the bill as to this matter, explains that he admitted the first part of said testimony as being a part of the *res gestæ*; it being the beginning of the difficulty in which deceased was killed, and a very short time after the first shots were fired. He excluded that part of it, however, in which Crocker responded to witness, "I guess you will believe now what I have been telling you about these parties, won't you?" as relating to a former transaction committed. And the court further states that this action appeared to be entirely satisfactory to the defendant at the time. In our opinion, the action of the court was proper.

4. On motion for a new trial in this case, appellant shows by his bill of exceptions that Ross McCain was a juror in this case, and was brought in as a talesman after the original special venire had been exhausted, and after

the defendant had exhausted all of his challenges; that said McCain answered on his voir dire that he was a qualified voter in the county and state, and that he was a householder in the county, and a freeholder in the state, and in every way qualified himself as a juror to try said case. Defendant shows that on his motion for a new trial he attacked the qualifications of the said juror McCain on the ground that he was not a householder in the county, nor a freeholder in the state, and offered evidence to show that said juror was neither a householder in the county, nor a freeholder in the state. Said evidence the court declined to hear upon the hearing of said motion for a new trial, to which ruling of the court the defendant then excepted. Said bill does not show that although the juror qualified himself as a householder in the county, and a freeholder in the state, the defendant was not aware of the contrary at the time. Moreover, where this question is raised for the first time after verdict, it will not afford the basis for a new trial, in the absence of a further showing that probable injury resulted to appellant by reason of the service of such juror on the trial. See *Leeper v. State*, 29 Tex. App. 63, 14 S. W. 398.

5. Appellant, in his motion for a new trial, insists that the court should grant a new trial for the want of the testimony of Sam H. Reese, sheriff of Colorado county. He states that he can prove by said Reese that his confession was made while under arrest, and that it was on account of a promise made by Sam H. Reese, who was co-operating with Sheriff Rich in his arrest, and who had him in custody at the time, that if he would make a confession he would use his influence with the authorities to procure his immunity from prosecution, and that he would not have made such confession but for such promises. In reply to this the state produced the affidavit of said Reese, who stated that, in so far as the application for a new trial stated that said Jim Williamson (defendant) made a confession in regard to the Crocker murder to him (Reese) under promise of immunity from prosecution or under promise that he would use his influence with the Wharton county authorities to procure him immunity from prosecution, the same is false and untrue, and that the statements made by Jim Williamson were voluntarily made by him after being warned as the law directs. There is also the affidavit of Sheriff Rich to the same effect. These answers, we think, effectually dispose of the motion for a new trial on this ground.

6. We have examined the charge of the court carefully, and in our opinion it is not subject to the criticism made by the appellant. The charge on accomplice's testimony is full and clear, and is applied to the witnesses whose testimony tended to show they were accomplices, and distinctly told the jury that the testimony of one accomplice did not corroborate another accomplice. And the court also correctly stated the purpose for which

the evidence in regard to the killing of Mrs. Crocker and the boy, Wesley Crocker, was admitted. The court fully charged on murder in the second degree, and there was no occasion to give the special charge asked by the appellant on that subject, even if it contained the law. There was nothing in the case to call for the charge on manslaughter asked by the defendant. Indeed, to our minds, the evidence shows nothing short of a most atrocious case of murder in the first degree. There being no errors in the record, the judgment is affirmed.

RAY v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1896.)

HOMICIDE—TRIAL—CONTINUANCE—RES GESTÆ—IMPEACHMENT—AGGRAVATED ASSAULT.

1. In a prosecution for an assault with intent to murder, where the jury gave defendant the minimum sentence for such an offense, possible error in denying a motion for continuance on the ground of the absence of a witness whose testimony would have gone only in mitigation of the punishment, and not to reduce the grade of the offense, was without prejudice.

2. Statements made by defendant to the party assailed, three hours after an assault with intent to murder, are not a part of the *res gestæ*.

3. Where defendant has elicited unfavorable testimony on a material fact in the cross-examination of a state's witness, further questions which might be admissible for the purpose of laying a predicate for impeaching the witness are inadmissible as original evidence to show that on other occasions the witness had made statements to other persons contrary to those made on the trial.

4. Where the original difficulty occurred between defendant and P., and defendant, after arming himself, returned to the scene, and, not finding P., thereupon attacked and shot at his partner, L., who had attempted to dissuade defendant from continuing the difficulty, it was not necessary for the court to charge on aggravated assault.

Appeal from district court, Kerr county; Eugene Archer, Judge.

Will Ray was convicted of an assault with intent to murder, and appeals. Affirmed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to murder, and given two years in the penitentiary, and prosecutes this appeal.

1. Appellant applied verbally for a postponement of the case, and, on the court refusing to grant his request, then applied for a continuance of the cause. His motion is based on the absence of one Jess Sublett. The application shows that defendant was indicted on the 7th day of May, 1896, and a copy of the indictment was served on him in jail on the 8th of May. He applied for a subpoena for the witness Sublett, who was alleged to live in Kerr county, on the 11th of May. He explains this delay by stating that he was not able to employ an attorney

until the 11th day of May, and did not know what witnesses he would need. The case was called for trial in its regular order on the 14th of May, and was postponed until the 15th. The subpoena for said witness was returned on the 15th. No other process was asked for him, though it was shown that he resided only 12 miles from the county seat. It appears that the defendant expected to prove by said absent witness that "he was the first person to reach the defendant after the gun was fired,—it being the shot on which the prosecution in this case is based; and that the defendant was so drunk, and in such a stupor from drunkenness, and from a blow on the head from a hammer, received a few minutes before, that he was wholly unconscious of what he was doing, and was hardly able to stand up; and that he further expected to prove that from the position that the parties occupied at the time of the shooting it was impossible that the shot was fired at the alleged injured party. And he further expected to prove that the said shot, from all of the surrounding circumstances, must have been accidental, and that the relations between the defendant and the alleged injured party at the time of the shooting were friendly." The defendant proved by Jack McNeal "that he saw the defendant directly after the shooting. Jess Sublett, Mr. Caldwell, and witness arrested him, and took the gun away from him, and that he seemed to be very drunk; and after we had got the gun away from him, Sublett and witness walked off a piece with him, and Sublett took charge of him, and carried him home." Caldwell testified to the same facts. In fact all of the witnesses who testified as to the condition of the defendant testified that he was drunk, and some of them that he was very drunk. None of them, however, testified that he was temporarily insane from the recent use of ardent spirits, nor is it proposed to prove this fact by the absent witness Sublett. If the defendant had been temporarily insane, such testimony would not have served to reduce the grade of the offense, but would only have gone in mitigation of the punishment. The jury in this case gave the appellant the least punishment for an assault with intent to murder, and we fail to see how the absent testimony could have benefited the defendant in this regard. The relation or friendship existing between the defendant and Langston, the assaulted party, preceding the assault, was not a disputed question in the case. All of the witnesses, including Langston himself, testify as to this. It is not contended that said witness was present at the difficulty, and he could hardly be expected to tell the relative position of the parties, or whether or not the shot was accidental. There was no error in overruling the motion for a continuance.

2. Appellant also excepted to the action of the court in refusing to permit him to prove by the witness Frank Langston that some

three hours after the shooting occurred the defendant told him that he had nothing against him. This was no part of the res gestæ, nor was any issue made in the case that prior to the alleged shooting the defendant entertained any ill feeling towards Langston. It would appear that after the defendant and Prather had gotten into trouble the defendant returned to his house, and armed himself, and came back in pursuit of Prather, but in the meantime he had fled; that defendant became enraged because he could not find Prather to wreak his vengeance upon him, and he transferred his malice to his partner, Langston, and shot at him.

3. When the state's witness Frank Langston was on the stand, on cross-examination by the defendant, he testified "that, if he had to express an opinion from what had occurred at the time of the firing of the shot, that he believed the defendant knew him (Langston) at the time of the shooting, because defendant called him by name." Defendant then offered to prove by said Langston "that on the same evening of the difficulty, and a short time thereafter, he stated to the justice of the peace, Joel Townsend, before whom he made complaint against defendant, that he did not believe defendant intended to hurt or shoot him, but that he believed defendant had mistaken him for Prather." This evidence was offered by defendant "for the purpose of showing that the actions of the defendant at the time of the shooting were such as to impress the witness, who was an eyewitness, and one of the principal actors, with the belief that the defendant at the time of the shooting mistook witness for Prather, and witness' belief was so strongly impressed upon his mind as to cause him to give utterance thereto immediately after the shooting occurred; and for the further purpose of rebutting the testimony of the witness to the effect that he believed the defendant knew him at the time of the shooting." This testimony was excluded by the court, and a bill of exceptions saved, and the same is assigned as error. With reference to the last portion of said rejected testimony, it is sufficient to say that the testimony on this subject as to the belief of Langston was elicited by the defendant from him on cross-examination, and was his testimony. Unquestionably he was not bound by this evidence, but could prove the fact by other witnesses that the defendant did not recognize the witness, and that he did not call his name; but it would not be rebuttal evidence to show that the witness had made different statements than that proven on the trial. We do not understand the bill of exceptions to show anywhere that the purpose and object of the defendant was to lay a predicate for the contradiction of this witness, but the testimony was insisted on by him as original evidence,—that is, that the witness on other occasions had made statements to other parties as to his belief or opinion as to the rec-

ognition of him by the defendant at the time of the assault, different from that given by him on the trial. As original testimony, this was not admissible, but, as stated before, if the testimony was admissible at all, it was simply as a predicate to afford grounds to contradict the witness by other witnesses. Taking this view of the question as presented by the bill of exceptions, it is not necessary for us to decide whether or not, if the testimony had been offered as impeaching evidence, it would have been admissible. The defendant may introduce a witness, and, if said witness testified as to some fact material in the case, which would prejudice the defendant, and he is surprised by the answer, he may impeach the witness in any other manner, except by proving the bad character of the witness. As to the fact stated by the witness that the defendant called his name at or about the time of the assault, if such fact had been testified to by the witness under the circumstances above indicated, the witness unquestionably could be contradicted as to such matter. But whether the fact that in the belief or opinion of a witness another party recognized him such testimony is admissible at all is not necessary to be determined in this case. Of course, if the opinion can be given in evidence by a witness as to whether a party recognized him, and such evidence is upon a material issue in the case, injurious to the party introducing the witness, the witness may be contradicted by showing that he had expressed to other parties a different opinion as to the matter of recognition. As stated before, however, the bill is not framed in such shape as to present this issue, and we hold that, as presented, the court did not err in excluding the evidence offered. What we have said as to this bill of exceptions disposes of the three succeeding bills of exception relating to the same subject.

4. In our opinion it was not necessary for the court in this case to charge on aggravated assault. The original difficulty occurred between the defendant and one Prather, in which Langston took no part. The evidence shows that the defendant was in the wrong as to this difficulty, and made the first assault. Prather then struck the defendant with a hammer, inflicting a severe wound on his head. Defendant then went off some 25 or 30 yards, to his home, procured a gun, and returned in search of Prather. Prather in the meantime, when he saw the defendant coming with his gun, fled. Langston attempted to dissuade defendant from pursuing the difficulty, and told him that Prather was gone. Defendant persisted in hunting around the shop and premises for him, and failed to find him, and then attacked Langston, and shot at him with his gun. If the last difficulty had occurred between Prather and the defendant, there might be some slight ground for the contention that aggravated assault should have been charged in connection with

cooling time. But our statute provides that manslaughter cannot be predicated upon a provocation given by some other person than the party killed.

Appellant complains that the court should have charged upon the rights of the defendant when he provoked the difficulty. In our opinion the court acted properly in refusing to give a charge on that subject. We have examined the charge of the court, and in our opinion it fairly presents the issues in this case. The attack by the defendant on Langston, and shooting at him with a gun, was proved beyond any reasonable doubt; it was unprovoked; and the court gave the jury a charge on temporary insanity, produced by the recent use of intoxicating liquors, though there was no proof that he was temporarily insane. The jury, however, seem to have given him the full benefit of such proof, and gave him the least punishment. The judgment of the lower court is affirmed.

BALL v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1896.)

CRIMINAL LAW—EVIDENCE—IMPEACHMENT—INSTRUCTIONS.

1. Where it is attempted to lay a predicate for the impeachment of a witness by showing that she had made a statement previous to the trial inconsistent with her testimony on the trial, she may, in explanation, state all of the conversation in which the alleged contradictory statement was made.

2. Where evidence of what a witness had said as to a certain fact, otherwise inadmissible as hearsay, is received on the ground that the other party had drawn out a part of the same conversation, and had introduced evidence tending to prove that the witness was testifying from corrupt motives, and to impeach her reputation for truth, the court's explanation in response to an exception to the reception of such evidence must further show that the contradictory statements related to the same fact as did the hearsay evidence.

3. An instruction that singles out the corroborative evidence received to impeach a witness, and tells the jury in effect that it should go to the witness' credibility, is erroneous as being on the weight of the evidence.

Appeal from district court, Kimble county; W. M. Allison, Judge.

Thomas Ball was convicted of theft, and appeals. Reversed.

Ward & James, W. A. Wright, and W. A. Williamson, for appellant. J. T. Stapleton, M. Fulton, and Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of the theft of cattle, and his punishment assessed at two years in the penitentiary, and he prosecutes this appeal.

1. The defendant recalled the witness Mrs. M. A. Dooley for the purpose of laying a predicate to impeach her. In reply to question asked by defendant's counsel, she stated that she had a conversation with Cloman Barfield, in the spring of 1894, about this case

against the defendant, and among other statements as to what she had said and had not said in this conversation she said: "I did not tell him this red calf run around our camp all winter,—a little, poor calf,—and that I knew it well. I did not tell him that I knew at the time that Ball killed the calf that he was stealing it, and did not tell him, if I didn't get Ball on this case, I had another string to get him on. I did have several conversations with him, and we talked about the case against Ball, and I told him that before I could be understood it appeared that I would have to explain about the killing of another calf, and told him about that blue calf. Told him I thought at the time that the defendant had a right to kill the calf. I did not tell him that the cow, the mother of this red calf, was branded on the left side, YPT, and had no other brands on her." The state thereupon asked the witness to state how she came to tell Barfield that she thought at the time the defendant killed the calf in question in this case that he had a right to kill it, and also to state the balance of this same conversation had with Barfield on the subject. The defendant objected, because the statement sought to be adduced was hearsay evidence. The court overruled the objection, and the witness stated as follows: "I told Mr. Barfield that it required a statement about the killing of the little blue calf that the defendant had killed on this ranch some time before the killing of this red calf, in order for me to be understood as to why I thought the defendant had a right to kill this calf. I then went on and told him that some time before this Mr. Ball had killed a little blue calf that had run around camp all winter, that sucked and followed a cow branded YPT, which cow and calf I knew well. In the winter this blue calf was a poor calf, and I called it 'my little poverty-stricken calf,' because it was like me, so poor; and that, after this blue calf was killed, Mr. Ball's son, Alex Ball, told me that it was all right for them to kill the calf, as Mr. Burbank and his pa were the best of friends, and it was all right between them." It will be noticed that the endeavor of the defendant was to show that Mrs. Dooley had made a statement previous to the trial inconsistent with her statement at the trial; that she had made to Barfield a certain statement about a calf; and the effort of the appellant was to show that the said conversation referred to the little red calf in dispute. It was competent for her, in response to the question of the appellant, to state the conversation about the calf, and in that connection to state, in explanation, as to what calf she had a conversation with Barfield about. If she was not permitted to do so, but merely to answer a categorical question propounded to her, it was permissible, on her re-examination by the state, to then explain that in her conversation with Barfield she did not refer to the little red

calf, but distinctly spoke of another and different calf. In fact, in her testimony as elicited by the defendant in this case, she stated that she conversed with Barfield about a little blue calf, and stated a considerable portion of the conversation in reference thereto; and in our opinion it was competent for the state, in further explanation of her conversation with Barfield, to have her state all of the conversation that she had between the parties on the subject.

2. On the trial of the case the state proved by the witness Asa Farmer "that he met Mrs. Dooley at the defendant's ranch on the day of the alleged theft, about two or three o'clock in the afternoon of said day, and that Mrs. Dooley told him (witness) that defendant Thomas Ball had killed a calf, and left it there, and that she wanted him (witness) to go and help her son to skin it." To this testimony appellant objected, "because such statement was not made in the presence of the defendant, and was hearsay evidence." The court overruled this objection, and the appellant excepted. The court, in his explanation, states: "That on a previous cross-examination of the witness Asa Farmer the defendant had drawn out a part of the same conversation, and that the defendant, by other witnesses, had introduced evidence tending to prove the witness Mrs. Dooley was testifying from corrupt motives; also evidence impeaching her reputation for truth as well as virtue, and also that she had heretofore made statements contradictory and inconsistent with those now made on the trial. After this impeaching evidence by several witnesses had been introduced by the defendant, the state was then permitted to recall Asa Farmer, who was permitted to state as above." Now, it will be seen that the court's explanation, while it is very comprehensive, is of the most general character, not going into details. The court's explanation does not show what part of the same conversation had been introduced by the defendant, so that it could be seen that this additional part elicited by the state was admissible. The statement should at least have shown that the additional part of the conversation was upon the same subject as that which had been elicited by the defendant and explanatory thereof. It seems that the defendant did not elicit from Farmer the fact that Mrs. Dooley had told him that the defendant had killed the calf. This was a material statement, and the other part of the conversation brought out by the defendant may not have related to the statement that Mrs. Dooley stated that the defendant had killed the calf. It may have been admissible on the part of the defendant to show by Farmer that Mrs. Dooley requested him to help her son skin the calf. The fact that she also stated that the defendant had killed the calf would not serve to explain her request that he should assist her son in skinning the calf. The fact, as stated by the

judge, that it had been shown that Mrs. Dooley was testifying from corrupt motives, would not, standing alone, authorize the evidence objected to; nor would the fact that Mrs. Dooley had been impeached by showing that her reputation for truth in the neighborhood was bad justify the admission of this evidence. If the court had stated in the explanation to said bill that the defendant had shown that she had made statements as to who killed the calf contradictory to her testimony on the trial, evidence that she had stated on a previous occasion to Farmer that the defendant killed the calf may have been admissible; but this is not stated. It is merely stated that she had heretofore made statements contradictory to and inconsistent with those now made on the trial. What statements, are not shown,—whether it related to the subject of who killed the calf or not. We have heretofore held that strictness would be required of a defendant in stating the grounds of his objection to the admissibility of testimony, and logically the same strictness would be required of the court when it proposes to state the grounds upon which the testimony was admitted. For aught that appears, these contradictory statements may have related to other portions of her testimony; and, if we are permitted to refer to the statement of facts, such contradictory statements do not relate to this feature of the case. Moreover, it occurs to us that the court's charge upon this feature of the case was calculated to impair the rights of the appellant. Said charge is as follows: "The state was permitted to recall Asa Farmer in rebuttal, and he was allowed to testify that upon his arrival at the ranch of the defendant Mrs. Dooley told him that the defendant killed the calf, and asked him to assist her son in skinning it. You can only consider this branch of the evidence of said Asa Farmer for one purpose, and that is, as it may tend to affect the credibility of the witness Mrs. Dooley, and for no other purpose, for you cannot consider this branch of Farmer's evidence as in any way tending to prove that the defendant took or killed the animal in question." If the witness Mrs. Dooley had been impeached by showing that she had made statements as to who killed the animal in question contradictory to her testimony on the trial, it would have been competent, as heretofore stated, to have corroborated her, by showing that recently after the alleged offense she had made statements corroborative of her evidence delivered on the trial; but we know of no rule that would require the court to single out this corroborative evidence and charge upon it. Indeed, it would be a charge upon the weight of the testimony. The court in this case tells the jury that they may consider the testimony as it may tend to affect the credibility of the witness Mrs. Dooley. The object of the testimony as regarded by the court was not to

discredit her, but to lend her credit before the jury, and it was, in effect, to single out this assumed feature of the case, and to tell the jury that this corroborative evidence should go to her credibility as a witness before the jury. The evidence on this subject was unauthorized, and the charge of the court predicated thereon was clearly unauthorized, and was calculated to injure the rights of the appellant. The judgment is accordingly reversed, and the cause remanded.

HURT, P. J., absent.

GUYER v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1896.)

ACCOMPLICES—CORROBORATION—INSTRUCTIONS.

Where the evidence showed that L. took an active part in the theft of cattle, having been paid by the sheriff to detect the perpetrators of recent thefts, and that P. and G. subsequently aided in disposing of the meat, either as accomplices, or as detectives engaged in ferreting out crime, it was error for the court to restrict an instruction as to the necessity for corroboration of an accomplice's testimony to that given by L., such being equivalent to a charge that P. and G. were not accomplices.

Appeal from district court, Wharton county; T. S. Reese, Judge.

A. D. Guyer was convicted of the theft of cattle, and appeals. Reversed.

Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of the theft of cattle, and given two years in the penitentiary, and prosecutes this appeal. There is but one bill of exceptions in the record in this case and it raises the question as to the sufficiency of the court's charge on accomplice's testimony. The court charged the jury on the subject of accomplice's testimony, but confined the charge to one witness by name,—D. O. Love. Appellant contends that the evidence in the case equally showed that John Pace and Billie Glass were accomplices, and that the court's charge should not have been restricted to Love, but should have embraced said two witnesses, or have been a general charge on the subject of accomplices, without naming any one, and left the question as to who were accomplices to be determined by the jury. The record in this case shows substantially, as follows: The head of cattle alleged to have been stolen was the property of one A. H. Pearce. The sheriff suspected that some persons were engaged in cattle-stealing "over on the Sandy and Golden Rod," in Wharton county, and commissioned one D. O. Love to detect such parties. Love went over in that county, and stopped at one W. B. Collingsworth's, and stayed all night there. At the same time the defendant (A. D. Guyer) and A. O'Brien came to said house, and stayed all night. The de-

fendant and O'Brien were ostensibly going down the river to get some corn, and Love informed Collingsworth that he was expecting defendant and O'Brien to come over and get corn on the river. The witness Love states that they left Collingsworth on the morning of the 4th of March,—Guyer, O'Brien, and himself,—all three on horseback. Defendant and witness had guns, but O'Brien had none, but had some sacks tied behind his saddle, and a hatchet in one of the sacks. Defendant told him he wanted him to help him kill a beef. After they left the house the parties separated, Guyer going out into the prairie to run the beef into the woods, and O'Brien and witness went into the bottom; and in a short time witness heard a gun fired, and went there and found a cow dead. That he did not know who fired the shot. The cow belonged to A. H. Pearce. O'Brien, Guyer, and witness skinned the cow, and quartered it up, and put the meat in the sacks O'Brien had on his saddle. The defendant put the hide, heart, and a piece of the fat in one sack, and hid it near the road. The parties then took the meat to the river, and the witness "went up the river a little way, and called John Pace, and had him bring his boat over, and cross the meat for us. O'Brien left Guyer and myself at the river, and went away, saying he was going to Wharton," and Guyer and witness went over with the beef in the boat. Witness hired a wagon and team from John Pace, and defendant and witness took the beef in the wagon to Billie Glass' house, and defendant sold the beef to Glass for \$12.50, and Glass gave him an order on Payne, at Wharton, for the money. "I wrote the order, and Glass signed it." They then took the wagon and team to Pace, and got their horses, and came to town. Witness shows that he got \$9 in money from the sheriff to aid in ferreting out that particular transaction. The sheriff, Rich, shows that he had paid the witness D. O. Love, for ferreting out cattle-stealing in that county, \$140. Sheriff Rich also says that he instructed him (Love) not to lead any one into trouble, but to get in with them, if he could, and not to contrary them, but do as they wished him to do. The witness John Pace testified that, on the Sunday before the 4th of March, Sheriff Rich came to him, and told him, if anybody came and wanted him to put any beef across the river, "to do it and keep my mouth shut, and I told him I would"; that when D. O. Love came to the river, and called him to bring his boat over and cross some meat for him, he took the boat over, and Mr. Love, defendant, and witness put the beef in the boat, and put it across the river, that he then hitched up his team to his wagon, and Love and the defendant drove off with the beef in it. Love paid him \$2 when he came back that evening, in the wagon, with the team. The witness Billie Glass testified that Sheriff Rich

came to his house a few days before the beef was brought there by Love and the defendant, and told him there would be a young man there to sell him some beef, and that Love would come with him, and for him to buy the beef; that in a day or so after this witness got uneasy, and went to Wharton to see Rich about it, and told him that he would rather not have anything to do with it, as they were all white men, and he wanted to get out of it, and Rich told him to go ahead and buy the beef, and he would stand between him and trouble. He testified that when the parties brought the beef to him he bought it for \$12.50, and gave defendant an order to Mr. Payne, in Wharton, for the amount. A. O'Brien testified, for the defendant: That Love came to his house about a week before the alleged theft, and remained there several days. While there he told defendant and witness, in the presence of his wife, daughter, and son Fred, that he (Love) had about \$180 in the bank, and that he intended to go into the butcher business. He also said that he had three or four fat cows down there, "and when we went over after corn, if we would help him to kill one of the cows, he would help" defendant and witness "get our corn across the river." That they started on the morning of the 28th of February down on the river, but found the creek up, and abandoned the trip. On the 3d of March, defendant and witness started again to the river for the corn. They went as far as W. B. Collingsworth's, and stayed all night. D. O. Love was there. On the next morning defendant and witness were at the lot, and Love came out and said, "I want you fellows to help me kill that beef to-day." Witness told him defendant might go, but that he had to go to Wharton on business. Love insisted that both should go and help him, and that he would help them to get the corn over the river. That they all got ready, and left the house together, but before leaving the house Love picked up a hatchet, and stuck it down, handle first, in his pants. "I tied the sacks I brought to get the corn in behind my saddle." Guyer and Love both had guns. Witness had none. When they got to the edge of the bottom, Love sent the defendant out on the prairie to hunt for the cow. Love and witness went in the bottom, and struck a bunch of cattle, and Love ran a cow down the bank of the river, and into a gully that ran into the river, and shot the cow down. That Love and witness commenced skinning the cow, and, when they had nearly finished skinning it, defendant rode up, and helped to finish skinning the cow. That they then cut it up, and put it in the sacks, and Love put the hide, heart, and a piece of the fat, and the hatchet in one sack, and hid it near the road, and left it there, where it was subsequently found. That they took the balance of the meat to the river. Love went up the river, and called a man, and asked him to bring his boat

over and cross the meat. Love and defendant went over with the meat in the boat, and witness went to town. The testimony of Mrs. A. O'Brien and F. A. O'Brien, the wife and son of the former witness, corresponds with the testimony of the witness A. O'Brien as to what transpired at the house of said A. O'Brien on the 28th of February. The defendant, Guyer, testified in his own behalf, and his evidence corresponded with that of A. O'Brien, as to all of the facts testified to by him; and, further: That he and Love took the beef across the river, and hired a team from the man (Pace) who carried them across, and took the beef up to the house of Bill Glass. On the way there, Love asked him to sell the beef for him, and said that he owed some parties up there, and did not want to pay them. That he sold the beef, as requested, for \$12.50. That Glass gave him an order on Payne, at Wharton, "and Love told me, as the order was in my name, I would have to go to Wharton and collect the money." Love wrote the order, and Glass signed it. They went back and crossed the river, and went down to Wharton that evening. "Love left me near the railroad, and said he was going up town on business, and would meet me up there. I went in Payne's store, presented the order, and they gave me a draft for the money. I then went to the bank, and it was closed; then to Roseberry's store, and, while waiting to get the check cashed, Love and Rich walked in. Love introduced Rich to witness. Rich pretended to be surprised, and glad to meet me. He then arrested me [defendant], and handcuffed me." Defendant asked him what he was arrested for. "Rich said he would tell me later. He then took the check and a nickel out of my pockets, and carried me to the courthouse, and there found and arrested O'Brien." Witness stated that he did not know whose cow it was that O'Brien and Love were skinning, when he found them in the bottom, but supposed it belonged to Love.

This, in the main, is the testimony of both the state and the defendant upon all of the salient features of the case. On this testimony it would appear that both Pace and Glass were either particeps criminis with the defendant in the theft of said beef, as they aided him in disposing of the same, or else were detectives engaged in ferreting out crime; and, while they did not have as much to do with the transaction as the witness Love, yet the testimony is ample to place them in the same category with him. And under the circumstances the court should have applied the charge on accomplices' testimony equally to them as to the witness Love; and it should have been submitted to the jury to determine whether they were accomplices, or not, participating in the crime for the purpose of theft, or simply acting as detectives in ferreting out crime. This the court did not do, but, on the contrary, singled

out Love alone in the charge. This was tantamount to instructing the jury that Pace and Glass were not accomplices, and that Love's evidence could be corroborated by others, when the court should have left the question as to whether or not they were accomplices to be decided by the jury. We would furthermore observe, in this connection, that there is enough in this record to at least suggest that this was a trap or scheme set on foot by Love in order to induce the defendant and O'Brien to commit a theft so that he might profit thereby. It further appears that the sheriff of the county was co-operating with Love,—whether with a knowledge of Love's purposes or not does not appear, except that he told Love not to lead any one into trouble, but to get in with them, if he could, and not contrary them, but do as they wished to do. We rather infer that Love was bleeding him for his own purposes, but it is rather curious that the sheriff should have foreseen for a week or more that the beef would be carried across the river by defendant, and sold to Glass. The testimony of both Pace and Glass in this regard stands uncontradicted. There is no testimony in the record, of a positive character, indicating that Pearce, the owner of the cow, was a party to this plan, or that he was consenting or agreeing that the sheriff and Love should take the cow for this purpose. If he was so assenting, then there was no theft in this case. If he was not, then all of the parties who engaged in this scheme are guilty of a criminal offense, and each of them was an accomplice, under this view, whose testimony would have to be corroborated by that of other witnesses. We do not undertake to say that the evidence establishes that there was such a plan on foot, but certainly there are some facts in the record which, standing uncontradicted, tend to indicate this view. We can conceive of no conduct more reprehensible on the part of officers, whose duty it is to prevent crime, and "nip it in the bud," instead of so doing, to lend aid and encouragement in carrying it out. As was said by Marston, J., in *Saunders v. People*, 38 Mich. 218: "Where a person contemplating the commission of an offense approaches an officer of the law, and asks his assistance, it would seem to be the duty of the latter, according to the plainest principles of duty and justice, to decline to render such assistance, and to take such steps as would be likely to prevent the commission of the offense, and tend to the elevation and improvement of the would-be criminal, rather than to his further debasement. Some courts have gone a great way in giving encouragement to detectives in some very questionable methods adopted by them to discover the guilt of criminals, but they have not yet gone so far, and I trust never will, as to lend aid or encouragement to officers who may, under a mistaken sense of duty, encourage and assist parties to commit crime in order that they may arrest and

have them punished for so doing." In this case the sheriff, instead of laying a plan to have the crime carried out, should have taken steps to prevent it. Instead thereof, it appears, not only from the testimony of the defendant's witnesses, but from the testimony of Love and others, that he was an active participant in the entire transaction and his own testimony scarcely relieves him from the taint that the crime was suggested by him. For the error of the court in the charge given on accomplice's testimony, the judgment in this case is reversed, and the cause remanded.

HURT, P. J., absent.

HUDSON v. STATE.

(Court of Criminal Appeals of Texas. June 17 1896.)

LARCENY—INSTRUCTION AS TO ACCOMPLICE—CONTINUANCE—SHOWING AS TO DILIGENCE.

1. Application for continuance for absence of witnesses residing in the county, showing that the indictment was presented on the 7th of the month; that defendant was recognized on the 9th, and the case set for trial on the 25th; that process for the witnesses was returned on the 25th,—but not showing whether it was served on them, and not showing any further act of diligence in regard to them, makes an insufficient showing as to diligence.

2. Eight days after defendant was recognized, and eight days before the day set for trial, attachment was issued to B. county for W. as a witness. Five days afterwards it was returned indorsed "Not executed. Said W. not found in said B. county." Three days later process was issued to H. county for the witness, which was not returned when case was tried. The application for continuance gave no excuse for failure to issue the first process earlier, and, though stating that defendant had learned that W. had removed to H. county, did not state how he learned it. *Held*, that there was an utter lack of diligence.

3. On an oral application for continuance, according to the statement of the court, defendant stated that he would prove by certain absent witnesses that, at the time of the theft of the cattle with which he was charged, he was at T. When application was reduced to writing, defendant said he was at P., and on the trial offered evidence to that effect. *Held*, that he had no right to change his oral statement.

4. Continuance for absence of witnesses who defendant states will testify that they were present when the cattle were stolen, helping, as employees, the person with whom defendant is charged to have stolen the cattle, and that defendant was not present, is properly denied on the ground that they would probably not so testify, or that if they would their testimony would probably be false; the cattle being taken at night, under such circumstances that no honest man would have accepted employment.

5. A charge that "in this case the state's witness C. is an accomplice to the offense charged" is not tantamount to telling the jury that defendant was guilty of the offense, or that C. was an accomplice with defendant, and is not objectionable, there being no question as to the fact of C.'s connection with the affair.

Appeal from district court, Houston county; J. R. Burnett, Judge.

Burrell Hudson appeals from a conviction. Affirmed.

W. A. Stewart, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of the theft of cattle, and given two years in the penitentiary, and prosecutes this appeal.

1. Appellant's first assignment of error is to the action of the court in refusing to grant him a continuance. The motion for continuance was predicated upon the absence of the following witnesses: Buck Dawson, Scott Sykes, Mack Langston, John Holmes, and John Jones, all residents of Houston county, and of Barney Wallace, said to reside in Brazos county. The court, in his explanation, shows that the witness John Jones was brought in and testified on the trial of the case, and that the witnesses Dawson and Holmes (the first being the defendant's brother-in-law, and the other his stepson) were in Crockett when the trial was in progress, and Dawson was in court a part of the time during the trial; so that these witnesses are eliminated from the application. The application shows that the indictment was presented in this case on the 7th day of March, and that the defendant was recognized on the 9th of March, and the case was set for trial on March 25, 1896. The application shows that the process for the witnesses to Houston county was returned on the 25th of March, 1896, but does not show whether it was served on the parties or not. Nor does it show any further act of diligence in regard to said witnesses. In our opinion the diligence was wholly insufficient as to these witnesses. As to the witness Barney Wallace, no attachment was issued to Brazos county for him until the 17th day of March, being an interval of eight days from the time when process could have been issued before any was issued, and no excuse is shown for the failure to issue said process earlier. The process was returned on the 22d of March, with the indorsement of the sheriff of Brazos county: "Not executed. Said Wallace not found in said Brazos county." The defendant allowed three days to elapse before he issued any other process for this witness, at which time process was issued to Hamilton county for said witness,—the defendant stating that he had learned that said Wallace had removed to said county; that said process to Hamilton county had not been returned when the case was tried, which was on the 25th of March. If appellant had used diligence in having issued his process to Brazos county immediately on his arrest, he, no doubt, would have procured a return at least a week earlier, and could then have issued his process to Hamilton county; and the sheriff of that county would have had a week or ten days within which to execute his process,

instead of two or three days, as appears from the bill. Nor does he state how he learned that said witness Wallace had removed to Hamilton county. There is an utter lack of diligence as to this witness. By all these witnesses, except Sykes and Wallace, defendant stated that he expected to prove that he was in Palestine on the 14th, 15th, and 16th days of October, 1895; by the witness Sykes, that he was with Ed Currie (jointly indicted with the defendant) on the night of the 14th of October, and helped drive the two cattle out of the pasture from which it is alleged they were stolen, and that the defendant was not present at that time; and also, by the witness Barney Wallace, that he was present with said Currie when the cattle were taken out of said pasture, and was employed by said Currie as a laborer. In this connection we would state that the proof in this case on the part of the state shows that the cattle were taken on the night of the 14th, near Crockett, and driven to Palestine, and there disposed of, and that the defendant was absent from Crockett all of the 15th of October, and was in Palestine with the cattle. In the court's explanation it is stated that the defendant's application was stated orally to the court, and in said oral statement appellant alleged "that he would prove by the absent witnesses that on October 14th, 15th, and 16th he was on the Trinity river, and not at Palestine." It seems, however, that when the application was reduced to writing a material change was made, and it was stated that the defendant at said time was in Palestine, and on the trial appellant offered testimony to that effect. From the statement made by the court, appellant should not have been permitted to change his oral statement. From the shape in which the application is presented to us, in connection with the explanation made by the court, viewed in conjunction with the record testimony in this case, we take it that, if said witnesses Sykes and Wallace were present, they would not likely swear as alleged in the application. It occurs to us that such testimony would implicate themselves in the theft, notwithstanding it is alleged that they were hired hands, yet the circumstances of the theft would hardly afford them relief as employes. The theft was committed at night, and under circumstances in which no honest man could have accepted employment. We take it, moreover, if they would so swear, that their testimony could not be regarded as probably true. And both because there was no diligence used by the appellant in procuring this testimony, and because the same is not probably true, the court did not err in overruling the application for a continuance in this case.

2. Nor did the court err in charging the jury that Ed Currie was an accomplice in the offense charged. There was no question as to this fact, and it was proper for

the court to assume in his charge on accomplice's testimony that said Ed Currie was an accomplice. The language of the court in this connection is as follows: "In this case the state's witness Ed Currie is an accomplice to the offense charged." This is not tantamount to telling the jury that the defendant was guilty of said offense, or that Ed Currie was an accomplice with the defendant. A charge embracing this idea was held bad in *Spears v. State*, 24 Tex. App. 537, 7 S. W. 245. We have examined the record in this case thoroughly, and in our opinion there is testimony, outside of the evidence of the accomplice Ed Currie, tending to connect the defendant with the offense charged. The offense was committed two or three miles from Crockett, in Houston county, on the night of the 14th of October, 1895. The cattle were driven that night to Palestine, in Anderson county, and were there disposed of upon the morning of the 15th of October. The defendant denies being there on that day with Currie, and yet two or three state's witnesses identify him as being in Palestine on that day, and one testified to seeing him with the accomplice Currie. The description of the horses of the two parties who drove the cattle, by a witness who saw them near Grapeland, is that the parties were riding gray horses, though this witness did not identify the parties. The defendant and Currie were both shown to have had gray horses in Palestine, and the defendant is shown to have borrowed from a person at Crockett a gray horse at that time, and to have kept him two or three days; and the defendant is also identified with the accomplice Currie, on the night of the 15th, en route back from Palestine, where the cattle were disposed of, to their homes at Crockett. There are other circumstances in the case tending to connect the defendant with the offense charged, which it is not necessary to mention. In our judgment the evidence tending to connect him with the offense charged is ample, and the jury very properly convicted him on the testimony. The judgment is affirmed.

HURT, P. J., absent.

GARRETT v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1896.)

AGGRAVATED ASSAULT—INSULT TO FEMALE RELATIVE.

1. If the conduct of the prosecutor towards defendant's sister at the time he was shot by defendant was reasonably calculated to impress the latter with a belief that the parties were engaged, or about to engage, in an act of illicit intercourse, and his passion was thereby aroused to such an extent that he became incapable of cool reflection, the offense would be reduced to aggravated assault.

2. The insulting conduct towards a female relative which will reduce an assault with intent to kill to an aggravated assault need not necessarily be such as to cause offense to the female herself.

Appeal from district court, Smith county; Felix J. McCord, Judge.

Joe Garrett was convicted of an assault with intent to murder, and appeals. Reversed.

Coal Johnson, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of an assault with intent to murder, and given two years in the penitentiary, and prosecutes this appeal.

1. Appellant relied upon two theories in the case: One theory claiming a mitigation or reduction of the offense from an assault with intent to murder to an aggravated assault, on the ground that the defendant acted, in the matter of shooting the prosecutor, on account of alleged insulting conduct towards Mrs. Patterson, the sister of the defendant. The other ground was self-defense. No complaint was made as to the charge on that subject, and so it is not necessary to discuss the case with reference to that matter. In reference to the theory of defense, on which he insisted that he should not have been convicted of a greater offense than aggravated assault, we will give a short résumé of the substance of the testimony, and then examine the charge of the court on this subject: Mrs. Patterson was the widowed sister of the defendant. The former wife of the prosecutor was also a sister of the defendant. The prosecutor had been boarding with Mrs. Patterson, and had for some time been paying her marked attention, and the record indicates that their conduct gave rise to some talk. A short while before the difficulty the prosecutor met the defendant, and had a talk with him on the subject, in which he told the defendant what Mrs. Hutcheson had said about the relations of the prosecutor and Mrs. Patterson; and he also told him that he thought Mortimer Garrett, a brother of the defendant, had got Mrs. Hutcheson to come up in order to break up the match between him and Mrs. Patterson, and that he believed that Mortimer and Mrs. Hutcheson "had it in for him." The defendant advised the prosecutor that he ought to move from Mrs. Patterson's. The prosecutor did move from Mrs. Patterson's boarding house in about a week thereafter. In two or three months after that the prosecutor, Mugford, resumed his visits to Mrs. Patterson's, which were usually after his work was done, about 10 o'clock at night. The evidence shows that about three weeks before the difficulty the prosecutor, Mugford, and Mrs. Patterson became engaged, and that at the time of the shooting they were to have been married within five days. Such engagement, however, was a secret between themselves. The record shows:

That, on the night before the difficulty, Mortimer Garrett, who lived at Mrs. Patterson's, went home about midnight. That he went into his sister's room, which adjoined the parlor. That directly the light in the parlor was put out, and he heard parties in the parlor talking. They remained there without a light for about 15 or 20 minutes, and then Mugford went out the front door, and his sister came out of the room. Mortimer told the defendant of this occurrence the next day. On the night of the difficulty, Mugford came to Mrs. Patterson's, passed some one on the porch, walked in the house and in the parlor, and was there 15 or 20 minutes, when Mrs. Patterson came in, and stayed there until about 12 o'clock. That when he started to leave he assisted Mrs. Patterson in putting out the lights in the house. She put the light out in the parlor, and then went in the dining room, which adjoined the parlor, put that light out, and left the light in the hall burning, and then went back in the kitchen, in the rear of the house, to put out the lights there, the prosecutor accompanying her. When they got in the kitchen the prosecutor put down the window. Mrs. Patterson came in, and partly closed the kitchen door. Then the prosecutor put his arms around her shoulders, and kissed her. While they were standing there, in the kitchen, the defendant pushed the kitchen door open, and stepped in the door, and said, "Mugford, hands up!" or "Hands up, Mugford!" and then began shooting at him. The prosecutor was so frightened that he was rendered powerless. Appellant shot four times; two of the shots striking the prosecutor, and inflicting upon him serious injuries. The prosecutor ran by the defendant out into the yard. As he ran out the door, some one hit him over the head. At the time he saw Mortimer Garrett right by the door, but was unable to say whether it was he that struck him or not. This was the account given of the difficulty by the prosecutor. Mortimer Garrett, the only other witness in the case, testified that at the time of the difficulty he "had just reached home from town, and heard a noise in the kitchen; went there, and saw Joe Garrett, who came in at the side door, close to the kitchen, step to the door, push it open, and step in. As he did so he said, 'Mugford.' As he said this, Mugford made towards him. Defendant pulled his pistol, and said, 'Stop' and, I think, said, 'Throw your hands up!' and began firing. By the time he had fired twice, Mugford had got up to him and got hold of him, and defendant fired twice after the prosecutor got hold of him. Mugford's clothes were set on fire. The defendant did not have his pistol out when he stepped in the door. Mrs. Patterson was in the kitchen while the shooting was going on, and, as soon as the defendant ceased firing, Mugford ran out the door and passed the defendant." The court gave an elaborate charge on the phase of the case involving insulting conduct of the pros-

ecutor toward Mrs. Patterson, the sister of the defendant. While no exceptions were taken to the charge, yet certain features thereof are assigned as error. Among other things, it is insisted that one paragraph of said charge was calculated to mislead the jury, in inducing them to believe that the conduct of the prosecutor must have been insulting to Mrs. Patterson. The charge objected to is in these words, to wit: "If, however, the conduct of said Mugford was not in itself insulting to Mrs. Patterson, or coupled with what defendant had heard recently, or such as would raise in the mind of an ordinarily prudent person a degree of anger, rage, sudden resentment, or terror, and was not such conduct in itself, and what he had heard, as created in defendant's mind the belief that Mugford's conduct was insulting to Mrs. Patterson, then such shooting would not be a voluntary shooting under the influence of sudden passion arising from an adequate cause." That portion of the charge above quoted, it appears to us, bears the construction contended for by the appellant; that is, before the conduct of the defendant could be considered as affording adequate cause to reduce the assault to an aggravated assault, they must believe that Mrs. Patterson was insulted thereby. There is certainly no evidence in the record in this case that indicates that the conduct of the prosecutor, whether it was merely such as could probably transpire between lovers, or was of an illicit character, afforded her any personal grievance. It is true that the language of the statute is that the insult must be towards a female relative, but we do not take it that this means that the female relative must herself be affronted by the conduct. If the conduct is towards her, and it is calculated reasonably to impress the male relative interfering that it is of such character as showed an illicit intercourse, though it may not be objectionable to the female, such outrageous conduct (for instance, to the daughter or sister of the male relative) may convey and create a grave and serious insult; and for the court to indicate by its charge that Mrs. Patterson should be insulted, before adequate cause existed in favor of the defendant, under the circumstances of this case, was calculated to mislead the jury. The defendant was entitled to a clear and emphatic charge on the subject to the effect that if the defendant at the time reasonably believed that the prosecutor and his sister were engaged in an act of illicit intercourse, or were about to engage in such act, and that his passion became aroused, on said account, to such an extent that he was incapable of cool reflection, and he then shot him, he would be guilty of an aggravated assault. See *Lewis v. State*, 18 Tex. App. 116.

2. The court also gave an extended charge with reference to a mistake of fact, presumably under article 47, Pen. Code. This, no doubt, was intended to cover the phase of the case which indicated that the prosecutor and

Mrs. Patterson were engaged, and that at the time he was shot he was merely caressing his fiancée, which, as an engaged person, he had a perfect right to do. The facts showed that this relationship between the parties was unknown to the defendant. The only fact about which the defendant could have been mistaken was as to what the parties were doing when he opened the kitchen door. If he then reasonably believed that the parties were engaged in an act of sexual intercourse, or about to engage in the same, and this cause excited his passion so that he was incapable of cool reflection, the offense would have been reduced to an aggravated assault. If the parties were merely engaged in an innocent pastime, such as might honorably transpire between engaged persons, and he reasonably believed the parties were engaged, then there would be no reduction in the grade of the offense. We think it would have been better had the court, instead of giving an abstract charge on mistake of fact, given one predicated directly upon the facts of the case. It is not necessary to discuss other questions raised in this case. For the errors above indicated the judgment is reversed, and the cause remanded.

MITCHELL v. STATE.

(Court of Criminal Appeals of Texas. June 28, 1896.)

CRIMINAL LAW—ABSENT WITNESS—LACK OF DILIGENCE—HOMICIDE—CONSPIRACY TO COMMIT UNLAWFUL ACT—NEGLIGENT HOMICIDE—MISCONDUCT OF JURY.

1. Defendant was indicted September 27th, the trial being set for October 9th. On September 30th attachments for witnesses living in another county were issued, but were not placed in the hands of an officer for service until October 2d. On October 1st subpoenas were issued for certain witnesses residing in the county, which were returned "Not found." No other steps were taken to secure the attendance of these witnesses. *Held*, that there was lack of diligence justifying the overruling of a motion for continuance on the ground of absence of witnesses.

2. Where one of the absent witnesses came into court before argument, but defendant did not place him on the stand, nor request that he be examined, he cannot complain that he was deprived of his testimony, even though the court had announced before such witness appeared that he would hear no more testimony.

3. Defendant and another combined to beat the deceased, and in pursuit of deceased the other shot and killed him. It appeared from the testimony that defendant expressed the intention of giving deceased a beating, and had sought to borrow a pistol before starting out on such errand. *Held*, it was not error to charge that, if the combination to commit an unlawful act existed, in the execution of which the other intentionally shot and killed deceased, defendant would be guilty of murder.

4. Where defendant and another combined to assault deceased, and in the attempt deceased was shot and killed, in view of testimony tending to show that the shooting was accidental an instruction should be given as to negligent homicide in the second degree.

5. In homicide it appeared that when the jury retired to consider their verdict they stood eight for acquittal; that two of the jurors stat-

ed to the jury that defendant had killed a certain man, and had made other statements tending to show that defendant and other members of his family were of bad character. *Held*, that this was misconduct sufficient to justify a new trial, under Code Cr. Proc. 1896, art. 817, § 7, granting new trial where the jury, after having retired to deliberate, have received other testimony. 33 S. W. 367, reversed.

On rehearing. For former report, see 33 S. W. 367.

A. H. Mitchell was convicted of murder in the second degree, and sentenced to five years in the penitentiary. The judgment having been affirmed on appeal, defendant moved for a rehearing. Granted.

John M. Duncan, Wm. Sorley, F. M. O. Fenn, and J. B. Brockman, for appellant. Mann Trice, for the State.

HURT, P. J. The appellant was convicted of murder in the second degree, and given five years in the penitentiary. He prosecuted an appeal, and the case was affirmed at the Tyler term of this court, and it now comes before us on motion for a rehearing. Counsel for appellant has filed an able brief presenting a number of questions, and insisting that in the affirmance of the case this court committed several errors, and urging upon us a careful review of the same in order that correct conclusions may be reached. He has also presented the same matters in a clear and forcible argument before this court. Aided by his lucid exposition of the matters involved in the case, we have again gone over it, and in the light of the argument and authorities cited have reconsidered all of the assignments, but we will content ourselves with presenting and discussing only such as are necessary to a proper disposition of the case, and such as are likely to occur again on another trial.

1. The appellant again urges that this court erred in holding that the lower court acted properly in overruling the motion for a continuance and in refusing a new trial based on the action of the court in overruling said motion. The motion for continuance was based on the absence of the following witnesses: McNeal, Harvey, King, and Johnnie Williams, all residents of Ft. Bend county; and of Bland, Mayfield Williams, and Chancy, all residents of Harris county. We will first consider the question of diligence as to these witnesses. The indictment was returned into court on the 27th of September. Subpoenas were not issued for the witnesses who lived in Ft. Bend county until the 1st of October, and were made returnable on the 9th. The case was set down for trial on the 9th of October. The subpoena was served on Williams, but was returned as to McNeal, Harvey, and King, "Not found." No reason is shown in the application why process for these witnesses was not issued earlier. For aught that appears, if the subpoena had been issued at the earliest moment when appellant could have sued out process, these three witnesses could have been found and served. On the 30th

day of September an attachment was issued to Harris county for Steve Bland and Mayfield Williams, and on October 2d an attachment was issued for Chancy, also to Harris county. The application shows that the process for these three witnesses was not placed in the hands of the officer of Harris county until October 2d. The application shows no reason why process was not sued out earlier for these witnesses, and certainly it should have been shown why the attachment was not issued for Chancy on the 30th of September; and some excuse should have been shown why the attachment to Harris county for Bland and Mayfield Williams was not delivered to the officer until October 2d. For aught that appears, this process could all have been issued earlier, and have been delivered to the sheriff of Harris county two or three days before it was, and might have been served upon said witnesses, and their attendance secured. In our opinion, there was a lack of diligence as to all the witnesses, both those residing in Ft. Bend county and those alleged to live in Harris county. But it is insisted that, although due diligence may not have been used to procure the attendance of these witnesses, by the motion for a new trial it appears that the testimony of the said absent witnesses is material, and probably true, and that a new trial should have been granted; and this appears to be the rule in accordance with the authorities in this state. See Willson, Cr. Proc. § 2186, and authorities there cited. The state's case mainly rested upon the testimony of Sophie Hunter and Annie Collins, in connection with the testimony of Kane Neal, an accomplice; the first two of whom testified that on the night of the shooting they were present, and saw it, and that the defendant, and not Kane Neal, did the shooting. This was a material issue in the case. The defendant introduced three witnesses who testified that they were in view when the shooting occurred, and that it was the taller man of the two who did the shooting. The evidence showed that Kane Neal was much taller than the appellant. Appellant himself testified that Kane Neal did the shooting. Appellant proposed to prove by Bland and Mayfield Williams that they saw the shooting; that Kane Neal did it, and not the defendant. By the witness McNeal that he heard the fatal shot, and at the time he saw Sophie Hunter, and she was in such position that she could not have seen it. By King and Harvey that they heard the shot, and at the same time Annie Collins was in their view, and that she could not have seen it. By Johnnie Williams that both Hunter and Collins were mad with the defendant, and he had heard them say they were going to swear against him to get even with him. This witness was served, but was not present. All of this testimony appears to be material,—that is, upon a vital issue in the case,—and it is in direct conflict with the state's theory and the evidence produced by the state

on the subject; and the rule in this regard is, there must not only be such a conflict, but the inculpatory facts should be so strong and convincing as to render the truth of the facts set forth in the application improbable. See *McAdams v. State*, 24 Tex. App. 86, 5 S. W. 82d. Under the circumstances of this case, we cannot say that the truth of the facts set forth in the application is improbable. But before we leave this branch of the case we would make some further observations on the question of diligence. The record shows that before the argument began the witness Chancy was brought into court. Appellant was apprised of the fact, for his counsel manifested some anxiety to have the account of the witness approved, so he could return to his home. Appellant made no effort to introduce this witness, and according to the application for continuance this witness saw the shooting, and would have testified that Kane Neal did it, and not the defendant. Appellant attempts to excuse himself on the ground that the court stated, when the testimony was closed, that he would hear no more testimony, except on some unforeseen contingency. This announcement was no excuse for the failure to tender the witness. Counsel should have proposed to place him on the stand, and, if the court refused to admit his testimony, he should then have reserved his bill of exceptions. It will be further observed that, although the trial in this case lasted four or five days, no effort was made to procure the attendance of any of the absent witnesses after the trial began. For aught that appears, by the use of reasonable diligence they could have been obtained in time to have testified in the case. Counsel, however, insist that on the overruling of his motion for a continuance he was not able to do any more in the way of diligence, and, no matter if said witnesses were accessible, and could have been produced, that upon the overruling of his motion for a continuance the case was, as to that matter, in statu quo, and this court could not look beyond the time of the overruling of the application for a continuance, as to the question of diligence. The statute places it in the discretion of the court to overrule a motion for a continuance, and then to re-examine the question on motion for a new trial, and to refuse a new trial, unless it should appear that the absent testimony was material, and probably true. And we hold that it is perfectly competent for the court to look to the action of the appellant and his counsel after the overruling of a motion for continuance, in passing upon the materiality or probable truth of the absent testimony. Suppose, in a trial of this character, counsel were informed by the court that the witness was in town, and could be had, and counsel should decline to ask for process to bring the witness before the court, or suppose that afterwards (as in the case of the witness Chancy) he should actually come into court, and appellant should decline to use him, would

not the court be compelled to hold in such case that appellant was trifling with the court, that the witness would not swear what was alleged, or else appellant did not regard the testimony as probably true? Such occurs to us to be the inevitable conclusion. And thus considering the action of the appellant with reference to these witnesses, we would hesitate to accord a new hearing upon this ground.

2. Appellant objects to the charge of the court defining the extent of Mitchell's responsibility for the act of Neal, which charge is predicated upon the theory that Neal actually fired the fatal shot. The charge of the court on this subject is as follows: "All persons are principals who are guilty of acting together in the commission of an offense, having a common purpose or agreement to commit such offense. If an offense is committed by one person, and others are present, and, knowing the intent of such person to commit such offense, aid him by acts, or encourage him by words or gestures in the commission of such offense, all persons so present and aiding and encouraging or assisting are principal offenders, and may be prosecuted as such. You are instructed that if the defendant and Kane Neal agreed together to commit an assault and battery upon the deceased, or, in the language of the witnesses, to give him a beating, and went to the place where deceased was for that purpose, and did commit an assault and battery upon deceased, and that deceased escaped from them and ran, and the defendant and Kane Neal pursued him, acting together and of common purpose in such pursuit, to overtake the deceased, and to give him a beating; and if while the defendant and said Neal were so engaged in such pursuit the said Neal drew his pistol, and intentionally shot and killed deceased, and that such act of shooting and killing by Neal was the natural and reasonable result to be arrived at from all of the evidence in the case of the agreement or common purpose aforesaid between defendant and Neal to give the deceased a beating, or was such an act as might be reasonably anticipated by the defendant as likely or probable to happen in the accomplishment of such purpose aforesaid,—then and in such case the defendant would be guilty of murder in the second degree. If, however, all the facts existed as detailed in the foregoing paragraph of this charge as to the agreement or purpose between the defendant and Neal to give the deceased a beating, or to commit an assault and battery upon him, and if such agreement or purpose on the part of defendant did not contemplate or embrace the killing of deceased, or the infliction upon him of serious bodily injury, which might reasonably result in his death; and if, while engaged in such pursuit of deceased by defendant and said Neal, the said Neal drew his pistol, and intentionally shot and killed deceased; and if, further, such shooting and killing by Neal

did not result reasonably, naturally, and probably from the agreement and purpose aforesaid to give the deceased a beating, and was not reasonably to be anticipated by Mitchell as the likely, probable, and reasonable result which would occur in the accomplishment of such purpose; and, further, if the defendant did not in any way aid, assist, or encourage said Neal in such act of shooting, knowing his intent to shoot,—then in such case the defendant would not be guilty of any offense, and should be acquitted. If the death of deceased was caused by a shot fired from a pistol in the hands of said Kane Neal, and if such shot was fired accidentally,—that is, if the said Neal struck or struck at the defendant with the pistol, and the pistol was accidentally and without intention on the part of Neal discharged,—causing the death of deceased, defendant would not be guilty of any offense, and should be acquitted. Now, therefore, applying the law as herein given you to the facts in evidence, you are instructed that if you are satisfied by the evidence beyond a reasonable doubt that the defendant and Kane Neal sought the deceased for the purpose of committing an assault and battery upon the deceased, both agreeing and concurring in such common purpose, and that they together pursued the deceased for such purpose, and that while so pursuing the deceased the said Kane Neal drew his pistol, and intentionally shot and killed deceased; and if you further so find that such act of shooting and killing deceased by Neal was the reasonable and probable result of the purpose and agreement aforesaid on the part of defendant and Neal to give the deceased a beating, and was to be reasonably anticipated by defendant as likely and probable to result in the accomplishment of such purpose to assault the deceased, but was not participated in by defendant further than as it might be such probable and reasonable result of such purpose; and if you further find that this occurred in Ft. Bend county, Texas, and at the time charged,—then in such case you will find the defendant guilty of murder in the second degree, and assess his punishment at confinement in the penitentiary for any term not less than five years. If you find that the shot was fired by the accidental and unintentional discharge of the pistol in the hands of Neal, as herein indicated, or if you have a reasonable doubt on this point, you will acquit the defendant." Appellant insists that the facts of this case do not warrant such a charge, and that the most that can be said is that the appellant combined with Neal to inflict on the deceased an assault and battery merely, and that the charge in question should not have been given, and, if given, certainly a clean-cut charge, predicated upon the agreement to inflict a mere assault and battery on the deceased, should have been given. Appellant insists that the language used by this court in the former opinion on this subject is not

the law. Said language is as follows: "If Neal and this appellant agreed and combined to do an unlawful act, such as to beat the deceased, and the deceased was killed by Neal in an attempt to execute the common purpose, the appellant would be guilty of murder, and nothing less, though he had not contemplated the death of the deceased." In this connection appellant cites us to *Blain v. State*, 30 Tex. App. 703, 18 S. W. 862, and quotes therefrom as follows: "If two persons combine to assault another with their fists, and one resorts to a deadly weapon and kills, without the other's knowledge or consent, would both be guilty of homicide? would both be guilty of murder? By no means." He also cites us to *Stevenson v. State*, 17 Tex. App. 618; *Woodworth v. State*, 20 Tex. App. 380; *Mercersmith v. State*, 8 Tex. App. 212; *Welsh v. State*, 3 Tex. App. 420. These authorities support the contention of the appellant. This question of joint intent in the commission of offenses has frequently been before this court, but, inasmuch as perhaps the precise question which the record seems to raise in this case has not been previously decided, we will examine and discuss the authorities on the subject. In *Guffee v. State*, 8 Tex. App. 187, it is held: "If one, knowing the unlawful intent of another, joins him in the commission of an offense, both are principal offenders. If one, finding another engaged in an affray, comes to his aid, and takes part in the conflict, his amenability to the law is dependent upon his own acts and intent, and not upon the intent of the other, who, without his knowledge, engaged in or prosecuted the difficulty." To the same effect, see *Foster v. State*, 8 Tex. App. 248, and *Snell v. State*, 29 Tex. App. 248, 15 S. W. 722. Mr. Roscoe says, "Although the criminal intent of a single person, who, without the knowledge or assent of his companions, is guilty of homicide, will not involve them in his guilt, yet it is otherwise where all the parties proceed with the intention to do an unlawful act, and with the resolution at the same time to overcome all opposition by force; for if, in pursuance of such resolution, one of the party be guilty of homicide, his companions will be liable to the penalty which he has incurred." See *Rosc. Cr. Ev.* p. 713, citing *Fost. Crown Law*, 352, and *Hawk. P. C.* bk. 2, c. 29, § 8. We quote Mr. Bishop on this subject as follows: "Whenever one without legal excuse or palliation does what is directly and immediately dangerous to life, any homicide which results therefrom, whether intended or not, is deemed by the law to have proceeded from malice aforethought, and is murder, not manslaughter." See 2 *Bish. New Cr. Law*, § 679. "Ordinarily, when one without legal excuse so uses a deadly weapon that the death of a human being results therefrom, the law, either conclusively or as a violent presumption of fact, infers malice aforethought, and adjudges the act to be murder." *Id.* § 680.

"Where the intent was to commit only a trespass or a misdemeanor, an accidental killing would be only manslaughter." *Id.* § 682; citing *State v. Smith*, 2 *Strob.* 77. Mr. Bishop appears to draw a distinction between chastisement or beating where one has the right to inflict punishment and where one has not. "'Wherever,' says Hawkins, speaking of cases other than parents and the like, 'a person in cool blood, by way of revenge, unlawfully and deliberately beats another in such a manner that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone so far;' because here, the reader perceives, there is no right of correction, even with a proper instrument. Yet this doctrine of Hawkins is stated a little too broadly, for if the beating, however wrongful, was neither with a deadly weapon, nor carried to a degree evidently dangerous, and there was no intent to kill, but unfortunately death followed, the offense would be only manslaughter." 2 *Bish. New Cr. Law*, § 690, subd. 2. "One unintentionally taking life in committing a mere criminal misdemeanor of a sort dangerous to life, so that the element of danger concurs with the unlawfulness of the act, commits murder." *Id.* § 691. "Hawkins says, 'If a man happen to kill another in the execution of a malicious and deliberate purpose to do him a personal hurt, by wounding or beating him, or in the willful commission of any unlawful act which necessarily tends to raise tumults and quarrels, and consequently cannot but be attended with the danger of personal hurt to some one or other, * * * he shall be guilty of murder.'" *Id.* § 691, subd. 4. "Where the misdemeanor intended and act done to perpetrate it are of a sort not thus directly dangerous to life, if accidentally a homicide results therefrom it is manslaughter." *Id.* § 692. "If several conspire to invade a man's household, and go to it, armed with deadly weapons, to attack and beat him, whereupon one gets into difficulty with him and kills him, the rest are guilty also of murder, though they did not mean it." 1 *Bish. New Cr. Law*, § 633, subd. 5; citing *Williams v. State*, 81 *Ala.* 1, 1 *South.* 179. "Where two combine to fight a third with fists, if death accidentally results from a blow inflicted by one, the other also is answerable for the homicide. But if the one resorts to a deadly weapon without the other's knowledge or consent, he only is thus liable." 1 *Bish. New Cr. Law*, § 637, subd. 5. Mr. Bishop deduces the following rules on the subject: "The rules to determine responsibility are, in reason, and fairly well deducible from the modern authorities, substantially as follows: One is responsible for what of wrong flows directly from his corrupt intentions, but not, though intending wrong, for the product of another's independent act. If he set in motion the physical power of another, he is liable for its result. If he contemplated the result, he is answerable though it is produced

in a manner he did not contemplate. If he did not intend it in kind, yet if it was the ordinary effect of the cause, he is responsible. If he awoke into action an indiscriminate power, he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible. But if the wrong done was a fresh and independent product of the mind of the doer, the other is not criminal therein merely because, when it was done, he meant to be a partaker with the doer in a different wrong." Id. § 641.

It follows, then, if the authorities cited enunciate the correct doctrine on this subject, that if the defendant and Kane Neal combined together to whip or beat the deceased, and to do so at all hazards, and, if necessary to that end, to take his life in case he resisted it or fled from it, that one would be responsible for the act of the other. If in such case they came upon him, and he resisted being beaten, and in order to accomplish their common purpose they either killed him with a picket or a pistol, it would be murder. If he fled from them to avoid being whipped, and they killed him with a picket or a pistol in his flight, it would be murder,—that is, if the picket was in its nature, as used, a dangerous and deadly weapon, and what was done with it or with the pistol was directly and immediately dangerous to the life of the deceased; and so, if he submitted, and they beat him with a picket or a pistol in a manner directly and immediately dangerous to his life, and death resulted, both would have been guilty of murder,—that is, if the parties in their joint agreement contemplated the result, the defendant would be answerable, though it was produced in a manner he did not contemplate. If he did not intend it in kind, yet if it was the ordinary effect of the cause, he is responsible. If he awoke into action an indiscriminate power, he is responsible. If, on the other hand, no more was contemplated than a mere misdemeanor, as an assault and battery with the hands and fists, not dangerous to life, and one of the parties, besides the intention of the other, drew a deadly weapon, and stabbed or shot the deceased, then such other is not liable for murder; and such was the idea intended to be conveyed by the language used in the former opinion of this court.

As to the intention of the parties on this subject, we refer to the testimony of the witnesses. Sophie Hunter states, in substance, that Lucy and Frank Williams, deceased, were having an altercation in the street, and defendant, Mitchell, came by, and asked what was the matter and was told that Frank was drunk, and Lucy wanted to tear his clothes off of him, and beat him in the face, and witness was not going to see it done. Defendant told her to turn Lucy loose, and if witness did not he would put her in

jail. Frank was cursing. Defendant told him if he did not hush he would have him arrested. It then appears that they went into one Mrs. Longtine's store, and that the row continued between Frank and Lucy. Defendant told Frank to quit cursing. He replied, "I am not bothering you or nobody else. If you want to shoot me you can do it." Defendant left; told deceased to wait until he came back. Witness then hurried the deceased to one Granny Mary's house near by, and shut the door. As she came out she met the defendant and Kane Neal. Defendant asked where Frank was. Witness told him she did not know; that he was not there. He told her to go back and open the door, and witness refused. Then he went to the door, and called Granny Mary, and said if she did not open the door he would shoot it down, and then broke the door open. He called to Frank to come out of there. Frank jumped out of the window. Kane Neal said, as Frank ran around the back part of the house, "Where is the son of a bitch?" Frank ran to the back of the fence, and tried to get over, when Neal ran there, and hit him with the picket, and defendant also ran there and hit him with a picket. They hit two or three licks with pickets, and he got loose from them, and ran out of the gate, to where witness was, and said, "The white folks are trying to kill me." He said he didn't know what to do; that he was drunk. Witness told him to go to Mr. Darst. After Frank started to run, defendant asked Kane for his gun, and said, "I allowed to beat the son of a bitch, but I can't catch him, so I will kill him," and just as Frank turned the corner defendant shot him. To the same effect is the testimony of Annie Collins. Maggie Longtine testified as to what occurred at her house. She said that Frank was cursing in the house; that he did nothing to Mitchell, but said, "All that you can do is shoot me." Mitchell said he knew what he could do, and went out. Sophie Hunter then took Frank away. Mitchell testified in his own behalf: That he came to Frank and Lucy in the street who were in a row. He told them that if they did not quit cursing and fighting they would be put in jail. "I passed, and went on up the street and they ran up the street and into Mrs. Longtine's store." That he (defendant) then went in there. They were still rowing, and Frank was cursing; and witness told him that he must quit cursing in the white lady's house and get out of there. Deceased said: "What is it to you, you damned white son of a bitch? You put me out." Witness said, "I will put you out, and teach you a lesson." "I did not feel like taking my hands to him, and I went to Mr. Austin's saloon, a few doors west on Railroad street, to borrow a pistol. I told Mr. Austin what I wanted, and what I wanted to do; that I wanted to put the negro out of the lady's house; and he said he didn't have a pistol; and Kane Neal, who was sitting there, and heard me ask for

the pistol, got up, and asked me what was the matter. I asked him if he had a gun. He said, 'No.' He asked me what I wanted with it. I told him a negro was drunk and cursing in a white lady's house, and I wanted to put him out, and give him a beating, to teach him how to behave himself. He said he would go with me, and we would put him out; and I told him to see that the negroes didn't double team on me, and I would throw him out of the house, and give him a good whipping. I intended to give him a good beating for his insolence. As we went from Mrs. Longtine's toward Granny Mary's, I broke a piece of a picket—a piece of a pine board—off of the fence, and carried it in my hand. We both went into the yard. I went to the door, and told Granny to open the door, and she said: 'Shove it open. It ain't locked.' I shoved it open, and it was not even locked. The light blew out. I told Granny to light the lamp, and she lit it with a match. Neal went to the window near the door on the same side the gate is on when we went into the yard, and looked into the room. I was standing with one foot on the step and the other on the ground. Neal called that Frank was getting out of the window, and he (Neal) ran out of the gate, and around to the rear of the yard on the outside. I went out of the gate and started around there, too, but I heard Neal say to deceased, 'Don't you try to get over here.' When the negro ran to the gate and ran out, Neal hollered to me to look out; he was coming. I struck at him with the piece of picket as he ran out. Neal had also run around towards the gate. He was on the outside of the back yard, and he ran past me after Frank, and I followed right after him. The negro ran on towards the corner, with Neal a little ways behind him, and I was behind Neal. Neal had told me he did not have a gun, and I did not know he had one until I saw him strike at the negro with it, just before he got to the corner. He kept the gun out of my sight, and, as he was ahead of me, I did not see him when he got it out. Frank got further ahead when Neal struck at him, and he turned the corner ahead, and when he turned he seemed to hit the bench on Third street. Neal could outrun me. Frank turned the corner into Third street, and just as he struck the bench was faced towards the railroad. Then Neal turned after him, and then I turned just behind Neal about two steps. Frank and Neal were both out at the outside edge of the sidewalk, and I was in next to the house. Just as I got about to where the steps are, and about two steps around the corner,—I was still about two steps to the rear and left of Neal,—Neal overtook Frank, who was in a stooping posture. Neal was right over and against Frank, and he struck at him again with the pistol, when it went off, and Neal turned around, and instantly said, 'I believe I have played hell.' I turned, too, and went with him, and asked 'Why?' and he said, 'I believe I have

shot that negro.'” And they went on off. Neal, who was introduced by the state, testified substantially to the same facts from the time when the defendant came to him that the defendant testified to, except as to the circumstances attending the shooting. He stated that the defendant, while they were in Mud Alley, ran by him, and grabbed his pistol from under his vest, and raised the pistol as if to strike, and it fired.

In our opinion, the circumstances here related, coming both from the state's witnesses and echoed by the defendant, indicate to our minds an ultimate purpose between the parties to inflict a severe beating upon the deceased at all hazards, and a beating, judged by the expressions of the defendant himself, of a dangerous character, and calculated to jeopardize the deceased's life, or to inflict upon him such serious bodily injury as might endanger his life. To use his own language, "He wouldn't take his hands to him;" "that he would teach him a lesson;" and he went immediately to get a pistol; and he declared his purpose to throw him out of the window, and give him a good beating; and on the way he pulled from the fence a picket, but its size and weight are not disclosed,—evidently of such a kind as is commonly used for fencing, as it was pulled from a fence. Such an ordinary picket in the hands of an ordinary man is calculated, when used as a weapon, to inflict serious bodily injury. And, moreover, the defendant himself relates that in the pursuit, and some little space before deceased was killed, he saw Kane Neal draw a pistol, and strike at the defendant, yet he makes no protestation against such use, but continues with him in the pursuit until the deceased is slain. In the face of this testimony of the defendant alone, to say nothing about the evidence given on the part of the state, the court was amply justified in giving the charge he did, and enunciated a correct rule of law. However, in addition to the charge given, the court should have presented a substantive charge to the effect that, if such was not the purpose and intent of the defendant, but defendant acted in the matter merely to inflict upon the deceased an ordinary assault and battery, which is a misdemeanor, and that Neal, besides the 'intent and purpose of the defendant, shot and killed the deceased intentionally, the defendant could not be convicted of a greater offense than assault and battery. The court should have further instructed the jury, if Neal, under such circumstances, struck at the deceased with his pistol, not with the intention of killing him, and he fired, and accidentally killed the deceased, under such circumstances the appellant only could be found guilty of assault and battery. The court, on this last-mentioned subject, instructed the jury in such event to acquit the defendant if the killing was the result of an accidental shooting by Neal. That the charge to acquit under such circumstan-

ces is more liberal to defendant is not the question. It is not the law of the case, and the jury, under a proper charge, might have been willing to have convicted the defendant of assault and battery, whereas they may not have been willing to acquit him entirely. The rule is that it is the duty of the court to give in charge every phase of the case which the evidence establishes or tends to establish. "If there is any evidence tending, though slightly, to establish a defense, the defendant is entitled to a charge directly upon that point, no matter what view the court may entertain of the weight and value of the testimony." See *Scott v. State*, 10 Tex. App. 113; *Guffee v. State*, 8 Tex. App. 187. The court also omitted to charge the jury if the defendant did the shooting and killing, and it may have been accidental, as to his liability, as there was some testimony tending to establish this phase, a charge presenting this subject to the jury should have been given in a charge presenting negligent homicide of the second degree.

3. In the former opinion of this court we held that the misconduct of the jury in receiving other evidence after they had retired to their jury room was sufficiently met by counter affidavits to show that the jury were not influenced thereby, and that consequently it afforded no ground for the reversal of the case. On motion for rehearing our attention has been directly drawn to the character of counter affidavits, and it occurs to us from a close inspection of said affidavits that the rebutting affidavits do not meet and controvert the more essential features of the affidavits introduced by appellant. Moreover, from the argument made, we have had our attention more pointedly attracted to the statute authorizing new trials on this ground, and the construction thereof, and we are inclined to the opinion that the terms of said statute are mandatory; and, where the jury have received new evidence after they have retired to the jury room, especially of a material character, that the right to a new trial is mandatory. The affidavit of the juror Fanning shows that he was on the jury that tried the defendant in this case. He says that after the jury had retired to consider their verdict, on the first vote taken, eight of the twelve jurymen voted to acquit the defendant; that after that one of the jurors—the foreman, Hubbard—stated to the jury that the defendant had shot a man in the back while he was sitting down on a gallery filing a gin saw, and killed him, because the man was a witness about some cattle. He also stated that he had seen the defendant playing a game of cards, and he had held out cards and played them in. And also stated that Jim Mitchell, brother of the defendant, went to Houston, provided himself with a pistol, and pretended to be waiting at the Central Depot for his brother, the defendant; and waited until a man that he knew was coming, with a child in his arms,

and commenced shooting him. The man fell, and drew his pistol, and that there were two or three men killed and several others shot in the difficulty. And affiant further stated that Wade Robinson, who was on the jury, said to the jury that "We know these boys" (meaning the Mitchell boys) "and Neal, and that they were not liable to have any accidental shooting." Foreman Hubbard and Robinson said to affiant that, as he was a stranger in the land, they were telling him these things. This was openly talked in the jury room. And to the same effect is the affidavit of the jurors Hagan and Carroll. These two jurors further stated "that Hubbard and Robinson stated that if the jury did not return a verdict they would be carried around four or five counties of the district by the judge. They further stated that eight of the jurors were influenced in finding the verdict of conviction by the statements made by said Hubbard and Robinson. The juror W. T. Carroll further stated that said Hubbard and Robinson stated to the jury that the defendant, A. H. Mitchell, and his brother, were bad men, and that the jury ought to convict the defendant on his bad character, saying to the other jurors that they did not know the bad character of the defendant, as they—Hubbard and Robinson—did; that said Hubbard and Robinson used these statements to other jurors, who, until almost the last moment of their deliberations, had uniformly voted to acquit the defendant, A. H. Mitchell, of the charge of which they were trying him, as arguments for the conviction of the defendant." The record also contains the affidavit of the counsel for the appellant, which recites that when they accepted the jurors Hubbard and Robinson, when they were examined on their voir dire examination, they each disclaimed bias or prejudice, or any conclusion as to the guilt or innocence of the accused, and each qualified himself as a competent juror to sit upon and try said case, and was accepted by appellant as such, before his peremptory challenges were exhausted. The state met these affidavits with counter affidavits. The jurors Hubbard, Robinson, Winer, Hagan, Horton, Walker, Smith, Lones, and Kageler, being nine of the jurors, stated in their affidavit that they tried and decided the above case under the law as given by the court, as they understood it upon a careful reading of the charge and the evidence as adduced during the trial; that each and every one rendered his verdict in accordance with the law and evidence sworn to by the witnesses, and that they were not influenced or persuaded by any outside pressure whatever; and that, so far as their knowledge and belief went, no attempt was made by any juror to influence any juror in his verdict by anything outside of the law and the evidence in the case. The jurors Hubbard and Robinson also made an affidavit from which the following is extracted, to wit: They say that

they have read the affidavit of Carroll, one of the jurors, "and they say under oath that in that part of said affidavit where said Carroll uses the following words, to wit: 'And that the defendant, A. H. Mitchell, and his brother were bad men, and that the jury ought to convict the defendant on account of his bad character, saying to the other jurors that they did not know the bad character of the defendant, as he—Hubbard and Robinson—did; that said Robinson and Hubbard used these statements to the other jurors, who, until almost the last moment of their deliberations, had uniformly voted to acquit the defendant, A. H. Mitchell, of the charge of which they were trying him, as arguments for the conviction of the said defendant Mitchell.' The said Hubbard and Robinson say that said language made and sworn to by said W. T. Carroll in his affidavit made and filed in motion for a new trial is wholly untrue and false, and that they pronounce it a fabrication; and so testify under their oath that no such language was used by them, or either of them, on the trial of said case." To the same effect is the affidavit of the jurors Bob Smith, W. P. Winer, D. M. Walker, J. H. Lones, A. J. Horton, and F. Kageler; and also the juror W. T. Carroll made an affidavit in which he stated that he is now satisfied, and was at the time said verdict was rendered, and that he rendered his verdict according to the law and the evidence as he understood it. It will be noticed here that the affidavits attempting to controvert the facts alleged in the motion, as made by the jurors Hubbard and Robinson, corroborated by the jurors Winer, Smith, Walker, Lones, Horton, and Kageler, do not attempt to controvert the affidavits of the jurors furnished by the appellant as to the facts stated in the affidavits of Fanning, Hagan, and Carroll as above stated. They only propose to question the last affidavit of W. T. Carroll, above set out, in which said Carroll stated that the jurors Hubbard and Robinson stated to the jury that the defendant and his brothers were bad men, and that the jury ought to convict him on account of his bad character, stating to the other jurors that they did not know the bad character of the defendant as they—Hubbard and Robinson—did; and the affidavits even meeting this question are couched in the most general terms, and do not state that language of similar import was not used, but simply state that no such language was ever used by them, or either of them, on the trial of said case. It is highly probable that the exact language could not be stated in this regard, and to have entirely met the question the affidavit should have stated that neither the language nor any of similar import was used. But it will be observed that these affidavits do not gainsay or controvert the fact that after the jury had retired to the jury room, and after eight had voted for acquittal and only four for conviction, that

during the discussion of the evidence and the charge the juror Hubbard, who was foreman, and the juror Robinson stated to the jury that the defendant had shot a man in the back while he was sitting on a gallery filing a gin saw, and killed him, because he was a witness against him about some cattle, and that they had seen the defendant playing at a game of cards, and saw him holding out cards; and the further statement that the brother of the defendant had killed a number of men at Houston by taking an unfair advantage of them, and that they were not men liable to shoot a man by accident. These facts stand uncontradicted by the state. No effort is made to controvert them, and that they were testimony of a most material character seems to be evident. As the defendant testified in the case, if he had been indicted for a previous homicide, there might have been permitted to be shown, as bearing upon his credit, the fact of such previous indictment. But in such case it would have been the bounden duty of the court to limit the testimony to its specific purpose, but this testimony went to the jury without limitation, and went to the jury when the defendant had no opportunity to meet it or cross-examine the witnesses, or to bring rebutting testimony. Moreover, it was an issue in the case whether or not the shooting was accidental. These witnesses in the jury room, after reciting the facts, speak as to the character of the defendant and his brother and Neal as men who were not liable to do accidental shooting, and that they were bad men, and ought to be convicted on that account. This testimony, coming in this shape, at a time when the defendant had no opportunity to meet it, was calculated to have a powerful effect against him, and evidently it must have had, because for no other assigned reason the jury changed from a majority of eight in number for acquittal to an unanimous verdict for conviction. It is no answer to this proposition to say that nine or ten of the jury made affidavits that they found their verdict upon the law and the evidence, and that they were not influenced by any outside pressure. Such an affidavit is to be expected from jurors seeking to justify themselves for their own misconduct, and to escape a responsibility imposed upon them by their oaths, which an admission that they were otherwise influenced would entail. The jurors by such means cannot escape the impeachment that their verdict was tainted by this improper evidence. At least, the record here before us, when critically examined, fails to disclose or show any other reason for the change in the status of the jury on the question of the guilt or innocence of the defendant. In our opinion, for the reason that the jury received evidence after their retirement into the jury room, this case should be reversed, if for no other reason.

4. In respect to the question, which, so

far as we know, is a new one in this state, as to whether this should be classed under the seventh or eighth subdivision of article 817, Code Cr. Proc. 1895. On an examination thereof we are inclined to the opinion that, the reception of the testimony by the jury after they had retired to their jury room might be considered a species of misconduct of the jury, and so come under the eighth subdivision, if it were not specially provided for under the seventh subdivision. The subdivision relating to this matter reads as follows: "A new trial shall be granted: (7) Where the jury after having retired to deliberate upon a case, have received other testimony; or where a juror has conversed with any person in regard to the case; or where any juror, at any time during the trial or after retiring, may have become so intoxicated as to render it probable his verdict was influenced thereby. But the mere drinking of liquor by a juror shall not be sufficient ground for granting a new trial." It would appear from this that if the jury received other testimony after having retired to deliberate upon a case, a new trial is mandatory. Certainly it would be so where the testimony is of a material character, and it makes no difference whether the jury received this testimony from one of their number, or from others. Prior to the adoption of the Code of 1879, there existed in the Code of Criminal Procedure, art. 616 (1 Pasch. Dig. p. 523), the following provisions: "If any juror has knowledge of any fact connected with the case on trial, it is his duty to make it known before the case is finally submitted. Should he fail to do this, he may come into the court with the other jurors, after their retirement, and shall be sworn as a witness, and give his testimony." At that time there was no provision in the Code disqualifying a juror as a witness. In the adoption of the Code in 1879 this article 616 was repealed by its omission, and a new disqualification of a juror was inserted, to wit, "that he is a witness in the case." Code Cr. Proc. 1895, art. 673. It would appear from this that it was the purpose and design of the legislature to get rid of all persons who might be witnesses from the jury, and to allow a person with knowledge of the facts to get upon the jury, and promulgate them in the jury room, would be a vain attempt to ignore the statute. Though the receiving of evidence by the jury, as in this case, after they had retired to their jury room, has been heretofore in cases termed "misconduct of the jury," in our opinion, while in a general sense it is a misconduct, it falls under subdivision 7, and not subdivision 8, of article 817; and for the reception of such evidence, where it is material, this court has invariably reversed the case. See *Wharton v. State*, 45 Tex. 2; *McKissick v. State*, 26 Tex. App. 673, 9 S. W. 269; *Anschicks v. State*, 6 Tex. App. 524; *Hargrove v. State* (Tex. Cr. App.) 26

S. W. 993; *Ellis v. State* (Tex. Cr. App.) 27 S. W. 135.

5. Another question presented is as to the bias and prejudice of the jurors Hubbard and Robinson. We have previously observed that both of these jurors qualified themselves to try the case. Each answered that they had no bias or prejudice in favor of or against the defendant, and were taken on the jury by the appellant with that understanding, and he had no knowledge to the contrary until after the rendition of the verdict. And on this account he was afforded no opportunity of challenging them. The statute is imperative on this subject, and if the juror answers, when he is being tested, that he has bias or prejudice in favor of or against the defendant, he is subject to a challenge for cause. The law does not stop to inquire as to the grounds of his bias or prejudice, but considers him disqualified to sit in the case. The evidence in this case establishes beyond question that, although these men may have answered (we may presume honestly, as the vice of prejudice or bias is that it renders its possessor blind to the fact of its possession) that they had no bias or prejudice, they were greatly prejudiced against the appellant. Mr. Webster defines "bias" as follows: "A leaning of the mind; propensity towards an object, not leaving the mind indifferent; inclination; prepossession; bent." He defines "prejudice" in this wise: "An opinion or decision of mind formed without due examination; prejudgment; a bias or leaning towards one side or the other of a question from other considerations than those belonging to it; an unreasonable predilection or prepossession for or against anything; especially an opinion or leaning adverse to anything, formed without proper grounds or before suitable knowledge." It is not necessary here to reiterate the facts stated by these jurors Hubbard and Robinson to the other members of the jury in the jury room. If they do not indicate prejudice against him, it would be difficult to find a case in which the English language would convey terms expressive of ill will and animosity against a person. See *Long v. State*, 10 Tex. App. 186; *Hanks v. State*, 21 Tex. 526; *Henrie v. State*, 41 Tex. 573; *Washburn v. State*, 31 Tex. Cr. App. 352, 20 S. W. 715; *Sewell v. State*, 15 Tex. App. 56.

The views herein expressed do not accord with some of the views expressed in the opinion heretofore rendered in this case, but, as stated, we have given the questions here presented a more thorough and critical examination, and the points here decided are in accord, we believe, with correct principle, and in consonance with the decisions of our courts on the subject. For the errors pointed out, a new hearing is granted, and the judgment of the lower court is reversed, and the cause remanded.

HATHAWAY v. STATE.

(Court 'of Criminal Appeals of Texas. June 26, 1896.)

CONSPIRACY AGAINST TRADE — INDICTMENT AND PROOF — VARIANCE.

1. Act March 30, 1890, relating to conspiracies against trade (Pen. Code 1895, art. 981), provides that any violation of the law is a conspiracy against trade, and any person who may be engaged in any such conspiracy, or who shall, as principal, manager, director, agent, servant, or employé, knowingly carry out any of the stipulations, purposes, prices, etc., shall be punished, etc. *Held*, that under such act two or more persons may form a conspiracy against trade, and others, after the conspiracy is formed, may enter therein, and become amenable as co-conspirators with those forming it; and, where one is charged with being a party to the conspiracy, proof merely that he was an agent, without proof that he had knowledge of the conspiracy, is insufficient to support a conviction.

2. Where the indictment does not charge defendant as principal or agent, or that he in any capacity acted for such trust, and knowingly carried out any of the purposes or orders thereunder or in pursuance thereof, proof of such facts will not support a conviction.

Appeal from district court, McLennan county; S. R. Scott, Judge.

E. T. Hathaway was convicted of engaging in a conspiracy against trade, and appeals. Reversed.

C. P. & J. D. Johnson and Clark & Bolinger, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of engaging in a conspiracy against trade, and his punishment assessed at a fine of \$50, and prosecutes this appeal.

1. The indictment is in six counts. The first count is as follows: "That in said county of McLennan, state aforesaid, on or about October 1, 1894, John D. Rockefeller, Henry M. Flagler, William Rockefeller, John D. Archbald, Benjamin Brewster, Henry H. Rogers, Wesley H. Tilford, Henry Clay Pierce, Arthur M. Finley, C. M. Adams, J. P. Gruet, E. Wells, Wm. Grice, E. T. Hathaway, and F. A. Austin did unlawfully agree, combine, conspire, confederate, and engage with William E. Hawkins and divers other persons, to the grand jurors unknown, in a conspiracy against trade, then and there, with the said William E. Hawkins and the said other persons, creating a trust by a combination of their capital, skill, and acts with the said Wm. E. Hawkins and other persons, for the purpose, design, and effect to create and carry out restrictions in trade, to wit, in the manufacture, production, sale, trade, and shipment of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils, the same being commercial commodities, by keeping the price of said oils at a certain price per gallon, and at a certain price as otherwise sold, which price was far above the true market price of said oils, and for the purpose and effect to prevent competition in the manufacture, production,

sale, trade, and shipment of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils, and to limit and reduce the production of said products, and to raise the price thereof above the true market value, and cause the same to be purchased by the actual consumers at a great price above the true market value, and to prevent competition in the manufacture, production, sale, trade, and shipment of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils, the same being commercial commodities, and products of prime necessity to the people, and for the purpose and effect to fix at a certain standard and figure the price of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils, whereby the prices thereof were and are established and fixed in said county of McLennan at a fictitious value, greatly in excess of the true market value. And the said John D. Rockefeller, Henry M. Flagler, William Rockefeller, Benjamin Brewster, John D. Archbald, Henry H. Rogers, Wesley H. Tilford, Henry Clay Pierce, Arthur M. Finley, C. M. Adams, J. P. Gruet, E. Wells, Wm. Grice, E. T. Hathaway, and F. A. Austin, did then and there unlawfully make and enter into a trust, combination, contract, agreement, obligation, and conspiracy with the said William E. Hawkins and other persons in said county, and all of said persons did agree, combine, conspire, confederate, and engage with each other and among themselves, that they would not manufacture, produce, sell, trade, and ship petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating oils, and lubricating oils below a certain price, which price was and is far above the true market value of said commercial commodity, and that they would fix and keep the price of said oils in said county at a certain price and graduated figures, and that for the purpose of establishing and setting the prices of said oils amongst themselves, and to preclude and destroy free and unrestricted competition in the manufacture, production, sale, trade, and shipment of said oils, they agreed to pool, combine, and unite their interests in the manufacture, production, sale, trade, and shipment of said oils, so that the price thereof would be affected and fixed at a certain figure; against the peace and dignity of the state."

So far as this appellant is concerned, the four succeeding counts are similar to the first count, above quoted. The sixth count is as follows: "And the said grand jurors aforesaid, upon their oaths in said court, do further present: That on or about the 2d day of January, A. D. 1882, a great many corporations, partnerships, firms, and individuals controlling, owning, and operating 95 per cent. of the capital invested in petroleum, its products, refined oils, illuminating oils, and lubricating oils, and in the manufacture, sale, and transportation thereof, met at some place in the

United States, to the grand jurors unknown, and organized themselves into a trust, combination, conspiracy, and confederation with each other and among themselves to organize a monopoly to control the oil trade in the United States. That there were about thirty-nine corporations, partnerships, firms, and individuals who entered into and bound themselves by said trust, conspiracy, combination, and agreement, and that they were scattered over many states of the United States, and owned, controlled, and operated almost the entire petroleum oil industry of the United States, and that the purposes of said trust, conspiracy, combination, and agreement were to organize said corporations, partnerships, firms, and individuals into an agreement, combination, and trust, to be known as the 'Standard Oil Trust,' for the purpose of mining, manufacturing, producing, refining, and dealing in petroleum and all its products, and all the material used in such business, and transact other business collateral thereto, and for such other purposes and powers as should be embraced in the several charters, such as should seem expedient to the parties thereto procuring charters. That, aside from the ostensible purposes already mentioned, the agreement, conspiracy, and trust were created and organized for the purpose of absorbing and controlling and monopolizing the petroleum oil industry of the United States, and that said thirty-nine corporations, partnerships, firms, and individuals also entered into and organized said agreement, conspiracy, trust, confederation, and combination known as the 'Standard Oil Trust' for the purposes of—First, creating and carrying out restrictions in trade; second, of limiting the production and increasing the price of petroleum and its products, the same being a commercial commodity; third, of preventing competition in the making, manufacture, and transportation and sale of petroleum oil and its products; fourth, of fixing at a certain standard and figure the price of petroleum oil and its products, whereby their prices to the public would be controlled and established, and said products being of prime necessity to the people for use and consumption; fifth, for the purpose of binding themselves not to sell, dispose of, and transport petroleum oil and its products at a fixed and graduated figure, and to establish and settle the price of petroleum and its products at such figures so as to preclude a free and unrestricted competition in the making, manufacturing, sale, and transportation of petroleum and its products, and for the purpose of pooling and combining their interests in the making, manufacture, sale, and transportation of petroleum and its products in such a manner that the price thereof would be affected; the said petroleum oil and its products being an article of trade and commercial commodity. That each of said corporations, partnerships, firms, and individuals agreed among themselves and with said trust to form in the states where they

were respectively domiciled a corporation known as the 'Standard Oil Company,' of the state where formed, and to become a part of the trust known as the 'Standard Oil Trust,' and that many such corporations, in pursuance of such agreement and trust, became a member and part of said 'Standard Oil Trust.' The corporations, partnerships, firms, individuals, and corporations formed in pursuance of the agreement mentioned agreed to transfer and assign, and did transfer and assign, all their stock to nine trustees of the 'Standard Oil Trust,' to be held by said trustees indefinitely. That the said corporations, partnerships, firms, and individuals agreed that nine trustees should be appointed to take charge of, control, and operate the affairs of the 'Standard Oil Trust,' and that a certain number of trustees should be elected annually after the election of the original trustees. That said trustees were required, empowered, and authorized to issue trust certificates to said corporations, partnerships, firms, and individuals in consideration for their said stock delivered and transferred to said trustees. That the value of said trust certificates so issued amounted to many millions of dollars. That the general office of said 'Standard Oil Trust' should be in New York City. That the meetings should be there held, and the trustees should be elected in New York City, and that the headquarters and general offices of the said nine trustees should be and remain in New York City. That the said corporations, partnerships, firms, and individuals then and there on the 2d of January, 1882, agreed and contracted that the 'Standard Oil Trust' should be perpetual, and that it has existed since said agreement and trust, and that its general offices and headquarters and the general offices and headquarters of the said trustees are now situated and located in New York City, state of New York, pursuing and carrying out the purposes of said trust, conspiracy, combination, contract, and confederation as hereinbefore detailed and stated. That said trustees are now engaged in carrying out, enforcing, and executing the terms and provisions of said trust, combination, conspiracy, and contract between said corporations, partnerships, firms, and individuals, and said 'Standard Oil Trust' is now in full force and effect, and have been since the 2d day of January, 1882, controlling, managing, and directing ninety-five per cent. of the capital invested in the petroleum industry, and that the value of said trust certificates now in existence is about \$200,000,000. That the trustees of the 'Standard Oil Trust' now in office are composed of the following named persons, to wit, John D. Rockefeller, Henry M. Flagler, William Rockefeller, John D. Archbald, Benjamin Brewster, Henry H. Rogers, and Wesley H. Tilford, and that said trustees are now carrying out, enforcing, and executing the trust agreement and conspiracy hereinabove set out. That said trustees have divided the market for petroleum oil and its

products into various subdivisions between the members of the 'Standard Oil Trust,' allotting to each corporation, firm, member, or individual of said trust a certain state or states in which to have the exclusive right to sell petroleum and its products. That the Waters-Pierce Oil Company, a corporation domiciled in the state of Missouri, has been allotted the market and territory lying in the states of Missouri, Arkansas, Louisiana, and Texas, and had the exclusive right to sell petroleum oil and its products in said states, and that the other members of said 'Standard Oil Trust' are bound by said trust not to invade said territory and sell therein. That the Waters-Pierce Oil Company has the exclusive right under said trust to sell petroleum oil and its products in Texas, and in McLennan county, Texas. That the officers of said Waters-Pierce Oil Company are as follows: Henry Clay Pierce, president; Arthur M. Finley, vice president; C. M. Adams, treasurer; J. P. Gruet, secretary; and E. Wells, auditor; and that Arthur M. Finley, vice president, lives in Galveston, state of Texas. That said trustees of the said 'Standard Oil Trust,' and said officers of the Waters-Pierce Oil Company, in pursuance of the trust, agreement, and conspiracy hereinbefore set out, have subdivided Texas into four grand divisions in which to sell the oils of the Waters-Pierce Oil Company, and have appointed an agent for each grand division, and many local agents for the various towns and counties of Texas, and in McLennan county, state of Texas, to sell their said oils. That said various local agents are acting under the supervision, direction, and orders of said trustees and said officers of the said Waters-Pierce Oil Company, and send daily reports of their said sales of oil to said trustees and officers. That William E. Hawkins, among many others, is the representative and local agent in McLennan county, state of Texas, and by agreement is acting with, conspiring, and confederating with said trustees of the 'Standard Oil Trust,' and the said officers and agents of the Waters-Pierce Oil Company, and is carrying out, enforcing, and executing in McLennan county, state of Texas, all the provisions, terms, and stipulations of said trust, conspiracy, contract, combination, and confederation, and was so doing on the 1st day of October, 1894. That on or about October 1, 1894, in McLennan county, state of Texas, in strict pursuance of and in accordance with said designs, agreements, trusts, combinations, conspiracy, contract, and confederation, and to carry out and execute said purposes, as hereinbefore detailed and set out, John D. Rockefeller, Henry M. Flagler, William Rockefeller, John D. Archbald, Benjamin Brewster, Henry H. Rogers, Wesley H. Tilford, Henry Clay Pierce, Arthur M. Finley, C. M. Adams, J. P. Gruet, E. Wells, William Grice, E. T. Hathaway, F. A. Austin, and William E. Hawkins, did unlawfully agree, combine, conspire, and confederate with each other and

among themselves, and with divers other persons in McLennan county, to the grand jurors unknown, in a conspiracy against trade, then and there creating a trust, by a combination of their capital, skill, and acts with each other for the purpose, design, and effect to create and carry out restrictions in trade, to wit, in the manufacture, production, sale, trade, and shipment of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating and lubricating oils, the same being articles of trade and commercial commodities, by keeping the price of said oils at a certain price per gallon, or at a certain price, as otherwise sold, which price was far above the true market price of said oils; and for the purpose and effect to prevent competition in the manufacture, production, sale, trade, and shipment of petroleum, petroleum oils, all the products of petroleum, refined oils, illuminating and lubricating oils, and to limit and reduce the production of said products, and to raise the price thereof above the true market value, and to cause the same to be purchased by the actual consumers at a great price above the true market value, and to prevent competition in the manufacture, production, sale, trade, and shipment of petroleum, petroleum oils, all their products, refined oils, illuminating and lubricating oils, the same being commercial commodities and products of prime necessity to the people; and for the purpose and effect to fix at a certain standard and figure the price of petroleum, petroleum oils, their products, refined oils, illuminating and lubricating oils, whereby the prices thereof were and are established and fixed in the said county of McLennan, state of Texas, at a fictitious value, greatly in excess of the true market value; and did then and there unlawfully make and enter into a trust, combination, contract, agreement, obligation, and conspiracy, and did unlawfully agree, combine, conspire, confederate, and engage with each other, that they would not manufacture, produce, sell, trade, and ship petroleum, petroleum oils, their products, refined oils, illuminating and lubricating oils below a certain price in McLennan county, state of Texas, which price was and is far above the true market value of said products, and that would fix (and did fix) and keep the price of said oils, in said county and in said state, at a certain price and graduated figure; and that for the purposes of establishing the prices of said oils, and to preclude and destroy free and unrestricted competition in the manufacture, production, sale, trade, and shipment of petroleum, its products, refined oils, illuminating oils, and lubricating oils, all the said above-named persons agreed to pool, combine, and unite their interests, in the manufacture, production, sale, trade, and shipment of said products and oils, so that the price thereof would be affected and fixed at a certain figure; and the prices of said oils were affected and fixed at a certain figure, and free and un-

restricted competition in said oils, products, and articles of trade was prevented and destroyed. That the prices of said oils were fixed and established, and free and unrestricted competition prevented in the following manner, to wit: All of said above-named persons, in connection with divers other persons, to the grand jurors unknown, would bring their oils into the various towns of Texas, and into McLennan county, state of Texas, and where they found competition in the sale of their oils would immediately cut prices far below a profitable selling price, and would not sell their oils to any dealer who would not agree not to purchase any competitive oils, and by reason of their immense power, wealth, fortunes, trusts, mutual combinations, and monopolies keep said prices at said unprofitable figures until all competition had been crushed and destroyed, and all competitors had fled the market and towns of said state and McLennan county, when they would raise the prices of their oils far above the true and honest market prices, and exact unreasonable and exorbitant prices from the actual consumers, and then and there keep fixed and established said prices. That in the manner, by the methods, and through the trusts hereinbefore described the said persons have carried restrictions in trade, increased the price of petroleum, its products and oils, and have destroyed competition in the manufacture, sale, and transportation of oils, and have fixed the prices of oils as a standard figure, so as to control the price thereof to the public, and have pooled, combined, and united their interests in the manufacture, sale, and transportation of oils in such a manner as to affect the price thereof, and have greatly increased the prices of oils to the people in McLennan county, state of Texas. That the Waters-Pierce Oil Company, acting with said trust, controls and manages 99 per cent. of the oil business of Texas, and that said business amounts to half a million barrels annually. Against the peace and dignity of the state."

This indictment was framed under the act of March 30, 1889. The clause of said act under which it was framed reads as follows: "Art. 981. Any violation of either or all the provisions of this law shall be and is hereby declared a conspiracy against trade and any person who may be or who may become engaged in any such conspiracy or take part therein, or aid or advise in its commission, or who shall, as principal, manager, director, agent, servant or employé, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or orders thereunder or in pursuance thereof, shall be punished by fine not less than fifty dollars nor more than five thousand dollars, and by imprisonment in the penitentiary not less than one nor more than ten years, or by either such fine or imprisonment. Each day during a violation of this provision shall constitute a separate offense." See Pen. Code 1895, art. 981. This act, according to the con-

struction we place upon it, constitutes two distinct characters of offenses. The first portion thereof makes all persons who may be or may become engaged in a conspiracy against trade, or who take a part therein, or aid or advise in its commission, offenders. The latter portion of said act makes those criminal who shall, as principals, managers, directors, agents, servants, or employés, or in any other capacity, knowingly carry out any of the stipulations, purposes, prices, rates, or orders thereunder, or in pursuance thereof; that is, two or more persons may enter into a conspiracy against trade, and become liable thereunder criminally, and others, after the conspiracy has been formed, may enter into said conspiracy, and become amenable as co-conspirators with those originally forming the trust or combination; and, after a conspiracy against trade has been formed, any person, though not himself a conspirator, if he shall as principal, manager, director, agent, servant, or employé, carry out the purposes, prices, rates, or orders of such conspiracy, then he becomes a violator of this statute. But it will be noted that, in order for the latter to become amenable, he must knowingly serve the trust in one of the capacities mentioned; that is, he must know that the trust or conspiracy against trade has been formed, and with such knowledge he must serve the trust in some capacity in carrying out its purposes,—that is, he may be a conspirator, and then he may serve the trust in the capacity of an agent or servant; and in such case an indictment charging him simply as a conspirator, with proof that he was such, would be maintained, notwithstanding the evidence also showed that he was an agent or servant of the company. In the case at bar it will be noted that there is no count that charges appellant as an agent. All charge that he was a party to the conspiracy, either as an original party or one who attached himself to it after its formation. This being the case, to sustain this conviction the proof must show that he was an original party to the conspiracy, or that he joined it after its formation. Proof that he was an agent would not be sufficient, unless it went further, and showed that he knew of the conspiracy. In order to convict a person of being an agent of a conspiracy, such as described in the statute, the indictment must allege that fact, and must also allege that he knew of the conspiracy. Upon the trial of this case, all proof which tended to show the agency of appellant was absolutely worthless without the further proof that he knew of the conspiracy. The statement of facts contains a little over 200 pages of typewritten matter, and we have given the same a thorough examination, and there is no evidence showing that the defendant was one of the original conspirators composing the trust, or that he afterwards entered into and joined said conspiracy.

The sixth count in said indictment charges

John D. Rockefeller, Henry M. Flagler, William Rockefeller, John D. Archbald, Benjamin Brewster, Henry H. Rogers, Wesley H. Tilford as being the trustees of the Standard Oil Trust, now carrying out the provisions of said trust. It alleges that 39 corporations, partnerships, firms, etc., went into and compose said trust, and that it was formed in the year 1882, and still continues; that the Waters-Pierce Oil Company, a corporation of the state of Missouri, was one of the corporations that entered into said trust and formed a part thereof; and that Henry Clay Pierce is president, Arthur M. Finley, vice president, C. M. Adams, treasurer, J. P. Gruet, secretary, and E. Wells, auditor. And it further charged that John D. Rockefeller, Henry M. Flagler, William Rockefeller, John D. Archbald, Benjamin Brewster, Henry H. Rogers, Wesley H. Tilford, Henry Clay Pierce, Arthur M. Finley, C. M. Adams, J. P. Gruet, and E. Wells (the same parties alleged to compose the Standard Oil Trust and the Waters-Pierce Oil Co.), together with William Grice, E. T. Hathaway, F. A. Austin, and William E. Hawkins,—the first three division agents in Texas of the Waters-Pierce Oil Company, and the latter, William E. Hawkins, the local agent of said Waters-Pierce Oil Company in McLennan county,—did unlawfully combine, conspire, and confederate with each other and among themselves, and with divers other persons in McLennan county, Texas, to the grand jurors unknown, in a conspiracy against trade, etc.; that is, it would appear that the conspiracy is charged to have been entered into between the trustees of the Standard Oil Trust and the officers of the Waters-Pierce Oil Company and three of the division agents in Texas and one of the local agents, to wit, William E. Hawkins, of McLennan county. There is some proof in the record to the effect that the trust was formed as early as 1882, between some 39 corporations, firms, individuals, and partnerships, and that the first seven named conspirators were the trustees of said trust or combine which was known as the "Standard Oil Trust"; and there is some proof in the record that the Waters-Pierce Oil Company was a party to said trust. But, aside from the fact that E. T. Hathaway was the agent of the Waters-Pierce Oil Company in Texas, we fail to find any evidence in the record that he was one of the original conspirators, or that he entered into the conspiracy at any time after it was formed. Of course, as stated before, the fact that he was an agent, if the proof went further, and showed that he was also a party to the conspiracy, would not absolve him from amenability to the law. We will notice those portions of the record which refer to Hathaway. Hiram Brooks, witness for the state, testified that he lived in Denison, Tex.; that he knew defendant Hathaway, and that he was known as the agent of the Waters-Pierce Oil Company in Denison; that he did not remember

ever to have had any conversation with the defendant about the oil business to amount to anything in particular. Had purchased oil from him or his agents. Have had no conversation directly with him. Have talked with Mr. Hathaway. J. M. Cullers, witness for the state, testified: "That he lived at Sherman, Texas. Was acquainted with the defendant Hathaway, and had known him for 10 or 15 years. He has been engaged in the oil business, and was agent for the Waters-Pierce Oil Company, prior to November, 1894; that is, division agent. Do not know the extent of his authority. Did not purchase oil from Hathaway, but from the local agent in Sherman. Would send orders to the local agent at Sherman, and it would be filled from the depot there. Stratton is the local agent at Sherman. We got the profit allowed jobbers of two cents per gallon. That the oil was billed to them at the price they were selling to the general trade, and the invoice was furnished from Denison by Mr. Hathaway, with the number of gallons bought. At the end of the month a statement of the account, less two cents a gallon on what had been bought, was sent us. Hathaway did not furnish us any price list at which oil should be sold in case competing companies came into the market." A. W. Clem, witness for the state, testified that he met Hathaway in the spring of 1894; that Hathaway did not know that he (Clem) was an agent of the Waters-Pierce Oil Company; that the defendant had charge of the northern division of the Waters-Pierce Oil Company with headquarters at Denison. This was in effect all the testimony offered by the state concerning the appellant, Hathaway. We quote from the testimony of E. T. Hathaway given in chief, as follows: "My name is E. T. Hathaway. I reside at Denison, Texas, and have resided there since 1878. I have resided in Texas since 1878, and my present position is agent for the Waters-Pierce Oil Company. I have been such agent since June of 1878. The Waters-Pierce Oil Company did business in Texas prior to 1878, but not under its corporate name. Waters, Pierce & Co. did business prior to that time. They were incorporated in 1878 and continued the business of selling oil. I do not know John D. Rockefeller, nor Henry M. Flagler, nor Wm. Rockefeller, nor John D. Archbald, nor Benjamin Brewster, nor Henry H. Rogers, nor Wesley H. Tilford. I never had any connection with any of these gentlemen, directly or indirectly. I never had a letter from them or either of them, or instructions from either of them. I was employed by the Waters-Pierce Oil Company, and that company pays me. My present salary as agent and employé is \$2,700 per annum. I knew W. E. Hawkins. I never had any dealings with Hawkins in McLennan county, or anywhere else of any character or nature. I never sold any oil in McLennan county. I own no stock in the Waters-Pierce Oil Company, nor do I own any

stock in the Standard Oil Trust, nor did I ever own any stock in either company. I know nothing about the Standard Oil Trust. I am simply an agent on salary. I never knew of any combination between the Waters-Pierce Oil Company and the Standard Oil Trust, or the officers of either of them. I never did any act knowingly and within my knowledge in the furtherance of the Standard Oil Trust, or any conspiracy of that kind with trade, in restriction of trade. The oil that I sold came from St. Louis. It is brought in from St. Louis, state of Missouri, and sold in Texas in unbroken packages; that is, it is brought in tank cars as well as in barrels and cases, and sold in those barrels and cases. It is kept in stock until it is sold. I know nothing whatever about the management of the Waters-Pierce Oil Company at St. Louis."

It will be seen that the state, by its testimony, failed to reach defendant with any evidence even tending to show that he was an original conspirator, or that he entered into a conspiracy in restraint of trade, which, of course, would apprehend that he had full knowledge of the object and purpose of such conspiracy, and its plan of operations. And when we come to consider his testimony, his evidence shows that his only connection with the alleged trust, was as agent and employé of the Waters-Pierce Oil Company at a stipulated salary of \$2,700 a year. A great deal of evidence is presented in this record, showing the method of dealing on the part of the Waters-Pierce Oil Company at various points in the state of Texas; but it is remarkable that this testimony is, for the most part, at other points and in other divisions than that allotted to the defendant Hathaway. And there is no proof furnished in the record that brings him in contact with any of the methods pursued by said trust which is obnoxious to the provisions of the statute in question. Certainly there is no testimony of any connection on his part, or that he had anything to do with the oil trade in McLennan county. McLennan county was in another and distinct division, and not under his management or control. Not only does the state fail to furnish any affirmative proof bringing him in contact with the transactions of Grice and Hawkins in McLennan county, but by his own testimony he negatives the proposition that he had anything whatever to do with the oil trade or with cutting rates on oil in McLennan county. Quoting from his testimony, he says: "I never had any dealing with Hawkins in McLennan county, or anywhere else, of any character or nature. I never sold any oil in McLennan county." Of course, if there was testimony in this case showing that he was one of the original conspirators, or that he entered into a conspiracy after it had been formed, he might be affected by the acts of the agents of the said trust in McLennan county. But, as we have seen, there is no such testimony.

If he had been indicted as an agent for some act done in McLennan county, the proof would not have sustained the accusation, because there is no testimony that he acted as such agent or in conjunction with any agent of the trust in McLennan county; nor is there any evidence tending to show that he advised, aided, or encouraged any man in Texas, or anywhere else, to enter into this conspiracy, or to act as an agent therefor. If appellant had acted as an agent for the conspiracy, with full knowledge of its purposes, and proof had been made of this fact, he could not be convicted under the allegations of this indictment. To hold him responsible as an agent, the indictment must allege the fact that he knew of the conspiracy and its purposes. See *State v. Stalls*, 37 Tex. 440; *Pressler v. State*, 13 Tex. App. 95; *Hunter v. State*, 18 Tex. App. 444.

2. As we have seen, there is no count in the indictment charging appellant as principal, manager, director, agent, servant, or employé, or that he in any capacity acted for said trust, and knowingly carried out any of the purposes, stipulations, prices, rates, or orders thereunder, or in pursuance thereof. And if there had been ever so much proof on this subject, the conviction could not have been sustained. However, the learned judge who tried this case seems to have proceeded upon this idea, as is demonstrated from the following portion of his charge, which is quoted, as follows: "And if you further believe from the evidence that at said last-mentioned time—that is, within three years next preceding November 21, 1894—either of the defendants William Grice or William E. Hawkins was then and there the agent of said Waters-Pierce Oil Co., and as such agent was at said time engaged in knowingly carrying out in McLennan county any and all of the provisions, terms, and purposes of said agreement and combination so entered into by the said Waters-Pierce Oil Co. (if any) as aforesaid, and you further find that at said time this defendant E. T. Hathaway was also agent of said Waters-Pierce Oil Co., and as such was at the same time engaged as such agent in knowingly carrying out and maintaining the purposes, provisions, and terms of said agreement by the Waters-Pierce Oil Co. on January 2, 1882, as hereinbefore mentioned (if any), anywhere within the state of Texas, then, if you so believe beyond a reasonable doubt, you will find the said defendant E. T. Hathaway guilty as charged in the indictment, and assess his punishment as hereinbefore stated. And in this connection you are charged that it is wholly immaterial whether or not he, the said E. T. Hathaway, was at any time in McLennan county. You are further charged that the contract offered in evidence, dated January 2, 1882, also the supplemental agreement dated January 4, 1882, and which is designated as the 'Standard Oil Trust Agreement,' includes not only the corporations, in

dividuals, firms, partnerships, and associations of persons therein mentioned, but all persons acting for or in connection with said corporations, firms, partnerships, individuals, or associations of persons, whether they be acting in the capacity of officers, managers, directors, agents, servants, or employés, or in any capacity whatever. And you are further charged that said contract so made and entered into as aforesaid is a combination, trust, and conspiracy in that it 'creates restrictions in trade'; and if you believe from the evidence beyond a reasonable doubt that at any time within three years immediately prior to November 21, 1894, said contract was in existence and in full force and effect as therein provided, and as such was then and there being executed and carried out in the state of Texas, by or through the officers of said Waters-Pierce Oil Co.; and if you further find that the purposes and provisions of said agreement was at said time being knowingly carried out and in force within the state of Texas by the managers, agents, servants, and employés of said Waters-Pierce Oil Co., including this defendant E. T. Hathaway; and you further find beyond a reasonable doubt that at said time, during the period last mentioned, the purposes and provisions of said agreement were knowingly being carried out and enforced in the county of McLennan by W. E. Hawkins or William Grice, or any other servant or employé of said Waters-Pierce Oil Co.,—then if you so find, you should find the defendant E. T. Hathaway guilty as charged in the indictment, and assess his punishment therefor as has hereinbefore been directed." If there had been a count in the indictment charging the appellant as a servant or agent of said trust in McLennan county, Tex., then the charge in question, if it had otherwise been a correct legal charge, would have been applicable under such indictment; but under the indictment in this case it was wholly inapplicable, because, as we have seen, if convicted at all, he could only be convicted as a principal conspirator. The record in this case is exceedingly meager of any acts of appellant done in his own district or division, and such as were there discharged were purely and simply as an agent of the Waters-Pierce Oil Company. Whether he would be indictable for said acts in one of the counties of his own district is not the question here. But the simple question is, does the record show that he was a conspirator, so as to make him guilty of some act done by the trust in McLennan county, Tex., in restraint of trade? The record fails to furnish us with any evidence that would fasten him to the conspiracy, so as to make him amenable as a conspirator in McLennan county.

3. There are some constitutional questions raised in this case. Some of the questions have been before our supreme court, and it has been decided by that tribunal that the

law in question is constitutional. It is claimed by the appellant, however, that the decision is obiter, and, moreover, that the decision of the question by that tribunal is not binding upon us. While the presumption will be indulged that the decision of the supreme court is correct, yet a discussion and decision of the question, in the view we have taken, is not necessary in determining this case. This question has been before the supreme court in the following cases: *Association v. Houck* (Tex. Civ. App.) 27 S. W. 696; *Houck v. Association*, 88 Tex. 184, 30 S. W. 869; *Coal Co. v. Lawson* (Tex. Sup.) 34 S. W. 919, and *Welch v. Windmill Co.* (recently decided) 30 S. W. 71. Because the court charged on a phase of the case not supported by any allegation in the indictment, and because the evidence wholly fails to sustain this verdict, the judgment is reversed, and the cause remanded.

LEACH v. STATE.

(Court of Criminal Appeals of Texas. June 26, 1896.)

MUNICIPAL COURTS — JURISDICTION — CONSTITUTIONAL LAW.

1. Under Const. art. 5, § 1, declaring that the "judicial power of this state" shall be vested in certain named courts, "and in such others as may be provided by law," the legislature cannot give a municipal court, created as an incident to a municipal corporation, jurisdiction concurrent with a state court over violations of state laws.

2. Under Const. art. 5, § 12, providing that the "style of all writs and process shall be, 'The State of Texas,' and all prosecutions shall be carried on in the name and by the authority of the state of Texas, and shall conclude 'against the peace and dignity of the state,'" a court cannot be authorized to carry on criminal prosecutions for violations of state laws under process having the style of "The City of Ft.," and running in the name and by the authority of, and concluding against the peace and dignity of, "the city of Ft."

3. A court cannot be given concurrent jurisdiction over offenses against the state without allowing an appeal from its judgments, as allowed by the constitution, from the judgments of the other courts having jurisdiction over such offenses.

Appeal from Tarrant county court; George W. Armstrong, Judge.

Elmer Leach appeals from a conviction. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted in the county court of Tarrant county of carrying on and about his person a pistol. He had been previously convicted for the same offense in the city court of Ft. Worth, and, in bar of the prosecution in the county court, pleaded the conviction had in the city court. The plea of jeopardy was overruled, and the action of the court in this respect is presented as the only question for our decision in this case. The question is, did the legislature have the authority to confer upon the city court of Ft. Worth ju-

jurisdiction to try acts violative of the criminal laws of the state of Texas? By the act of March 20, 1889, a special charter was granted the city of Ft. Worth, and among other things said charter provided that the judicial power of said city be vested in a court known as the "Ft. Worth City Court," presided over by a judge to be known as the "City Judge," and given criminal jurisdiction as follows: "(1) To try and punish all misdemeanors over which the recorder's court of Ft. Worth now has jurisdiction. (2) To try, determine, and punish all misdemeanors arising under the provisions of this charter; to have concurrent jurisdiction with the state courts over all misdemeanors against the laws of the state, committed within the city limits, except theft, swindling, aggravated assault, aggravated assault and battery, keepers or exhibitors of such games as are prohibited by law, and matters involving official misconduct; and to have exclusive jurisdiction over any violation of the Sunday laws, between the hours of twelve o'clock Saturday night and nine o'clock Sunday morning, and between the hours of four o'clock p. m. Sunday and twelve o'clock Sunday night." Civil jurisdiction was prohibited this court, except in the forfeiture and collection of bonds. Section 28 of said charter provides that "all process of said court shall run in the name and by the authority of the city of Ft. Worth, and shall conclude, against the peace and dignity of the city. * * * The style of process shall be The City of Ft. Worth." Section 31 provides, "No appeal shall lie from this court, unless the fine is twenty dollars or more, and then only to the court of appeals." In so far as the charter sought to confer exclusive jurisdiction of state cases upon said city court, it was held in *Ginnocchio's Case*, 30 Tex. App. 584, 18 S. W. 82, that said charter was void, and it was further held that the legislature had no authority to divest the justice court of the power and jurisdiction conferred upon it by the constitution. The question of the authority of the legislature to confer upon said city court jurisdiction concurrent with state courts, over violations of the state laws, was not discussed in that case, but was expressly pretermitted. Section 1, art. 5, of the constitution, ordains that "the judicial power of this state shall be vested in one supreme court, and courts of civil appeals, in courts of criminal appeals, in district courts, in county courts, in commissioners' courts, in courts of justices of the peace, and in such other courts as may be provided by law. * * * The legislature may establish such other courts as it may deem necessary, and prescribe the jurisdiction and organization thereof, and may conform the jurisdiction of the district and other inferior courts thereto." Section 18 of this article confers upon the county court original jurisdiction of all misdemeanors,

except those involving official misconduct, and those in which exclusive original jurisdiction is given to the justice court. Section 19 of said article confers jurisdiction upon the justice court, in criminal matters, of all cases where the penalty or fine imposed by law may not exceed \$200, with right of appeal from the judgment in said court in all criminal cases, without reference to the amount of the fine imposed in said court. Section 22 of the said article provides that the legislature may, by local or general law, increase or diminish or change the civil and criminal jurisdiction of the county court.

The powers of the legislative, judicial, and executive departments of the government of this state are each, by article 2 of the constitution, protected from encroachment by one upon the others, and the powers conferred upon each cannot be infringed or abrogated by either or both of the co-ordinate branches of the government. It is not necessary to discuss this question. It is a plain, positive provision of the constitution. In framing the provisions of article 5, "it was the object of the framers of the constitution to mark out a complete judicial system, defining generally the province of each of the courts by reference to the objects confided to the action of each, and the relation of each to the others. Such a system cannot be changed by action of the legislative department except when the power to make the change is conferred by the constitution itself." *Ex parte Towles*, 48 Tex. 414; *Ex parte Ginnocchio*, 30 Tex. App. 584, 18 S. W. 82; *Gibson v. Templeton*, 62 Tex. 555, and authorities cited. It follows, therefore, that the courts designated in article 5 cannot be abrogated by legislative enactment, because the power has not been conferred in the constitution to do so. That "such other courts" may be established as are deemed necessary, their jurisdiction and organization prescribed, and the jurisdiction of the district and other inferior courts made to conform to such changes in the judicial system, does not authorize the abrogation of the courts specified in article 5. The authority to create additional courts has reference to those courts which, if created by the legislature, would constitute a part of the "judicial power of this state." It has no reference to courts created as incidental to the charter of a municipal corporation which has been brought into existence under the provisions of article 11 of the constitution, for it is by virtue of this article of the constitution that municipal charters are authorized to be created by the legislature. The municipal court, being but an incident to a municipal corporation, cannot exist without the corporate charter. Such courts are not courts, within the contemplation of the provisions of article 5, which provides for the judicial system of this state; for, if so, they could exist in-

dependent of the municipal charter, and exercise authority as municipal courts in the absence of such a charter, and independent of the municipality. This article, creating the judicial system of the state, has reference to state courts, as contradistinguished from municipal courts. If this were not so, the creation of a municipal corporation would be a necessary and prerequisite step to the exercise of legislative authority, under article 5, in creating or establishing such municipal courts. This is not the case. If the legislature may delegate authority to a municipal court in one town to enforce the general laws of the state, it may do so in every town; and, if it can confer authority upon said courts to take jurisdiction of one misdemeanor, then it may do so as to all this class of offenses. If as to misdemeanors, then the reasoning would be equally as cogent that it could do so as to all felonies; for there is no constitutional objection in the way as to one class of offenses that does not obtain equally as to all classes of offenses. If this power can be delegated to a municipal court in matters appertaining to criminal cases, then it can be so delegated with equal propriety to all classes of civil actions; and we should have the anomalous condition of a municipal court exercising concurrent original jurisdiction in civil and criminal cases throughout the state at the same time with district courts, county courts, and justice courts, and also at the same time could be made to exercise appellate jurisdiction co-extensive with district and county courts. Hence such jurisdiction would be original with district, county, and justice courts, and at the same time appellate, without conforming the jurisdiction of the constitutional courts to that conferred upon the municipal courts. Article 5, § 1. It is no answer to this that the legislature had not so provided, or that it may not do so. If the power be conceded, then that body may, at its option, exercise such authority; and, if such authority in law does exist, the legislature could constitutionally and rightfully confer jurisdiction upon them, as trial courts, or even appellate courts, in inferior appeal cases, without conforming to the plain demands of the constitution. Again, if municipal courts are instituted by virtue of, and under the provisions of, article 5, then it would be prerequisite to their creation that a municipal charter be first granted, under article 11, else article 5 could not be made operative so as to authorize the legislature to create said court under the general term, "such other courts," specified in article 5. This authority, as I understand the constitution, does not and cannot exist, and the legislature went beyond its authority in conferring such jurisdiction upon the Ft. Worth city court.

In Louisiana, under the constitutional provision declaring, "The judicial power shall be vested in a supreme court, in district courts,

and in justice of the peace courts" (Const. 1845, art. 62), an act conferring judicial powers on a mayor of a city was considered void, and it was held that for violation of its ordinances the city should resort to the judicial tribunals organized under the constitution; citing *Lafon v. Dufrocq*, 9 La. Ann. 350. The true rule should be, and is, I think, where the organic law provides that the judicial power of the state shall be vested in specified courts, and such other courts as may be authorized by the terms of such organic law to be created by the lawmaking power, that this does not prohibit the creation of municipal courts for the enforcement alone of municipal ordinances and regulations. See *Blessing v. City of Galveston*, 42 Tex. 542-661; *State v. Young*, 3 Kan. 445; *Hutchings v. Scott*, 9 N. J. Law, 218; *Shafer v. Mumma*, 17 Md. 331; *Mayor, etc., v. Dechert*, 32 Md. 369; *Montross v. State*, 61 Miss. 429. In other words, under the terms of our constitution municipal courts can only be created for municipal purposes, and as incidental to municipal corporations, and their judicial power is limited to the enforcement of municipal ordinances and regulations within the municipality. It will be observed that no action was taken by the legislature, in creating the charter of the city of Ft. Worth, with reference to the jurisdiction of the county court on the justices' courts of Tarrant county, in regard to changing, increasing, altering, or diminishing the jurisdiction of said county court. But if this had been done, and the law had sought to adjust the relations of said courts and the city court, it still would not have affected the question, because, as before stated, the legislature is not authorized to invest said city court of Ft. Worth with jurisdiction to try violations of state laws. The mayor, recorder, city judge,—by whatever name such municipal officer may be called,—is not a state officer. *Dill. Mun. Corp.* §§ 53, 427 et seq., and notes; *State v. Valle*, 41 Mo. 29. The city judge of Ft. Worth is elected, under the provisions of the city charter of Ft. Worth, at a municipal election, and not at any general election for state officers. He is a city officer,—a municipal officer. See city charter of Ft. Worth, § 28a, and authorities above cited.

Again, the charter under consideration requires all process, in cases of violation of state laws cognizable before said city court, to run in the name of the city of Ft. Worth. Its process shall conclude against the peace and dignity of the city, and prosecutions in said court shall be carried on in the name of the city of Ft. Worth. Ft. Worth City Charter, § 28. That the legislature has the authority to provide that writs and process from said city court should run in the name of the city, and the prosecutions to be carried on in its name, may be conceded, in so far as violations of the city ordinances and regulations are concerned; but this could not be done as to state offenses, for the simple reason that article 5,

§ 12, of the state constitution provides that the "style of all writs and process shall be, 'The State of Texas'; and all prosecutions shall be carried on in the name and by the authority of the state of Texas; and shall conclude against the peace and dignity of the state." It has uniformly been held—and could not be otherwise—that all criminal prosecutions for violations of state laws must be carried on "in the name and by the authority of the state of Texas," and they shall conclude "against the peace and dignity of the state," and that all writs of process issued from any court created by virtue of article 5, and forming part of the judicial power of this state, must run in the name of the state of Texas. How any court could hold otherwise, I do not understand, unless it has first set at naught the plain, mandatory provisions of the constitution which brought that court into existence. See *Bautsch v. State*, 27 Tex. App. 342, 11 S. W. 414; *Ex parte Boland*, 11 Tex. App. 159; *City of Davenport v. Bird*, 34 Iowa, 524. Not only does this charter of the city of Ft. Worth seek to transfer the judicial power of this state to a municipal court, but it seeks, in terms, to confer authority upon said city court to try a vast majority of the misdemeanor violations of the state laws, and has sought to set aside and abrogate the plain provisions and emphatic requirements of the constitution, as set forth in section 12 of article 5, *supra*. See Dill. Mun. Corp. § 429, note 1, for authorities. If this city court is created by virtue of article 5 of the constitution, then it must be obedient to its provisions. Its writs must run, and its proceedings must be carried on, in the name of the state of Texas; and the prosecutions therein carried on must begin in the name of the state of Texas, and conclude against the peace and dignity of the state, and not in the name of the city of Ft. Worth, as provided by its charter. If the court is a state court, a part of "the judicial power of this state," it exercises its authority by virtue of article 5, and must be obedient to its commands and provisions, in the exercise of that authority. This it cannot do under the terms of the charter, for that instrument makes no provisions for such process and prosecutions. If the court be but an incident to the charter, then it had no relation to article 5 whatever, and cannot exercise authority in state cases. Whenever a party accused of a violation of the state penal statute is prosecuted, that prosecution must be carried on "in the name and by the authority of the state of Texas," and conclude "against the peace and dignity of the state"; and the legislature can no more abrogate this provision than it can abolish the constitution itself, or the courts created under the constitution. These provisions are superior to both the legislative and judicial departments of the government, and imperiously command obedience from both departments.

Again, this city charter (section 31) provides, "No appeal shall lie from this court, unless

the fine is twenty dollars or more, and then only to the court of appeals." This is a violation, also, of the constitution, as I understand the reading of that instrument. As before observed, if the charter of the city of Ft. Worth is valid in respect to the question under discussion, then it is plain that it has authority to try criminal causes violative of state laws, concurrent with the county court and justice of the peace court. Some of the causes over which it can exercise jurisdiction may be tried only in the county court originally. From the county court, in such case, there lies an appeal to the court of criminal appeals, in all criminal cases, whatever may be the amount of the fine, or whatever may be the punishment assessed,—whether that be below or in excess of \$20. From convictions in the justice court there lies an appeal to the county court, or, as the case may be, to the district court, in case the county court does not exercise jurisdiction in the given county, in all criminal cases tried in said justice court, without reference to the amount of the penalty or fine imposed; but in that appellate tribunal the judgment upon a trial *de novo* becomes final unless the amount of the fine imposed should be in excess of \$100. So it will be seen that whether the prosecution originates in the justice of the peace court, or in the county court, the party convicted upon the original trial is entitled to his appeal to some court, without reference to the amount of the fine imposed. With reference to the provisions of the city charter under discussion, it will be seen that an appeal from said court is absolutely prohibited unless the fine should be \$20 or more. Thus the legislature has sought to deprive a party accused, under the state law, of a violation of said law, of his right of appeal; and, if the law is a valid one, that body has succeeded in depriving every person who may be tried in the city court of Ft. Worth, and whose fine has been fixed at \$20 or less, of the right of having an appellate tribunal pass upon the questions involved in his case. I think it would take no reasoning to show this provision of the charter to be void. While not expressing any opinion upon that phase of section 31 which limits the right of appeal "only to the court of appeals," we would call attention to the anomalous condition in which a party appealing from said city court might be placed. The "court of appeals" has no existence, and has had none since the recent amendments to the constitution. See *Cummings v. State*, 31 Tex. Cr. R. 406, 20 S. W. 706, and numerous subsequent decisions. If, upon an investigation of that question, it should be held, by reason of the requirement to appeal to the "court of appeals," an appeal could not lie from said city court, because there exists no such court, then it would follow that in all cases tried in said city court the constitutional guaranty of a right of appeal has been abolished by the terms of this charter. We, however, will not express an opinion on this question.

From these views it follows that the city court of Ft. Worth was without authority or jurisdiction of the offense of which appellant was convicted, and its judgment imposing a fine upon him was a nullity. Appellant, therefore, was not in jeopardy when tried in said court, nor was he legally convicted in said court, wherefore his plea in bar of the prosecution on the trial in the county court was properly overruled. The judgment is affirmed.

HOWARD v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1896.)

FORGERY—INDICTMENT—PROOF—APPEAL—OBJECTIONS NOT MADE BELOW—EVIDENCE OF REPUTATION—INSTRUCTIONS—HARMLESS ERROR.

1. An indictment which contains no purport clause, but sets out the forged instrument according to its tenor, with the allegation that defendant made the same without lawful authority, and with intent to defraud, is sufficient, and need not charge an intent to defraud a particular person. *Labbaite v. State*, 6 Tex. App. 483, distinguished.

2. Under an indictment setting out the forged instrument according to its tenor, with the allegation that defendant made the same without lawful authority, and with intent to defraud, proof is admissible that the signature to such instrument is that of a firm. *Johnson v. State* (Tex. Cr. App.) 33 S. W. 231, followed.

3. Appellant cannot complain of the admission of testimony to which no objection was made below.

4. On a prosecution for forgery the state's counsel asked a witness for defendant if the latter had not been convicted of the same offense before in G. county, to which he replied, "No, sir; not in G. county," whereupon he was asked whether defendant "was convicted somewhere else, then." *Held*, that the asking of the last question, which was not permitted to be answered, was not prejudicial error.

5. Evidence that defendant held a position of trust at a fair salary is incompetent to prove reputation.

6. A charge that the temporary insanity of defendant, produced by the recent use of ardent spirits, would only mitigate the punishment, and not acquit him, is not cause for reversal, even if erroneous, where the proof did not show that defendant was insane when he committed the act.

7. In a prosecution for forgery, evidence that defendant was very drunk at about the time he passed the forged check does not justify a charge on temporary insanity produced by the recent use of ardent spirits, there being no evidence of his condition when he signed the check.

Appeal from district court, Harris county; E. D. Cavin, Judge.

P. Howard was convicted of forgery, and appeals. Affirmed.

Norman G. Kittrell, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of forgery, and given two years in the penitentiary.

1. The indictment is in the following form as to the charging part: That said P. Howard, "with intent to injure and defraud, did willfully and fraudulently make a false in-

strument in writing, which said false instrument in writing is to the tenor following: 'Houston, Texas, Feby. 7, 189-. No. 201. Planters' & Mechanics' National Bank pay to P. Howard, or order (\$25.00) twenty-five dollars. John Finnigan & Co.,—contrary to law and against the peace and dignity of the state." Appellant filed a motion in arrest of judgment on the ground, "that the indictment does not charge any offense, and specifically sets up that, while the instrument purports to be signed by John Finnigan & Co., there is no allegation who or what John Finnigan is or are. So far as revealed by the indictment, John Finnigan & Co. may be an individual, a firm, or a corporation. Because there is no allegation who composed or constituted the said firm of John Finnigan & Co., the evidence revealing that the same is a firm composed of two partners, but who such partners are is not alleged, as is necessary under the law. Because it is not alleged that said instrument purported to be the act of another, the mere signature of John Finnigan & Co. not disclosing who or what John Finnigan & Co. was or were." Appellant insists that this case comes squarely under the decision of *Labbaite v. State*, 6 Tex. App. 483. The indictment in that case had a purport clause, which is not so in the present case. The allegation in the indictment in said case is that it purports to be the act of White & Gibson, but it is stated in the decision that these are simply the surnames of two persons, and their given names are not stated, and it is not stated that they are partners; and the court proceeds to apply the same principle to the allegation of names of the alleged forged persons as is applicable to the owners of stolen property in theft. The case of *State v. Harrison*, 69 N. C. 143, is also referred to as authority upon this point. The charge in that case was for forging a duebill in the following words: "Due to Wm. H. Harrison for filling of rosin and storing of spirits. \$50.00, payable 25th of August. Williams & Murchison,"—"with intent to defraud one George W. Williams and one Daniel M. Murchison, against the form of the statute in such case made and provided, and against the peace and dignity of the state." The court says in that case: "The indictment charges that the defendant forged the name of the firm of Williams & Murchison with intent to defraud George W. Williams and Daniel M. Murchison, and there was evidence tending to show that he did forge the name of the firm with intent to defraud the firm, but there was no evidence that George W. Williams and Daniel M. Murchison were the individual members of the firm, and therefore there was no evidence that the intent was to defraud George W. Williams and Daniel M. Murchison;" and the case was reversed on this ground. It will be noticed that in the first case there was a purport clause, and in the last that

there was an allegation of an intent to defraud two certain persons, giving their full names, and the case went off on the proof that there was no evidence that George W. Williams and Daniel M. Murchison were the individual members of said firm. With reference to the first case, it may be stated that we are inclined to differ with the court rendering said opinion to the effect that the same particularity is required in alleging the names of the persons whose names are forged as is required in alleging the ownership of stolen property. On this point we quote from Mr. Bishop as follows: "If the intent is to defraud a firm, the allegation is not required to be in the form essential in laying ownership. There the indictment must set out all the names of joint owners; but here, when a forger means to defraud two or more persons, whether constituting a firm or not, his intent is also to defraud each of them. Therefore the indictment may lay it as to all or as to one or more, less than all, at the pleader's pleasure." See 2 Bish. Cr. Proc. § 424. We quote from a note to Wharton's *Precedents of Indictments and Pleas* (volume 1, p. 282, 4th Ed.), as follows: "All the partners in a firm need not be set out in averring the intent to defraud. Thus, where the first count charged the offense to be committed with intent to defraud D. L. and D. L., Jr., and the second count stated the offense to have been committed with intent to defraud the president and directors of said company, and the fourth count, etc., with intent to defraud D. L., the court, on motion in arrest of judgment, held that the omission of one of the partners in one count and two of them in another was not fatal; for the acquittal on such indictment will always be a bar to another prosecution for the same forgery, though laid with intent to injure some other person." The ordinary form of an indictment at common law contained a purport clause, and the rule seems to have been that the indictment should allege an intent to defraud some particular person. See 1 Whart. Prec. Ind. p. 274, 282. But under our system it is not necessary to set out the purport clause, nor is it necessary that the allegation contain an averment that the act was done with intent to defraud some particular person. It is sufficient merely if the instrument be set out by its tenor, and that the indictment contain an allegation that the same was made by the defendant without lawful authority, and with intent to defraud. See *Westbrook v. State*, 23 Tex. App. 401, 5 S. W. 248. However, it has been held in a number of cases that where the indictment contains a purport clause, and the instrument is set out by its tenor, and there is a variance between the purport and tenor clauses, it will be fatal to the indictment. In the *Case of Labbate*, above cited, the real question in that case was as to whether, when the indictment proposed to set out by

a purport clause the names of the parties whose names were forged, it should set out their full names, and, if a partnership, that the names of the co-partners be stated as such. And the *North Carolina Case*, as we have seen, was decided on the proposition that, the prosecution having alleged the full names of the parties intended to be defrauded, the evidence did not support the allegation. So we take it that neither of said cases is an authority in this case. Here we have no purport clause, nor have we an allegation that the act was done with intent to defraud any particular person. We have the instrument simply set out according to its tenor, with the allegation that the appellant made the same without lawful authority, and with intent to defraud. In support of the allegation of the indictment it became necessary for the state to prove that the defendant signed the name of John Finnigan & Co. to said instrument without lawful authority, and with intent to defraud. John Finnigan & Co. might be the name of a fictitious person, and it might be a commercial establishment conducted under said name by John Finnigan alone, or by John Finnigan and one or more firm members. In *Johnson v. State* (Tex. Cr. App.) 33 S. W. 231, this court held that, where the name of the alleged forged party was that of a fictitious person, the indictment need not allege this, but that proof that the name was fictitious could be made under the allegation that said instrument was made without lawful authority. In that case the name of the fictitious person was that of a firm, and, if such proof can be made where the name of the alleged forged party was fictitious, we see no reason why the same proof cannot be made under an allegation that the instrument was executed without lawful authority, where the firm is in existence. In our opinion, the *Johnson Case* is based upon correct legal principle, and is supported by the authorities, and is decisive of the question here presented.

2. Appellant assigns as error the action of the court with regard to the examination of one Robert Howard, a witness for the defendant. Said witness had testified that he was acquainted with the reputation of the defendant for honesty and fair dealing in Galveston county, prior to the transaction charged against him, and that it was good. On cross-examination by the state counsel asked witness, "Is it not a fact that the defendant has once before been convicted of forgery in Galveston county?" And said witness answered, before objection, "No, sir; not in Galveston county." The district attorney then asked said witness was he (defendant) "convicted somewhere else, then?" To which the defendant's counsel objected on the ground that it was not proper cross-examination; that the state should be confined to the defendant's general reputation as to integrity and honesty in Galveston county.

The objection of the appellant was sustained, and the question was not answered. Appellant contends that injury was done him by the answer of the witness already made, to wit: "No, sir; not in Galveston county;" and also because the question itself was not a legal one, and was calculated to prejudice the appellant before the jury. With reference to the first objection, it is sufficient to say that the question was propounded and the answer elicited and no objection made to the testimony, and no motion was made to strike out the same. Moreover, in asking the question if appellant had committed a similar offense in Galveston county, Tex., it seems that the same was admissible. See 3 Rice, Ev. pp. 603-605, and authorities there collated. With reference to the second objection, it does not appear to us that the asking of the question, which was not permitted by the court to be answered, was calculated to prejudice the appellant.

3. And in our opinion it was not competent for the appellant to prove that he held a position of trust at a fair salary in Galveston. This was no evidence of reputation, and it was not pertinent to any issue in the case.

4. Objection is also made to the charge of the court on temporary insanity produced by the recent use of ardent spirits. The court, in effect, told the jury that if appellant, at the time he committed the act (if he did commit it), was temporarily insane from the recent use of ardent spirits, it would not acquit him, but it would go in mitigation of the punishment. This charge was in accordance with the decision of this court in *Evers v. State*, 31 Tex. Cr. R. 318, 20 S. W. 744. Counsel for appellant, however, insists that such cannot be the rule of law, and asked special instructions on the subject, covering the question of insanity in connection with fraudulent intent. We do not believe that the facts in this case required a charge on the doctrine of temporary insanity produced from the recent use of ardent spirits at all, and so it is not a proper case in which to review the former decision of this court. No witness in this case testified to the temporary insanity of the appellant at the time he committed the alleged forgery. Robert Howard, a brother of the appellant, was not in Houston at the time of said forgery. He testifies that he heard of the defendant being in Houston on a spree, and when he got there he found him very drunk, and he took him to Galveston with him. Doucett stated "that when the defendant gets under the influence of liquor he gets very drunk, and that the defendant wanted him to cash the check in question"; and he says "that when the defendant came to him he was not so drunk that he did not know his own identity, and was not so drunk that he did not know that he was not John Finnigan & Company." F. M. Joseph, a cousin of the defendant, testified that he met him on the streets of Houston, somewhere about that time, and that he was in a fearful

condition; that he was very stupid, caused either by liquor or morphine, or something of the kind; that he was talking foolishly, and he said that Finnigan & Co. owed him money, and he was going to stay in Houston until he got it. This witness stated that he did not know his condition at the time he signed the check. This is all the testimony regarding his temporary insanity offered by the defendant, and the circumstances of the passing of the check in this case do not indicate that he was in such a condition that he did not know right from wrong, or that he did not know that the act he was then doing was wrong. We do not believe the evidence called for or required the court to charge on the question of insanity in connection with intent, regardless of the cause by which the same may have been produced. There being no errors, the judgment is affirmed.

SNODGRASS v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1896.)

CRIMINAL LAW—CONTINUANCE—ABSENT WITNESS—DILIGENCE—SUFFICIENCY OF AFFIDAVIT—CONDUCT OF JURY—APPEAL—SEDUCTION—EVIDENCE.

1. An affidavit for continuance on the ground of the absence of a witness alleged to live in another county stated that on March 9th an attachment issued to such county, which was returned "Not found"; that on August 20th, having learned that the witness lived in a certain other county, another attachment was issued, directed to that county, which was returned, September 9th, "Not found"; that on the same day a second attachment to the same county was issued, which had not been returned. *Held*, that the affidavit was insufficient to show diligence on the part of defendant to secure attendance of the witness.

2. In seduction, where defendant asked continuance on the ground of the absence of a material witness, the affidavit stated that it was expected to prove by such witness that within a year prior to the alleged seduction the witness had had intercourse with the prosecutrix in the county, and it was shown by others that the witness had not been in the county for two years. *Held*, that the affidavit was insufficient to support the motion for a continuance.

3. In seduction, it was not error to allow it to be proved by the testimony of the prosecutrix that the defendant was the father of the child then in her arms.

4. Testimony of the mother of the prosecutrix that she had overheard a certain conversation between defendant and the prosecutrix was admissible in corroboration of the testimony of the prosecutrix as to the engagement to marry, and to show the terms upon which defendant was admitted to the house.

5. Exceptions based on the refusal to sustain objections to certain questions, where it was not shown what answer was made, or whether the questions were answered at all, will not be considered.

6. One of the jurors made affidavit that before their verdict was rendered, and while returning from supper, he had heard some one say that one of the witnesses for the defense had been arrested for perjury committed in the case; that nothing had been said about it in the jury room; that he had already consented to a conviction, but that he would not have agreed to the punishment assessed if it had not

been for the remark regarding the witness. *Held*, that the affidavit was insufficient to warrant a reversal.

Appeal from district court, Jack county; J. W. Patterson, Judge.

Joe Snodgrass was convicted of seduction, and appeals. Affirmed.

W. E. Taylor, B. R. McConnell, and Stine, Chesnutt & Hurt, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of seduction, and given a term of two years in the penitentiary, and prosecutes this appeal.

1. Appellant made a motion for a continuance on account of the absence of Dave Jones, alleged to reside in Hill county, Tex., and Mrs. Lilly Grubs. As to the latter witness, it is sufficient to say that she was present at the trial, and was not placed on the stand by the appellant, but was used as a witness for the state. Appellant shows, as to the diligence used as to the witness Jones, "that on March 9, 1895, he applied to the clerk of the district court of Jack county for an attachment to Tarrant county, Texas, for said witness Dave Jones, as he was informed and believed said witness then resided in Tarrant county; that the same was thereafter returned by the sheriff of Tarrant county, stating that said witness was not found; that the defendant then began to make inquiries concerning the residence of said witness, and ascertained that on or about the 20th of August, 1895, said witness resided in Hill county, at Hillsboro, and defendant on said day applied for and had issued an attachment to Hill county for said witness; that thereafter, on the 9th of September, the sheriff of Hill county returned the said attachment, stating that Dave Jones was not found in said county. Defendant had another attachment issued on the 9th of September, to Hill county, for said witness, and said attachment has not been returned." Appellant does not show by any averment that said last-mentioned attachment was ever sent to Hill county, to the proper officer. It occurs to us that, if appellant had used reasonable diligence between the March and September terms of said court, he could have located said witness, and had him under process. Appellant states that he expects to prove by said witness that within a year of the time, and before, it is alleged in the indictment that the defendant seduced the prosecutrix, he (said witness) had had sexual intercourse with the prosecutrix, in Jack county, Tex. He does not state the time or place when he had this act of sexual intercourse, but states, in a general way, that it was somewhere in the county of Jack, and some time within a year before the alleged prosecution. This allegation, to say the least of it, is very general. And, moreover, it is shown by a number of

witnesses that said Dave Jones, who had, several years before, lived in Jack county, had not been seen in the neighborhood where the prosecutrix lived for some two years before the time of the alleged offense. We take it that, if said witness would swear to an act of sexual intercourse, as stated in said application, it is not probably true; and so the court did not err in overruling the application, and in refusing a new trial predicated upon this ground.

2. On the examination of the prosecutrix, the state asked the witness, "Would you have yielded to the sexual embrace of the defendant, had it not been on account of his promise to marry you?" The bill of exceptions shows that the defendant saved an exception to this question, but the answer of the witness is not shown. This ought to have been shown. Besides, we see no objection to the question, regardless of the answer. Nor was it objectionable, in our opinion, to prove by the prosecutrix that the defendant was the father of her child, then in her arms. Nor was it objectionable to prove by the mother of the prosecutrix that she overheard a conversation between the appellant and the prosecutrix in April or May, 1894. This, we think, was legitimate testimony, tending to corroborate the prosecutrix as to the defendant's engagement to marry her. And in our opinion it was admissible to prove that the defendant was received at the house of the mother of the prosecutrix on terms of familiarity.

3. On the trial of the case the state's counsel asked the witness Steve Tillman if he did not say to Will Tillman, in Leach's livery stable in Jacksboro, Tex., in the month of March last, that E. W. Nicholson, counsel for the state, told him (Steve Tillman) to go and tell Will Tillman that he would put, or have him put, in the penitentiary, if he swore against the prosecution in this case, and also asked the witness if he at the same time and place, in the presence of Roberts, said to Will Tillman that, if any one swore against the character of the prosecutrix, he would not live to get out of town. Appellant's bill of exceptions shows that this testimony was objected to by defendant, and state's counsel stated that the purpose of the testimony was to impeach the testimony of the defendant's witness Will Tillman. Appellant reserved his bill of exceptions to said question, because it was upon an immaterial issue. It will be noticed that the answer of the witness, or whether the answer of the witness was given, is not stated; nor is it shown that any evidence was adduced, upon this predicate, of an impeaching character. Under these circumstances, we cannot consider this bill of exceptions.

4. We have examined the bill of exceptions to the refusal of the court to give the charges asked by the appellant, and the exceptions to the charge of the court. We think the charge of the court upon the matters

embraced in said exceptions is sufficiently full and clear, and there was no error in refusing to give the requested instructions.

5. Appellant, on his motion for a new trial, produced the affidavit of one T. A. Hight, and said affidavit is to the following effect: That he was one of the jurors who tried this case against appellant; that, before the jury arrived at a verdict, they were taken to supper, and on the way back this juror, Hight, states that he heard somehow, but does not know how, that the defendant's witness Walter Tillman had been arrested for perjury committed on the trial of the case, and his bond had been fixed at \$600. This juror further states that the matter was mentioned before the jury, but he does not state what was said, nor does he pretend to state that it had the least effect upon any other member of the jury. He does say, however, that before he heard of this incident he had agreed on a conviction of the defendant, and the assessment against him of a small pecuniary fine; and he does not believe he would have consented to the punishment assessed if he had not heard of the arrest of said Walter Tillman, and then began to look at the probable bearing that the said arrest for perjury might have on the case in the event of any possible truth in said charge, and he then consented to the verdict which was rendered. We would gather from the silence of this affidavit that none of the other jurors were affected in the slightest degree, and the only effect it is pretended said arrest could have possibly had was to contaminate and corrupt the mind of the juror who made this affidavit. No evidence is presented by this affidavit, or otherwise, that there was even any truth in the report that said Walter Tillman had been actually arrested on a charge of perjury committed in said case. For aught that we know, this was mere idle rumor and hearsay; and it can hardly be contended that this court is to reverse a case on the ground of mere rumor and hearsay of this character, which it appears so easily permeated the recalcitrant juror, and corrupted him to the extent of constraining him to agree with the other 11 jurors trying the case. But, if it be true that the witness Walter Tillman had been arrested on said charge, we fail to see how this could be considered in the nature of new evidence in the case. The ground upon which the charge, if any, was preferred against said witness, was on account of matters transpiring right before the jury, on the trial of the case. They were in possession of all the facts, and the jurors could know whether there was any reasonable ground for the charge against said witness. In the administration of law, it may be that the witness committed perjury in the case then being tried; and in such case it would be the duty of the officers, on proper affidavit, to prefer the charge, and cause the arrest to be made. Of course, where the

case is on trial, it should always be managed so that the arrest may be kept from the jury; but if the fact of the arrest should accidentally get out, and the jury get information of it, we can see no reason why this fact alone should cause a reversal of the case, especially in the absence of a further showing of prejudice against the defendant than is here presented. See *Parker v. State* (Tex. Cr. App.) 30 S. W. 553; *Williams v. State* (Tex. Cr. App.) 25 S. W. 620.

6. Another question presented in this case is as to the authority of the district court of Jack county to hold a term of court when the defendant was tried for this offense. This same question was presented in the case of *Phlips v. State* (disposed of at the present term of this court) 36 S. W. 753; and on the authority of that case we hold that the district court of Jack county held a legal term under the law of 1892 on the first Monday in March, 1896, and that the trial and conviction of the defendant was at a legal term of said district court. There being no errors in the record, the judgment is affirmed.

FUQUA et al. v. PABST BREWING CO.
(Court of Civil Appeals of Texas. June 24, 1896.)

ACTION FOR PRICE OF GOODS—PLEADING—DEMURRER—CONTRACTS—VALIDITY—PUBLIC POLICY—PERFORMANCE—RELEASE OF SURETY—PAROL EVIDENCE.

1. A petition alleging that a contract was "executed" between plaintiff and defendant is good as against general demurrer, though it fails to set up that the contract was signed and sealed by the corporate officers of one of the parties, as provided in the agreement.

2. A stipulation in a contract for the sale of goods to defendant that defendant would not sell or be interested in any goods of the same kind not manufactured by plaintiff does not render the contract void as against public policy.

3. A contract for the sale of beer provided that the seller "agrees to allow him (buyer) a running credit on such sales to at least the amount of \$1,000," and provided that for all beer purchased by defendant in excess of such amount he would pay at the time of sending in the order. *Held*, that the contract did not bind plaintiff not to deliver to defendant, on credit, beer worth more than \$1,000, so as to release sureties on the contract in case credit was furnished in an amount greater than \$1,000.

4. Parol evidence is inadmissible to show that, by a contract for the sale of beer providing that plaintiff "agrees to allow him a running credit on such sales to at least the amount of \$1,000," plaintiff agreed not to furnish credit to a greater amount than \$1,000.

Appeal from district court, Potter county; H. H. Wallace, Judge.

Action by the Pabst Brewing Company against C. P. Kingsbury, W. H. Fuqua, T. B. Hinkle, Walter Davis, and others. Judgment for plaintiff, and defendants Fuqua, Hinkle, and Davis appeal. Affirmed.

This suit was brought by appellee, the Pabst Brewing Company, November 7, 1893,

and by amended petition against C. P. Kingsbury, W. H. Fuqua, T. B. Hinkle, T. S. Mullins, and Walter Davis,—against Kingsbury, for balance due on account of \$1,164.48, as principal, and for \$1,000 of the same against the defendants as sureties for Kingsbury, they having guarantied the payment of \$1,000 of the account Kingsbury might make with plaintiff. The agreement of Kingsbury and plaintiff, with the guaranty of the other defendants and the account of Kingsbury, are filed as exhibits to the petition, and made a part thereof. Defendants Davis, Fuqua, and Hinkle filed general and special demurrers, general denial, and special answers. Defendant Kingsbury defaulted. Defendant Mullins appeared and denied the other sureties' cross bill that he was a partner of Kingsbury. The cause was tried by the court, a jury being waived, and judgment was rendered for plaintiff, December 19, 1894, against Kingsbury, for the amount due on the account, principal and interest, \$1,249.83, and against Fuqua, Hinkle, Mullins, and Davis as sureties for principal and interest, \$1,073.33, of the debt on their guaranty. Fuqua, Hinkle, and Davis have appealed. There is no statement of facts in the record.

Geo. E. Holland, for appellants. Browning & Madden, for appellee.

COLLARD, J. (after stating the facts). 1. The first assignment of error, that the general demurrer to the petition should have been sustained because the contract sued on binds plaintiff to sell Kingsbury certain specified goods, and that the petition fails to show that any such goods were sold, is not well taken. The record does not sustain the assignment. The petition shows that the specific kind of goods mentioned in the contract were sold by plaintiff to Kingsbury.

2. The general demurrer does not reach the supposed defect in the petition, in failing to aver that the contract with Kingsbury to sell him goods should not be binding upon the plaintiff until it was signed by one of its corporate officers and its corporate seal affixed at Milwaukee, Wis. The petition omits to allege that the seal was so affixed. Other facts of signing, etc., are alleged. The petition alleges that the contract was made and executed, and that the parties plaintiff and Kingsbury were bound to perform its stipulations as stated. The petition is good on general demurrer.

3. The stipulation in the contract between the plaintiff and Kingsbury binding the latter not to sell or be interested in the sale of any beer not manufactured by plaintiff did not render the contract to pay for the beer sold thereunder void, as contrary to public policy. The assignment of error is that the contract was contrary to public policy, and therefore void. We do not think it was. This question was decided in the case of

Brewing Ass'n v. Houck (Tex. Civ. App.) 27 S. W. 692, and it was held that such a contract was not contrary to public policy, as contended in the assignment. The decision is sustained by the authorities cited, as well as the reasons given therefor, to which we refer. We limit the discussion and the decision made by us to the assignment of error as made. See note to Angier v. Webber, 30 Am. Dec. 762, also supporting the case above cited.

4. The contract with Kingsbury was not violated, as contended by appellants, by selling to him on credit goods in excess of \$1,000, and the court did not err in overruling the special exception to the suit against the sureties on that ground. The contract binds the company to sell to Kingsbury beer of the quality usually manufactured by the corporation at stipulated prices, and the company "agrees to allow him a running credit on such sales to at least the amount of \$1,000 on the purchases made under this contract." And it is stipulated on his part that for all beer he may purchase in excess of the amount of the credit he will pay at the time of sending in his order therefor. The guarantors or sureties bind themselves for the faithful performance of said contract to the extent and amount of \$1,000, "it being understood," says the guaranty, "that our liability shall not exceed that sum, however great the default of said C. P. Kingsbury may be." Neither the contract with Kingsbury nor the written guaranty binds the company to sell on credit to Kingsbury goods not exceeding \$1,000, or to limit his credit to that amount. The sureties certainly are not bound for more than \$1,000 of the credit extended to him, "however great the default of Kingsbury may be."

5. The court did not err in sustaining plaintiff's exception to defendant's seventh subdivision of their amended answer, seeking to set up a contemporaneous oral agreement in addition to the written agreement to the effect that plaintiff agreed not to extend to Kingsbury credit exceeding \$1,000. The written guaranty of the sureties, read in connection with the contract with Kingsbury, is not ambiguous. It clearly assumes that plaintiff may sell to Kingsbury on credit more than \$1,000 worth of goods, and that his credit may exceed that amount, but that the sureties will not be liable for more than \$1,000 of the credit so extended. The parol contract attempted to be set up would have been in violation of the rule that such contemporaneous agreements cannot be pleaded to alter or vary the written agreement, by incorporating therein a different contract or one not embraced in the written contract. Sanborn v. Murphy, 86 Tex. 437, 25 S. W. 610. There is nothing in the writings entered into between the parties indicating that it was not the entire contract of the parties. The writings will not admit of other contemporaneous agreements not embraced therein. Hunt v. White, 34 Tex. 643; Smith v. Garrett, 29

Tex. 49; *Bedwell v. Thompson*, 25 Tex. Supp. 246. And see *Mead v. Randolph*, 8 Tex. 196; *Cuney v. Dupree*, 21 Tex. 219; and *Railroad Co. v. Garrett*, 52 Tex. 139. We find no reversible error in the case, and the judgment of the lower court is affirmed.

LANING v. IRON CITY NAT. BANK OF LLANO.

(Court of Civil Appeals of Texas. June 24, 1896.)

ATTACHMENT—BOND—EXECUTION OF—QUALIFICATION OF SURETIES—CLERK OF COURT—INTEREST IN SUIT—EFFECT.

1. Though an attachment bond described the principal therein as "Iron City National Bank," it was sufficient where it was signed in its legal name, viz. "Iron City National Bank of Llano."

2. A deputy clerk of court is not disqualified to take the affidavit and approve a bond for attachment merely because the clerk was a director and vice president of the bank that sued out the attachment.

3. The officers and directors of a bank may become sureties on its bond in attachment.

Error from district court, Llano county; W. M. Allison, Judge.

Action in attachment by the Iron City National Bank of Llano against R. H. Laning. From the judgment rendered defendant brings error. Modified.

The brief of the plaintiff in error contains the following statement of the nature and result of this suit: "This suit was instituted on the 11th day of September, 1894, in district court of Llano county, by Iron City National Bank of Llano, Texas, against R. H. Laning, plaintiff in error, on six promissory notes, no one of which was then due, aggregating \$8,299.08 principal, and providing for the payment of the further sum of ten per cent. additional on the amount of the principal and interest if placed in the hands of an attorney for collection. A writ of attachment was on the same day sued out and levied on certain goods of defendant. Defendant filed motion to quash the writ of attachment, and also pleas to abate the writ. At the same time, and in due order, he filed general and special exceptions and a general denial, and by way of reconvention alleged and sought to recover actual and exemplary damages for the suing out and levy of the writ of attachment. The court overruled the motion to quash, and also the plea in abatement of the writ of attachment, to which defendant duly excepted. The cause was tried by a jury. The court instructed the jury to find for plaintiff the amount of the principal and interest of the six notes sued on, with the further sum of ten per cent. additional on the amount of said principal and interest as attorney's fees (the notes having matured after suit was filed, and plaintiff having amended his original petition). The question of actual and exemplary damages was submitted to the jury. Under the court's instructions

the jury returned a verdict for plaintiff for \$8,299.08, the total principal of the six notes sued on, together with ten per cent. interest per annum on each of the notes from date of its maturity (if bearing interest from that date only), together with ten per cent. additional as attorney's fees on said principal and interest, aggregating \$9,261.52, the sum included found for attorney's fees amounting to eight hundred and forty-one and ninety-five hundredth dollars. On defendant's cross action against plaintiff the jury found that the writ of attachment was wrongfully sued out, and found for defendant actual damages, the value of the goods attached, \$10,914.09. Upon this verdict defendant, by written motion, asked that judgment be entered disregarding the finding for the 10 per cent. for attorney's fees on the notes sued on, which motion was overruled, to which defendant excepted. The court thereupon rendered judgment in favor of plaintiff, directing the clerk to pay it out of the proceeds of the sale of said attached property made in vacation, \$3,042.78; that the remainder of said proceeds of sale, being \$1,834.47, be paid by the said clerk to defendant, and that defendant recover of plaintiff and the sureties on its attachment bond all the costs of suit, for which execution was awarded. Defendant brings the case up on writ of error." There is no statement of facts in the record. On the plea in abatement the trial court made the following findings: "First. That the affidavit for writ of attachment in this suit, and upon which the said writ of attachment was issued, was made before M. M. Hargis, as clerk of this court, by his deputy, S. J. Chamberlain, and that at the time said affidavit was so made said M. M. Hargis was a director of, vice president of, and one of the managing officers of the plaintiff, the Iron City National Bank of Llano. Second. That the attachment bond upon which the writ of attachment was issued in this case was taken and approved by M. M. Hargis, as clerk of this court, and that at the time said attachment bond was so taken and approved the said M. M. Hargis was a director of, vice president of, and one of the managing officers of plaintiff in this case, said Iron City Nat. Bank of Llano, Texas. Third. That the bond upon which the writ of attachment was issued in this case was signed by only three persons as securities, and that at the time said bond was signed and approved two of the persons who signed the same were directors and managing officers of plaintiff bank, viz. J. A. Raffety, one of the sureties, was president, and W. O. Richardson, one of said sureties, was cashier, of said Iron City Nat. Bank, plaintiff herein. Fourth. That the affidavit upon which the writ of attachment was issued in this case was made by the Iron City National Bank, and that the true name of said bank is 'The Iron City National Bank of Llano.' Fifth. That no part of the indebtedness upon which this suit was instituted and the at-

attachment sued out herein was due at the time this suit was instituted. Sixth. That S. J. Chamberlain was deputy district clerk under the said M. M. Hargis, and in fact was the person in charge of the clerk's office, and the person who took the affidavit and approved the attachment bond and issued the attachment in this cause above mentioned."

Chas. L. Lauderdale, for plaintiff in error.

KEY, J. 1. Laning moved to quash the writ of attachment, and the court below, as we think, properly overruled the motion. The affidavit stated with sufficient certainty the amount of the indebtedness. While the bond describes the principal as "Iron City National Bank," it is signed "Iron City National Bank of Llano, Texas"; and the plaintiff designates itself by both these names in its pleadings. The attachment bond complies strictly with the form given in the statute, and is sufficient.

2. We do not think Chamberlain, the deputy clerk, was disqualified to take the affidavit and approve the bond for attachment merely because Hargis, the clerk, was a director and the vice president of the bank that sued out the attachment. Conceding that the act of the deputy was the act of the clerk, and that the clerk, by reason of his connection with the bank, was indirectly interested in the case, still we are not prepared to hold that either was disqualified to do the acts referred to, they being within the general scope of official duty, and there being no statute prohibiting them from discharging such duties in cases in which they are interested. Neither Hargis nor his deputy was a party to the suit, and while the result of it may remotely affect Hargis' pecuniary interest, the same may be said as to many other proceedings in which the clerk of a court is called upon to do some official act. A defendant may be largely indebted to the clerk, and the latter may know that, if the plaintiff succeeds in obtaining a judgment and execution, all the defendant's property will be absorbed, and he will lose his debt; yet these facts would not affect the authority and duty of the clerk as to any proceeding in the case. Besides, if the contention of counsel for the bank be correct, then neither Hargis nor his deputy had any authority to issue the attachment, even if the affidavit had been made before some other officer; and as the law does not, in such cases, devolve the duty of approving the bond and issuing the attachment upon any other officer, the result would be to deprive the plaintiff of a remedy afforded other litigants,—a result that should, if possible, be avoided.

3. We do not think there is any merit in the proposition that the officers and directors of the bank could not become sureties on its bond for attachment. The bank is a corporation, in law a separate and distinct person from its stockholders, directors, and officers;

and, there being no statutory inhibition against it, we are satisfied that the directors and officers of the bank could properly become its sureties on the attachment bond.

4. The only other assignment of error that we care to allude to complains of the action of the court in allowing the plaintiff to recover \$841.95 attorney's fee. This question we have certified to the supreme court, and that court has decided (35 S. W. 1048) that, under the circumstances disclosed by the record, the attorney's fee stipulated in the notes was not recoverable. We therefore reform the judgment so as to disallow the recovery of the \$841.95 attorney's fee, and as thus reformed the judgment will be affirmed. The costs of this court will be taxed against appellee. Reformed and affirmed.

STEPHENSON et al. v. CHAPPELL et al.
(Court of Civil Appeals of Texas. May 13, 1896.)

COMMUNITY ESTATE—INTEREST OF MINORS—RELEASE BY GUARDIAN—AUTHORITY—EVIDENCE—INSTRUCTIONS—BASIS OF RECOVERY—VALUE AT DATE OF TRIAL—SPECIAL VERDICT—SUFFICIENCY—APPEAL—COSTS.

1. A guardian has no authority, without an order of court, to compromise and release, to the survivor of a community estate consisting partly of realty, the interest which his wards have as heirs in the community estate.

2. The objection that the testimony of a guardian showed that she had received different amounts on claims due her wards from those shown by her receipts is without merit, where it appears that those shown by the receipts were adopted as correct.

3. An instruction that, where deeds of property are made to either spouse during marriage, such property is presumed to be community property, was proper, especially where the survivor testified, on taking charge of the property, that it was community estate.

4. In an action to recover the interest of heirs in community personalty which has been withheld, plaintiffs are entitled to recover on the basis of the value at the time of trial.

5. In an action by maternal heirs to recover from heirs of the father, who was the survivor, their interest in community estate which had been withheld by the father and his heirs, defendants were properly refused credit for improvements, taxes, and commissions for care of the land during the period it was withheld, where there was no evidence that the improvements were made or taxes paid with separate money of the survivor.

6. A special verdict which fails to find all the facts put in issue by the pleadings is defective, though the evidence shows beyond controversy the existence of the facts not found.

7. Declarations of a deceased father to his daughter that property was bought with his separate money are, in an action against her by the maternal heirs for the interest in the community estate which remained in the father's possession as survivor, hearsay and obnoxious to Sayles' Civ. St. art. 2248.

8. Where a transcript includes a large amount of superfluous matter, the costs therefor should be taxed against the appellant.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action by Ella V. Thruston, as guardian of Eugenia W. and William A. Chappell, minors,

against Mary A. Stephenson and others, to recover their interest in the community estate of their grandmother. From a judgment for plaintiffs, defendants appeal. Reversed.

Geo. H. Plowman and Joseph M. Cary, for appellants. Leake, Henry, Reeves & Greer and Word & Charlton, for appellees.

FLY, J. In 1891, the suit from which this appeal resulted was brought by Mrs. Ella V. Thruston as guardian of the estates of Eugenia W. Chappell and William A. Chappell, her minor children by a former marriage. The statement of the matters pleaded made by appellees is correct, and we adopt it, as follows: "In 1877 Elizabeth A. H. Armstrong, grandmother of defendant in error, died intestate, leaving, surviving her, her husband, Samuel Armstrong, and three children, her only heirs, viz. Mary A. Stephenson, plaintiff in error and defendant in lower court, and William Armstrong, her children by her marriage with Samuel Armstrong, and John H. Chappell, a son by a former marriage. At the time of the death of the said Eliza A. H. Armstrong, she and her husband, the said Samuel A. H. Armstrong, owned community property, consisting of lands and personal property of the aggregate value of \$10,000 and \$25,000 in money. On November 10, 1880, said Samuel Armstrong qualified as survivor of the community estate in the manner prescribed by law. That he did not keep a fair and full account and statement of the community debts and expenses paid by him, and of the disposition by him of such community property, and had wholly failed to account to said minors for their interest in such community estate with the increase and profits thereof. That he sold and disposed of all the community personal property, and converted and appropriated to his own use all notes, accounts, claims, and moneys belonging to said community estate, which were on hand at the time of the death of Mrs. Armstrong. That the inventory filed by the said Samuel Armstrong on qualifying as survivor had been lost, and he had kept no account or statement of his doings and acts as such survivor or otherwise, and a better statement and account of the property coming into his hands and the disposition made thereof could not be ascertained and given. That portion of the land on hand at the time of Mrs. Armstrong's death had been sold by him, and the persons to whom sold, the amount received for each tract sold, and the date thereof, were set out, amounting in the aggregate to more than \$100,000. That he had loaned out the community moneys at interest, and had failed to account to said minors for either the principal or interest thereon. On January 17, 1890, Samuel Armstrong died at the residence of the plaintiff in error, Mrs. Stephenson, then Mrs. Stevens, and at the time

of his death he had in his possession \$10,000 in money, a part of the community estate, and a large number of notes given in payment and part payment for community lands and community property so sold by him subsequent to November 10, 1880, amounting in the aggregate to \$75,000, all of which were immediately seized and converted by her. Defendants in error prayed that an accounting might be had, and that it be ascertained in what amount the said Samuel Armstrong was indebted to them, and that an accounting be also had with plaintiff in error, and it be ascertained and determined how much of said notes, property, and moneys she had appropriated and converted, and for judgment against her for their interest therein, and that such judgment might be decreed to be a lien on the community estate now on hand. If not entitled to said relief, then defendants prayed for such relief as they might be entitled to under the law and the evidence."

There is no merit in the contention that a survivor, by paying over to the heirs pro rata shares of the inventoried value of the estate, becomes ipso facto the owner of the entire community estate. If heirs who were competent to contract should accept such sum or any other as their share of the estate they would, of course, have no claim on the estate, not because, however, they may have received their share as shown by the inventory, but because they had, by their acceptance, estopped themselves from claiming anything further in the absence of fraud or mistake. We think the survivor could make a settlement with the heirs, and that they could accept any sum for their share of the estate, provided the settlement was fairly made and the heirs were competent to contract; and, of course, the entire community estate in such case remaining after the settlement would be the property of the survivor. The object to be accomplished by the survivor is fixed by the statute, but the mode of carrying out and accomplishing the design is left largely to the discretion of the individual. He must pay off the community debts, but it is left to him to determine the manner of payment.

The vital question in this case, however, is, did the guardian of the minor children of John Chappell have the power and authority, under the law of her appointment, not only to receipt for money paid to her by the survivor, but thereby to release all the right, title, and interest that the minors had in the community estate? If she did, then the testimony as to the value of the lands and other property at the time of the settlement should have been admitted in evidence, and the issue should have been submitted to the jury; but if she did not have such authority, then the action of the court in excluding the testimony and in refusing to submit that issue was correct. We are of the opinion that the receipt of the guardian

for the amount paid her by Samuel Armstrong did not relinquish the right and title that the heirs owned in the community estate, and its only effect was to make that amount with legal interest a charge against their portion of the estate. Upon the death of Mrs. Armstrong the legal title to his share of the land belonging to the community estate vested at once in John Chappell, and upon his death his children (the appellees) succeeded to all his rights, subject, of course, to the payment of community debts. Sayles' Civ. St. art. 1653. At the time that the guardian gave the receipt to the survivor, the title to their part of the lands had vested in the minors, and to divest them of their title it must be held that a guardian could sell the real property of the wards without any sanction or authority on the part of the court in which the guardianship was pending, and without the ceremony of giving any kind of conveyance to it. While the guardian was authorized to receive any money due the estate of her wards, and, doubtless, if the survivor had sold all the land, she would have been authorized, without an order of court, to receive any sums due the wards from the sale, still that is not the class of case that is presented for our consideration. The land had not been sold, and the guardian, without direct authority from the county court, had no power or authority, by compromise or otherwise, to dispose of the interest that her wards had in the community estate of their grandmother. No such authority was shown, and in its absence we conclude that the receipts given by the guardian did not have the effect of relinquishing the title the minors had in the lands in controversy. *Rainey v. Chambers*, 56 Tex. 17; *Doughty v. Cottraux*, 8 Tex. Civ. App. 125, 27 S. W. 914; *Specht v. Collins*, 81 Tex. 213, 16 S. W. 934. There is one mode recognized in Texas of divesting minors of their title to real estate through a guardian, and that mode must be followed or the title will not be divested. No evasion of the law can or will be sanctioned by the courts of the state. We have been referred to no authority that sustains the contention of appellants.

The deposition of Mrs. Stephenson, explaining how she knew that the property in Texas was bought with the separate money of Samuel Armstrong, was properly stricken out. She disclosed the fact that she knew nothing about how the money was obtained except through what she obtained by hearsay from her father. The testimony was clearly obnoxious to article 2248, Sayles' Civ. St. All that was not prohibited by the statute was immaterial, and could have been of no service to appellants on the trial. Much of the answer excluded was gratuitous, and not responsive to the interrogatory. It was clearly inadmissible to prove by J. O. Adams what Mrs. Stephenson and her former husband, Dr. Stevens, had told him. Appel-

lants have no cause to complain of the testimony of Mrs. Thruston as to what amounts had been paid her by Samuel Armstrong; for, if her testimony showed different amounts from those shown by the receipts, the amounts shown by the latter were taken as correct, and no injury resulted.

It was not error to charge the jury that, "where deeds to property are made to either husband or wife during marriage, such property is presumed by law to be community property." The fact that the property was purchased shortly after the parties removed to Texas would not render the law inapplicable. The cases cited to sustain the converse of the above proposition are not in point. In addition to the presumption arising from the deeds being made to the husband during marriage, he swore, after the death of his wife, that the property was community, and the other evidence on the point tends to give it the same character. Mrs. Stephenson told witness Allen that the property came through her mother. It was not error to instruct the jury to find the value of all the personal property that had come into the possession of Mrs. Stephenson from the community estate of her father and mother after the death of the latter. This was necessary, in order to arrive at the value of the property in which appellees were interested. Appellees were entitled to their share of the value of the personal property at the time of trial. The special charge asked by appellants, in which it was sought to instruct the jury that appellants should be credited with the value of improvements placed on the community lands, taxes, and commissions, had nothing in law or justice to commend it, and was properly refused. The improvements were made and the taxes paid with money belonging to the community, and there would be little justice in compelling appellees to pay certain imaginary commissions claimed to be due to the survivor, who, together with appellants, had been through many years enjoying the fruits and revenues arising from the whole of the community estate, while the appellees were getting nothing. There is no evidence that the improvements were made or taxes paid with the separate money of Samuel Armstrong.

The case was submitted to the jury on the following special issues, to which are appended the answers given by the jury: "Was the property in Samuel Armstrong's possession at the date of the death of his wife, Eliza A. H. Armstrong, his separate property, or was it the community property of himself and wife, Eliza A. Armstrong?" Answer: "We find this to be the community property of Samuel and Eliza A. H. Armstrong." "What is the value in money today of all the personal property, notes, and money of every kind and description which Mrs. Mary A. Stephenson has received at any and all times from the community es-

tate of both her father, Samuel Armstrong, and her mother, Eliza A. H. Armstrong, since the death of said Eliza A. H. Armstrong?" Answer: "Total, twenty-eight thousand and nine hundred and nineteen $\frac{69}{100}$ dollars." On the above findings of fact the court decreed that appellees had received \$2,915.80 from the community estate of Samuel Armstrong and Eliza A. H. Armstrong, that they were entitled to a recovery of $\frac{7}{32}$ undivided interest, as heirs of their father, John Chappell, and as heirs of their uncle, William Armstrong, in all community lands on hand, and an undivided $\frac{7}{32}$ interest in the value of all community property traced into the hands of Mrs. Mary A. Stephenson, upon bringing into hotchpotch and accounting for said sum of \$2,915.80, with legal interest thereon from the date of its payment. That part of the judgment had a basis in the findings of the jury, in the admissions in the pleadings of appellants, and the law of descent and distribution. In addition to the above, it was decreed that appellees should recover from appellants a $\frac{7}{32}$ interest in five tracts of land that were on hand and unsold, describing by surveys and metes and bounds. It was specially denied by appellants in their answer that they had on hand any of the lands described in the petition save and except three tracts, which were fully described. This raised an issue of fact, and that issue was not determined by the jury. In addition, it was found, in the judgment, that certain lands had been sold by Samuel Armstrong, but this was not admitted in the pleadings or found by the jury. The appellants had demanded a trial by jury, and had the right to have the jury to pass upon every contested point. "A special verdict is defective, and must be set aside, which does not find all the facts put in issue by the pleading, although the evidence may establish beyond any controversy the existence of the facts not found." Moore v. Moore, 67 Tex. 294, 3 S. W. 284; Ledyard v. Brown, 27 Tex. 393; Smith v. Warren, 60 Tex. 462.

For the reason that the verdict did not find on all the contested issues which enter into and form a part of the judgment, the opinion heretofore rendered affirming the same is withdrawn, and the judgment is reversed, and the cause remanded.

On Motion to Retax Costs.

(May 27, 1896.)

The record in this case is very bulky and cumbersome, containing 297 pages of type-written matter, much of which was not necessary to a decision of the case. Transcripts should not be incumbered with matter which can have no possible bearing upon the points involved in a case. It not only entails additional labor upon courts, but is a burden that should not be laid upon the shoulders of the losing party, and when it is done the

cost of inserting such irrelevant matter will be taxed against the party responsible for it. Insurance Co. v. Long, 51 Tex. 89; Leon v. Davis, 56 Tex. 423. In this case 10 pages of the transcript are consumed in a copy of the writ of error bond, which could and should have been so written as not to have comprised more than one-third of the space. There is nothing in the statute requiring the whole judgment to be inserted in an appeal bond. The law is fully complied with by describing the judgment by giving the case number, names of all the parties, the nature of the recovery, with the names of the parties in favor of and against whom rendered. Hollis v. Border, 10 Tex. 277; Smith v. Cheatham, 12 Tex. 37; Herndon v. Bremond, 17 Tex. 432; In re O'Hara's Estate, 60 Tex. 179. While it is not contemplated in the statute that the judgment in *hæc verba* should be inserted in the appeal bond, it does not, of course, render it invalid; but when a long judgment, containing descriptions of tracts of lands, with copious field notes, is copied into the bond, the party so copying should be made to pay for it. There is also copied into the record a supersedeas bond, covering 10 pages of the record, which had no place whatever in it. In addition, there are motions to quash depositions about which no point was made, two copies of assignments of error, and other superfluous matter, amounting to at least 100 pages of the transcript. The costs for this matter, amounting to \$60, will be taxed against plaintiffs in error.

GALVESTON, H. & S. A. RY. CO. v. LONG.¹

(Court of Civil Appeals of Texas. May 20, 1896.)

CARRIERS — LIABILITY FOR INJURY TO PASSENGER — CONDUCT OF FELLOW PASSENGER.

1. A carrier of passengers has power, and it is its duty, to refuse to receive or to convey, as a passenger, one whose conduct is such as to lead a reasonably prudent person to anticipate that his presence will endanger the safety, or interfere with the convenience or reasonable comfort of the other passengers; but it has no right to eject a passenger who, though intoxicated, conducts himself in a proper manner, and it is not liable for an injury to another passenger which it could not reasonably anticipate.

2. A passenger on a railway train, who was somewhat intoxicated, and walked a number of times through the cars, looking for some one, though he conducted himself without offense towards the other passengers, accidentally stumbled over some baggage; and a revolver fell from his pocket and was discharged, wounding another passenger in the foot. *Held*, that the carrier had no reason to anticipate such an accident, and was not liable for the injury.

Appeal from district court, Bexar county; S. G. Newton, Judge.

Action by W. C. Long against the Galveston, Harrisburg & San Antonio Railway Com-

¹ Rehearing denied.

pany Judgment for plaintiff, and defendant appeals. Reversed.

Upson & Bergstrom, for appellant. Simpson & Onion, for appellee.

FLY, J. Appellee sued appellant for damages in the sum of \$10,220, arising from a wound in the foot. It was alleged that appellee and his wife in October, 1894, entered a passenger coach of appellant, in the city of Houston, to be transported to San Antonio; that a person named Emmett Townsend also boarded the train at Houston, while in a drunken condition; that the employés, knowing that said Townsend was intoxicated, permitted him to stagger up and down through the train and jostle the passengers; that the employés of appellant also knew that Townsend carried a 45-caliber six-shooter, and while he was passing through the car in which appellee was seated the pistol fell to the floor and was discharged, the bullet inflicting a serious wound on the foot of appellee. There was a verdict for \$4,320 in favor of appellee.

The carrier of passengers is held to the exercise of a high degree of care in providing for the comfort and convenience of its passengers, and, incidental to this duty, the power is given to repress and prohibit all disorderly conduct on its means of transportation, and to expel or exclude therefrom any person whose conduct or condition is such as to render acts of impropriety, rudeness, indecency, or disturbance either inevitable or reasonably probable. *Sullivan v. Railroad Co.* (Mass.) 18 N. E. 678; *Putnam v. Railroad Co.*, 55 N. Y. 108; *Ray, Neg. Imp. Dut.* § 53. In all of the cases to which our attention has been called, where damages have been allowed on account of the acts of one passenger towards another, the liability of the carrier has been made to depend upon the conduct or condition of the offending passenger being such as to place a prudent person upon notice that interference with other passengers was reasonably to be anticipated. In other words, the carrier will be held liable when, by the exercise of proper care, the acts of violence might have been foreseen and prevented. *Britton v. Railway Co.*, 88 N. C. 544; *King v. Railway Co.* (Ind.) 18 Am. & Eng. R. Cas. 386; *Putnam v. Railroad Co.*, 55 N. Y. 108; *Weeks v. Railroad Co.*, 72 N. Y. 50; *Felton v. Railway Co.*, 69 Iowa, 580, 20 N. W. 618; *Mullan v. Railroad Co.*, 46 Minn. 474, 49 N. W. 249. A railway company has the power, as above stated, of refusing to receive as a passenger, or to expel, any one who is drunk or disorderly, or whose conduct is such "as to endanger the safety or interfere with the reasonable comfort and convenience of the other passengers, and may exert all necessary power and means to eject from the cars any one so imperiling the safety or annoying others." * * * If this duty is neglected without good cause, and a

passenger receives injury, which might have been reasonably anticipated or naturally expected, from one who is improperly received or permitted to continue as a passenger, the carrier is responsible." *Meyer v. Railway Co.*, 4 C. C. A. 221, 54 Fed. 116; *Railway Co. v. Hinds* (Pa.) 91 Am. Dec. 224; *Flint v. Transportation Co.*, 34 Conn. 554. In the last-cited case a passenger was wounded by the discharge of a gun which fell from the hands of one of a number of drunken soldiers who were engaged in an affray on a boat, and the liability of the carrier was put upon the ground that the passenger was allowed to pass without warning to the part of the boat where the affray was going on, and no effort whatever was made to quell the disturbance. The following charge given by the trial court was commended: "The defendants were bound to exercise the utmost vigilance in maintaining order and guarding the passenger against violence, from whatever source arising, which might reasonably be anticipated or naturally be expected to occur, in view of all the circumstances, and of the number and character of the persons on board." The facts in the case of *Putnam v. Railroad Co.*, above cited, are more nearly similar to the case before us than any we have seen, and in passing upon it the New York court of appeals said: "It may be conceded that Foster, the individual who inflicted the injury resulting in the death of the plaintiff's intestate, was drunk when he came on the car; but so long as he remained quietly by the driver on the platform, neither entering the car nor molesting or annoying passengers in any way, the conductor would not have been justified in refusing to permit him to remain as a passenger. The fact that an individual may have drunk to excess will not, in every case, justify his expulsion from a public conveyance. It is rather the degree of the intoxication, and its effect upon the individual, and the fact that by reason of the intoxication he is dangerous or annoying to the other passengers, that gives the right and imposes the duty of expulsion. The facts in that case were that Foster was drunk, and went into a street car, and grossly insulted two ladies who were with the party who was afterwards killed by him. Deceased expostulated, and appealed to the conductor to make Foster keep quiet, which he did. Foster then left the car, and went out on the front platform, where he quietly remained until deceased was leaving the car at the other end, when he (Foster) sprang from the car, and ran back and assaulted deceased. The court held that there was nothing in the conduct of Foster, after the insult committed by him, that would lead the employés to apprehend that he intended making a murderous attack on deceased. It was said by the court: "The assault by Foster upon the deceased could not have been foreseen, and it was not the reasonable or probable consequence of the

omission of the conductor to eject him from the car; and upon principle, as well as upon authority, the injury was too remote to charge the defendant for the damages." In the case now before us the facts to charge the railroad company are not so strong as in the New York case. Appellee, with his wife, had entered the car of appellant, at Houston, to be transported to San Antonio. Before the train left the main depot, one Emmett Townsend passed through the car, smoking a cigar, and was met by a porter, who did not attempt to stop him. As he passed through he peered into the faces of the passengers, as if looking for some one. He was staggering. After the train started, Townsend was noticed standing on the platform next the sleeper, looking into the car. The conductor talked to him. As soon as the conductor went into the sleeper, Townsend again passed through the coach in which appellee and wife were sitting. He stumbled when near them, and fell against appellee's wife. Appellee pushed him, and he went on through. He did not speak, and did not display any weapon, or endeavor to interfere with any one. Townsend passed through the car two other times, each time staggering, but saying nothing, nor interfering with any one. He was intoxicated. Some time after Townsend had passed through the car the fourth and last time, appellee went into the smoking apartment, which was divided from the coach by a partition, and took a seat. Townsend was in this apartment asleep. A station was approached, and, when the whistle sounded, Townsend got up, and as he passed appellee a small pistol fell from his person, struck the floor, and was discharged; the ball entering appellee's foot, and seriously and permanently injuring him. The above is the version of the affair as stated by appellee, who judged that Townsend was intoxicated by his staggering, and the maudlin expression on his face. Townsend was not boisterous, but passed quietly through the car. When Townsend stumbled, one hand was thrown out, and passed over the hair and face of Mrs. Long. Townsend was partially paralyzed. He was a deputy sheriff, and told the conductor he was looking for a negro. No one said anything to the employes of appellant about the actions of Townsend. There does not appear in the record any circumstance that could cause the employes of appellant to anticipate that Townsend would get up and drop a pistol, unless it be the fact that he was intoxicated, and staggered and smoked in the ladies' car before the train started. He was not rude, except as stated, nor boisterous, and when he stumbled it would seem that it occurred by his running against baggage lying on the floor of the car. There does not seem to be any connection between the intoxication and the dropping of the pistol. It might have happened to any man who carries arms, no matter how sober. There was nothing in the conduct of Town-

send that would have justified the carrier in refusing him admittance to the car, or in ejecting him. *Thompson v. Railway Co.* (Sup.) 27 N. Y. Supp. 608. No human being could have foreseen what happened, or could have had any ground upon which to base an anticipation that such a result would follow the presence and intoxication of Townsend. Says the supreme court of Kentucky: "It may be stated briefly, in assuming the liability of a railroad to its passengers for injury done by another passenger, only where the conduct of this passenger had been such before the injury as to induce a reasonably prudent and vigilant conductor to believe that there was reasonable ground to apprehend violence and danger to the other passengers, and in that case asserting it to be the duty of the conductor of the railroad train to use all reasonable means to prevent such injury, and if he neglects this reasonable duty, and injury is done, that then the company is responsible; that otherwise the railroad is not responsible." *Railroad Co. v. McEwan*, 31 S. W. 465. No one on the train seemed to anticipate any trouble from Townsend, and that appellee himself did not expect any trouble to result from his presence on the train is shown by the fact that he made no complaint to the conductor, and went into the apartment where he had seen Townsend go, and where he found him, and seated himself. The pistol was not displayed, and no one could have known that he had one, unless it may have been the conductor, who knew he was an officer and had authority to carry arms. Because the evidence is insufficient to sustain the verdict, the judgment is reversed and the cause remanded.

MISSOURI, K. & T. RY. CO. OF TEXAS v. FERCH.¹

(Court of Civil Appeals of Texas. May 20, 1896.)

MASTER AND SERVANT—SUBSTITUTION BY EMPLOYER—NOTICE TO SERVANT—LIABILITY OF MASTER.

1. A master cannot escape his liability to his servant for negligence by relegating his employé to the service of another; the servant being continued at his original employment, and no knowledge imparted to him of a change in the relations between him and his master.

2. In an action against a railway company for injuries sustained by plaintiff while operating a pile driver, it appeared that the machine belonged to defendant, and that the crew of which plaintiff was one had been operating it for defendant for a long time. There was testimony that the crew had been ordered to report to a construction company building defendant's road under a contract; that the foreman had informed the men that they were going to work for the construction company, and at the time of the accident they had been in the service of such company for about two months. It was also shown that defendant carried the men on its pay roll, and paid them with its

¹ Rehearing denied.

own checks; that plaintiff did not know of the existence of the construction company, and was not informed that they were going to work for such company; that the crew had often been ordered to work for others, but had always remained in defendant's employ. *Held*, that it was for the jury to say whether plaintiff was defendant's servant when injured, and an instruction taking the question away from the jury was error.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Action by F. F. Ferch against the Missouri, Kansas & Texas Railway Company of Texas for personal injuries. There was judgment for plaintiff, and defendant appealed. Reversed.

R. C. Foster, A. E. Wilkinson, and Head, Dillard & Muse, for appellant. C. B. Randall, for appellee.

JAMES, C. J. Plaintiff, Ferch, was injured by a pile driver crushing his hands while he was in the act of placing a ring around the head of the pile to keep it from splitting, which was one of his duties. The jury found that the injury happened, not from any negligence on his part or that of his co-employees, but through defects in the apparatus which could have been discovered and remedied by the exercise of ordinary care. The assignments of error, down to the eleventh, are not well taken, for there is evidence to support all the findings of the jury that are questioned. The court directed the jury to find that the pile-driving gang to which the plaintiff belonged when hurt were employees of defendant at the time, which is assigned as error. We are constrained to hold that there was a view of the testimony which required this issue to be left to the jury. The machine was appellant's, and plaintiff was one of the crew which had been operating it for appellant for a long time previous; but it was in testimony that they were ordered to report to Fratt, the chief engineer of the Southwestern Construction Company, which company the evidence shows to have been an independent contractor for appellant, engaged in completing its line to Houston; that they, with the pile driver, had been in the service of the construction company for about two months when this injury occurred. It was testified to that it was explained to all the men, by their foreman, that they were going down there to work for the construction company, and that while there they were under the orders and direction of the construction company, and appellant did not have any control over them, or the right to discharge the men. The fact that the appellant carried the men on its pay rolls during the time, and that they were paid with its checks, is not controlling. It was shown that appellant billed on the construction company for the amounts, and therefore the latter paid them, after all. It was also in evidence that the construction com-

pany was chargeable with inspecting and repairing the machine while they had it. We are not informed of the terms of the contract or arrangement between appellant and the construction company relative to this use of the pile driver and crew, except as they may be inferred from the testimony. It would appear that appellant, being anxious to have its line finished, allowed its machine and crew to work for the construction company, under some arrangement, one of the considerations of which we know to be that expense of the men and supplies was to be borne by the construction company. A railway company is not liable for the negligence of its independent contractor engaged in doing work on its road. *Burton v. Railway Co.*, 61 Tex. 535; *Cunningham v. Railroad Co.*, 51 Tex. 509. If the facts stated above are taken as true, it would appear that plaintiff, and the crew he was with, knowingly went from the service of appellant into the service of the construction company, and, for the term of his service there, became removed from the service, control, and orders of appellant, and was subject to the construction company alone. In this view of the case, appellant would not have been their master, while they were so engaged, so as to owe them the well-known duty in regard to providing safe machinery and keeping the same in repair. On the other hand, there was testimony going to show that plaintiff was not aware of the existence of said construction company, and was not informed that they were going to work for such company; that this crew and machine would go where ordered by the officers of appellant, sometimes to work on other roads, but always remaining in the employ of appellant; that he went with the machine crew and foreman to this work under orders of appellant's engineer; that when the work was completed they were ordered back by appellant. In brief, there was evidence that would sustain a finding that plaintiff did not know of or assent to any change of masters, but in doing this work was performing the customary service for which he was engaged by appellant, without any act of his own, or any circumstance, to indicate to him that he was serving any other person. While it cannot be doubted that if the machine and crew went into the independent service of the contractor, and subject to its sole direction and control, with knowledge on the part of the crew of the change, appellant would be absolved from the duties that apply to the relation of master, still we think it equally clear that the employer cannot relegate his employee to the service of another, under circumstances that do not charge the employee with notice of any change, and thereby escape the obligations of master. The servant cannot be held to have ceased being such, where he is continued in his ordinary work, and no knowledge is imparted to him of any change

in the relations between him and his employer. See *Ward v. Fiber Co.* (Mass.) 28 N. E. 300; *Morgan v. Smith* (Mass.) 35 N. E. 101, citing *Johnson v. Lindsay* [1891] App. Cas. 371; *Railway Co. v. Dorsey*, 66 Tex. 152, 18 S. W. 444. According to the rule just mentioned, the original employer continues to sustain the relation of master, and (without any reference to the question of his liability to third persons, and without reference to the contractor's liability), in our opinion, it follows that the servant may look to him for the performance of those duties that result from the relation of master, among which was reasonable care in keeping safe the machinery at which he worked. The court erred in holding that the evidence conclusively showed that plaintiff was appellant's servant when injured, and in withdrawing that question from the jury. Reversed and remanded.

DEUTSCHMAN et al. v. BATTAILE.¹

(Court of Civil Appeals of Texas. May 27, 1896.)

ACTION ON BONDS—PARTIES—PAROL EVIDENCE—ACTION ON CONTRACT—PLEA IN RECONVENTION—CONSIDERATION.

1. Where a bond is given for the faithful performance of a contract, the obligee may, on breach thereof, join in one suit the sureties on such bond and the sureties on a subsequent bond executed as additional security for the performance of the same contract. *Manufacturing Co. v. Ponder*, 18 S. W. 152, 82 Tex. 653, followed.

2. Parol evidence is admissible to show that a second bond given for the faithful performance of a contract was intended as additional security and not in lieu of the first bond.

3. In an action on an account for newspapers furnished defendant under a written contract of agency, which he might terminate on 30 days' notice, a plea in reconvention for the breach of a subsequent oral agreement, that if defendant would continue his agency until he should find a purchaser, plaintiff would accept the purchaser as his agent, and credit the purchase money on defendant's account, is maintainable.

4. Defendant's promise to continue his agency until he should find a purchaser was sufficient consideration for plaintiff's agreement to appoint such purchaser as his agent in defendant's place, and credit the purchase on defendant's account.

Error from district court, Bexar county; S. G. Newton, Judge.

Action by W. A. Battaille against S. Deutschman and others on a contract and bonds. Judgment for plaintiff, and defendants bring error. Reversed.

John Sehorn, for plaintiffs in error. J. D. Martin and T. M. Watlington, for defendant in error.

JAMES, C. J. Plaintiff in error Deutschman entered into the following contracts and

bonds with defendant in error on October 1, 1893, and July 10, 1894:

"San Antonio, Texas, Oct. 1, 1893.

"W. A. Battaille, Proprietor Texas Circulation St. Louis Republic, St. Louis, Mo.: In consideration of the agreement to furnish me with such numbers of copies of the Republic as I may require at exceptionally low rates, to wit, 1¼ cents per copy for the daily and 2½ cents per copy for the Sunday issue, I hereby agree to make a prompt and regular service of the Republic by carrier to all responsible parties residing within the town of San Antonio, Texas, who shall agree to pay me 65 cents per month for the daily and Sunday issue; such service to be by delivery at the store, residence, or other place designated by subscriber, promptly on arrival of papers each day. It is understood that all bills for papers sent each month are due the first of the subsequent month, and must be paid immediately upon receipt of bill. I further agree to give thirty days' notice of my intention to surrender this agency and to turn over a full list of all subscribers.

"[Signed] Selig Deutschman, Dealer.

"Approved: W. A. Battaille for W. A. Battaille."

"Oct. 1, 1893.

"W. A. Battaille, Proprietor Texas Circulation St. Louis Republic, St. Louis, Mo.: We, the undersigned, hereby become sureties, individually and collectively, for S. Deutschman, and hold ourselves responsible to you for the prompt payment by him each month for all copies of the St. Louis Republic furnished him by you. We further guaranty that such payment shall be made at your office in St. Louis, Mo., immediately after a proper statement of his account has been rendered to him. And, further, in connection with our guaranty of prompt payment, we hereby authorize you, whenever there shall be default in such payment, to draw on us for the amount due after five days' notice by mail.

"[Signed]

A. Lewy.

"W. H. Grigg.

"Approved: W. A. Battaille for W. A. Battaille."

"San Antonio, Texas, July 10, 1894.

"W. A. Battaille, Proprietor Texas Circulation, Ft. Worth, Tex.: In consideration of the agreement to furnish me such number of copies of the St. Louis Republic as I may require, at exceptionally low rates, to wit, 1¼ cents per copy for the daily and 2½ cents per copy for the Sunday issue, I hereby agree to make a prompt and regular service of the Republic by carrier to all responsible persons residing within the city of San Antonio, Texas, who shall agree to pay me the sum of 65 cents per month for the daily and Sunday issue; such service to be by delivery at the residence or other place designated by the subscriber, promptly on arrival of papers each day. I further agree to give 30 days' notice of my intention to surrender this

¹ Rehearing denied.

agency and furnish you a full list of all Republic subscribers.

"[Signed] Selig Deutschman, Dealer.

"Approved: W. R. Marchman for W. A. Battaille."

"W. A. Battaille, Proprietor Texas Circulation, Ft. Worth, Tex.: We, the undersigned, hereby become sureties, individually and collectively, for Selig Deutschman, and hold ourselves responsible to you for the prompt payment of any sum, not to exceed the sum of \$300, for papers furnished by you to him under above agreement. And, further, in connection with our guaranty of prompt payment, we authorize you to draw on us, or either of us, after five days' notice by mail, for such amount as may be due by him, not exceeding \$300. It is further agreed that 10 per cent. shall be added to any such sum for attorney's fees if sued upon or placed in the hands of an attorney for collection.

"[Signed]

Augustus Lewy.

"A. Friedrich.

"Approved: W. A. Marchman for W. A. Battaille."

It seems that on March 1, 1894, another bond had been furnished, signed by A. Lewy and W. E. Cox as sureties. The suit was upon an account for papers furnished Deutschman, which was admitted to be correct, and upon the two bonds copied. The issues raised by defendants were in substance as follows: First, a special demurrer, claiming that plaintiff had improperly joined two separate and distinct causes of action, they being independent contracts with different sureties; this exception being founded on the ruling of the supreme court in *Association v. Smith*, 70 Tex. 168, 7 S. W. 793, and *Oglesby's Sureties v. State*, 73 Tex. 658, 11 S. W. 873. It was contended that the contracts and bonds were given in lieu of the other, and were separate and distinct obligations. There was also a plea in reconvention by defendant Deutschman, in effect as follows: That when the contracts were made it was contemplated by the parties that his agency should only continue to October 1, 1894. That about August 10, 1894, defendant then having about 100 subscribers, plaintiff requested him to devote his whole time and attention to building up the subscription list, and as an inducement for defendant to devote his whole time and attention to increasing the circulation of the paper, plaintiff agreed that, after defendant increased the circulation, defendant might sell his agency to any person, and that plaintiff would appoint such person his agent at San Antonio; and, further, that plaintiff would accept the purchase money received by defendant for such agency as a payment of whatever sum defendant might be indebted to plaintiff for papers delivered to him; and, further, that plaintiff would require such agent to collect all outstanding subscriptions and credit defendant's account therewith.

That, induced by said promise, defendant went to work, and increased the circulation to 600 subscribers. That on November 1, 1894, he obtained a purchaser for his agency at the price of \$450, which defendant was willing to accept. That this purchaser tendered plaintiff a good and proper bond as agent, etc., when plaintiff refused to appoint him, and instead appointed another person, causing plaintiff to be thereby damaged in the sum of \$450, and other special damages, alleged.

The first matter of defense was raised by the special demurrer and charges asked and refused. We are of opinion that the rule in the cases cited would apply but for the allegations and proof to the effect that the contracts and bonds of March 1, 1894, and July 10, 1894, were understood and intended by the parties to give plaintiff additional security in reference to the performance of the original contract of October, 1893, and not as new and separate transactions. There was nothing recited in any of the successive writings stipulating that one was a substitute for another, or necessarily implying that it was an independent transaction. Under such circumstances, it was not contradicting or varying their terms to admit testimony that they were incidental to, and to additionally secure the fulfillment of, defendant's agreement. The agreements were substantially in the same terms. There may really have been one continuous contract between the parties covering the transactions in question, and, if it should be found that such was the case, and the bonds were taken in reference to defendant's performance of that contract, and as additional to each other, it would be proper for plaintiff to enforce his rights against all the sureties in one suit. *Manufacturing Co. v. Ponder*, 82 Tex. 653, 18 S. W. 152. But his right to a judgment on all the bonds depended on his sustaining such allegations. The court on the trial submitted this issue to the jury, and it was resolved in favor of plaintiff, and they then found, in answer to other questions submitted to them, the amount due and unpaid by Deutschman for papers delivered between October 1, 1893, and July 10, 1894, to be \$304.37, and after that date the sum of \$321.53. Whereupon judgment was entered against defendant and A. Lewy, surety, for the whole sum, and against the surety Friedrich for \$330, the extent of his obligation.

It is contended by defendant in error that the plea in reconvention was not maintainable because the suit was upon a liquidated demand, and the plea was for an unliquidated uncertain sum growing out of an oral contract independent of the contract sued on, and the alleged damages too remote to constitute a set-off. These grounds of exception were not well taken. Another ground of exception was that the agreement upon which the reconvention was founded is that there appeared to be no consideration for it, as it

required defendant to perform no more than he had already agreed to do by the existing contract. It is contended by plaintiff in error Deutschman that he was not obligated by his contract to give his whole time and attention to getting subscriptions. The contract, we think, required this of him if it was necessary in order to furnish the paper to all responsible persons in San Antonio who would pay a certain price per month. He had contracted to make a prompt and regular service to all such persons within the town of San Antonio, which necessarily implied that he undertook to reach all such persons, and if, to do this, it required all his time and service, he would not perform his contract if he failed to do so. The contracts provided no definite period for their continuance, but they did provide that defendant's relations would terminate 30 days after notice of his intention to surrender his agency. This was virtually a provision that it should continue until that time. The arrangement as set forth in the plea was upon the basis that Deutschman would continue the service, and not discontinue his agency, until such time as he found a purchaser, and this may have induced him to continue longer than he otherwise would have done. It cannot, upon this view, be held that it was without consideration to support it. He would, in such case, be entitled to recover the damages he may have sustained by the refusal to appoint as agent the proposed purchaser. For this reason, the judgment is reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. KNOTT.
(Court of Civil Appeals of Texas. June 3, 1896.)

MASTER AND SERVANT—INJURY OF EMPLOYEE—AP-
PARENT DANGER—NEGLIGENCE—STATUTE OF
LIMITATIONS—ATTORNEY—COST BOND.

1. If, by the negligence of a master, a servant is placed in a position which appears to him to threaten the loss of his life or his serious injury, and in an effort to save himself he is injured, the master will be liable for the injury, without regard to whether the servant acted as a prudent person might be expected to act under like circumstances.

2. Plaintiff was employed as a section hand on defendant's railroad, and, while assisting in clearing away a wreck, was ordered to climb upon a car which was being raised. While on the car it appeared that the supports under one side of the car were giving way, and that it was about to turn over, and plaintiff, to save himself, jumped and was injured. The car, however, did not fall. Held that, there being no danger, actual or apparent, when plaintiff was ordered to go upon the car, and no negligence being alleged on the part of defendant in the placing of the supports under it, there was no ground on which defendant could be held liable for the injury.

3. Where a petition is filed within the time limited by the statute, the action will not become barred because the plaintiff is unable to give the cost bond required and procure the issuance of citation before the time has elapsed, though he fails to procure the bond, and afterwards makes a pauper's affidavit.

4. An attorney who prosecutes an action for damages on a contingent fee, for a part of the judgment recovered, cannot be required to furnish security for costs.

Appeal from district court, Collin county; J. E. Dillard, Judge.

Action by Lee Knott against the Gulf, Colorado & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

J. W. Terry and Chas. K. Lee, for appellant.

NEILL, J. The appellee, plaintiff below, instituted this suit in the district court of Collin county, to recover of appellant damages for injuries alleged to have been sustained about the 30th day of June, 1890; plaintiff alleging, in substance, as follows: That about the ——— day of May, 1890, he, then a minor, under 21 years of age, was employed by defendant's section boss to work as a section hand, and at the time he was inexperienced and ignorant of the several risks and grievances incident to raising and replacing wrecked cars on the track, and the same had not been explained to him by the section boss or any other person; that he was so ignorant on the date of his injuries, and neither by nature and intelligence nor experience was he able to or did comprehend such dangers, and the same had not been explained to him; that one Webb was section foreman of the section, and supervising the construction and repair of the road, and had supervision and control over the same, with power to employ and discharge hands; that Webb knowing of plaintiff's minority, employed him as a section hand without explaining the risks incident to raising wrecked cars; that one Squires was foreman of a wrecking crew operating on defendant's road, in charge of a distinct and different branch of service, having charge and supervision of all hands employed at and about wrecked cars; that, about June 30, 1890, a wreck occurred on the defendant's road and Webb ordered Knott and his fellow section hands to assist in raising the wrecked cars; that, to enable them to raise the wrecked cars, the defendant furnished jackscrews, which are not ordinarily used for such purposes, and which was unknown to plaintiff; that it also furnished a derrick, block, and tackle, operated and managed by a locomotive of defendant; that such jackscrews were defective and out of repair, were worn and weak, and would not hold, and the hydraulic jacks were not supplied with oil, were weak and out of repair, and were placed in the hands of a man who did not understand how to operate them; that plaintiff was ignorant of the defect, and that the party in charge of the same did not know how to use it; that the said jacks were carelessly placed under one end of the wrecked car by and under the supervision of Webb and Squires, and by means of said

jackscrows so defective, and by means of the block and tackle, one end of the car was raised; that Webb directed plaintiff to climb on said car to assist in loosening the ropes then supporting the car, also to cast off ropes on said car; that plaintiff attempted to obey the orders, and climbed on the car; that this was dangerous, and known to Webb to be so; that plaintiff, by reason of his inexperience, was ignorant of the same; that, when plaintiff was on said car, said Squires, in order to get another hitch on the car, caused and directed the engine to slack up, and thereby permitted said car to careen and turn; that Squires well knew that this would cause the car to turn; that when the car turned the defective screws were unable to sustain the car, and the same turned partly over, and that the negligent slackening of the derrick caused the car to careen, and that said slackening was negligent; that plaintiff was placed in a position of apparent danger, where he was forced to exercise his discretion whether to remain on the car and be crushed by the car rolling over him, or jump from the same, and that said Webb directed him to jump; and that it was necessary for him to jump, in the exercise of sound discretion, to save his life,—whereby plaintiff was injured, to his damage \$12,000, etc. Defendant answered by general and special exceptions, general denial, plea of contributory negligence, and that plaintiff's injuries, if any, were the result of dangers incident to his employment, which he had contracted to assume, and dangers which he knew or ought to have known by the exercise of ordinary care.

As a number of the assignments of error are aimed at the court's charge, and others complain of the refusal of special instructions asked by appellant to cure its defects, we will, for the purpose of having the points raised by such assignments and having what we shall say in our consideration of them clearly understood, insert here so much of the charge as may subserve that purpose: "The jury are instructed that it is the duty of employers to furnish their employes with reasonably safe machinery and implements when required for use by the employé in the line of his duty. The jury are further instructed that it is the duty of employers to use reasonable precaution to prevent their employes and servants from receiving injury while pursuing their labors. The jury are further instructed that it is the duty of an employer, and his servants and agents acting for him, to refrain from placing an inexperienced employé or laborer in a dangerous service without first warning and instructing such employé of the dangers incident to such service. A fellow servant is another servant or person engaged in the same kind of service, under the same principal or director. A person employed by another to perform any service, with power to employ other persons and to direct them in

the performance of their labors, with power to discharge such persons, in law is regarded as the agent of his principal, and his words and acts within the scope of his duties are binding upon the principal, and a person employed and acting under such an agent does not occupy the relation of fellow servant to such agent. The principal is not responsible in damages for an injury resulting from the act of a fellow servant. The principal is responsible, however, in damages, for any personal injury to his employé resulting from the negligent acts or conduct of his agent, under whose direction and supervision such employé is laboring at the time. It is the duty of the laborer or employé to exercise reasonable and proper care and caution, while engaged in the service of his master or employer, to prevent injury to his own person. 'Reasonable and proper care,' as used in this charge, means such reasonable caution and prudence that any person of average caution and prudence would exercise under similar circumstances. 'Negligence,' as used in this charge, means any failure to discharge any duty or obligation to another required by law. 'Contributory negligence' is any negligence upon the part of the person injured which contributed directly or proximately to the accident. * * *

The jury are charged, if they believe, from the evidence before them, that in May, 1890, plaintiff was a minor; and that he was employed to work on defendant's road by one J. E. Webb, who was then acting as defendant's section boss on a certain section of defendant's road; and that said Webb had power to employ hands to work upon said section, and to direct them in their labors, and to discharge them; and that on or about the 30th of June, 1890, the plaintiff went, with other hands, to assist in removing a wreck upon said defendant's road; and that at that time plaintiff was inexperienced in removing wrecks upon the road, and that the business of removing wrecks is a dangerous business; and that said Webb had failed to instruct or to inform plaintiff of the danger attendant upon such business; and that one William Squires was at said wreck with defendant's wrecking train, and had control over the hands sent to assist in removing said wreck; and that plaintiff was ordered to go upon top of a caboose car which was partially raised, and was supported at one end upon trucks and at the other by pump jacks; and that he was ordered to go on said car either by said Squires or said J. E. Webb; and that plaintiff went on top of said car in obedience to said command; and that, after plaintiff had got on top of said car, said car was caused to drop or fall a short distance and to careen over through the negligence of said Squires in slackening the rope around said car, or by failure of defendant's servants to properly place said pump jacks under said car, under the direction of Squires or said Webb, or by both.

those causes combined: and that, about the time said car careened over, if it did, said J. E. Webb ordered plaintiff to jump off said car; or that plaintiff had just reason to believe that he was about to be turned over while on said car, and to escape greater danger or through fright he attempted to jump from said car; and that plaintiff, in attempting to jump from said car, fell to the ground, and received any or all the injuries complained of by plaintiff in his petition,—then plaintiff would be entitled to recover reasonable damages for such injuries as the proof shows he has sustained. * * * The jury are further charged, if they believe, from the evidence before them, that plaintiff fell from the top of defendant's car, but if they further believe that plaintiff did not receive any permanent injury from said fall, then they should find for defendant. The jury are further charged, if they believe, from the evidence, that at the time of the occurrence of the accident, if any such occurred, defendant's agents and principals, Webb and Squires, were not guilty of any negligence, and that defendant, through fright, or without any just cause to become alarmed, jumped from said train, and sustained said injuries complained of, then the jury should find for defendant. The jury are further charged, if they believe that the defendant's agents, Webb and Squires, were guilty of the negligent acts complained of by plaintiff, at the time of the accident, and if they further believe, from the evidence, that plaintiff was guilty of contributory negligence in attempting to jump from said car without any just cause for alarm, then they should find for the defendant. The jury are further charged and instructed to disregard the defendant's plea of the statute of limitations."

To entitle the appellee to recover, he must have been placed in a position of apparent danger by one or more of the alleged negligent acts of the appellant, and injured by an effort to avert his seeming peril. His obvious hazardous position must not have been such as the risk of which he assumed as an incident to his employment, but must have been such as resulted proximately from some negligent act which he has alleged of his employer. It is said by Mr. Justice Brown, in *Railway Co. v. Neff*, 87 Tex. 309, 28 S. W. 283: "The rule is sound and just which holds the party guilty of negligence responsible for the result, if that negligence has caused another to be surrounded by such circumstances as to him appear to threaten the destruction of his life or serious injury to his person, whether that person be prudent or imprudent, if, in an effort to save his life, he makes a choice of means from which injury results, and notwithstanding it may turn out that, if he had done differently, or had done nothing, he would have escaped injury altogether." Under this rule it is not required that the act of the party which results in his own injury should be such as

might have been expected from an ordinarily prudent person under like circumstances. Such qualification, by the opinion in the case referred to, is deemed to be useless, if not calculated to confuse the jury, when expressed in a charge; and it may now, in this case, be considered eliminated from the rule which before obtained in cases of this character. Therefore, under the law as it now stands, and as it was when this case was tried, the trial court properly refused the special charge asked by appellant's counsel embodying the qualification expurgated from the law as it stood aforesaid. Nor is the error in the charge, wherein the jury are directed to find for the defendant if they believe, from the evidence, that plaintiff was guilty of contributory negligence in attempting to jump from the car without just cause of alarm, such as the appellant can complain of; for, however viewed, it was an error in its favor.

While the appellee charged appellant with a number of negligent acts, he only ascribed the careening of the car, which caused his alarm and impelled him to jump, to two of them, which are (1) Squires' directing the engine to slack up, knowing that it would cause the car to turn; and (2) defective jackscrews, which were unable to sustain the car. The evidence shows without controversy that the jackscrews, even if defective, in no way caused or contributed to the threatened danger, but that it was caused either by the way the jackscrews were placed under the end of the car, or by the "slacking up" of the wrecking engine,—the great preponderance of the evidence being that it was caused by the former. From this it follows that the court erred in submitting to the jury the question as to whether the car was caused to careen by the failure of appellant's servants to properly place the jackscrews, and in instructing them they might find for appellee if the careening was caused from such failure of appellant's servants, and the appellee, through fright, jumped from the car to save himself from the apprehended danger. This not being one of the alleged negligent acts to which the turning of the car was attributed, the proof of it, in the absence of the necessary allegation, did not authorize the instruction. Besides, the mere fact that the wrecking crew were working under the direction of Squires and Webb would not impose upon the appellant a liability for the negligent act of appellee's fellow servants, unless such negligent act was done under the direction of such vice principals of the railroad company. It was not shown that either Webb or Squires directed the jackscrews to be placed as they were under the car, or that they were negligently placed. The fact that the timber supporting the jack gave way and caused it to lean is not, of itself, sufficient to show negligence on the part of appellant's servants; and, if it were, it would be an act of appellee's fellow servant for which appellant

would not be liable unless it was directed to be done in the manner it was by those in control of the actions of the wrecking crew. Employés of a railroad company engaged in removing a wrecked train necessarily work under the direction and supervision of a foreman; but, while so employed, it is impracticable, if not impossible, for him to direct and supervise every act of each of the various servants, and see that it is so skillfully performed that one of the employés, afterwards, in the performance of some other duty, in furtherance of the work, will not, in consequence of it, suffer injury. Hence, to make the employé responsible to his employer for the negligent act of his fellow servant, the negligent act must have been performed as directed by the master, and, thus, in effect, become the act of the master himself. It is demonstrated by the evidence in this case that appellee's danger was not real, but only apparent, and that its appearance, which he sought to avoid by jumping, did not exist when he went upon the car, in obedience to the order of his superior, to perform a service not in itself dangerous, actually or apparently, but occurred after he got on top of the car. If, then, this appearance of danger was not caused by appellant's negligence it is difficult to perceive how he can recover in this action. It cannot be said that he was placed in a position of danger incident to his employment which he cannot be charged with having assumed, by reason of his minority or inexperience, because he was not in any danger at all. If he was sent into a place of apparent danger, it cannot be said his minority and inexperience would not excuse him from going into it, for in that event the danger would have been apparent to him, and, as we have said, the apparent danger which caused him to act was not obvious when he went on the car. What, then, has appellee's being employed while a minor, and ignorant of the danger incident to his employment, got to do with this case, unless he was placed in a position of apparent danger by the negligence of appellant? In that event it may be material, for what might appear dangerous to one of tender years and inexperience might present a different aspect to one of age and experience. In any other event we cannot perceive its materiality. According to appellee's own testimony, he did not jump from the car because he was told to by Webb, but because he apprehended it would turn over and crush him. So it seems he would have endeavored to escape the apparent danger, whether warned to do so or not, and that the warning did not impel his action. However, we are yet to see a case holding that a servant can recover damages from his employer for injuries caused by his acting upon the cries of apparent danger to others which were not obvious to himself.

There was no error in the court's refusing to give appellant's special charge to find

in its favor on the plea of limitations. The action was brought within one year after the alleged injury occurred, and the appellee's inability to give a cost bond or file an affidavit in lieu thereof before 12 months elapsed from the accrual of his cause of action did not keep the statute running after his petition was filed until he made the affidavit and procured the issuance of citation. He wished and endeavored to make the bond, and the interest of the officers of the court as well as of appellant demand that he should have a reasonable time to give the bond before filing a pauper's affidavit. Nor do we think that an attorney who prosecutes a cause for damages upon a contingent fee of a part of the judgment to be recovered can be required to give security for costs. Only parties to a suit can be required to give such bond, and such an attorney is in no sense a party to the action. *Railway Co. v. Scott* (Tex. Civ. App.) 28 S. W. 457.

Such other errors as are assigned will not probably arise on another trial, and it is unnecessary for us to consider them. Because of the errors indicated in the charge, and the manifest insufficiency of the evidence to support the verdict, the judgment of the district court is reversed, and the cause remanded.

RAHM v. BERGSTROM.

(Court of Civil Appeals of Texas. June 3, 1896.)

ADMINISTRATOR—ACCOUNTING—PRACTICE ON APPEAL.

On appeal to the district court from the approval of the final account of an administrator, objections to the account sufficiently alleging fraud, and denunciations thereto, were stricken out without their merits being considered, and, without any evidence being taken, the judgment of the county court was sustained. *Held error.*

Appeal from district court, Bexar county: Robert B. Green, Judge.

Accounting by Oscar Bergstrom, administrator. From a judgment of the district court sustaining the judgment of the county court approving the account, John A. Rahm appeals. Reversed.

McMinn & Milligan and James Raley, for appellant.

FLY, J. On March 7, 1892, appellee filed in the county court of Bexar county his final account as administrator of the estate of Adam Rahm, deceased. This report was contested by H. E. Vernor and John A. Rahm. On January 23, 1893, an amended account was filed by the administrator, and it was contested by the same parties. In the amended account it was alleged that \$3,850 had been paid to H. E. Vernor for which no receipt had been obtained, the reasons for the failure to obtain it being set out in the account. It was also alleged that certain litigation had arisen and was pending in the district court of Bexar county that would pre-

vent a proper settlement of the final account until the said litigation was determined in some manner, and a postponement was asked. On the 22d day of May, 1893, the final account was approved by the county court, and an appeal was taken to the district court. It seems that the appeal was dismissed by the district court, but the cause was afterwards reinstated on motion of Jackson Royal, executor of the last will of John A. Rahm, who had died pending the proceedings, said executor praying that he be made a party. Prior to this time, however, a supplemental account had been filed by the administrator, and an amended contest, in which the final account of the administrator was specially excepted to, and fraud alleged in certain affairs connected with the estate. The objections of appellant to the final account were upon motion of appellee stricken out, and judgment was rendered sustaining the judgment of the county court and approving the final account. The executor of John A. Rahm has perfected this appeal.

The answer should not have been stricken out, but the demurrers should have been heard and acted upon; and the allegations as to fraud were sufficient to let in proof to sustain them. The language of the judgment would indicate that no evidence whatever was taken. We are not called on, with the record before us, to pass on the merit of the demurrers or exceptions to the answer, as no action was taken on them by the district court. All that is before this court is whether or not the district court erred in striking out the demurrers without passing on their merits, and striking out the allegations of fraud, and not admitting proof to sustain them. We hold that the action of the lower court in both particulars was erroneous, and the judgment is reversed, and the cause remanded.

EDMONDS v. CITY OF SAN ANTONIO.
(Court of Civil Appeals of Texas. June 3, 1896.)

TAXATION—EXEMPTION—SCHOOL BUILDING.

A house owned by a practicing attorney, in which he lives with his wife, she conducting therein a day and boarding school, is not within Rev. St. 1895, art. 5065, exempting from taxation, under authority of Const. art. 8, § 2, "all buildings used exclusively and owned by persons or associations * * * for school purposes."

Appeal from district court, Bexar county; Robert B. Green, Judge.

Action by Elias Edmonds against the city of San Antonio. Judgment for defendant. Plaintiff appeals. Affirmed.

C. L. Bates, for appellant. R. B. Minor, for appellee.

FLY, J. Appellant sued the city of San Antonio to recover the sum of \$530, which

he had paid as taxes on lots 4, 5, and part of lot 6, block 4, on King William street, city of San Antonio. It was also alleged that the property had been all the time used exclusively for school purposes, and was, therefore, exempt from taxation. An injunction was prayed for to restrain the city from the collection of other taxes. Appellee pleaded general denial and statute of limitations as to all the items except the one paid in 1894. The case was tried by the court, and judgment rendered for appellee. Appellant was the only witness, and swore that he built the house in 1875 for the purpose of conducting a day and boarding school for girls. He and his wife have lived in the house since 1875, with the exception of 18 months spent in La Salle county. The house was used for all the purposes of a homestead as well as a schoolhouse. Appellant and wife raised one girl in the house, who had married about three years before the trial. Appellant's wife taught the school. Appellant is a practicing attorney, who spends a larger portion of the day in his law office. The findings of fact by the court that the house was erected for a home for appellant and his family, and had been so used, and was not used exclusively for school purposes, are supported by the evidence. The constitution of Texas authorizes the legislature to exempt from taxation "all buildings used exclusively and owned by persons or associations of persons for school purposes." Article 8, § 2. It is further provided in the same section that "all laws exempting property from taxation, other than the property above mentioned, shall be void." The legislature under the above section, among other property specified in the constitution, exempted from taxation "all buildings used exclusively and owned by persons, or associations of persons, for school purposes." Rev. St. 1895, art. 5065; Rev. St. 1879, art. 4673. The word "building," used in the constitution and statute, has been construed not only to include the buildings, but land "necessary and used for the proper and economical conduct of the school." *Cassiano v. Ursuline Academy*, 64 Tex. 673.

The only question that can arise in this case is as to whether the premises were used exclusively for school purposes. The constitutional provision in question was ordained in the interest of education, and not for the protection of individuals, and it should be construed so as to carry out the intention of its adoption, and not with any view of screening the property of an individual from legitimate taxation. Laws exempting property from taxation are strictly construed. It is said by the supreme court of Pennsylvania: "Taxation is an act of sovereignty, to be performed, so far as it conveniently can be, with justice and equality to all. Exemptions, no matter how meritorious, are of grace, and must be strictly construed." Judge Cooley, in his work on Taxation, says: "It is also a very just rule that

¹ Rehearing denied.

when an exemption is found to exist it shall not be enlarged by construction. On the contrary, it ought to receive a strict construction, for the reasonable presumption is that the state has granted in express terms all it intended to grant at all, and that, unless the privilege is limited to the very terms of the statute the favor would be extended to what was not meant." The provision of the constitution which makes private property used exclusively for school purposes exempt from taxation comes dangerously near infringing that rule, which in theory at least, permeates our system of government, that forbids the use of the power of the government to build up and foster individual enterprises at the expense of the mass of the people, and can be justified alone upon the ground that it encourages education which elevates and enlightens society, and is directly for the public good. The grace extended to the person owning the property is only an incident, the main object being the welfare of the people. On this ground is justified every exemption of private property from taxation. Applying the rule laid down to the facts in this case, and we conclude that the house and lots were not used exclusively for school purposes, but were used as a home for an attorney while engaged in the practice of his profession, as well as for a schoolhouse. It was never contemplated that a man engaged in any calling other than teaching could, by having his wife teach school in the residence, exempt it from taxation. If appellant had been a teacher in the school, and had no other profession, the property might have been exempt from taxation; but when there is appended to the teaching the practice of law, or to the practice of law the teaching of children is appended, the premises were not used exclusively for school purposes. If the contention of appellant were sustained, an attorney at law with a practice that was bringing him a princely income, could exempt a palatial residence from taxation by having his wife engaged in teaching a few pupils. We do not mean to intimate that the use of the premises for school purposes was not bona fide, and that its use as a schoolhouse was not the main one for which it was occupied, but simply that it was not used for school purposes, and no other. It formed the residence of an attorney at law, as well as the schoolhouse of his wife. Our opinion is supported by the opinions of the courts of Texas on the subject.

The first case bearing directly on the subject is that of *Red v. Johnson*, 53 Tex. 284. In that case the buildings were used by the owner and family not only for school purposes, but also as a residence, and the court said: "It is not enough that the main use of the building was as a school, nor that the owner and family were all engaged in the school as teachers or pupils. A building used by the owner as a family residence is not one used exclusively for school purposes,

and therefore is not one exempted." Under the operation of the above rule, appellant's property would not be exempt, even though teaching therein had been his vocation; but it is unnecessary to carry the doctrine that far in this case. The question of exemption of the same property was afterwards raised in the case of *Red v. Morris*, 72 Tex. 551, 10 S. W. 681. While it is stated in that opinion that the parties occupying the premises were unmarried, and were each of full age, it is not clear that those facts were of great importance in shaping the opinion, still they were stated in connection with the additional fact that they did not occupy the property as a residence, but as a mere incident to the uses to which the property was devoted. The case of *Cassiano v. Ursuline Academy*, 64 Tex. 674, is cited, wherein it was said every person who occupied any portion of the premises was exclusively engaged in some department in the service of the school. In that case, as well as the case in 72 Tex., and 10 S. W., the business of the occupants is a circumstance to show the character of the use of the buildings. It might be interesting to discuss the authorities of other states on the same subject, but we do not deem it necessary to pursue the subject further. We conclude that there is no error in the judgment, and it is affirmed.

HOUSTON & T. C. RY. CO. v. GRIGSBY.¹
(Court of Civil Appeals of Texas. June 3, 1896.)

APPEAL—MOTION FOR REHEARING—TIME FOR FILING.

Leave will not be granted to file a motion for a rehearing after the expiration of 15 days where no sufficient reason is given for a failure to file it within the time fixed by the rules.

On motion for leave to file motion for rehearing. Overruled.

For former opinion, see 35 S. W. 815.

FLY, J. On May 6, 1896, the opinion was rendered in this case, and on May 25th, 15 days thereafter, appellant asks permission to file a motion for rehearing. In the application it is stated that the attorney of record for appellant received notice of the affirmance of the judgment on May 7th, the day after the opinion was delivered and judgment entered by this court; that the notice was sent immediately to the general attorneys of appellant, at Houston; that the first notice appellant's attorney of record had that the general attorneys expected him to file a motion for rehearing was by a telegram from them dated May 22d, which was after the expiration of 15 days from date of delivery of the opinion. In the telegram it was stated that a letter had been written by the general attorneys to the attorney of record to file a motion for rehearing. There is nothing to

¹ Writ of error denied by supreme court.

show that such a letter was ever written, except the statement in the telegram, and nothing whatever to show that the letter was ever mailed. It was the business of appellant or its attorneys to see that a motion for a rehearing was filed in proper time, and when it is neglected, and no valid excuse is given, a motion for leave to file a motion for rehearing after the expiration of 15 days will not be granted. There is nothing in the excuse given in the application for leave to file the motion for rehearing that appeals to the consideration of this court. The rules governing the practice in this court, as prescribed by the statute, will not be set aside on frivolous and insufficient excuses for a failure to conform to them. *Kneeland v. Miles* (Tex. Civ. App.) 25 S. W. 486. The motion for leave to file motion for rehearing is overruled.

MISSOURI, K. & T. RY. CO. OF TEXAS
v. DOSS et al.

(Court of Civil Appeals of Texas. May 16,
1896.)

PLEADING — SPECIAL DEMURRER — AUTHORITY OF
AGENT TO CONTRACT—DEED—PAROL EVIDENCE
OF CONSIDERATION.

1. In an action on a contract, a special demurrer that the petition did not disclose the name of the agent who made the contract, interposed after the parties had announced themselves ready for trial, a term of court having elapsed since the answer was filed, was properly ignored, as interposed too late.

2. In an action against a railway company for breach of contract to locate and maintain a depot at a certain point, an objection to the admissibility of evidence as to such contract, on the ground that no authority had been shown for the agent to make the contract, was properly overruled, where it appeared that the contract was made by the chief engineer and right of way agent, who had procured the right of way and depot grounds all along the line.

3. A deed conveying right of way and depot grounds recited that it was in consideration of a small cash payment and supposed advantages to result to the grantor from the location of the depot. *Held* that, notwithstanding the consideration so expressed, parol evidence was admissible to show a contract to maintain the depot at a specified place as further consideration for the donation of lands.

Appeal from district court, Clay county; George E. Miller, Judge.

Action by J. P. Doss and others against the Missouri, Kansas & Texas Railway Company of Texas for damages resulting from the removal of defendant's depot from the town of Doss. There was judgment for plaintiffs, and defendant appeals. Affirmed.

A. K. Swan, for appellant. J. A. Templeton, for appellees.

Conclusions of Fact.

STEPHENS, J. Appellees J. P. and D. B. Doss recovered judgment against appellant railway company in the sum of \$1,456.25, as damages resulting from the removal by ap-

pellant of its depot and stock pens from Doss, in Clay county, to Ringgold, in Montague county, a distance of about three miles. Both places were stations, successively, on the line of railway constructed in 1886 and 1887 between Gainesville and Henrietta by the Gainesville, Henrietta & Western Railway Company, since merged, as provided in a special act of the legislature, in appellant company, under terms and conditions which imposed upon the latter company the liabilities of the former. See *Railway v. Lacy* (recently decided in Third district) 35 S. W. 305. The location of the depot and stock pens at Doss, in 1887, created the town or village of that name, which the subsequent removal, in 1892 or 1893, to Ringgold destroyed. This location, as well as all others along the line, was made by Maj. Wathen, chief engineer for the company constructing the road, assisted by Volney Hall, the right of way agent, in pursuance of a contract to that effect with appellees, who owned a large body of land in that vicinity. This contract, which was verbal, required the depot and stock pens to be permanently located and maintained at Doss, in consideration of the gift by appellees to the railway company of 5 acres of land for the stock pens and 200 feet for depot purposes in addition to the right of way of 100 feet already granted, and also a half interest in the town site of 200 acres. Appellees executed deeds in compliance with their part of the undertaking. The deed conveying the additional right of way or depot grounds and the 5 acres for stock pens, executed March 24, 1887, recites the consideration thus: "In consideration of the supposed advantages and facilities which it is supposed our lands will derive from the construction and operation of the Gainesville, Henrietta & Western Railway through, over, and across them, and for the further consideration of ten dollars to us in hand paid." The contents of the other deed do not appear in the record, further than that "the evidence of title to the land was taken by the company in the name of the trustee for the benefit of the company." The verdict is sustained by the evidence in the following findings upon the controverted issues of fact: (1) The verbal contract for the permanent location of the station at Doss, with depot and stock pens, was made, as alleged by appellees, between them and Chief Engineer Wathen and Right of Way Agent Hall, acting in behalf of the Gainesville, Henrietta & Western Railway Company, and said location was so made in 1887, as said Hall expressed it, "to stay." (2) Wathen and Hall had authority to make such contract, and the railway company received and retains the consideration therefor. (3) Appellant company, which was equally bound to respect the contract, violated it, and removed the station, depot, and stock pens, and broke up the town of Doss, in 1892 or 1893. (4) The result was a depreciation in the price of appellees' lands

adjacent to said station equal to the amount of the verdict.

Conclusions of Law.

1. The special exception to appellees' petition, urging that it did not give the name of the railway agent who made the contract with them, was properly ignored by the court, on the ground that it came too late. Not only had a term of the court passed since appellant had answered, but no action was invoked on the special demurrer until after both parties, upon the call of the jury docket, had announced ready for trial. The fact that the special exception may have been then for the first time introduced by amendment does not alter the case. Sayles' Civ. St. arts. 1269, 1289; Dist. Ct. Rules, 24, 25, 20 S. W. xiii. Besides, no harm could have resulted, as it appears from the answer that appellant knew the name of the agent (Hall), and pleaded under oath to his want of authority.

2. The several objections of appellant to the admissibility of the evidence offered by appellees to prove the contract for the location of Doss station, interposed on the ground that the authority of Wathen and Hall to make such contract had not been shown, were all properly overruled. They had authority to locate and procure the right of way and depot grounds, and did so all along the line. If there was any restriction upon their authority as to the manner of doing this, no effort was made by appellant to show it. The evidence certainly tended to show full authority in the premises, except that dealing in town sites seems to have been forbidden. The extent of the authority was for the jury. *Railway Co. v. Simons* (Tex. Civ. App.) 25 S. W. 996, and cases cited; *Caraway v. Bank* (Tex. Civ. App.) 29 S. W. 506; *Railway Co. v. Jones*, 82 Tex. 156, 17 S. W. 534; *Stiff v. Fisher*, 2 Tex. Civ. App. 346, 21 S. W. 291.

3. Whether the parol agreement for the location of the depot and stock pens was excluded by the terms of the deed of March 24, 1887, reciting the consideration as quoted above, presents the most difficult question in the case, especially in view of the opinion of Justice Bonner in *Railroad Co. v. Garrett*, 52 Tex. 133, and subsequent opinions in line with it. But may not this be distinguished from the *Garrett Case*? There only the ordinary right of way was conveyed, and no extra land for a depot, nor was any depot located in pursuance of the verbal agreement. Here three separate deeds were made, and the depot and stock pens were located and constructed as contemplated. The first bore date December 30, 1886, and was prior to the oral agreement in question. It conveyed the ordinary right of way of 100 feet in width, in consideration, as therein recited, "of the benefits resulting to the lands of the undersigned by the construction and

operation of the railroad hereinafter mentioned, and for the further consideration of six hundred (\$600) dollars to us in hand paid by the Gainesville, Henrietta & Western Railway Company." By this deed the railway company secured the usual right of way, and appellees a right to the benefits accruing from the construction and operation thereon of the proposed railroad. By the subsequent deed of March 24, 1887, the right of way (between station No. 2,945 and station No. 2,975) was extended from 100 to 300 feet in width, and the railway company also acquired "five acres of land to be used by said company exclusively for stock pens," therein set out by metes and bounds. By the terms, then, in the March deed, "of the supposed advantages and facilities," etc., something more must have been contemplated and intended as the inducement to that deed than was covered and already secured by similar recitals in the prior deed. "The supposed advantages and facilities" to be derived from "the construction and operation" of the railway, as recited in the March deed, must have been such as were expected to arise from the use of the additional land conveyed for the purposes for which it was conveyed, viz. depot and stock pens. Only when so constructed and operated could the additional "advantages and facilities" which evidently induced the making of the deed be realized. Read in the light of the surroundings and the situation of the parties, then, the recital of the consideration in the March deed is not such as to exclude parol evidence of the full and precise extent thereof. Besides, two deeds were executed in pursuance of the oral contract, and, taken together, they cannot be said to show on their face that either one embodied the entire agreement. While the contents of the deed to the town-site property do not appear in the record, the fact that two were executed as parts of the same transaction itself tends to show that neither expressed the entire agreement, and hence to rebut the inference of completeness in either. There is also the fact of a practical construction by the conduct of the parties arising out of the execution of the oral contract by the location and construction of the depot and stock pens. Upon the whole, this really seems to be a case of deeds executed in pursuance of a more comprehensive verbal agreement, and hence not within the rule. *Railway Co. v. Jones*, 82 Tex. 156, 17 S. W. 534; *Thomas v. Hammond*, 47 Tex. 52. But, if mistaken in these views, we still do not see how appellant is to escape the force of the statute (article 4224, Sayles' Civ. St.), which prohibits the removal of a depot once established. The petition is broad enough to cover this phase of the case also, though it does not refer to the article in question. It alleges the location and removal of the depot and the resultant damages. These conclusions lead to an affirmance of the judgment.

ZERKEL v. WOOLDRIDGE et al.

(Court of Civil Appeals of Texas. June 2, 1896.)

EX PARTE DEPOSITIONS.

The deposition of one party defendant taken by plaintiff without notice to, or service of the interrogatories upon, the other defendant, is not admissible against the latter, at whose instance deponent was made a party, and who seeks relief against both him and plaintiff.

Appeal from Baylor county court; J. G. Kenan, Judge.

Action by Wooldridge & Bro. against B. N. Zerkel. P. Toberman was made a party defendant at the instance of defendant Zerkel, and from a judgment for plaintiffs said Zerkel appeals. Reversed.

Holman & Glasgow, for appellant. Newton & Dalton, for appellees.

TARLTON, C. J. Wooldridge & Bro., a firm doing business at Seymour, in Baylor county, were sureties upon a note for the sum of \$482, executed by P. Toberman and his wife, L. A. Toberman, as principals, to the First National Bank of Seymour. The sureties, having been required to pay this note, thereafter held it as an obligation against P. Toberman and his wife. Subsequently, on December 4, 1891, Toberman sold and conveyed to B. N. Zerkel by warranty deed certain lots in the town of Seymour, and in part consideration of this property he took a note from Zerkel, retaining a vendor's lien. This note, however, by agreement of the parties, was made payable, not to Toberman, but to Wooldridge & Bro. or order. It was for the sum of \$500, dated December 4, 1891, due April 25, 1892. It came into the hands of Wooldridge & Bro., and on January 31, 1894, they brought suit upon it against the appellant, who, from a verdict and judgment had thereupon, prosecutes this appeal. One of the issues presented by the pleadings and the evidence on the trial was the question whether this note was delivered to Wooldridge & Bro. as collateral to the obligation which, as sureties, they had paid to the bank, and which they subsequently held against the Tobermans, or whether the note had simply been delivered to them, to the end that they might examine it with the view of accepting it as in itself a payment and discharge of the surety obligation, in accordance with a proposition to that effect advanced by Toberman. On this issue the defendant offered the testimony of W. D. Isenberg, an attorney at law, to the effect that J. C. Wooldridge, one of the plaintiffs, stated to the witness, about December 15, 1893, that the firm of Wooldridge & Bro. claimed no interest in the note in suit. The court erroneously excluded this testimony, on the ground that it was in the nature of a confidential communication. We think that the record indicates, with reference to the subject-matter of this

statement, that no relation, express or implied, direct or remote, of attorney and client, existed between the parties thereto. Upon the issue above indicated the court, over the objection of the defendant, permitted to be read in evidence in behalf of the plaintiff the ex parte deposition of P. Toberman. The fact that Toberman had been made a party at the instance of Zerkel did not authorize the plaintiff, on an issue between himself and the defendant Zerkel, to take the deposition in question without notice to the defendant or service of the interrogatories upon him. Such a deposition, while admissible as between the plaintiff and the defendant Toberman, could not bind the defendant Zerkel, who was claiming relief against both the remaining parties. The third and fourth assignments of error, which severally include the complaint of the court's refusal to grant divers special charges, are not considered because they are deemed by us to be not in compliance with the rules for the proper briefing of causes in this court. For the errors pointed out, the judgment is reversed, and the cause is remanded.

ROBINSON v. DICKEY et al.

(Court of Civil Appeals of Texas. June 8, 1896.)

EQUITY—RESCISSION OF CONTRACTS—FRAUD.

1. Plaintiff, induced by false representations made to him by the officers of a bank, that the bank was solvent, and that the shares of stock which were to be delivered to him as part consideration were worth their face value, contracted to convey certain lots to the bank, on its agreement to erect a building thereon. The bank never completed the contract, further than to deliver the stock, and subsequently went into the hands of a receiver. Held, that plaintiff was entitled to a rescission of the entire contract on tender of the stock itself to the receiver.

2. A judgment rescinding a contract whereby bank stock was accepted by plaintiff on false representations of the bank officers as to its value, and directing such stock to be restored to the receiver of the bank, who was appointed subsequently to the execution of the contract, is not a determination that plaintiff is not liable for any assessment of such stock.

Appeal from district court, Wilbarger county; G. A. Brown, Judge.

Action by W. T. Dickey against the State National Bank of Vernon and T. Windsor Robinson, its receiver, to rescind a contract. From a judgment for plaintiff, said receiver appeals. Affirmed.

Frank P. McGhee, for appellant. Wells & Bonner, for appellees.

Statement of the Case, with Conclusions of Fact.

TARLTON, C. J. Suit by W. T. Dickey against the State National Bank of Vernon, and against T. Windsor Robinson, as receiver of the bank, for the cancellation of a contract whereby the plaintiff undertook to convey to

the bank certain realty situated in the town of Vernon, Tex., and to recover possession of that realty, and also for the rescission of a contract whereby plaintiff acquired certain stock from the bank. From a judgment in favor of the plaintiff, the receiver appeals to this court. The judgment appealed from imports a finding by the court, which we adopt, of the substantial truth of the plaintiff's allegations. These are as follows: On December 19, 1893, the plaintiff, who was the owner of the realty in controversy, consisting of certain lots and parcels of land described in the petition, and situate in the town of Vernon, Tex., executed and delivered a bond or contract, which was promptly recorded, whereby he undertook to convey this property to the defendant the State National Bank of Vernon, Tex., on terms as follows: (1) The transfer by the bank to the plaintiff, Dickey, of 68 shares of stock of the bank, of the face value of \$100 each, of which 53 shares were transferred on the execution and delivery of the bond, and 15 shares were to be transferred when Dickey paid to the bank \$1,000 in money, to be used by it in the construction of a two-story brick building upon a certain described portion of the realty in question. (2) The construction by the bank, on the lot of land described, of a two-story brick building, to cost not less than \$3,000; the first story to be built and occupied by it within 12 months after the execution of the bond. Dickey also bound himself to pay the further sum of \$1,000 to the bank,—\$500 when the foundation of the brick building should be laid, and the remainder during the further construction thereof. The plaintiff was moved to the execution of this instrument and the purchase of the stock by the fact that he desired to secure the erection of the two-story brick building mentioned, and the permanent location and operation of the bank on the property, by which means realty of the plaintiff in the immediate vicinity would be greatly enhanced in value. He was further thereto influenced by the representations made to him by the president and cashier of the bank that it was solvent, and that its stock was worth 100 cents on the dollar. The representations relied upon by the plaintiff were false, and he was without means of knowing the true condition of the bank's affairs, other than through the statements of its officers. These statements were made for the false and fraudulent purpose of procuring plaintiff to execute the bond in question, and of inducing him to purchase the shares of stock referred to, which, if not then wholly worthless, was of much less than its face value. Plaintiff has been at all times ready, since the execution of the contract, to comply with the conditions resting upon him. The defendant bank has in no sense complied with its obligation, except in the issuance and delivery to plaintiff of the 53 shares of stock referred to. It was insolvent at the date of the transaction, and has ever since so remain-

ed. It failed on August 18, 1894, and the appellant, Robinson, was appointed its receiver on September 30, 1894. The bank took immediate possession of the property described in the bond for title, which was held by it and by the receiver until it was sequestered by the plaintiff, who instituted this suit on January 9, 1895. On the trial, and by his petition, the 53 shares of bank stock were produced by the plaintiff, and tendered in court for the receiver.

Opinion.

We are of opinion:

1. The plaintiff's petition presented a cause of action for the rescission of the contract in question, and for the restitution of the property. The defendants' demurrers were properly overruled.

2. If it be true, as contended by the appellant in his second assignment of error, that the stock at the date of the transaction was worth as much as 50 cents on the dollar, the plaintiff would yet be entitled to a rescission of the contract on tender of the stock itself, without being required to tender its value thus estimated. The false and fraudulent representations entitled him to relief in equity against the entire contract. *Prewett v. Trimble* (Ky.) 17 S. W. 356.

3. It is true that the judgment grants the prayer of the plaintiff for the rescission of the contract whereby the 53 shares of bank stock was acquired, and divests out of the plaintiff all interest and title claimed by him in these shares, which had been by the plaintiff produced, tendered, and delivered into court, and directs that the clerk shall deliver the certificates of stock to the receiver on demand. We do not, however, understand that this judgment determines the question of liability on the part of the plaintiff for any assessment or charge to which he may be subject under the federal statute. *Rev. St. U. S. § 5151*. Such an issue does not appear to be here litigated. Under the pleadings and the evidence as interpreted by the court, the plaintiff was entitled to a rescission of this contract, including that feature referring to the acquisition of the certificates of stock. The defendant is in no attitude to complain of the tender of the stock by the plaintiff, nor of the fact that the court enforced this tender. *Improvement Co. v. Merrill*, 2 C. C. A. 629, 52 Fed. 77. The judgment is affirmed.

MISSOURI, K. & T. RY. CO. OF TEXAS v. COBB.

(Court of Civil Appeals of Texas. June 6, 1896.)

APPEAL—HARMLESS ERROR IN ADMITTING EVIDENCE—CARRIERS—DELAY IN SHIPPING CATTLE—MEASURE OF DAMAGES.

1. Error in admitting opinion evidence as to damages caused by delay in shipping cattle is harmless where there was other competent evidence of damage sufficient to sustain the verdict.

2. The measure of damages for delay in shipping cattle and failing to feed and water them in transit is the difference between the price actually brought and the price they would have brought had they been properly taken care of and delivered on time.

Appeal from Cooke county court; J. P. Hall, Judge.

Action by L. C. Cobb against the Missouri, Kansas & Texas Railway Company of Texas. Judgment for plaintiff, and defendant appeals. Reversed.

R. C. Foster and A. E. Wilkinson, for appellant. Green & Culp, for appellee.

Reasons for Reversal.

HUNTER, J. The opinion evidence of George Ball and John Latimer to establish the amount of damage to the cattle was improperly admitted. Their conclusions were exactly what it was the province of the jury to find. Every objection urged to their evidence should have been sustained. This error alone would not result in a reversal, if there were other competent evidence of the damages sufficient upon which to base the verdict; but the only other testimony as to the amount of damages was that of the plaintiff, who shows by his answers that he did not know the amount of injury done the cattle, but based his estimate of the damages on what a commission man at Kansas City told him. The commission man's evidence, if properly taken and introduced, might or might not be competent, but his unsworn statements are not, and the plaintiff must state the facts, and let the jury determine the amount of damages. His conclusion that they were damaged two or three dollars per head is not competent evidence. If the cattle were unnecessarily delayed, and such delay was caused by the negligence of the railway company, and if they were not fed and watered on the way, and this was not attributable to the plaintiff, and if the cattle were thereby injured so that they brought less money than they would if such delay and negligence and failure to feed and water had not occurred, then the difference in the price they brought, and the price they would have brought had the railroad company not been negligent and in default, is the correct measure of damages. From what is here expressed, we think it unnecessary to pass on all the various assignments of error, as the errors complained of are not likely to occur on another trial. The judgment is reversed, and cause remanded.

JONES v. BULL et al.

(Court of Civil Appeals of Texas. May 23, 1896.)

CLAIM BOND—AMENDMENT—NEW CAUSE OF ACTION—LIMITATIONS.

An action under the statute on a claim bond for the trial of the right to personal prop-

erty fails when it develops that the property is fixtures severed from the freehold; and an amended petition, which seeks to enforce the liability of the sureties for having aided the principal, by means of the purported claim bond, in severing from the freehold, and converting to his own use the fixtures claimed, sets up a new cause of action, against which limitations were not stayed by the original petition.

Appeal from district court, Eastland county; T. H. Conner, Judge.

Action by G. A. Jones against T. D. Bull and others to try the right to property. The sureties on defendant's claim bond, by special exception, interposed the defense of limitations to plaintiff's cause of action set up in an amended petition. Defendant Bull made no such defense. From a judgment sustaining the exceptions, plaintiff appeals. Affirmed.

R. B. Truly, for appellant. D. G. Hunt, for appellees.

STEPHENS, J. This is the third appeal in this case. 85 Tex. 136, 19 S. W. 1031, and 29 S. W. 804. After the cause was remanded the last time appellant amended, May 14, 1895, his pleadings, and, in addition to his previous allegations, set up for the first time, in a second count, the following grounds of recovery: "(4) That on or about the 12th day of July, 1889, while plaintiff was in the actual possession of all said property as aforesaid, using and enjoying the same, together with the fruits and revenue thereof, the defendant T. D. Bull, assuming and pretending to act under color of the law and by lawful authority, illegally and wrongfully made a deliberately false and fictitious affidavit and claim to said 20 horse power engine, cotton gin, and cotton press, feeder and condenser, purporting to claim the said property as is required under the statute of the trial of right to property, and claimed the same as personal property, which claim, together with the execution and delivery of the purported claimant's bond hereinafter mentioned, was made for the purpose of converting and appropriating all of said property to the use and benefit of said defendant Bull, being aided and assisted therein by the other defendants, as hereinafter alleged. (5) That on the 4th day of June, 1889, the defendants J. P. Shannon and L. C. Downtain, as sureties, executed with said defendant T. D. Bull the purported claimant's bond herein filed on the 6th day of June, 1889, which bond was entered into in the sum of eighteen hundred dollars, was payable to the plaintiff, and conditioned as bonds are required to be payable, and conditioned by the statute for the trial of right to personal property, which bond is on file among the papers of this cause, and is asked to be considered as part hereof. (6) Plaintiff avers that said bond and said affidavit were executed and delivered under assumed and pretended legal authority, for the purpose and with the intent upon the part of the defendants, acting together, to unlawfully sever, detach, and carry away the part of the machinery and motive power of the gin and mill property and lot

before described, to thereby claim the same as personalty, and enlisting in their unlawful purpose the officers of the law to deprive the plaintiff of the value of said property, and to appropriate it to their own use and benefit, without plaintiff's consent; which acts were, in consummation of such unlawful purpose, carried out, and by the execution of said affidavit and bond and its filing in this court, and aided by the officers of the law, assuming and pretending to act by lawful authority, defendants detached, severed, separated, and caused to be detached, separated, and severed, and to be appropriated by defendant Bull, assuming to be the claimant, assisted by the other defendants, all of said property, and deprived plaintiff of the value thereof; and said defendant Bull, being actually and notoriously insolvent, left plaintiff with no other effectual remedy than he was entitled to under said bond. Wherefore he is damaged in the amount of said bond, to wit, in the sum of eighteen hundred dollars, whereby the defendants became liable and bound to pay to the plaintiff said damages by virtue of said bond as a common-law obligation, which they have failed to do, or to return said property or any part thereof; and wherefore, premises considered, and whereas the supreme court of the state of Texas has on the decision of this case for the first time, rendered on the 3d day of June, 1892, and the court of civil appeals of this supreme judicial district, in this case, in accordance therewith, have adjudged said property to be a part of the realty, and not subject to defendants' pretended claim, plaintiff prays that defendants be cited in terms of law to answer this petition; that upon final hearing hereof plaintiff have judgment for his said damages, legal interest, and costs of suit, and for general relief." To this declaration appellees Shannon and Downtain interposed the defense of limitation by special exception, which was sustained. Appellee Bull made no such defense, and judgment went against him. This appeal is prosecuted because judgment was not also rendered against Shannon and Downtain, the sureties on the claim bond of Bull.

We are of opinion that the amended pleading of May 14, 1895, stated a new cause of action, which, as therein alleged, arose about July 12, 1889, and was consequently barred by statute of limitations. It sought a recovery against the sureties for aiding the principal, by means of the bond, in severing from the freehold and converting to his own use the fixtures claimed. Their previous connection with the case was solely by virtue of the statute, as sureties on the claim bond. The holding of the supreme court (85 Tex. 136, 19 S. W. 1031) that the property seized under appellant's order of sale and claimed by appellee Bull was of the class of realty known as "fixtures," and that consequently appellant, as purchaser under a real-estate mortgage, had the better right thereto; and the holding of this court (29 S. W. 804) that the statutory provisions for claim bond and judgment thereon in our action for trial of the rights of property are applicable

only where personal property is levied on and claimed, are conclusive of the original contentions, which are again urged. The judgment is therefore affirmed.

PRUITT v. JONES.

(Court of Civil Appeals of Texas. June 13, 1896.)

**SALE OF LAND—FALSE REPRESENTATIONS—DAMAGES
—ACTION ON PURCHASE-MONEY NOTE BY ASSIGNEE—BRINGING IN PAYEE.**

1. In an action on a purchase-money note by an assignee thereof, defendant, claiming that he was induced to make the purchase for which the note was given by false representations, and that the note was without consideration, may bring in the payee to respond in damages for such sum as plaintiff may recover against him, and for such other damages as defendant suffered by reason of the false representations.

2. The measure of damages for false representations as to the quality of land, on which one was induced to purchase it, is the difference between the purchase price and a sum which bears the same proportion to the purchase price as the actual value of the land bears to the value thereof if it had been as represented.

Appeal from district court, Jones county; Ed J. Hamner, Judge.

Action by T. J. Jones against A. A. Pruitt. Judgment for plaintiff. Defendant appeals. Reversed.

B. Frank Bule, for appellant. John B. Thomas and C. C. Terrell, for appellee.

HUNTER, J. Appellee, Jones, brought this suit in the district court of Jones county against appellant upon a note for \$100 given as part of the purchase money for a certain 160-acre tract of land lying in Jones county, Tex., and upon which he prays foreclosure of the vendor's lien. The land had been purchased by appellant from one McGowen at the price and sum of \$309.33. Of this amount, \$300 was paid to McGowen in cash, and two notes, of \$100 each, executed and delivered to him; and appellant furthermore assumed to pay to the state of Texas a balance due it on said land of \$309.33. The \$100 notes were due, respectively, in one and two years, the first one of which was paid off, and the second is the one sued on. Appellant alleged in his answer, substantially: That he had never been in Jones county, never had seen the land, and knew nothing about the kind and quality thereof, and that said McGowen, in order to induce him to purchase said land, falsely and fraudulently represented to him that said land was a No. 1, first-class tract of land, for Jones county, Tex.; that there were from 90 to 110 acres of good, nice, smooth, level, tillable land, in a solid body, on said tract; and that all of said tract, except about 10 acres, would do to cultivate. That he believed said representations, and was induced thereby to purchase said land, relying on said statements and representations being true, and agreed to pay the

price above named, but that the said land was not of the quality, kind, and character as represented by said McGowen. That it did not contain more than 25 acres of good, nice, smooth, level, tillable land, on the entire tract, including separate parcels large enough to cultivate, and did not contain more than 60 acres of first-class and second-class tillable land, both included, all of which the said McGowen well knew. And that by means of the premises he had been greatly injured and damaged, in the sum of, to wit, \$250, and that the consideration of the note had failed. The appellant then prayed that said McGowen be made a party defendant to the suit, that he be cited to answer, and, on final trial, that he have judgment against McGowen for a sum equal to the sum plaintiff recovered against him, for costs of suit, and for general and equitable relief. The appellee (plaintiff below) demurred to this pleading in about seven special exceptions, which we are inclined to treat as a general demurrer, except one, which objected to the making of McGowen a party to the suit, upon the ground that he was neither a proper nor necessary party thereto. All of these exceptions were sustained, and, the appellant (defendant below) declining to amend, the case went to trial, and judgment was rendered against appellant for the sum of \$149.88, with foreclosure of lien upon the land.

Appellant makes numerous assignments of error, but there are only two questions in the case, according to our view. One is whether the court erred in holding that the matters pleaded in defense were insufficient to bar or preclude the plaintiff from recovering, and the second is whether McGowen could properly be made a party to this suit; and the decision of these two questions, we think, will be sufficient to dispose of the case as it comes before us on these demurrers.

We will answer the second of these questions first, by saying that we are of opinion that McGowen was a proper party to the suit, and that we see no reason why he might not be brought in by the defendant, and made to respond in damages to whatever amount the plaintiff in this suit might recover against the defendant; or, if the defendant's pleadings were properly shaped, he might extinguish the plaintiff's demand, if in fact he obtained the note after maturity, and have judgment over against McGowen for the balance of his damages. The defendant is entitled to plead against this note, in the hands of an assignee who received it after maturity, "every discount and defense against the same which it would have been subject to in the hands of any previous owner, before notice of the assignment was given to the defendant." Rev. St. 1895, art. 309.

As to the first question, we are clearly of opinion that the pleading of the defendant sets up a good defense, and, if proved, the defendant would be entitled to judgment for the amount of injury sustained by him. The

measure of damages in this case would be the difference between the purchase price and a sum of money which bears the same proportion to the purchase price as the actual value of the land bears to the value thereof if it had been as represented. To state it as an arithmetical problem: If the land had been as represented, it would have been worth \$1,000; but, as it actually was when purchased, it was worth only \$500. The purchaser paid \$800 for it. To what amount of reduction in price is he entitled? Solution: Find the amount he should have paid for it in the above proportion, and subtract it from the amount he agreed to pay, and the difference will be the amount of reduction in the purchase price, which, in the problem above given, would be \$400. *Merrill v. Taylor*, 72 Tex. 296, 10 S. W. 532.

From what we have above said, we regard it as unnecessary to pass upon the assignments of error in detail; and for the error in sustaining the demurrers to defendant's answer we reverse the judgment herein, and remand this cause for a new trial in accordance with this opinion.

COLLINS et al. v. CHASTAIN.

(Court of Civil Appeals of Texas. June 13, 1896.)

ACTION ON BOND—CONDITIONS.

In an action on a bond purporting to be executed by M. B. C. as principal, and the other defendants as sureties, and conditioned that whereas the partnership between M. B. C. and F., under the firm name and style of C. & F., had been dissolved, and said M. B. C. had agreed to pay the debts of said firm of C. & F., now, if said M. B. C. shall pay said debts, and hold said F., the obligation should be void, the partnership alleged and proved being one between G. H. C. and F. (G. H. C. being, as appeared by the evidence, though not by the pleadings, the husband of M. B. C.), and it being proved that G. H. C. had executed the bond in the capacity of principal, and there being no allegation or proof that the name of M. B. C. had been by mistake inserted in the bond as principal thereof, and as member of the partnership, and no attempt to reform the bond, judgment cannot be sustained against the sureties.

Appeal from Eastland county court; G. W. Dakam, Judge.

Action by B. F. Chastain against M. B. Collins and others. Judgment for plaintiff. Defendants appeal. Reversed.

J. H. Calhoun, for appellants.

Reasons for Reversal.

STEPHENS, J. The bond declared on by appellee purports on its face to have been executed by M. B. Collins as principal, and G. H. Collins and the other appellants as sureties, and is conditioned as follows: "The condition of the above obligation is such that, whereas the partnership heretofore existing between M. B. Collins and B. F. Chastain, under the firm name and style of Collins &

Chastain, doing a retail drug business in the town of Eastland, Texas, has this day been dissolved by mutual consent; and whereas, by the terms of said agreement of dissolution, the said M. B. Collins agreed to pay the following claims or debts owing by the said firm of Collins & Chastain to the following parties, viz.: W. B. Ellis Tob. Co., \$138.51; St. Louis News Co., \$26.75; Chas. Watz, \$34.80; Coal Oil Co., \$9.09; F. H. Collins Music Co., \$7.92; Doolittle & Simpson, \$9.25,—and the said M. B. Collins releasing the said B. F. Chastain from any further liability on account of said claims: Now, if the said M. B. Collins shall pay off and satisfy, when the same shall become due, the several amounts hereinbefore mentioned, and hold the said B. F. Chastain harmless from liability on all of said claims aforesaid, then this obligation to be null and void; otherwise, to remain in full force and effect." It thus distinctly appears that the sureties on this bond were, in terms, bound for the failure of M. B. Collins to pay the specified debts of a firm composed of M. B. Collins and B. F. Chastain, and not the debts of a firm composed of G. H. Collins and B. F. Chastain. But the partnership alleged and proven was one between the last-named persons. There was neither allegation nor proof to the effect that the name of M. B. Collins had been inserted in the bond as principal thereof, and as the partner of Chastain, by mistake. No attempt was made to reform the bond, yet, both in the pleadings and evidence, appellee insisted that G. H. Collins, who was the husband of M. B. Collins, as appears from the evidence, but not from the pleadings, had been the partner, and had executed the bond declared on in the capacity of principal. The judgment against the sureties on account of the default of G. H. Collins in not paying the debts of a firm composed of himself and appellee is therefore not sustained by the record. Their liability is measured by the terms of the bond, which did not provide indemnity for such default of G. H. Collins. If it was the intention of the parties in the execution of the bond to so provide, and the failure of the bond to express that intention was due to mistake, appellee's remedy was, upon allegation and proof of the mistake, to have the instrument reformed, and so to recover upon it.

The judgment must therefore be reversed, and the cause will be remanded for further proceedings, in accordance with the view here expressed.

FLEMING v. STANSELL et al.
(Court of Civil Appeals of Texas. May 30, 1896.)

PERSONAL PROPERTY—TRIAL OF RIGHT—ASSIGNMENT OF JUDGMENT—LIQUIDATED DAMAGES—SET-OFF.

1. An assignee of a judgment recovered in an attachment suit, with notice that the prop-

erty in controversy between plaintiff and defendant was taken and converted by a third party under a claimant's bond for the trial of right to property, takes it subject to any existing defenses to a judgment on the claimant's bond which could have been urged against the assignor.

2. An action on the claimant's bond is not for unliquidated damages, since the amount sought to be recovered is the judgment assigned, plus the 10 per cent. damages liquidated by statute.

3. In the statutory action for the trial of the right to personal property, where it appears that plaintiff is a nonresident, owns no property within the jurisdiction of the court, and is insolvent, defendant can set off a debt due to him from plaintiff, against plaintiff's claim on the bond.

Error from district court, Eastland county; D. K. Scott, Special Judge.

Original action by J. C. Stansell against J. E. Pritchard, in attachment. J. R. Fleming, under a claim bond for the trial of the right to property, took and converted the property to his own use. From judgments on the claim bond in favor of plaintiff Stansell, and R. B. Truly, assignee and intervener, defendant Fleming brings error. Reversed.

Moore & Mack, for plaintiff in error. R. B. Truly, for defendants in error.

STEPHENS, J. J. C. Stansell caused a stock of furniture belonging to J. E. Pritchard to be attached for a debt due him from Pritchard. J. R. Fleming claimed the property, and obtained possession thereof under affidavit and bond as provided by statute in such cases. He also intervened in the original attachment suit, and sought to enjoin the proceeding for the trial of the rights of property; claiming to be a partnership creditor of Stansell & Pritchard, and as such entitled to an equitable lien on the property attached. This contention, which prevailed in the trial court, was overruled on appeal to the supreme court, as will appear from the opinion of Chief Justice Stayton (81 Tex. 294, 16 S. W. 1083), which contains a careful statement of the issues and facts developed up to that time,—June 5, 1891. That opinion affirmed the judgment in favor of Stansell against Pritchard for \$840.06 (which, with interest, amounted to \$1,233.75 on the last trial), and held that Stansell was entitled to look to Fleming and the sureties on the claimant's bond for satisfaction thereof. Otherwise the judgment was reversed, but without prejudice to the rights of Fleming as creditor of the other parties, and the cause was remanded for further proceedings. The injunction against the prosecution of the suit for the trial of the rights of property having been thus removed, Stansell made therein, December 21, 1891, the following tender of issues: "(1) That plaintiff in cause No. 350 in this court, as appears from the record and proceedings thereof, had and held a valid and subsisting attachment lien on the property of J. E. Pritchard, the defendant in said suit. (2) That while said attachment

lien was in full force and effect, to wit, on or about the 14th day of January, 1887, the defendant J. R. Fleming, by mistake of his agent, as alleged by him in said suit No. 350, claimed such property as the property of said defendant, and took and converted the same to his own use and benefit. (3) That the defendant executed and filed in this cause his claimant's bond in form of law, with J. M. Moore and L. E. Brannin as his sureties, for trial of right to property at the time said property was taken and converted as aforesaid; and said bond, with the oath prescribed for such action, are both filed in this court in this suit, and prayed to be taken and considered as part hereof. (4) That said property so taken and converted was, according to the appraised value thereof, and in fact, of the value of two thousand two hundred and fifty dollars. (5) That on the 28th day of December, 1888, or thereabouts, the plaintiff recovered a judgment against said J. E. Pritchard, in said suit No. 350, for the sum of eight hundred and forty and $\frac{88}{100}$ dollars, with interest from the date of said judgment at the rate of ten per cent. per annum, and all costs of suit; that said judgment remains in full force and effect, and is still unsatisfied and unpaid. (6) That by reason of the facts herein alleged, and by virtue of the judgment and decision of the supreme court, and mandate thereof, in said cause No. 350, rendered on the — day of June, 1891, which decision and judgment is on file in said cause No. 350, the plaintiff is entitled to look to and to recover from the defendant and his said sureties the full amount of his said judgment against said J. E. Pritchard, with interest accrued, now amounting to the sum of one thousand and ninety dollars, with his costs in said suit incurred. (7) The plaintiff further alleges that by a conveyance in writing, duly acknowledged and filed in this suit on the — day of June, 1891, he duly transferred, sold, and conveyed to R. B. Truly, his attorney in this suit, a three-fourths interest in his judgment against said Pritchard, and in the judgment rendered in this suit; and plaintiff prays that the said interest of said R. B. Truly be duly protected and adjudged to him in this suit, and that judgment be rendered herein for the full amount of plaintiff's judgment aforesaid, together with his interest and costs of suit, against the defendant and the said sureties on his said claimant's bond, and for general relief." R. B. Truly intervened, and sought a recovery in his own name for three-fourths of the amount so claimed, by virtue of a transfer made to him January 24, 1891, and filed in the original case June 30, 1891, as follows: "In consideration of the services of R. B. Truly, attorney at law, of Eastland, Texas, in a certain suit in the district and supreme courts of the state of Texas, wherein I am plaintiff, and J. E. Pritchard is defendant, and in which J. R. Fleming intervened, in which suit there

was a final judgment rendered in said supreme court in my favor against said J. R. Fleming and his bondsmen in suit No. 353 in the district court of said Eastland county, I, J. C. Stansell, in accordance with a former agreement with said R. B. Truly, do hereby sell unto and transfer to said Truly a three-fourths interest in said judgment, to have and to hold against all claims. [Signed] J. C. Stansell." Fleming met these issues with a counterclaim or set-off of the joint and several promissory notes given him by Stansell and Pritchard, aggregating about \$3,000, and long past due when the claim bond (in the sum of \$5,000) was executed, January 13, 1887; alleging the utter insolvency and non-residence of both Stansell and Pritchard, and the irreparable injury which he would sustain if not allowed to interpose such counterclaim. The two cases were consolidated, but the right of Fleming to so plead his set-off was denied; hence this writ of error. The facts were all substantially agreed to, including the following: That the stock of furniture claimed was of the value of \$2,000; that it had been sold by Fleming for about \$800; and that both Stansell and Pritchard were, and had been since January, 1886, non-residents of the state of Texas, notoriously insolvent and unable to pay their debts, having no property, save the claim of Stansell against Fleming on his bond, out of which the latter could make his debt.

The issue to be determined is exclusively one of law,—whether Fleming was entitled, under the peculiar features of this case, to have the joint and several debt due him from Stansell and Pritchard set off against the claim of Stansell and Truly on the bond. That a joint and several debt against two or more may be offset against a debt due either of them is no longer an open question. *Rust v. Burke*, 57 Tex. 341, and cases there cited. Fleming, then, in a proper case, could unquestionably plead in set-off against Stansell his debt against Stansell and Pritchard, which was several as well as joint; and the intervention of Truly could not prevent this, because when he acquired by assignment, with full notice, a part of the claim on the bond, together with the assignment of a part of the judgment against Pritchard, Fleming's debt was then past due, the suit was pending, and the right to interpose the defense already existed. The English rule, as expressed in *Burrough v. Moss*, 10 Barn. & C. 558 (1 Daniel, Neg. Inst. § 725), if ever adopted in this state, has no application to this case, because the bond declared on, of which Truly claims to be in part the assignee, is not an instrument negotiable by the law merchant, but is rather of the class of instruments to which articles 266, 267, *Sayles' Civ. St.*, are applicable. The defense provided for in these articles, and in the more comprehensive article 645, under the head of "Counterclaim," cannot be thus cut off by assignment. See, also, *Smalley v. Trammel*,

11 Tex. 10; *Mitchell v. Rucker*, 22 Tex. 67; *Hamilton v. Van Hook*, 26 Tex. 302; *Master-son v. Goodlett*, 46 Tex. 402; *Bank v. Cres-son*, 75 Tex. 298, 12 S. W. 819. It is also the rule that sureties have the right to plead in offset a debt due their principal. *Aultman & Taylor Co. v. Hefner*, 67 Tex. 54, 2 S. W. 861, and authorities there cited; *Green v. Conrad* (Mo.) 21 S. W. 839.

The next question is, was the action on the bond one for uncertain or unliquidated dam-ages? We think not. The issue tendered itself showed that the amount sought to be recovered, which was less than the value of the property, had been ascertained by the judgment against Pritchard, plus the 10 per cent. damages liquidated by statute. *Sayles' Civ. St. arts. 4840, 4841*. It was also fixed by agreement. If it had depended upon proof as to the market value of the goods, it would still have been a debt sufficiently certain to support attachment. *Stiff v. Fisher*, 2 Tex. Civ. App. 346, 21 S. W. 291. See, also, 7 *Wait, Act. & Def.* p. 481, § 7, and cases there cited. A conversion of the goods was alleg-ed, and it was manifest that they could not be returned. The authority to return the goods in satisfaction of the judgment on the bond is the privilege of the claimant, which had thus been lost or waived in this instance. The plaintiff, under the statute, looks exclu-sively to his money judgment on the bond, to be enforced by execution. *Sayles' Civ. St. art. 4843*; *Martin v. Hartnett*, 86 Tex. 517, 25 S. W. 1115; *Id.*, 86 Tex. 674, 26 S. W. 945.

The only question remaining is whether this defense was admissible in our statutory action for the trial of the right of property, and we are of opinion that it was. *Howard v. Parks*, 1 Tex. Civ. App. 606, 21 S. W. 269. Set-off as a defense seems to have been adopted in the different states of the Union from the civil law, not having been a part of the old English common law. While it is largely a statutory remedy adopted to pre-vent circuity of action, it may nevertheless become an equitable remedy as well. Where insolvency or other circumstances would lead to irreparable injury without allowing the set-off, a court of equity has never been with-out power to afford an adequate remedy. Because the common law, among other things, by reason of its inflexible forms of action and mode of procedure, did not afford adequate relief, equity jurisdiction arose to correct that wherein the law, by reason of its universality, was deficient. Hence the power of a court of equity to enjoin an action at law, where the jurisdictions were kept sepa-rate. If, then, to prevent the irreparable loss which Fleming must sustain if he is com-pelled to pay the sum for which the bond makes him liable to an insolvent nonresident who owes him a still greater sum, a court of separate equity jurisdiction would interfere, and enjoin the action at law on the bond in order to compel an offset not admissible under the law practice (1 *Pom. Eq. Jur.* § 189),

no reason can be given why, in our blended system, the same relief might not be had, upon the allegation and proof made in this case, in the very action itself for the trial of the right of property. To clothe that in-formal action with such rigidity as to make it the means of taking from one of our citi-zens, and giving to an insolvent foreigner, what in equity and justice he does not owe to, and cannot recover back from, such in-solvent nonresident, would transcend any of the achievements of the old common-law sys-tem. On the other hand, by allowing the offset Stansell is not injured, and justice is done to Fleming. A result so consonant with the purposes for which all legal forms and methods of procedure have been instituted strengthens us in the conclusion that the court erred in overruling the defense of set-off in this case. We therefore reverse the judgment, and here render judgment against defendants in error, offsetting their claim with so much of the debt due plaintiff in er-ror as may be required for that purpose, and render judgment in favor of the latter against J. C. Stansell for the remainder of his debt.

KEARBY v. HOPKINS et al.¹

(Court of Civil Appeals of Texas. June 3, 1896.)

MORTGAGES—EXTENSION—CONSIDERATION—SUBSE-
QUENT INCUMBRANCE—CONVEYANCE TO MINOR
— FRAUDULENT CONVEYANCES — STATUTE OF
FRAUDS.

1. A debtor made a note for \$10,000, and secured it by a trust deed of land. By mesne conveyances the land passed to H. and T., who became the owners of divided half interests, and each assumed one-half the mortgage debt. T. sold his interest, and took purchase-money notes, secured by vendor's lien, the grantee as-suming one-half the \$10,000 note. The pur-chase-money notes were assigned by T. The \$10,000 note was not paid at maturity, and H. and T. obtained an extension for two years. *Held*, that the assignee of the purchase-money notes was not a subsequent incumbrancer as to the half interest of H., and to that extent, at least, could not complain of the extension.

2. Before the date of the extension, H. con-veyed his half interest to a minor daughter, who had no regularly appointed guardian, but in whose interest her father acted in the manage-ment of the property. The holder of the pur-chase-money notes assigned by T. took up the \$10,000 note, which contained no provision for accelerated maturity, and sought to sell all the property covered by the trust deed on the ground that the extension as to H.'s interest was void because made without legal authority of the minor, and was therefore void in toto. *Held* that, since she could not assume the pay-ment of the incumbrance, it remained the per-sonal obligation of the father, and, the mort-gage being simply an incident to a debt which she did not owe, the one from whom it was due could prolong its payment whether she consent-ed to it or not.

3. The bona fides of a conveyance by a mortgagor of the mortgaged premises cannot be questioned by one who was not at the time a creditor, but who afterwards became the as-signee of the mortgage debt.

¹ Application for writ of error pending.

4. An agreement between the maker and holder of a note that it shall be extended for a stipulated time is not without consideration, though the extension be at a reduced rate of interest,—the absolute right to secure the interest for the entire time of the extension being offset by the creditor's agreement not to sue.

5. An extension of a note for a period longer than a year is within the statute of frauds.

6. Where the extension of time of payment of a note for two years was negotiated by letters, fully showing the terms of agreement of extension, which passed between the holder of the note and his agents, who were also authorized by the makers of the note to negotiate the extension, the agreement was sufficiently in writing to be taken out of the statute.

7. An extension of the time of payment of a note secured by mortgage modifies the original condition of the mortgage to the same extent as if the agreement as to time of payment was incorporated in the condition.

Appeal from district court, Dallas county; R. E. Burke, Judge.

Action by S. B. Hopkins and others against J. C. Kearby and others to set aside a sale of lands and to enjoin the foreclosure of a trust deed. From a judgment in favor of plaintiffs, defendant Kearby appeals. Affirmed.

The judgment appealed from vacates a sale of certain land sold by John A. Pope, as substitute trustee, in a deed of trust on the premises; and was rendered on the following facts found by the trial court, which we adopt as our conclusions of fact:

(1) On November 9, 1885, H. M. Spalding executed and delivered to Mrs. Susan M. Knowles a note for \$10,000, due five years after date, with interest at 7 per cent. per annum, payable semiannually, said note being fully described in plaintiff's petition.

(2) On the same day, to secure the payment of said note, said H. M. Spalding executed and delivered to J. F. Kimball, trustee, a deed of trust in the nature of a mortgage, covering 50x200 feet of land then owned by Spalding, and extending through from Commerce street to Jackson street, in the city of Dallas. This deed of trust is fully and properly described in the plaintiff's petition, and is duly acknowledged and recorded as alleged by plaintiff.

(3) Prior to February 4, 1891, by a series of mesne conveyances not material to set forth, the title of the west half of said property, being 25x200 feet, became vested in S. B. Hopkins, who, as hereinafter shown, had deeded it to his daughter, Maud Hopkins; and the title to the east half, 25x200 feet, became vested in E. M. Tillman. Hopkins and Tillman, in purchasing, each personally assumed one-half of the mortgage debt. On said date—February 4, 1891—said Tillman and Hopkins each owned a divided half of said property, subject to said trust deed, which was past due and unpaid, and which Mrs. Susan M. Knowles still owned. These tracts, for convenience, are hereinafter called the "Tillman Tract" and the "Hopkins Tract," respectively.

(4) Hopkins and Tillman, desiring to secure an extension of time for the payment of said

mortgage debt, and Mrs. Susan M. Knowles not desiring to carry the debt further herself, thereupon said Hopkins and Tillman entered into an agreement with one C. B. Bowling to purchase the note from Mrs. Susan M. Knowles, and grant an extension of time at an increased rate of interest to them, the said Tillman and Hopkins. They, said Hopkins and Tillman, then paid the interest to February 4, 1891, and the following indorsements were then put on said note, to wit: "Interest paid to February 4, 1891, and principal extended for two years at 10 per cent. semi-annual interest. See indorsement below. Without recourse pay C. B. Bowling or order. Susan M. Knowles." Below the above indorsements, the following indorsement was also made at the same time, to wit: "We, E. M. Tillman and S. B. Hopkins, the present owners of the within-mentioned property, desiring this note extended for two years from this date, agree to pay interest at the rate of ten per cent. per annum, payable semiannually as it accrues, and to pay said note promptly on the 4th day of February, 1893, at the office of Murphy & Bolanz, Dallas, Texas. Further agreeing, if this note is placed in the hands of an attorney for collection, or if collected by suit, to pay 10 per cent. addition on the full amount due as attorney's fees. [Signed] E. M. Tillman. S. B. Hopkins." On the same day the above agreement was reduced to writing in a separate instrument, fully describing the note and trust deed, and this separate instrument was signed by Hopkins and Tillman, acknowledged for record, and duly recorded in the records of real-estate mortgages for Dallas county. Murphy & Bolanz were a firm of real-estate and money brokers in Dallas, and they represented Bowling and Mrs. Knowles in negotiating the transaction, though the papers were signed by the principals in person, as above shown. The note was duly delivered to Bowling, and Mrs. Knowles has since had nothing to do with the transaction.

(5) About this time Tillman organized the Southern Distilling Company, a corporation organized under the Texas statutes, and of which he was the president, manager, and principal stockholder, as hereinafter more particularly shown. The Southern Distilling Company occupied the Tillman half of the property as Tillman's tenant, until it purchased the said Tillman half, as hereinafter shown, and after the purchase occupied the property in its own right until it went out of business. Hopkins, for a time, occupied his half of the property himself, as a place of business, but for some time it has been rented out. The particulars, so far as deemed material to this case, will be more fully shown hereinafter.

(6) On July 2, 1891, there was filed for record in the county clerk's office of Dallas county a deed from S. B. Hopkins and wife, Mary B. Hopkins, to Maud Hopkins, a minor daughter of S. B. Hopkins by a former marriage,

conveying to said Maud Hopkins the Hopkins half of said property. Said deed purports to have been executed and acknowledged on the 23d of October, 1888, the consideration recited being one dollar, natural love and affection. Maud Hopkins was, at the date of the record of said deed, 11 years of age, and has had no guardian of her estate until after the institution of this suit, her father, S. B. Hopkins, having all along acted as guardian of both her person and estate, paying the taxes, collecting the rents, and negotiating for the protection of said property, with her full knowledge and consent, it being the only piece of property owned or claimed by her in her separate right. The mortgage for \$10,000 being a lien on her property at the time her father transferred it to her, he has assumed and exercised the authority to make any and all necessary arrangements for extending said lien and the \$10,000 note aforesaid. After the institution of this suit, said Maud Hopkins had a guardian duly appointed for her estate, to represent and protect her interests herein, who is one W. M. C. Hill, who has duly intervened herein, setting up her title and rights as shown in his petition of intervention.

(7) Said Tillman and Hopkins paid the semi-annual installment of interest on said \$10,000 note as follows: August 5, 1891, \$500; February 6, 1892, \$500; August 8, 1892, \$500; February 14, 1893, \$500,—all of which payments were duly indorsed on said note. No other payments of interest were actually made, except as hereinafter described.

(8) On January 28, 1892, E. M. Tillman and wife executed and delivered to the Southern Distilling Company a deed conveying his one-half of said property to said company, which was duly acknowledged and recorded at the time. The consideration recited on the face of this deed was \$32,500, as follows: The assumption by said company of the one-half of said \$10,000 note, and four vendor's lien notes for \$5,000 each, due in two, three, four, and five years, respectively, after date, and one vendor's lien note for \$7,500, due in six years after date; all of said notes being negotiable in form, made by the Southern Distilling Company, payable to E. M. Tillman or order, with 7 per cent. interest from date, payable semiannually, and 10 per cent. additional as attorney's fees in case of collection by law or by attorneys; and upon default in the payment of any semiannual installment of interest or of any one of said notes when due the others should become due and payable at the option of the holder or owner of said notes.

(9) On December 1, 1892, the Southern Distilling Company was indebted to the North Texas National Bank to the amount of upwards of \$29,000, E. M. Tillman being personally liable therefor as indorser on its paper. On said date, at the request of the bank, Tillman delivered to the bank the four last-named vendor's lien notes above mentioned, aggregating \$22,500, as collateral se-

curity for the said company's indebtedness, Tillman indorsing said vendor's lien notes to the bank. Subsequently, on September 5, 1893, when the Southern Distilling Company had become insolvent, and after it had made a deed of trust of other property, Tillman, acting as president, and by virtue of a resolution of the directors of said company, by deed in writing between it and P. T. Morey transferred its half of said property then held in the name of the company to P. T. Morey, the then president of the bank, in whom the title was thus vested, he acting for the bank in the transaction; but the transfer was not recorded. The transfer was made subject to all incumbrances, which exceeded the value of the property. Afterwards, on September 7, 1893, the distilling company went into the hands of a receiver, the North Texas National Bank being its principal creditor by reason of the indebtedness above mentioned. The receivership was closed in December, 1894, and the assets distributed, the bank receiving 6.7 per cent.—its pro rata share of the same as holder of said \$29,000 debt. Said real estate was not treated as an asset in this receivership.

(10) About February 1, 1893, the said bank borrowed \$367,000 in Boston, and pledged most of its assets as collateral security, among which were afterwards included the \$22,500 of vendor's lien notes above described. This debt was held by James B. Case and Jacob Edwards and the National Bank of Redemption of Boston. In October, 1893, the North Texas National Bank also became the holder of the original \$10,000 note held by C. B. Bowling, as above mentioned.

(11) Shortly after the date of the execution of the vendor's lien notes by the distilling company to Tillman, as aforesaid, Tillman transferred and indorsed to Leopold Weiss the first of said notes for \$5000, due January 25, 1894; and said Weiss now owns and holds said note, and has intervened herein to protect the same as a second lien on said property. In the distribution of the assets of the Southern Distilling Company in December, 1894, Weiss received his pro rata share of the same as holder of said note against said company, being a little over \$300.

(12) On December 28, 1892, Murphy & Bolanz, a firm of real-estate agents and loan brokers in Dallas, who had acted as agents for C. B. Bowling, the holder of the \$10,000 note in the first extension of said note, in February, 1891, and were still his agents, wrote to Bowling, stating they had tried to secure a second extension of the note by Tillman and Hopkins on the same terms as the first extension, viz. at 10 per cent. per annum interest, and provisions as to attorney's fees as shown in the indorsement of the first extension set out in paragraph 4 above, but that Tillman and Hopkins were not willing to renew or extend the note at 10 per cent. interest; that they would do the best they

could in the matter, etc. In the meantime Murphy & Bolanz wrote to Tillman and Hopkins the letters mentioned and attached as exhibits in plaintiff's petition. On January 27, 1893, Murphy & Bolanz wrote to Bowling in Missouri, where he lived, that they had succeeded in securing an extension of the note to Tillman and Hopkins for two years at 8 per cent. interest, payable semiannually, and that the two parties would be in in a few days and arrange the matter. On February 8, 1893, the said agents wrote again to Bowling to the same effect, and that the matter had not yet been finally arranged, but would be in a few days, as soon as the parties came in. On February 16, 1893, Murphy & Bolanz wrote to Bowling, notifying him of the fact that the extension had been finally arranged at 8 per cent. for two years, and they inclosed a statement showing payment of the \$500 interest by Tillman and Hopkins, being the semiannual installment due in the last six months prior to February 4, 1893, which last-named date was the date of the second extension, the same being indorsed on the note by Bolanz's instruction, in the following words: "Six months' interest paid to February 4, 1893, this February 14, 1893, and the principal of within note is hereby extended for two years, the interest to be paid semiannually at eight per cent. per annum, instead of ten per cent." Tillman and Hopkins paid Murphy & Bolanz the sum of \$250 for negotiating this extension for them, as they had paid them for making the first extension. In the letter of Murphy & Bolanz to Bowling, of February 8, 1893, they say that they had difficulty in getting Tillman and Hopkins to take the loan for a longer period, because Tillman wanted to pay off his half of the note, and only consented to extend it to accommodate Hopkins, who was not ready to pay. On February 2, 1893, Bowling wrote to Murphy & Bolanz, acknowledging their letter of January 27, 1893, and saying that he was glad the extension had been made on the terms indicated; and on February 22, 1893, he acknowledged their letter, and inclosed statement of February 16, 1893, expressing himself as satisfied. By contemporaneous entries on their books, Murphy & Bolanz made a memorandum of the transaction, such entries not being signed. Afterwards, in the summer of 1893, when the first semiannual installment of interest was to become due, Bowling wrote to Hopkins the letters mentioned in plaintiff's petition. These letters above mentioned, and the unsigned indorsement by Bolanz on the note, were all that occurred in regard to the second extension. The extension was made with the knowledge and consent of the Southern Distilling Company, and by Hopkins as representing his daughter, Maud; but the North Texas National Bank had no notice of the same. Neither Hopkins nor his daughter had any notice on February 4, 1893, of the bank holding these vendor's lien notes, or

that the bank claimed any interest in the property. There was no express provision in the original note, nor in the second extension, for attorney's fees, nor for maturing the principal for default in payment of interest.

(13) When the first installment of interest fell due, under the second extension of the \$10,000 note, on August 4, 1893, the Southern Distilling Company had become insolvent, and on August 18, 1893, made a deed of trust, and stopped business; and Tillman, its president and manager, was so involved that he was unable to meet his half of the interest, \$200. Hopkins was ready and willing to pay his half, \$200, and tried to do so, through the American National Bank at Dallas, and so informed Bowling by letter, and tendered the money at the bank, but the holder of the note was not willing to accept half of the interest without the other being provided for, and the matter was allowed to run along without any definite settlement of what was to be done. Murphy & Bolanz had failed in business just before this installment of interest was due.

(14) On October 24, 1893, J. F. Kimball, the trustee named in the trust deed to secure the \$10,000 note, resigned, and the North Texas National Bank, as holder of said note, on December 9, 1893, by instrument in writing, duly executed and acknowledged, appointed John A. Pope substitute trustee in said deed of trust, and requested him to advertise the property for sale under provisions of said deed of trust, and to apply the proceeds of the same in accordance therewith. Pope accepted the appointment, and advertised the property for sale on January 2, 1894, between the hours of 10 o'clock a. m. and 4 o'clock p. m., at the door of the courthouse of Dallas county, Texas. The regularity of the resignation of Kimball and appointment of Pope is admitted, and that Pope made the advertisement of the sale as stated.

(15) After the advertisement of the sale as aforesaid, the North Texas National Bank transferred said note to the National Bank of Redemption of Boston, the legal owner and holder of the note at the date of sale.

(16) The North Texas National Bank was insolvent and in process of voluntary liquidation at the time of the advertisement and sale above mentioned, and has since been wound up and closed out of business, with loss to all of its stockholders of their entire holdings; the Boston creditors having purchased all of its property in satisfaction of their claims, there being no other creditors.

(17) A few days after the substitute trustee, Pope, advertised the property for sale under the deed of trust, Hopkins learned of the advertisement, and at once employed G. G. Wright, Esq., his usual attorney, to enjoin the sale, on the ground that the note was not due, and would not become due until February 4, 1895, and no foreclosure could be had on the property until said last-

named date and default in the payment of the note at said date. He so advised and instructed his attorney, and relied upon him to take all necessary steps to enjoin the sale on these grounds.

(18) On January 2, 1893, the day of sale as advertised, the substitute trustee, Pope, about 11 o'clock a. m., offered the property in separate halves, selling the Tillman half first, the same being bid in for the sum of \$5,800, and was sold to Theophilus King, of Boston, Mass., who is vice president of the National Bank of Redemption. Deed was duly executed, acknowledged, and delivered to said purchaser of the Tillman half, and the purchase price bid for it, less trustee's fees, was credited on the \$10,000 note at once. Neither Tillman nor Weiss, nor any one representing them, was present at the sale, or had any knowledge of it until afterwards. G. G. Wright and J. P. Kelley, Hopkins' bookkeeper, were present, and the Hopkins half of the property was put up and bid in by Wright in the name of one Huey Carberry, for \$10,050, which was much more than was necessary to pay the balance due on the note, after crediting the amount for which the Tillman half had sold. The exact amount due on the note, principal and interest, at the date of the sale, was \$——. The note being in the hands of attorneys for collection, 10 per cent. additional was claimed as attorney's fees. Hopkins at once employed Dudley G. Wooten as hereafter stated. This was about 12 o'clock m., January 2, 1894. Wooten at once sent Hopkins to get a copy of the note and of the terms of the deed of trust, and other necessary information for preparing and filing a petition to enjoin the consummation of the sale by delivery of the deed. Wooten also instructed Hopkins not to let it be known what he was doing, and to lead the other parties to think that Carberry would carry out his bid, so as to get time for preparing and filing the petition and securing service of injunction. It took some two or three hours to get the necessary papers ready, but the petition for injunction was finally filed about 2:30 o'clock p. m., and injunction granted and served on Pope a little after 4 o'clock p. m. In the meantime Pope and the attorneys for the bank had made a second offer and sale of the Hopkins half of the property, and bid it off to Jerome C. Kearby for \$6,000, but the injunction was served on Pope before the sale was consummated by execution and delivery of the deed, although Kearby was then, and is now, and has all along been, ready and anxious to pay the money and receive the deed.

(19) The Tillman property is worth less than the liens that were upon it, including one-half of the original \$10,000 note, and all the second lien notes. It has been worth less than the amount of the liens ever since the second lien notes were executed. It is worth more than the amount of one-half the first mortgage of \$10,000.

(20) The Hopkins property is worth more than one-half the \$10,000 note.

(21) On September 5, 1893, the Southern Distilling Company conveyed to P. T. Morey, who was president of the North Texas National Bank, and acting for it, the said Tillman property for a nominal consideration.

(22) The National Bank of Redemption, for the purpose of protecting its interest in the Tillman property, has paid taxes and insurance upon the same, as follows: Taxes, \$814.90; insurance, \$155,—as set forth in its answer herein. This has not been repaid.

(23) Said \$10,000 note was placed in the hands of attorneys for collection before the advertisement of trustee's sale by Pope. Said vendor's lien notes are also in the hands of attorneys for collection. The vendor's lien notes are past due and unpaid, having been declared due for default in interest. The \$10,000 is unpaid, unless and except as shown to the contrary, and is owned by the National Bank of Redemption, which also owns the \$22,500 vendor's lien notes transferred to it; all of said notes having passed to it as assets of and from the North Texas National Bank. Weiss owns the remaining \$5,000 vendor's lien note.

(24) Since the institution of this suit, W. M. C. Hill has been appointed guardian to the estate of Maud Hopkins. He has paid, by way of interest on one-half of the \$10,000 note, chargeable against the Hopkins half of the property, to the National Bank of Redemption, the holder of the note, March 12, 1894, \$400; August 2, 1894, \$200.

(25) The deed to Maud Hopkins was never delivered to her, and she has never seen it, but she had knowledge of it. No valuable consideration was paid by Maud Hopkins.

(26) At the time of the registration of said deed to Maud Hopkins, on July 2, 1891, S. B. Hopkins was heavily involved financially, and thereafter became actually insolvent, and is now insolvent, the North Texas National Bank being one of his creditors. The Ninth National Bank of Dallas, of which Hopkins was a director, and with which he was actively connected, failed on July 1, 1891.

(27) When the semiannual installment of interest became due on August 4, 1893, on the \$10,000 note, under the agreement mentioned, Bowling wrote to Hopkins and Tillman for the interest, as shown by the letters attached to plaintiff's petition. Hopkins offered to pay \$200, but Tillman and the Southern Distilling Company were unable to pay \$200, and on that account failed and refused to do so. Bowling, and the American National Bank acting for Bowling, declined to receive less than \$400, the full amount of the semiannual interest at 8 per cent. per annum. Murphy & Bolanz had failed in business then, but as Bowling's agents they claimed the right to foreclose the deed of trust, and so notified Hopkins and Tillman, who contended that the de-

fault in payment of interest did not make the note due. The full \$400 was not paid or offered to be paid, and no more interest was paid on said \$10,000 note until after the institution of this suit as herein set forth.

(28) After demanding the \$400 interest from Hopkins and Tillman, and notifying them that, unless the full amount of the interest was paid, Bowling would at once foreclose the trust deed under the power of sale, Murphy & Bolanz, acting for Bowling, and learning that the North Texas National Bank had a second lien on the Tillman half of the property, notified the bank that, unless the note was paid, Bowling would at once have the property sold out under the deed of trust. Thereupon the bank, to protect its second lien, purchased the \$10,000 note from Bowling, paying the full amount of the principal and interest to date of purchase, and thereupon the following indorsement was placed on said \$10,000 note, to wit: "Without recourse on me I assign the within note to — for value. [Signed] C. B. Bowling." The note was thereupon delivered to the bank, the blank left for the name of the purchaser not being filled.

(29) The trust deed in question provided, among other things, as follows: "In case of the failure or default in the payment of said promissory note, together with the interest thereon accrued, according to its terms and face, at the maturity of the same, then, and in such event, the said J. F. Kimball, or substitute, is by these presents fully authorized and empowered, and it is made his especial duty, at the request of the said Mrs. Susan M. Knowles, or the legal holder of said note, at any time, made after the maturity of said promissory note, to sell the above-described property to the highest bidder for cash in hand at the courthouse door in the city of Dallas, Dallas county, and state of Texas, after giving public notice of the time, place, and terms of said sale by posting a written notice on the bulletin board in the courthouse in the city of Dallas, Dallas county, state of Texas, for at least twenty days prior to said day of sale, and after said sale as aforesaid to make to the purchaser or purchasers thereof a good and sufficient deed in law to the premises so sold, with the usual covenants and warrants, and to receive the proceeds of said sale, and the same to apply to the payment of said note, the interest thereon accrued, and the expenses of executing said trust, including one per cent. commission to said trustee, holding the remainder thereof subject to the order of myself, the said H. M. Spalding, or my legal representatives. And whereas, for the better security of said note, I hereby agree to keep the buildings now on said premises, or that may hereafter be erected thereon, insured for the benefit of said Susan M. Knowles, or other legal holder of this note, in the sum of not less than eight thousand dollars (\$8,000), and will deliver the policy

or policies, with proper indemnity clause attached thereto; and it is hereby specially provided that, should the same J. F. Kimball, from any cause whatever, fail or refuse to act or become disqualified from acting as such trustee, then the said Mrs. Susan M. Knowles, or the legal holder of said note, shall have full power to appoint a substitute in writing, who shall have the same powers as are hereby delegated to the said J. F. Kimball; and I do by these presents fully and absolutely ratify and confirm any and all acts the said J. F. Kimball or his substitute as herein provided may do in the premises by virtue thereof."

(30) On January 2, 1894, John A. Pope, substitute trustee, proceeded to make the sale under the trust deed as advertised. The sale took place shortly before 12 o'clock noon. The original Tillman half of the property was first offered for sale separately, and sold to Theophilus King for \$5,800. The Hopkins half of the property was next offered for sale, and sold to Huey Carberry for \$10,050. W. J. Moroney, attorney for the National Bank of Redemption, bid the Tillman half of the property in for Theophilus King, who was vice president of said National Bank of Redemption; and G. G. Wright, attorney for S. B. Hopkins, bought the Hopkins part of the property in the name of Huey Carberry. King and Carberry were not present at the sale in person.

(31) After the sale, and the same day, John A. Pope, substitute trustee, executed and delivered to Theophilus King a deed in due form of law, properly acknowledged, purporting to convey to him the property purchased by him at the trustee's sale, and the following indorsement was placed on said \$10,000 note, to wit: "\$5,728.05, being principal, interest and attorney's fees due to date on one-half within note paid by proceeds of sale by Jno. A. Pope, substituted trustee, to Theophilus King, of the east half of the property described in the trust deed from H. M. Spalding to J. F. Kimball, trustee, securing the within note. Dated this January 2, 1894. John A. Pope, Substitute Trustee." This was done by authority and direction of the National Bank of Redemption, the North Texas National Bank, and Theophilus King.

(32) Pope also prepared, signed, and acknowledged a deed in due form of law to Huey Carberry for the property bid in his name, but neither Carberry nor any one representing him could be found who would pay the amount of his bid, and Pope thereupon, the same day, a few minutes before 4 o'clock p. m., resold the property previously sold to Carberry, at which resale the property was bid in by Jerome C. Kearby in person, and for himself, for the sum of \$6,000, and a signed memorandum of such sale made at the time in writing on the back of the notice of sale in the following form, to wit: "Sold to J. C. Kearby for \$6,000, 1/2, 1894. John A. Pope, Substitute Trustee. J.

C. Kearby." John A. Pope, substitute trustee, prepared, signed, and acknowledged a deed in due form of law to Kearby for the property so purchased, but before the deed could be delivered an injunction in this case was served on him, restraining him as prayed for in plaintiff's original petition. The same day, after the injunction was served on Pope, Kearby tendered to Pope \$6,000 in legal tender money, and demanded a deed, which Pope refused to deliver on account of the service of the injunction. Kearby has always been willing, and is now willing, to make his bid good, and pay the amount of the same on receipt of a deed.

(33) Before the sale, Hopkins learned that the property was advertised for sale, and employed G. G. Wright, an attorney at law, to enjoin the sale. Wright, on his own responsibility, came to the conclusion that the interests of Hopkins could be best protected by allowing the sale to proceed, and buying the property at the sale in Hopkins' interest, expecting to be able to himself arrange to purchase the Hopkins' half of the property for the amount of the debt, interest, and trustee's fees primarily chargeable against the Hopkins half of the property, and to then extend the loan to suit Hopkins' convenience. Wright attended the sale for this purpose. Unexpected competition forced the property up to \$10,050, at which figure he bid the property in, in the name of Huey Carberry. After the sale, however, he voluntarily decided not to carry the sale through, and when he informed Hopkins of what had occurred at the sale Hopkins at once employed Dudley G. Wooten, attorney at law, to bring this suit to enjoin further proceedings. Before this injunction was served, the property had been again bid off to Kearby, as hereinbefore stated. When Kearby purchased at the sale he had no actual knowledge of what had previously occurred, and simply understood that he was buying the property at a valid trustee's sale. The property was sold in separate parcels, by agreement with G. G. Wright, he wishing to bid on the Hopkins half alone. When Hopkins employed Dudley G. Wooten to bring the injunction suit, he sent his bookkeeper, Joseph P. Kelley, to W. J. Moroney, to get a copy of the \$10,000 note, to aid his attorney in framing his petition. Kelley found Moroney in the office of the North Texas National Bank about 2:30 p. m., and copied the note without saying why he was doing so, except that it was at Hopkins' request. Moroney then told Kelley that Carberry's bid would have to be complied with immediately. Kelley replied that Wright had the money, and that if he did not do so Hopkins would, as he had just gone to lunch, and in a few minutes would come down, and attend to the matter. Kelley then went away. About 3 p. m. Hopkins came to the bank, and inquired for Pope, who was then absent. Moroney told Hopkins that he had the trustee's

deed to Carberry for inspection, and handed it to Hopkins, who examined it, and handed it back to Moroney. Moroney then told Hopkins that the money would have to be paid by 3:30 p. m., and, hearing nothing further from Hopkins, Wright, or Carberry, Moroney instructed Pope to resell, which he proceeded to do as hereinbefore stated. Kelley had no authority for Hopkins in regard to this note and trust deed, but was his bookkeeper in other business.

(34) By settlement between the North Texas National Bank and Tillman on September 4, 1893, Tillman was released from all personal liability, in consideration in part that the bank should become absolute owner of the \$22,500 in collateral vendor's lien notes, with the right to foreclose the lien on the land, etc., it being understood by the bank in this settlement that Tillman still held the other \$5,000 vendor's lien note, whereby it would be postponed until the \$22,500 notes were paid. Weiss, the holder of this \$5,000 note, knew nothing of this transaction. The bank did not notify Tillman personally of the sale, because it did not consider him personally interested in the same. The bank had no information that Weiss had purchased said \$5,000 note until Weiss intervened in this suit after the sale had been made. The deed from the Southern Distilling Co. to Morey was made in order to keep the property insured, the Southern Distilling Co. not having the means to pay premiums, and the insurance companies being unwilling to issue policies to it, or in its name. Morey was president of the North Texas National Bank, pending its liquidation, and acted for the bank in this transaction. There was no concealment from Tillman of the sale under the \$10,000 mortgage, but neither Tillman nor Weiss knew of it until afterwards; but all parties understood by the bank at the time to have any interest in the sale had actual notice of the same, and, so far as the bank then knew, raised no objections to the sale. A day or two before the sale, Hopkins told W. J. Moroney that Wright would represent him at the sale. When Murphy & Bolans were trying to collect the interest from Tillman, he referred them to the North Texas National Bank, the then owner of the \$22,500 vendor's lien notes, but Tillman was not notified of the sale.

J. C. Muse, for appellant. Dudley G. Wooten, Dickson & Moroney, and T. T. Vander Hoeven, for appellees.

NEILL, J. (after stating the facts). Under his assignments of error the appellant contends that the sale to him was valid on each of the following grounds: "(1) The agreement to extend, having been made without the knowledge or consent of a second mortgagee, the North Texas National Bank, and to its substantial and serious prejudice, was void as to it, and it had the right, as it did,

to pay the holder the amount of the note, take an assignment of it, and immediately foreclose for its own protection. (2) The agreement to extend, having been made without legal authority of Maud Hopkins, the minor owner of the property in question, was void as to her, and was therefore void in toto. (3) If S. B. Hopkins had the right to make the agreement on behalf of his minor daughter, Maud Hopkins, he had an equal right to waive it; and, having done so, and consented to the sale, it cannot be objected by her, after the sale, that it was premature. (4) The agreement to extend was without consideration, and therefore void. (5) The agreement to extend was void under the statute of frauds. (6) The agreement being executory, and Hopkins and Tillman having wholly failed and refused to perform the same in whole or in part, without just cause or excuse, the holder of the note, under the facts of this case, had the legal right to elect to treat the agreement as abandoned, and assert his rights under the original contract." We will consider each in the order presented.

1. It is an elementary principle of equity that a subsequent mortgagee has the right to discharge the first mortgage at its maturity, and stand in the place of, and be subrogated to all the rights of, the first mortgagee. This right is given for the purpose of enabling the second lienholder to protect himself by preserving his security so far as he can against the prior incumbrance, and subject it to the satisfaction of his demand; and the exercise of the right is determinable from the purpose for which it is given. It cannot be exercised for the purpose of injuring or obtaining an undue advantage over either the prior mortgagor or mortgagee, or preventing them from dealing with each other as they choose respecting the mortgage existing between them, so long as they do not impair the security of the subsequent mortgagee. The discharge by the subsequent lienholder of a prior mortgage and the consequent right of subrogation has so often been successfully used as an engine of destruction to the rights of the mortgagor that he who avails himself of it has lost sight of the fact that it was given only for his protection, and has come to believe that it was given for the purpose of placing the mortgagor in his power, so that through it he may work his ruin. The subsequent mortgagee is the master neither of the mortgagor nor prior mortgagee, nor has he such authority or control over them, or either of them, that they needs must go to him and supplicate his consent to exercise their freedom of contract; and if, without his consent, they have exercised this freedom, it is none of his business, so long as he is uninjured by it. What have the mortgagors and prior mortgagee in this case done to injure the holder of the subsequent mortgage, or, rather, what has S. B. Hopkins or his minor child done? The North Texas National Bank, nor its assignees, ever ob-

tained any lien upon the Hopkins' half of the property. The subsequent lien held by it and its assignees only extended to the half interest owned by Tillman. As to the interest of Hopkins or his daughter, no subsequent lien ever attached. In taking a lien on Tillman's interest after the lot had been partitioned, the Southern Distilling Company, the North Texas National Bank, and their assignees necessarily recognized the validity of the partition, and knew that they were not subsequent lienholders on the Hopkins half, and, consequently, as to that interest, they had no right to discharge the prior mortgage, and to stand in the place of C. B. Bowling, the holder of the first lien. When they took up the Bowling note they were, of course, subrogated to his lien on the entire lot; but this did not charge the Hopkins half of the property with one dollar of the money the second lien was given to secure. It was only charged with its pro rata share of the original debt, and was as free from the subsequent one, which was only a lien upon the Tillman property, as though such debt had never existed. This original debt had been extended by an arrangement satisfactory to Bowling, Tillman, and Hopkins, and as the original lien of the North Texas National Bank did not cover the Hopkins half of the lot so far as it was concerned, it was a matter of no moment to the bank or its assignees whether it was extended or not. And as Jerome C. Kearby, who claims the sale of the Hopkins half to him was valid, has alone appealed from the judgment, it is hardly necessary to inquire whether the extension of the original debt, so far as it was a lien on the Tillman half of the property, could be made without the consent of the subsequent lienholder or not. But it is laid down as a general rule that the extension of the time of payment of a mortgage in no way impairs the security as against subsequent incumbrancers, even if effected by a renewal of the mortgage note. Jones, *Mortg.* § 942; *Bank v. Finch*, 3 Barb. Ch. 293. If this rule is correct, the consent of the subsequent incumbrancers was not necessary to the extension of the debt to the extent of the lien on the part of the property allotted to Tillman.

2. We cannot agree to the correctness of the proposition that the agreement to extend was made without the authority of Maud Hopkins, and was, therefore, void as to her and in toto. The property had been conveyed to her by her father as a gift, with his note secured by the mortgage outstanding as a lien upon it. She had not assumed the payment of this note, nor could she, being a minor, be held personally liable thereon. It remained the personal obligation of her father, and a charge upon the property she received from him; and, as she took the property cum onere, she could not, being unable to discharge the note herself, object to her father's obtaining an extension of the time of

its payment; and, if her consent was necessary, it might well be, in the absence of evidence to the contrary, presumed, for what her father did was in her interest as well as his own, and was intended to preserve the property from foreclosure until such a time as he would be able to pay for it, and thus secure to her its unincumbered ownership. But as the mortgage was simply an incident to a debt which she did not owe, the one from whom it was due could prolong its payment whether she consented to it or not, and such extension would necessarily carry with it the mortgage. The parties through whom appellant seeks to claim the property had no lien or claim against the part owned by Maud Hopkins when her father procured the extension of the payment of the debt which was a lien upon it, and the appellant wants this court to say now that, because she was a minor, and could not contract for an extension of the time herself, she cannot avail herself of the benefit of a contract made in her interest by her father, and that, therefore, her property must be taken from her on a sale that would have been void had she been old enough to sanction the contract made in her interest. We shall say no such thing. As those through whom appellant would claim had no lien of any kind on the property when the debt was extended, it is none of their business whether Maud Hopkins consented to it or not. She never complained of her father's actions, and if he made a valid contract of extension, that was sufficient to protect her from the consequences of the sale of her property at which appellant bought, she should have the benefit of it, though she was a minor.

3. It is unnecessary to consider the question as to whether one who has the right to make a contract for the benefit of a minor, after he has made it, has an equal right to waive it. But we will say the proposition that the right to waive a contract beneficial to an infant necessarily follows the right to make such contract finds no support, either in principle or authority. But as in this case the evidence shows that S. B. Hopkins never waived the benefit to his daughter of the contract to extend the debt for which the property was sold, nor consented to its sale, we will not discuss the question as to whether Maud could object to a premature sale of her property. As the benefit was not waived, she had the right to avail herself of it, as she has done. Before considering the other three grounds upon which the validity of the sale is urged, we will say that, as the conveyance by S. B. Hopkins of the property claimed to be purchased by appellant to his daughter did not affect the mortgage lien held by Bowling upon it and as neither the North Texas National Bank nor its assignees were the creditors of Hopkins before the assignment to them of the note by Bowling, it is immaterial to appellant whether or not such conveyance was made by S. B. Hopkins in

bad faith, and with intent to defraud his creditors. Only creditors of a grantor, or those whose interest may in some way be affected by his conveyance, can inquire into or question his intention or motive in making it. Therefore the trial court did not err, as is complained of in appellant's fourth assignment, in not finding as a fact that the deed to Maud Hopkins was made by her father in bad faith, and with intent to defraud his creditors; nor in failing to find, as is complained of in the sixth assignment, that it was understood that the deed to Maud should be, so far as S. B. Hopkins was concerned, purely formal, and that he should retain the beneficial ownership of the property notwithstanding the deed.

4. Was the agreement to extend without consideration, and therefore void? It will be observed from the conclusions of fact that the note originally bore interest at the rate of 7 per cent. per annum, and that on February 4, 1891, after it became due, it was extended for two years from that date upon the agreement of Tillman and Hopkins to pay interest at the rate of 10 per cent. per annum; and, the interest being paid up to February 4, 1893, the termination of the period of extension, it was again extended, if at all, on the 14th of February, 1893, upon the agreement of Tillman and Hopkins to pay interest semiannually at the rate of 8 per cent. per annum for two years from that date. It is this extension that is attacked for want of consideration. In *Benson v. Phipps*, 87 Tex. 580, 29 S. W. 1061, the supreme court, speaking through Chief Justice Gaines, says: "In case of a debt which bears interest either by convention or operation of law, when an extension for a definite period is agreed upon by the parties thereto the contract is that the creditor will forbear suit during the time of the extension, and the debtor foregoes his right to pay the debt before the end of the time. The latter secures the benefit of the forbearance; the former secures an interest-bearing investment for a definite period of time. One gives up his right to sue for a period in consideration of a promise to pay interest during the whole of the time; the other relinquishes his right to pay during the same period in consideration of the promise of forbearance. To question why this is not a contract, we think no satisfactory answer can be given. It seems to us it would be a binding contract, even if the agreement was that the debt should be extended at a reduced rate of interest." And in distinguishing this case from *Abstract Co. v. Bahn* (Tex. Sup.) 30 S. W. 430, in his opinion in the latter case he says: "In *Benson v. Phipps* the principal maker of the note and the payee agreed upon an extension for 12 months, from which the promise was implied on part of the former not to sue, and upon the latter not to pay, within the stipulated time. The promise of the debtor to forego his right to pay

at any time after the note was originally due secured to the creditor the absolute right to secure the interest for the entire time of the extension, and continued the consideration for the creditor's promise." The soundness of the principles expressed in the above quotations could not, perhaps, be better illustrated than by the case under consideration. After the expiration of the first period of extension, Bowling, the holder of the note, desires to have it again extended on the same terms as before. The payees, Tillman and Hopkins, are unwilling to consent to an extension on the same terms, but are willing for it to be extended for two years, upon the terms finally agreed upon. It is to be presumed that these parties understood their own business, and can manage their own affairs, and are competent to judge and pass upon what, as between themselves, will be a sufficient consideration to support an agreement. If Bowling, deeming his debt secure, preferred interest on it for two years at 7 per cent. per annum to the payment of his money when due, and Tillman and Hopkins preferred to pay such interest for that period to paying the debt at its maturity, and they all came to an agreement expressive of their wishes, no one, not even themselves, has a right to question the sufficiency of the consideration upon which the agreement was founded. To say that such an agreement is without consideration would be to hold that when one's debt is due, though he may prefer and deem it to his best interest to extend it upon an agreement of his debtor to pay a stipulated interest, he must take his money, which he may have no immediate use for, and risk lending it upon security as good as he has, and for interest equal to what his debtor is willing to pay; and, though the debtor can better afford to pay interest that his creditor is perfectly willing to take than to raise money to pay the matured debt, he must get the money at any sacrifice, and discharge an obligation his creditor is perfectly willing to prolong, and thus, without rhyme or reason, deprive parties of substantial rights, and prevent them from conducting their business as they choose. The agreement to extend was supported by a sufficient consideration.

5. Is this agreement void under the statute of frauds? As the agreement of extension could not be performed within the space of a year from the time it was made, we think the statute requires a memorandum of it to be in writing, and signed by the party charged therewith, in order to make it effective. Rev. St. 1879, § 2464. Reed, St. Frauds, § 190; *Grace v. Lynch*, 80 Wis. 166, 49 N. W. 751. Without reiterating the facts found in the twelfth conclusion, we think that a reference to them will show sufficient memoranda in writing, signed by the parties charged with the agreement of extension, to relieve it of the statute of frauds. The statute does not require the writing to be signed by

both parties, but only the party charged therewith. A letter may be a sufficient writing to comply with the statute, so that it contain enough to show a valid agreement, and that it was concluded, and not a mere offer or treaty, or an agreement with conditions annexed. *Fertilizer Co. v. Logan* (Ala.) 12 South. 712. It is held in this state that when one party to a written contract signs, and the other accepts it without signing, the one failing to sign is bound thereby, and is entitled to its benefits, the same as if he had signed. *Martin v. Roberts*, 57 Tex. 568; *Campbell v. McFadin*, 71 Tex. 31, 9 S. W. 138. *Murphy & Bolanz*, the agents of Bowling, the holder of note, received from Tillman and Hopkins \$250 for negotiating the extension. The negotiation was by letters written by such agents to their principal, and by him to them, and shows fully the terms of the agreement of extension. *Murphy & Bolanz* were authorized by Tillman and Hopkins to negotiate the extension agreed upon, as is evidenced by their paying them for such services.

6. The proposition here contended for is that, the agreement being executory, and Tillman and Hopkins having wholly failed and refused to perform it, either in whole or in part, without just cause or excuse, the holder of the note had the right to treat the agreement as abandoned, and assert his rights under the original contract. This proposition assumes as a matter of fact that Tillman and Hopkins failed and refused to perform their part of the agreement without just cause or excuse. Is such assumption warranted by the evidence in the record? The first installment of interest under the extension fell due August 4, 1893. The North Texas National Bank then held the Southern Distilling Company's notes to Tillman, which were indorsed by him, for \$22,500, and were a lien on Tillman's half of the lot. The Southern Distilling Company and Tillman were insolvent, the latter so involved that he was unable to meet his part of the interest then due on the extended note. Hopkins was then ready and willing to pay his part of the interest, and tried to do so through the American Bank at Dallas, and so informed Bowling by letter, and tendered the money at the bank, but the holder of the note was not willing to accept it without the other part being provided for. Under these facts, was it not as much the duty of the North Texas National Bank to provide for the payment of Tillman's part of the interest as it was Hopkins'? The bank, under these facts, was practically the owner of Tillman's half of the property. On September 5th—just 31 days after the interest installment became due—a deed to the property was in fact made by Tillman conveying the property to the president of the bank for its use. Up to this time Hopkins was ready, willing, and anxious to perform his part of the agreement, and there had been no election by Bow-

ling to rescind the contract on account of its nonperformance by the other parties. He still held the note, and was willing to abide by his part of the contract if the other parties would carry out theirs. The North Texas National Bank was standing in Tillman's shoes, holding the property subject to his contract of extension; and, instead of joining with Hopkins, as it was its duty in good conscience to do, in the payment of the installment of interest, it concluded that the shoes of Bowling would fit it better than Tillman's, and in October, 1893, attempted to put them on by becoming the holder of the original \$10,000 note before held by C. B. Bowling. Now it elects, as Bowling had never done, to rescind a contract which it was its duty in part to perform, and says to him who was anxious to perform his part of the agreement, "You shall not enjoy its benefits, but that which thou hast, as well as that which thou hast not, shall be taken from you." This is not right. Thus it is seen that the assumption of fact embodied in the proposition is not warranted by the evidence, and the part of the proposition asserted as law, in the absence of the assumed facts, has nothing to rest upon. It therefore becomes unnecessary for us to give it further consideration. When the time of payment of a mortgage is extended, the right to foreclose is suspended until the expiration of the extended time, and the extension has the effect in equity of modifying the original condition of the mortgage to the same extent as if the time of the new agreement was incorporated in the condition. Jones, Mortg. § 1190; Insurance Co. v. Bonnell, 35 Ohio St. 365. The sale being premature, the trial court did not err in vacating it, and in enjoining the execution and delivery by the trustee of the deed to appellant. Its judgment is therefore affirmed.

TEXAS & P. RY. CO. v. CAPLES.¹
 (Court of Civil Appeals of Texas. May 27, 1896.)

REMOVAL OF CAUSES—FEDERAL QUESTION—HARMLESS ERROR.

1. A cause cannot be removed from a state to a federal court on the ground that it is one arising under the federal constitution or laws, unless the fact is shown by the complaint.

2. Where the fact that the action is one arising under the federal constitution or laws is not shown by the complaint, it cannot be supplied by the petition for removal, or by amendment of the complaint after removal.

3. In an action against a railroad company for damages to the fee of abutting property by construction of its road along a public street, and by its use of the street for loading and unloading cars, a refusal to strike allegations as to damages by such use, to which limitations were pleaded, if error, was harmless, where the jury were instructed to disregard altogether this claim for damages.

Appeal from district court, El Paso county;
 C. N. Buckler, Judge.

¹ Rehearing denied.

Action by William Caples against the Texas & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Peyton F. Edwards, for appellant. W. M. Caldwell and Millard Patterson, for appellee.

FLY, J. It was alleged in the petition that the railway company had damaged appellee by constructing and maintaining a railroad track along First street, in the city of El Paso, upon which appellee owned and possessed in fee a lot of land having a front of 120 feet on the south side of said street; that appellant operated its engines and cars on said track, and the building and operating of the road had greatly damaged appellee, who prayed for \$1,500 permanent damages to the land, and \$1,000 actual and \$5,000 vindictive damages. And there was also a prayer for an injunction to prevent appellant from unloading and loading its cars on said street, and using the same as a place of deposit. Appellant asked for and obtained an order removing the cause from the state court to the circuit court of the United States on the ground that the railway company was incorporated by an act of congress, and the cause of action was for more than \$2,000, and that it was a suit arising under the laws of the United States. In the circuit court, appellee filed an amended petition, in which vindictive damages were laid at \$2,000, and the prayer for injunction was abandoned. A motion to remand to the state court for want of jurisdiction in the federal court was made by appellee, and was granted. The trial in the state court resulted in a verdict and judgment for appellee for \$500. We conclude that the facts show that the building and manner of operation of appellant's road on First street, in El Paso, permanently damaged the land of appellee on that street in the sum of \$500. Appellee had his residence abutting on First street, in close proximity to the railroad track.

The first, second, and sixth assignments of error bring in review the action of the district court in overruling a demurrer to its jurisdiction, in refusing to hear evidence on the merits of the plea to the jurisdiction, and for the reason that the cause arose under the laws of the United States. There is no allegation in the statement of the claim of appellee that indicates that it arose under the constitution or laws of the United States, and Mr. Justice Maxey, in his opinion (57 Fed. 9) remanding the cause to the state court, held, correctly, that the want of such statement in the petition of appellee could not be supplied by the petition for removal, or in the subsequent pleadings in the case, and the federal court had no jurisdiction; and his opinion is sustained by ample authority. *Railway Co. v. Hightower* (Tex. Civ. App.) 33 S. W. 541; *Cable Co. v. Alabama*, 155 U. S. 487, 15 Sup. Ct. 192; *Tennes-*

see *v. Union & Planters' Bank*, 152 U. S. 461, 14 Sup. Ct. 654; *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34; *Land Co. v. Brown*, 155 U. S. 488, 15 Sup. Ct. 357. It follows that the cause should not have been transferred to the circuit court of the United States, and it was properly remanded by the federal court for trial, and the assignments of error are not well taken. In this connection we call attention to the opinion of Chief Justice James, rendered in case of *Talbott & Sons v. Planters' Oil Co.* (Tex. Civ. App.) 33 S. W. 745.

We cannot see any force in the third, fourth, and fifth assignments of error, or the propositions thereunder, which complain of a refusal on the part of the court to strike out the allegations as to appellant's using the street as a place for loading and unloading and deposit of cars,—a claim which it was pleaded was barred by limitation. If this action was error on the part of the court, no injury could have resulted thereby to appellant, for the reason that the court instructed the jury that the claim for damage on this ground was not to be considered by them, and the damage was expressly restricted to that claimed for permanent injury to the real estate by the construction and operation of the road. The damage for using the street for a place of deposit, and for loading and unloading cars, was a separate item, and the jury were told not to consider the item. The manner of using the street was fully set up in other parts of the petition. We have considered all the assignments of error, and, finding no error of which appellant is in a position to complain, the judgment is affirmed.

McCOWN v. McCafferty.

(Court of Civil Appeals of Texas. June 13, 1896.)

TRESPASS TO TRY TITLE—LIMITATIONS—IMPROVEMENTS.

1. Plaintiff purchased school lands of the state, under Acts 1883, p. 85, c. 88. On his failure to pay interest for the year 1885, the land board forfeited the land, after their power to do so, under Act 1883, for such failure, had been taken away by Act Feb. 23, 1885 (Acts 1885, p. 18). Thereafter defendant made application for purchase of the land, under Acts 1887, p. 83, c. 90, complied with all the requirements of the act, and the land was regularly awarded to him, and he filed his proof of three years' occupancy. The power given by Act 1887, § 11, to declare forfeitures of purchases under that act, was, by provision of section 25, not to affect rights of purchasers under former laws. *Held*, that defendant had neither title, nor color of title, within the three-years statute of limitations.

2. Defendant in trespass to try title is not entitled to recover for improvements on mere proof of value of improvements made; there having been no evidence of the value of the land with and without the improvements, findings as to which are required by Sayles' Civ. St. art. 4814.

Appeal from district court, Jones county; Ed J. Hamner, Judge.

Action by C. B. McCafferty against W. C. McCown. Judgment for plaintiff. Defendant appeals. Affirmed.

A. M. Craig and C. C. Terrell, for appellant. Kirby & Kirby, for appellee.

STEPHENS, J. Appellee brought this action of trespass to try title to recover 320 acres of school land in Jones county. Appellant's defense was not guilty, limitation of three years, and claim for the value of improvements. The court not only gave appellee a judgment for the land, but denied appellant any recovery for the value of his improvements. This judgment rests upon the following agreed statement of facts: "(1) Plaintiff, C. B. McCafferty, purchased the land in controversy under Acts 1883, p. 85, c. 88; and, in the sale by the state to plaintiff, all requirements of law and the resolutions of the land board were fully complied with, the award of said land to plaintiff having been made January 3, 1894. Plaintiff made but one payment on said purchase. (2) Plaintiff failed to pay the interest on said land for the year 1885, and said land was, on account of said failure, declared forfeited by the land board of the state of Texas. (3) After said land had been declared forfeited, the defendant, W. C. McCown, properly made application to purchase the N. W. ¼ of section 10, B. B. B. & C. R. R. Co. lands (the land in controversy herein), under Acts of 1887, p. 83, c. 99, complied with all requirements of said act of 1887, and on April 16, 1888, said N. W. ¼ of said section 10 was regularly awarded to defendant, W. C. McCown; and on August 5, 1891, W. C. McCown filed in the general land office his proof of three years' occupancy of said land. (4) Defendant, W. C. McCown, took possession of said land on December 6, 1887, inclosed same more than three years before August 6, 1894, and has continuously remained in possession to the date of trial hereof. (5) Defendant, W. C. McCown, has made improvements on said land as follows:

90 acres grubbed and put in cultivation..	\$400
Built 2 miles of fence of wire and posts..	100
Built dwelling house of 4 rooms.....	250
Built cistern	50
Built stock sheds.....	50
Planted 2 acres in orchard.....	60
Put in water tank.....	25

Total value of improvements..... \$935

—All of which said improvements were made more than one year before the commencement of this suit. (6) The record of classification and sale of public lands kept by the county clerk of Jones county, Texas, shows that the land in controversy was sold to W. C. McCown, defendant, on April 14, 1888."

It is clear that the land board had no power to declare a forfeiture of a purchase of school land for nonpayment of interest, under the act of 1883, after February 23, 1885, when the act to prevent such forfeitures was ap-

proved. Acts 1885, p. 18; *Stock Co. v. McCarty*, 85 Tex. 412, 21 S. W. 598. And it seems that the power conferred by the act of 1887 on the land commissioner to declare forfeitures of purchases made under that act (as provided in section 11) was not to affect (as provided in section 25) the rights of purchasers under former laws. Acts 1887, p. 83. The dictum in *Anderson v. Bank*, 86 Tex. 618, 28 S. W. 344, seems to have overlooked section 25 of that act.

Limitation was no defense, because appellant had neither title, nor color of title, as defined in the three-years statute. *Sayles' Civ. St. arts. 3191, 3192; Buford v. Bostick*, 58 Tex. 63. Nor did appellant go far enough in the proof to entitle him to recover the value of his improvements, in that no evidence was offered of the value of the land with or without the improvements. *Sayles' Civ. St. art. 4814; Thomas v. Quarles*, 64 Tex. 491.

These conclusions overrule all the assignments of error and every proposition submitted in appellant's brief. Affirmance of the judgment must therefore be entered, though it is done reluctantly, as the record suggests a better case for appellant than it really contains.

CITY OF COVINGTON v. McKENNA.

(Court of Appeals of Kentucky. June 19, 1896.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS —BONDS—INCREASE OF INDEBTEDNESS— ASSENT OF VOTERS.

St. 1894, § 3096, authorizes cities of the second class to improve streets at the expense of abutting property holders, on petition. Section 3101 provides that such improvement may be paid for in cash, or in 10 annual payments, and that to provide for the immediate payment of the cost assessed against those who elect to pay on the 10-year plan, the city is authorized to borrow money and issue bonds therefor, "pledging the faith and credit of the city for the payment of the principal and interest thereof." It also provides that the bond issue is to be "in anticipation of the collection of a special assessment for such improvement * * * from such property holders." Const. § 157, prohibits any city from becoming indebted to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose. *Held*, that bonds issued for the cost of a street improvement under section 3101, would create a present indebtedness to that amount, and, being an appropriation of the income of future years to an amount exceeding the income provided for the year in which they might be issued, were within the meaning of Const. § 157, and must therefore be submitted to a vote of the people.

Appeal from circuit court, Kenton county.

"To be officially reported."

Controversy between the city of Covington and John McKenna, submitted by agreement for the decision of the question involved. From a judgment in favor of McKenna, the city appeals. Reversed.

W. McD. Shaw, for appellant. C. B. Simrall, for appellee.

DU RELLE, J. This is an agreed submission of a question for decision. By section 158 of the constitution, it is provided, that cities of the second class, to which appellant belongs, shall not be permitted to incur indebtedness to an amount, including the then existing indebtedness, in the aggregate exceeding 10 per centum on the value of the taxable property therein, to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness. After providing for indebtedness authorized by laws in force prior to the adoption of the constitution, and for the completion of public improvements undertaken prior thereto, this section further provides that if, on the adoption of the constitution, the aggregate indebtedness of the municipality, including that which it is authorized to contract, shall exceed the prescribed limit, then it shall not be permitted to increase its indebtedness, in an amount exceeding 2 per cent. in the aggregate upon the value of the taxable property therein, until the aggregate of its indebtedness shall have been reduced below the limit fixed, and thereafter it shall not exceed the limit, except in case of emergency. By section 3096, St. Ky., cities of the second class are authorized to improve streets by original construction of the abutting property holders, upon the petition of the holders of a given proportion of such property, and by section 3101 such improvement may be paid for on the 10-year plan, the owner of the abutting property having the option to pay in cash or in 10 annual payments. To provide for the immediate payment of the cost of the proportion improvement assessed against those property holders who elect to pay on the 10-year plan, the city is authorized to borrow the money, and issue bonds therefor, "pledging the faith and credit of the city for the payment of the principal and interest thereof," the bonds to be in 10 series, maturing annually through the 10-year period. It is provided that the bond issue thus authorized is to be "in anticipation of the collection of a special tax or assessment for such improvement or re-improvement from such property holders," that the property shall be in lieu of the assessment until it is paid, and, in the succeeding section, that no local assessment for street improvement shall exceed one-half of the value of the property assessed. Under these statutory provisions an ordinance was passed providing for the issue and sale of bonds of the city, and providing a fund for the payment of the improvement of Seventieth street with brick pavement. By the agreed statement of facts it appears that all the statutory prerequisites to the bond issue had been regularly performed, by the petition of the property owners, the passage of the ordinance in accordance with the charter pro-

visions, advertisement for bids, contract for the improvement, etc. It further appears that no general tax levy will be necessary to pay the bonds, if issued, but that they will be paid by the tax levied and assessed upon the property abutting on the improvement; that at the time of the adoption of the present constitution the debt of the city was 14 per cent. of the assessed value of the property therein, and has never since that adoption reached 2 per cent. of the assessed value, in addition to the percentage which existed at the time of the adoption, or of any subsequent valuation thereof. The assessed value of property in the city in 1891, when the constitution was adopted, was \$17,470,855, and the city debt was \$2,444,300, or about 14 per cent. of the assessed value. An addition of 2 per cent., or \$349,419.30, would make a total of \$2,793,719.30, the maximum which the city can incur until the assessed value shall so increase that 10 per cent. of it will be greater than its indebtedness. It is agreed that the debt of the city has never reached that figure, though the assessment has increased in amount. Upon this state of facts the court below held (1) that section 158 of the constitution does not prevent the issue of the \$6,000 of bonds provided for by the ordinance, and in this conclusion we concur; and (2) that neither section 157 of the constitution nor section 3073 of the Kentucky Statutes required the assent of two-thirds of the voters of the city before the bonds could be issued. The latter conclusion was reached upon the theory that "the amount of the debt incurred and maturing each year will be met by the special tax, and will not exceed the city income or revenue provided for that year," and that therefore the assent of two-thirds of the voters is not required by section 157 of the constitution. Section 3070, St. Ky., permits the additional 2 per centum indebtedness allowed by the constitution (section 158) to cities of the second class which had already a 10 per centum debt at the adoption of the constitution, provided the assent of two-thirds of the voters voting at an election, etc., be obtained. It provides, further, for the issue of bonds for such increased indebtedness, and for the levy of an annual tax to pay the interest and create a sinking fund for the payment of the principal; and the tax thus provided for is evidently a general one, to be levied on all the taxable property of the city. It is very plausibly argued that, as this section provides for a general indebtedness which will be a charge upon all the taxable property of the city, it can have no application to the street-improvement bonds provided for by section 3101, which are intended to be paid out of the sums realized from the assessment upon the abutting property. It is unnecessary, however, to pass upon this question.

The main question remaining is whether, under section 157 of the constitution, the issue of the bonds in question will cause the city to become indebted to an amount ex-

ceeding in any year the income and revenue provided for such year. It is claimed for the appellee that the amount of the debt incurred and maturing each year will be met by the special tax, and will not exceed the city income provided for that year. This is clearly erroneous. If it is a debt of the city, it is incurred in the year in which the bonds are issued, though it does not then mature. It is an anticipation of the income of future years. In *Beard v. City of Hopkinsville*, 24 S. W. 872, which, with extensive annotation, is given in 23 *Law. Rep. Ann.* 403, this court held that a contract by a city to pay an annual rental for the use of water hydrants and electric lights is a contracting of indebtedness, within the meaning of section 158 of the constitution. But it is contended that, because the bonds are to be paid out of the assessments, which are a lien upon the property abutting on the improvement, they are therefore not an indebtedness of the city, and that, as the obligation is a current one, to be paid out of the current revenue of each year as the installments fall due, such disposition and appropriation of future revenue to meet and discharge an obligation which is but a contingent one, and is to mature in the future at the time at which the provision is made to meet it, is not the creation of an indebtedness, within the meaning of the constitution. It must be remembered that the statute under consideration (section 3101), while it provides for a special assessment to meet the bonds, provides, also, for "pledging the faith and credit of the city for the payment of the principal and interest thereof"; and, though it is required, in section 3102, that no local assessment for street improvement shall exceed one-half the value of the property assessed, values may fall, and the amount realized from the sale of the land assessed may be inadequate to pay the bonds, to say nothing of the assessments proving uncollectible. As said in the case of *Beard v. City of Hopkinsville*, supra: "If the words used in the constitution are to be given their usual and commonly accepted meaning, by the contract in question the city does incur an indebtedness in the sense these terms are used in the constitution, and that this indebtedness is in excess of the limitation imposed is apparent." So in *City of Springfield v. Edwards*, 84 Ill. 626, in discussing a similar constitutional provision, the court said: "The prohibition is against becoming indebted,—that is, voluntarily incurring a legal liability to pay in any manner or for any purpose,—when a given amount of indebtedness has previously been incurred. It could hardly be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise, and there is no reason to believe the convention did not intend what the words convey. A debt payable in the future is obviously no less a debt than if payable presently; and a debt payable upon a contingency, as upon the happening of some

event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and therefore within the prohibition." In *U. S. v. Ft. Scott*, 99 U. S. 152, under a statute very similar to the one in question, providing for local improvement bonds upon a three-year plan, and that "for the payment of said bonds assessments shall be made each year," etc., the court said, "That the bonds for the amount which the relator obtained judgment constitute a debt, or a portion of the bonded indebtedness of the city, within the meaning of the statute, cannot well be doubted," and this, though the ordinance under which the bonds were issued provided that they should "be paid, principal and interest, solely from the special assessments," etc. See, also, *Culbertson v. City of Fulton*, 127 Ill. 30, 18 N. E. 781; *Law v. People*, 87 Ill. 385; *Prince v. City of Quincy*, 105 Ill. 138.

We therefore conclude that the bonds proposed to be issued would create an indebtedness, and, being an appropriation of the income of future years, it would be to an amount exceeding the income provided for the year in which they might be issued, within the meaning of section 157 of the constitution, and must therefore be submitted to the vote of the people. Wherefore the judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

LOUISVILLE WATER CO. v. UPTON.

(Court of Appeals of Kentucky. June 18, 1896.)

INJURY TO SERVANT — EXCESSIVE DAMAGES — REVIEW ON APPEAL — EVIDENCE ON FORMER TRIAL — READING FROM BILL OF EXCEPTIONS.

1. An order setting aside a verdict for \$6,750 for the loss by a servant of two fingers of his right hand will not be disturbed on appeal, where the injured hand was in evidence and the court had opportunity to judge of the extent of the injury.

2. The court may permit the testimony of a witness, given on a former trial, to be read from the bill of exceptions, made part of the record of the case, where the witness is absent from the state.

Cross appeals from circuit court, Jefferson county.

"Not to be officially reported."

Action by John Upton against the Louisville Water Company for personal injuries. From a judgment for plaintiff, defendant appeals, and plaintiff brings a cross appeal. Affirmed on both appeals.

O'Neal & Pryor and Matt O'Doherty, for plaintiff. Lane & Burnett, for defendant.

PAYNTER, J. On the 24th day of November, 1890, while the plaintiff was in performance of his duties as a laborer for the defendant, he was injured to such an extent as to impair partially the use of one of his hands. It is claimed that on the day of the injury, when engaged in the labor assigned him, he was directed by the foreman to take hold of, and push with his hands, a

wire rope attached to a large iron bucket containing sand, which was then being hoisted by the rope, pulley, hooks, shears, and derricks, with steam power; that, following the direction of the foreman, plaintiff caught hold of the wire rope, and pushed with his hand; in doing so his hand was caught in a break in the rope, and run into by the shears before he could extricate it; and that his little and ring fingers of his right hand were torn off at the knuckles, etc. It is claimed the injury resulted from a defect in the ropes; that the plaintiff did not know, and could not by the exercise of ordinary diligence have discovered, the defectiveness and unfit condition of the rope, and prevented the injury, and that the defendant knew, or could by the exercise of ordinary diligence have discovered and known, of the defectiveness of the rope; and that the injury resulted from the gross negligence of the defendant. On the trial the verdict of the jury awarded the plaintiff \$10,000. This was set aside by the court, presumably because it was excessive. On another trial the verdict was for \$6,750. The court set it aside, and, after an examination of the record, we conclude that it was done because, in the opinion of the court, the verdict was excessive. On the last trial the jury fixed the amount of damages at \$3,000. From the judgment in this verdict this appeal is prosecuted. The plaintiff prosecutes a cross appeal.

The injured hand of the plaintiff was in evidence before the jury, which the court saw. Its appearance should have had, and presumably did have, great weight with the court in determining the question as to excessive damages for the injury sustained. We cannot have the benefit of the knowledge which the court below thus acquired. Therefore we decline to disturb the judgment of the court in setting aside the verdict for \$6,750. We do not want to be understood as holding that a verdict for \$6,750 for the loss of a hand, in some cases, would be excessive. The learned counsel for the appellant contends that the court should have given the jury a peremptory instruction to find for the defendant. They have shown much learning in the law relating to the liability of the master to servant for injuries received by the servant while in the performance of his duty, but after a careful examination of the evidence offered by the plaintiff, and the authorities cited, we entertain no doubt that the court did not err in refusing to take the case from the jury. Besides, three juries have found for the plaintiff. The instructions which the court gave the jury are in apt language, state the law of the case with more than ordinary accuracy, and indeed seem to us to be faultless.

Charles Wilkerson testified on a former trial of the case. His evidence was in a bill of exceptions made part of the record in the

case. The court permitted his testimony given on former trial, and contained in the bill of exceptions, to be read on the trial. He was absent from the state when the trial took place, and it was proper for the court to allow his testimony to be read from the bill of exceptions. *Reynolds v. Powers*, 96 Ky. 481, 29 S. W. 299. The judgment is affirmed on the original and cross appeals.

LANCASTER v. LANGSTON.

(Court of Appeals of Kentucky. June 12, 1896.)

MALICIOUS PROSECUTION—PROBABLE CAUSE—ADVISE OF COUNSEL—QUESTIONS FOR JURY—INSTRUCTIONS.

1. In an action for malicious prosecution of and arrest in a civil suit it appeared that before bringing such suit defendant consulted a competent attorney, who advised him he had a cause of action, and was entitled to the remedy pursued. Defendant claimed that he laid all the facts before the attorney, and acted in good faith on his advice. *Held*, that it was proper to submit to the jury the questions whether he obtained such advice from counsel, and whether he obtained it fairly, and in good faith acted on it.

2. It was error to charge that, if the jury believed defendant acted "solely" on the advice of the attorney, etc.; since he had a right to act on it, or independently on his knowledge of the facts.

3. It appeared that the suit in which the arrest was made was for commission claimed to have been earned by defendant as agent for the sale of plaintiff's farm. Defendant claimed that under their contract he was to ask \$115 per acre to secure \$110 per acre, while plaintiff claimed he only authorized a sale for \$115. The court charged that, if there was a contract that plaintiff would pay defendant 2 per cent. commission if he would effect a sale, and defendant found or assisted in finding a purchaser "upon the terms substantially prescribed by plaintiff in contract," plaintiff became indebted to defendant in a sum equal to 2 per cent. on the price of land sold; and if, when defendant commenced such suit and obtained the order of arrest, he had such evidence as would authorize a man of ordinary prudence to believe in the justness of his debt, and that it would be sustained by the court, the jury should find for him on the ground that he had probable cause. *Held*, that the quoted part of the charge was misleading; since the commission was earned, though the contract was to sell at \$115 per acre, if defendant furnished the purchaser on modified terms.

4. In malicious prosecution, plaintiff must show want of probable cause by positive and express proof; and the fact that plaintiff was acquitted of the charge preferred against him, or that defendant abandoned the prosecution, is insufficient.

5. Where the facts and circumstances which it is claimed show probable cause are in controversy, the question must be submitted to the jury under proper instructions.

6. What facts and circumstances amount to probable cause is a question of law.

Appeal from circuit court, Bourbon county.
"Not to be officially reported."

Action by Robert Langston against J. W. Lancaster for malicious arrest and prosecution. From a judgment for plaintiff, defendant appeals. Reversed.

G. C. Lockhart and J. W. Lucas, for appellant. Ward & Dickson, for appellee.

PAYNTER, J. Lancaster is a real-estate agent at Paris. He brought suit in the Bourbon circuit court against Langston to recover \$254 for services rendered under a contract with him to sell his farm. Lancaster claimed that he was instrumental in effecting a sale of the farm, and under the contract Langston owed him the sum named as commission for his services. In the action an order of arrest was obtained, by virtue of which he was arrested by the sheriff of Bourbon county, and incarcerated in jail. On the trial of the case Langston defeated a recovery. This action is to recover damages, because, as it is alleged, defendant prosecuted the former action, and had him arrested maliciously, and without probable cause. The trial resulted in a verdict and judgment for the plaintiff for \$1,000. The only question to be determined is as to the correctness of the instructions which the court gave the jury. The fact that in the trial of the case wherein the order of arrest was obtained the judgment was for the defendant therein, does not create the presumption on the trial of this case that the suit was prosecuted maliciously and without probable cause. As the plaintiff must prove malice, the proof of the want of probable cause devolves on him. The defendant is not required to prove anything until the plaintiff shall have given some evidence of malice independent of any inference to be drawn from the judgment in his favor. *Ullman v. Abrams*, 9 Bush, 743. When want of probable cause is shown, then the law decides that the prosecution or action was commenced with malicious motives alone. *Cox v. Taylor's Adm'r*, 10 B. Mon. 20. In *Stone v. Crocker*, 24 Pick. 84, the supreme court of Massachusetts said: "The want of probable cause is the essential ground of this action. Other things may be inferred from this. But this cannot be inferred from anything else. It must be established by positive and express proof. It is not enough to show that the plaintiff was acquitted of the charge preferred against him, or that the defendant abandoned the prosecution. But the onus probandi is upon the plaintiff to prove affirmatively, by circumstances or otherwise, as he may be able, that the defendant had no grounds for commencing the prosecution. * * * The functions of the court and jury are different, and generally distinct. * * * If these functions encroach upon each other, it will not be because their respective provinces are not separated by plain boundaries. What facts and circumstances amount to probable cause is a pure question of law. Whether they exist or not in any particular case is a pure question of fact. The former is exclusively for the court; the latter for the jury. This subject must necessarily be submitted to the jury when the facts are in controversy; the court instructing them what the law is." We think the foregoing is a correct statement of the law. Plain-

tiff's evidence tending to establish a want of probable cause was sufficient to warrant the court in submitting the question to the jury; therefore the court did not err in refusing to instruct the jury to find for the defendant. Before bringing the action against Langston, Lancaster consulted a competent attorney, and, as he claims, laid all the facts before him, who advised him that he had a cause of action, and was entitled to the remedy pursued. Lancaster claims that he acted in good faith upon the advice which his counsel gave him. It was proper for the court to submit the question to the jury as to whether he obtained such advice from counsel, and as to whether he obtained it fairly, and in good faith acted upon it. It is said in *Walter v. Sample*, 25 Pa. St. 275: "Professors of the law are the proper advisers of men in doubtful circumstances, and this advice, when fairly obtained, exempts the party who acts upon it from the imputation of proceeding maliciously and without probable cause. It may be erroneous, but the client is not responsible for the error. He is not the insurer of his lawyer. Whether the facts amount to probable cause is the very question submitted to counsel in such cases, and when the client is instructed that they do he has taken all the precaution demanded of a good citizen. To manifest the good faith of the party, it is important that he should resort to a professional adviser of competency and integrity. He cannot, in the language of Judge Rogers, make such resort a mere cover for the prosecution;" but when he has done his whole duty in the premises he is not to be made liable because the facts did not clearly warrant the advice and prosecution. To the same effect is *Stewart v. Sonneborn*, 98 U. S. 187. In giving an instruction (No. 4) on this phase of the case the court told the jury that, "if they believed from the evidence that the defendant acted solely on the advice of the attorney," etc. To use the word "solely" was misleading to the jury. He had the right to act, not only on the advice of the attorney, but independently upon any knowledge he possessed of the facts as to his contract with Langston. This instruction would be proper with the omission of the word "solely." Lancaster claimed that under his contract with Langston he was to ask \$115 per acre for the farm to secure \$110 per acre. Langston claimed that he only authorized him to sell for \$115 per acre. Instruction No. 3 is as follows: "If there was a contract between plaintiff and defendant before the institution of this action in the circuit court mentioned in its first instruction to the effect that plaintiff would pay defendant two per cent. commission on the purchase money if said Lancaster would effect a sale of plaintiff's farm in Bourbon county, and defendant, in pursuance of said contract, and while said contract was in effect, did find, or assist in finding, a purchaser for plaintiff's

farm upon the terms substantially prescribed by plaintiff in contract, then the plaintiff became indebted to the defendant in the sum equal to two per cent. of the amount of the purchase price of land sold; and if the jury believe from the evidence that at the time defendant's action was instituted in the circuit court mentioned, and the order of arrest was obtained against the plaintiff, the defendant had such evidence as would authorize a man of ordinary prudence and discretion to believe in the justness of his debt as stated above, and to believe that said debt would be sustained by the court, they should find for the defendant on the ground that he had probable cause for the institution of the action aforesaid, and the procuring of the order of arrest." The words, "upon the terms substantially prescribed by plaintiff in contract," were misleading to the jury. Although, by the terms of the contract, the farm was to be sold at \$115 per acre, yet, if Lancaster furnished the purchaser upon modified terms, the commission is earned. *Coleman's Ex'r v. Meade*, 13 Bush, 363. The jury may have thought that selling at \$110 per acre was not on terms substantially prescribed by plaintiff in the contract. While this court does not reverse the case on the facts, yet, after a careful examination of the evidence in the case, the court is of the opinion that the jury must have been misled by the errors which we have suggested appear in the instructions. The court did not err in failing to give an instruction defining in terms probable cause. The court was submitting the question of probable cause in instructions Nos. 3 and 4, and, when given on any subsequent trial with the changes which the criticisms of this opinion suggest, probable cause is sufficiently defined. The judgment is reversed, with directions that further proceedings be had in conformity with this opinion.

HOFFMAN v. TRUSTEES OF TOWN OF SHEPHERDSVILLE.

(Court of Appeals of Kentucky. June 12, 1896.)

DEED—ACTION TO SET ASIDE—PLEADING—DESCRIPTION OF PROPERTY—TRESPASS—WHEN TO MAINTAIN.

1. In an action to set aside a deed made by the trustees of a town, on the ground that it conveyed a portion of a public street and a courthouse square, where the description of the property in the deed, as alleged in the petition, showed that the lot conveyed ran only to the street, and did not include any part of it, a demurrer to the petition was properly sustained.

2. A taxpayer may not maintain a bill to set aside a deed made by the town trustees, on the ground that it purports to convey a portion of the courthouse square, or to enjoin a trespass on such property; the right to maintain such action being in the county, and not in the citizen.

Appeal from circuit court, Bullitt county.
"Not to be officially reported."

Bill by John A. Hoffman against the trustees of the town of Shepherdsville. There was judgment dismissing the petition, and plaintiff appeals. Affirmed.

J. W. Croan, for appellant. Fairleigh & Strauss, for appellee.

PAYNTER, J. The appellant filed a petition, and several amendments thereto, in which it is alleged that the trustees of the town of Shepherdsville on the 2d day of July, 1894, executed and delivered to Troutman Bros. a deed conveying to them a "certain portion of the public streets and public square in the said town of Shepherdsville, the same described in the said deed as follows, to wit: 'Beginning at the north corner of the lot conveyed to Troutman Brothers by J. I. Rickerson and wife, lying on Main street, and running north, with Main street, 12 feet; thence east about 40 feet, to line of lot owned by H. F. Troutman, lying on Second street; thence south 12 feet, with the line of H. F. Troutman's lot, to the line of the lot purchased by Troutman Bros. of J. I. Rickerson; thence, with the line of said lot, about 40 feet, to the place of beginning.'" A copy of the deed is filed as part of the petition. It is further alleged that a part of Main street, in the town of Shepherdsville, and a part of the courthouse square, is attempted to be conveyed by the deed. It is also alleged that plaintiff is a citizen and taxpayer of the town; that he owns and occupies a lot contiguous to the public square, and abutting on Main street, on the opposite side from the ground embraced in the deed; that Troutman Bros. are erecting a brick building on the ground purported to be sold them by the trustees; that plaintiff and other citizens will suffer great and irreparable damage by the obstruction of the aforesaid Main street; that plaintiff is a physician; that he has been using Main street daily, with horses and vehicles, as a way of ingress and egress to his place of business; and that the obstruction will "depress and narrow" his ingress and egress to his place of business, and result in his irreparable injury, and for which he has no adequate remedy at law. The foregoing is all that is essential to be stated as to the allegations of the petition. A demurrer was sustained to it as amended, and a judgment was entered dismissing it. From that judgment this appeal is prosecuted.

On this inquiry it is needless to consider and decide what right the trustees of the town of Shepherdsville had to sell and convey a part of a public street of the town, or as to whether a citizen and taxpayer of the town has the right to have them enjoined from making such sale, or their vendee enjoined from erecting a building thereon, because it is alleged that Troutman Bros. are erecting a building on the ground which the deed purports to convey. The description of

the ground given in the petition and deed shows that the trustee did not attempt to, nor did they, convey any part of Main street. The deed calls to run "north with Main street," and does not purport to embrace any part of it. The description of the ground given in the petition (being the same as in the deed) and the deed shows conclusively that no part of Main street had been conveyed to Troutman Bros., and, as they were having the house erected on the ground embraced in the deed, it follows that it could not be on any part of Main street. Pleadings must be construed most strongly against the pleader, but in this case the conclusion which we have reached is only a fair deduction from plaintiff's pleadings. When the pleadings alleged the facts with reference to the conveyance, and gave the language of the deed, and a description of the ground conveyed, and which shows that it conveys the ground only to Main street, and not a part of Main street, then a statement that it conveys part of Main street is a conclusion of the pleader, and appears to be a very erroneous one. Under the law the trustees of the town in which a courthouse square is situated have no control of it, nor could they make a valid conveyance of any part of it, or place any one in the rightful possession thereof. If Troutman Bros. entered upon the courthouse square, the authorities of Bullitt county are the proper parties to recover the possession of the property, or of damages for a trespass thereon. There are no allegations that the plaintiff or the public have been or will be deprived of the uses for which it was intended, or that the county authorities have or will decline to take such steps as are necessary to preserve the courthouse square for the use of the public. The judgment is affirmed.

GILBERT v. MOODY et al.

(Court of Appeals of Kentucky. June 13, 1896.)

MECHANIC'S LIEN—PAYMENT—CROSS APPEAL.

1. A landowner executed notes in payment for material used in the erection of a building which showed that they were lien notes. Subsequently he executed other notes, after the maturity of the first, which referred to the old notes as collateral security for the new, and afterwards executed another note for the full amount of the debt. *Held*, that the new notes were not necessarily a payment of the lien notes, so as to extinguish the lien as against a subsequent mortgagee.

2. An appellee cannot take a cross appeal as against another appellee.

Appeal from circuit court, Knox county. "Not to be officially reported."

Appeal by William Gilbert in the consolidated actions of G. E. Moody & Co. and others. Affirmed.

John T. Hays, for appellant. J. T. Woodson, Cook & Deshman, and W. R. Black, for appellees.

GUFFY, J. This appeal is prosecuted by William Gilbert from a judgment of the Knox circuit court rendered in the consolidated actions of appellees, G. E. Moody & Co. et al. But the only parties here complaining or insisting on relief are the appellees Moody & Co., John A. Black, and the appellant. It appears that Moody & Co. acquired a material man's lien upon a house and lot, the property of one James T. Gibson, May 20, 1890, on account of material furnished Gibson to build a house, etc., on said lot. The amount of the lien seems to have been \$1,308.65, for which Gibson executed three notes, falling due in 60, 90, and 120 days, respectively. These notes showed that they were lien notes. Gibson, on 7th of August, 1890, paid \$221.23 on the first one of said notes, but, as alleged by Moody & Co., never paid any more. These notes were discounted by Moody & Co. at the Third National Bank of Louisville, but Gibson failed to pay same, and appellees took them up, and it appears that Gibson executed other notes to Moody & Co. for the sums due, referring to the said notes as collateral security for the new notes, which new notes were in like manner discounted by appellees at said bank, and, Gibson failing to meet same, appellees had also to take them up. Finally Gibson executed a note to appellees for the sum of \$1,173.57, dated 4th of May, 1891, due in 10 days, and sent the same to appellees before the 4th of May, 1891. It is said that the \$1,173.57 note was for the full amount due from Gibson to appellees. On the 2d of May, 1891, Gibson made an assignment for the benefit of creditors, and on the 8th of May, 1891, the appellees Moody & Co. brought suit to recover judgment for their debt, and for enforcement of their liens upon the property aforesaid. They filed the original lien notes; also the \$1,173.57 note. Some months afterwards they filed an amended petition, giving fuller and more detailed account of the transactions had with Gibson. The appellant holds a mortgage upon the same property that Moody & Co. claim to be in lien to them, which mortgage is for between \$4,000 and \$5,000, of date February 20, 1891. On the 23d of January, 1893, the sheriff of Knox county sold the lot in contest for taxes for the years 1890 and 1891; the taxes for 1890 being, as is claimed, \$137.33, and for 1891 amounted to \$156.77. Appellee Black became the purchaser of the lot in question, bidding therefor the sums aforesaid, and he, on his own petition, was made party to these consolidated suits, and claimed a superior lien on the lot in contest, for the amount of his bids with 30 per cent. interest. The court, upon final hearing, adjudged that appellee Black had a prior lien upon the lot in question for the payment to him of the \$137.33, with interest from 23d January, 1893, and costs, being taxes for 1891; but dismissed the residue of the claim of Black. The court also adjudged

in favor of appellees Moody & Co., and adjudged a sale of the mortgaged property, from which judgments and ruling of the court Gilbert has appealed. The substance of appellant's contention as between him and Moody & Co., is that Moody & Co.'s lien was extinguished by the execution of the renewal notes; that the renewal notes were payments of the lien debts, and that at the time appellees brought their suit Gibson did not owe them on enforceable demand, the \$1,173.57 note not being due; and that the suit was based on it, and no amendment or suit brought to enforce their lien, until more than 12 months after the same was filed and recorded, and that the motions to dismiss appellees Moody & Co.'s petition, and demurrer thereto, ought to have been sustained. Appellees Moody & Co. insist that the suit was on the lien notes, and that the renewal notes were neither novations nor payments of the lien notes, and, in our opinion, the contention of Moody & Co., is entirely tenable under the law and facts of this case as disclosed by the record. Appellant also contends that the judgment in favor of appellee Black is erroneous, but we cannot concur in the view expressed and conclusions reached by him in respect to the claims of Black, nor do we think that Black was entitled to any greater or additional sum than that awarded him by the court below; and, besides, it does not appear that he has ever obtained a cross appeal as to Gilbert, and he could not have a cross appeal as to Moody & Co. Taking into consideration the facts disclosed by this record, we are of opinion that the judgment of the court below is fully sustained by the law, and it is therefore affirmed as to all the parties to this appeal.

GIBBS v. BOARD OF ALDERMEN OF CITY OF LOUISVILLE.

(Court of Appeals of Kentucky. June 16, 1896.)

CITY OFFICERS—REMOVAL BY ALDERMEN—CONSTRUCTION OF STATUTES—CONSTITUTIONAL LAW—JUDICIAL POWERS.

1. Gen. St. § 2781, provides that executive and ministerial officers in cities, unless otherwise provided, shall be removable by the board of aldermen, sitting as a court, on charges preferred; and section 2847 provides that, if any member of the board of park commissioners commits a felony, he shall immediately cease to be a member of said board. *Held*, that the latter section did not "otherwise provide" for the removal of a park commissioner charged with perjury, so as to preclude the board of aldermen from assuming jurisdiction under section 2781.

2. The constitution of 1849 provided that the judicial power of the commonwealth should be vested in a court of appeals, the courts established by the constitution, and such inferior courts "as the general assembly may from time to time establish"; and such provision was changed in the later constitution, which provides that the judicial power shall be vested in the senate, when sitting as a court of impeach-

ment, and in the court of appeals and the courts established by the constitution. *Held*, that the change did not invalidate Gen. St. § 2781, providing that executive and ministerial officers in cities shall be removable by the board of aldermen "sitting as a court," since the power conferred on such board is not strictly judicial, and it does not act as a court of impeachment.

Appeal from court of common pleas, Jefferson county.

"To be officially reported."

Proceedings by the board of aldermen of the city of Louisville against Frederick H. Gibbs, wherein said Gibbs was removed from his office as a member of the board of park commissioners of said city. From the judgment of removal, defendant appeals. Affirmed.

Hargis & Turner and F. Hagan, for appellant. H. S. Barker and Kohn & Baird, for appellee.

PRYOR, C. J. This case involves a question of jurisdiction only. The appellant, Gibbs, was a member of the board of park commissioners, and, for causes alleged, was cited to appear before the board of aldermen upon a proceeding to remove him from office. The jurisdiction to remove the appellant is found in section 2781 of the Kentucky statutes, and is as follows: "Executive and ministerial officers unless otherwise provided in this act, shall be removable by the board of aldermen sitting as a court, under oath or affirmation, upon charges preferred by the mayor or any two members of the board of councilmen," etc. It is claimed that the manner of removing such an official has been otherwise provided for, under section 2847 of an act for the government of cities of the first class. That section reads: "If any member of said board [park commissioners] cease to be a bona fide resident or housekeeper of the city, or incur any of the disqualifications mentioned herein, or become incapacitated to perform any of the duties of commissioner, or be found guilty of any felony or high misdemeanor, he shall immediately cease to be a member of said board,"—and that by the provisions of this section the board of aldermen are, in effect, prohibited from removing the appellant by impeachment, and that, if such jurisdiction is attempted to be given, no such power exists, as is shown by the change made in the present constitution on the subject. The constitution of 1849 (article 4, § 1) provided, "The judicial power of this commonwealth shall be vested both as to matters of law and equity in one supreme court (to be styled court of appeals) the courts established by this constitution, and such courts inferior to the supreme court, as the general assembly may from time to time establish." The present constitution (section 109) provides, "The judicial power of the commonwealth both as to matters of law and equity, shall be vested in the senate when sitting as a court of impeachment, and one supreme court (to be styled the court of appeals) and

the courts established by this constitution." So it is contended that the new or present constitution created all the courts necessary for the purposes of state government, and withheld from the legislature the power to create courts as was authorized by the constitution of 1849. Section 160 of the present constitution left with the legislature the right of determining the manner in, and the cause for which, city officials may be removed; and while the board of aldermen may be termed, in one sense, a court, it is an organized municipal body, with the power to remove city officials, and is not a court of impeachment, nor was it ever contemplated by the framers of the constitution that city officers could be removed by impeachment proceedings before the state senate. Angel & Ames on Corporations (section 110) say that "the power of a motion is incident to every corporation." Mr. Dillon, in his work on Municipal Corporations, says: "The power to remove a corporate officer from his office for reasonable and just cause is one of the common-law incidents to every corporation." And the framers of the constitution, recognizing the common-law rule on the subject, by an express constitutional provision, gave the power to the legislature to provide the manner and the causes for which officials of municipal governments may be removed. This power to remove is not strictly judicial, and was not so regarded at common law, and the fact that the board of aldermen is called a court does not make the entire act unconstitutional. We have recently held in the case of Todd v. Dunlap, 36 S. W. 541, that when no causes of removal have been designated the common-law rule supplies the defect; and, if the causes are assigned as to the removal of a park commissioner, there is no other mode of proceeding pointed out than the section of the statute giving to the board of aldermen the power to determine such questions. This is the only tribunal provided by the charter, and that the board has the jurisdiction to remove the official for misfeasance or malfeasance in office, as well as for causes that unfit him for the place, is, we think, unquestioned. See Hinkle v. City of Louisville. This case has been heretofore in this court, on questions bearing on the issue now presented. 26 S. W. 188. The case (Com. v. Gibbs) will be found reported in 96 Ky. 407, 29 S. W. 237. And this court held that the party could not be indicted and punished for perjury, because the committee (as constituted) making the investigation was not authorized to administer an oath, but this did not affect the jurisdiction of the board to try the appellant for the offense charged. We have nothing to do, in the case before us, with the guilt or innocence of the appellant. As before stated, the only question is as to the jurisdiction of the board of aldermen to try the appellant. It is not necessary to determine whether there should be a conviction by a court of competent jurisdiction under an in-

dictment for bribery or perjury, which of itself would render the office vacant before the board could act. Other charges are made, of an indefinite character, that may affect the discharge of his duties as an official, or, if not, render him unfit for the place; but, as before stated, we are not investigating such questions, but only the one of jurisdiction. The judgment is therefore affirmed.

NEALE'S ADM'R v. NEALE et al.
(Court of Appeals of Kentucky. June 16, 1896.)

NEGOTIABLE INSTRUMENTS—PLEADING—DENIAL OF ASSIGNMENT—WITNESS—TRANSACTIONS WITH DECEDENT.

1. In an action by the administrator of the payee of a note which appeared by indorsement to have been assigned by the payee to one T., a reply alleging that plaintiff charges that his intestate did not by herself make said pretended assignment, nor authorize any one else to make the same, and therefore denies that said alleged pretended assignment is the act of his intestate, and again denying the assignment or transfer to T., or that T. had any power from his intestate to assign the note or pledge the same, sufficiently denies the validity of the assignment, as against a subsequent assignee from T.

2. Civ. Code, § 606, cl. 2, provides that no person shall testify for himself concerning any transaction with a decedent. Clause 9 provides that the assignment of a claim by a person who is incompetent to testify for himself shall not make him competent to testify for another. *Held* that, as against the administrator of the payee of a note, a person appearing by indorsement on the note to be the assignee of the payee, who has reassigned the note during the life of the payee is incompetent to testify, in favor of his assignee, as to the assignment by the payee to him.

Appeal from circuit court, Allen county.
"To be officially reported."

Action by Mary W. Neale's administrator against E. P. Neale and others. There was a judgment for defendant Ralston, and plaintiff appeals. Reversed.

E. W. Hines and Wilkins & Bradburn, for appellant. Lewis McQuown, for appellees.

LANDES, J. The material questions in this case are: (1) Were the allegations of the reply, which were designed to put in issue the validity of the assignment of the note sued on, by the appellant's intestate to T. S. Neale, sufficient to put on the appellee Thomas Ralston the burden of proving it? And (2) was T. S. Neale a competent witness to prove the validity of the assignment of said note to him by the intestate?

The note in question was executed by the appellee E. P. Neale to the intestate, Mary W. Neale, on the 11th day of April, 1892, for the sum of \$1,050, due one day after date, and in some way passed into the possession of T. S. Neale, the son of the intestate, who on the 2d day of February, 1894, borrowed from the appellee Thomas Ralston \$1,150 and executed his note therefor, and delivered the note sued on, to Ralston, as

collateral security for the sum he had borrowed from him. By an indorsement on the back of the note, it appears to have been transferred to him by the intestate on the 31st day of January, 1894. On the 2d day of August, 1893, and previous to the death of the intestate, he assigned the note absolutely to the appellee Thomas Ralston. After the death of Mrs. Neale, which occurred in September, 1893, the appellant qualified as her administrator, and brought this suit against E. P. Neale, the maker of the note, and appellee Ralston; claiming that the note belonged to the estate of the intestate, and calling upon appellee Ralston to assert any claim he might have to the note. Ralston filed his answer, setting up the note, and the assignment of it to T. S. Neale by the intestate, and by T. S. Neale to him, as has been stated, and making his answer a cross petition against E. P. Neale, the maker of the note, asked judgment on the note, in his favor, against him. The appellant filed a reply containing the following allegations, for the purpose of putting in issue the validity of the assignment of the note by the intestate to T. S. Neale, viz.: "He says that he is informed, believes, and so charges, that Mary W. Neale did not by herself make or write said pretended writing of transfer and assignment, nor authorize any one else to make the same, and he therefore denies that said alleged pretended assignment or transfer is the act or deed of said Mary W. Neale. He says that he has no knowledge, or information sufficient to form a belief, as to whether on the 2d day of February, 1894, or at any other time, the said T. S. Neale borrowed from the defendant \$1,150, or any other sum, or executed to the defendant his note for said sum, or any other sum, or that in order to secure the payment of said sum, or any other sum, or for any other purpose, he delivered or assigned to defendant, as collateral security or otherwise, said note, which defendant E. P. Neale had executed to Mary W. Neale, or which she had assigned to T. S. Neale as alleged, or at all. He again denies that she ever assigned or transferred said note to T. S. Neale. * * * He alleges that said T. S. Neale had no right or authority from the true owner of said note, this plaintiff's intestate, Mary W. Neale, to deposit said note as collateral security, or to transfer or assign it to said Ralston for any purpose, or that said T. S. Neale did not own said note, or any part of it, nor had he any right to collect any part of it, nor to deposit it with defendant Ralston for any purpose, nor to transfer or assign to said Ralston said note, or any part of it, and the said Ralston by said alleged transfer or assignment acquired no title to said note, or interest in its proceeds, or any part of it." The reply was sworn to by the appellant, the affidavit stating that "the statements in the foregoing reply are true."

1. We cannot see that the issue as to the

validity of the alleged assignment of the note to T. S. Neale could have been presented more definitely or directly than it was presented in the allegations we have quoted from the reply. It is conceded that the transfer was written by T. S. Neale, and it is expressly denied that Mrs. Neale transferred it to him. Certainly, if it was done by him without authority the transfer was not the act and deed of Mary W. Neale, the payee of the note. The facts with reference to the alleged transfer were not, presumably, within the knowledge of the appellant, and the form or manner of making the statements to put the matter in issue is all that could have been required of him, in his attitude or relation to the parties to the alleged transaction, and was sufficient to throw the burden on appellee Ralston, who claimed under the alleged transfers of the note, to establish its genuineness or validity.

2. In order to establish the legal validity of the transfer, the deposition of T. S. Neale was taken, to which exception was filed by the appellant, which was overruled by the court, and his testimony on that point was permitted to be read to the jury. Section 606, cl. 2, of the Civil Code, contains the following provision: " * * * No person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by * * * one who is * * * dead when the testimony is offered to be given, except," etc. Clause 9 of the same section is as follows: "The assignment of a claim by a person who is incompetent to testify for himself shall not make him competent to testify for another." These provisions have repeatedly been construed by this court, and the settled construction is that they were designed, and their effect is, to render incompetent the testimony of one concerning his transactions with another, which become the subject of litigation, after the death of one of the parties to the transaction, between the representatives of the deceased party and another, regardless of whether or not the surviving party to the transaction, whose testimony is offered, is a party to the litigation, or is interested therein. *Hardin's Adm'r v. Taylor*, 78 Ky. 593; *Harpening's Ex'rs v. Daniel*, 80 Ky. 449; *Hopkins' Adm'r v. Faerber*, 86 Ky. 223, 5 S. W. 749; *Hurry v. Kline*, 93 Ky. 358, 20 S. W. 277; *Hobbs' Ex'r v. Russell's Ex'r*, 79 Ky. 61; *Alexander's Ex'rs v. Alford*, 89 Ky. 105, 20 S. W. 164. In the case last referred to it was held that the mere fact that one has divested himself of all interest in a claim against the estate of a deceased person does not render competent a witness against the estate, with regard to the transaction had by him with the decedent, out of which the claim arose. After quoting the two clauses of section 606 of the Civil Code which we have quoted, the following language was used by the court: "The interest of the witness may be in equipoise, or he may be testifying against

his interest, still his testimony affects the rights of those who are not present to speak with reference to the transaction, and, in rendering all competent to testify, this was made an exception, and for the purpose of denying to one the right to testify for himself when the person with whom he had the transaction cannot be heard to speak. Interest does not now exclude one from testifying, but when testifying for himself, or when he has assigned the claim, and would have been incompetent if he has not assigned it, he cannot testify against one who is dead, with reference to the transaction, although he may have divested himself of all interest." The court proceeded to say that the very object of the exception was to protect the estates and interests of those who cannot speak, and that the fact that the party who made the contract which might be the subject of such litigation was no longer interested in the subject-matter furnished no reason for disregarding the exception, and added that: "The interest of the witness, in such a case, is not the subject of the inquiry, but the question is, does the statement made affect the rights of the party who is dead? If so, he is incompetent; the whole object of the statute being to place the dead and the living upon terms of perfect equality in this particular. The one not being able to testify, the other shall not." We approve and adhere to the doctrine announced in these cases on this question. But counsel for the appellee insist that the note having been assigned by T. S. Neale to Ralston during the life of Mrs. Neale, the payee of the note, and at a time when T. S. Neale would have been a competent witness to testify concerning it, he could not be disqualified by assigning the note, and so render himself incompetent, after the death of Mrs. Neale, because, as they contend, clause 9 of the section refers only to "a person who is incompetent," under clause 2, to testify concerning the transaction, at the time it occurs. This position of counsel is not tenable, for the obvious reason that the condition of the disqualification of a person to testify before assigning away his interest in the subject-matter, imposed by clause 2, is the fact of the party with whom the transaction was made being "dead at the time the testimony is offered to be given," and this condition necessarily operates after as well as before the assignment of the interest of the witness in the subject-matter of such transaction, for without it the manifest object of the provision in clause 9 could easily be defeated. We cannot approve a construction of the statute designed to remove restrictions upon the competency of parties to litigation to testify, and at the same time place them upon an exact equality, that would operate to defeat the object and purpose of its enactment. Thus far we have considered the question from the point of view that T. S. Neale had no interest in the issue as to the validity of the assignment to him of the note

sued on. But if the assignment was not valid, and did not give him title to the note, it follows that he had no right to assign it to the appellee Thomas Ralston, and his assignment of it to Ralston did not give the latter title to it, as against Mrs. Neale or her personal representative. Consequently T. S. Neale was directly interested in the issue, and, in effect, testified "for himself"; for it was manifestly to his interest to establish the validity of the assignment to him, and thus avoid liability to Ralston, which would attach to him if he had no title to the note. So that, in either view of the question, T. S. Neale was not a competent witness to the transaction by which it is claimed he became the owner of the note, and the court below erred in permitting his testimony as to that transaction to be read to the jury.

Other exceptions were taken, which are mentioned in the grounds for a new trial, but are not discussed in the briefs of counsel. We shall not pass upon them, because it does not seem necessary to do so, and counsel seem to have abandoned them. But for the reasons given the judgment is reversed, and the cause remanded, with directions to set aside the verdict and award the appellant a new trial, and for proceedings consistent with this opinion.

AMERICAN ACC. CO. v. FIDDLER'S ADM'X.

(Court of Appeals of Kentucky. June 17, 1896.)

NONEXPERT TESTIMONY—ADMISSIBILITY.

When the character of the case requires scientific knowledge to enable one to form a correct judgment, one not an expert, and who has never investigated the question at issue, and whose personal experiences have not been sufficient to enable him to understand the question, is not a competent witness to prove that which can only be acquired by a scientific knowledge of the subject, or from an experience that enables him to understand the issue.

On rehearing. Overruled. For original opinion see 35 S. W. 905.

PRYOR, C. J. If counsel had taken the pains to examine Rogers on Expert Testimony in the library, he would have found the citation made by the court to be correct. In rendering the opinion, page 6 was given instead of page 10. It will be conceded that from the necessities of the case as said by the same author it is sometimes essential that the opinions of ordinary witnesses should be received, and this court has gone so far as to permit the opinions of witnesses (nonexperts) as to the sanity or insanity of those alleged to be incompetent to transact the business affairs of life, when the witness has known the habits, character, and conduct of the party, and from ordinary observation would be able to judge of the condition of his mind; but this court has

never adjudged, when the character of the case requires scientific knowledge to enable one to form a correct judgment, that one not an expert, and who has never studied or investigated the question at issue, nor whose personal observation and experiences have not been sufficient to enable the witness to understand the question, is a competent witness to prove that which can only be acquired by a scientific knowledge of the subject, or from an experience that enables one to understand the issue. The opinion of one having no experience in the science of surgery should have no weight when eminent surgeons are present, and have testified that a limb was improperly amputated, or that it was not necessary to save the life of the patient; nor, where the disease is pronounced to be typhoid fever by educated physicians, is it competent to prove by one inexperienced in the treatment of diseases, and who had never made a study of medicine, that the physicians were mistaken. It is said in Boyers on Expert Testimony "that the testimony of experts is inadmissible upon a matter concerning which, with the same knowledge of the facts, the opinion of any one else would have as much weight. It is admissible when the facts are obscure, and can only be made clear by and through the opinions of persons skilled in relation to the subject-matter of injury." It is insisted that this rule is not to be followed, and that one unskilled in the treatment of diseases, either as nurse or otherwise, will be permitted to contradict the testimony of an expert, by giving an opinion adverse to his. Such is not the law. Petition overruled.

NEWPORT NEWS & M. V. CO. v. STEWART'S ADM'R. SAME v. STEWART et al. (two cases). SAME v. WYATT.

(Court of Appeals of Kentucky. June 17, 1896.)

ACCIDENT AT CROSSING—EVIDENCE—INSTRUCTION—DUTY TO GUARD CROSSING.

1. Plaintiffs were riding in a wagon, and were struck by a locomotive while attempting to cross defendant's road. The highway crossed the railroad a short distance from the corporate line of Mayfield, and about 15 feet south of a deep cut. The railroad track was elevated above the highway, and in crossing the grade was steep, and travelers approaching the crossing could not see a train coming from the north until within 15 feet of the track. There was evidence that, when the wind was from the south, as it was at the time of the accident, it obstructed sounds coming from the north; that the thoroughfare was much used by the inhabitants of Mayfield; that plaintiffs left the city after the train was due there, and, on arriving at the crossing, supposed that the train has passed; that, as they drove along, their attention was attracted by a freight train moving to and fro south of the crossing; that, before crossing, plaintiffs listened for trains; and that the whistle was not timely blown. The train was behind time, and there was testimony that it was running

very fast, and that, if defendant's servants were on the lookout, they could have seen the team in time to have stopped the train. *Held*, that the evidence entitled plaintiffs to go to the jury.

2. An instruction on contributory negligence which submitted to the jury the question of the intelligence of the intestate of one of the plaintiffs, who drove the wagon, was not prejudicial, where plaintiffs' evidence showed that he was a remarkably bright and intelligent boy, and had often driven on the road.

3. Under the circumstances it was not error to charge that, if the jury believed that by reason of the proximity of the crossing to Mayfield and the number of traveling public crossing there, or by reason of any obstruction of view of the railroad or of the hearing of approach of trains, said crossing was unusually dangerous, then it was defendant's duty to use ordinary care to discover such danger, and, if necessary to avoid injuries to travelers, to keep a flagman there to warn travelers, or to use some other reasonably safe and effectual mode of warning travelers of the approach of trains, and if the jury believed that defendant negligently failed to provide or use such means of warning as were reasonably safe and effectual to avoid injury to travelers, and by reason thereof the injuries to plaintiffs occurred, defendant was liable, unless they contributed to such injury.

4. The instruction did not make it incumbent upon the company to adopt some mode that would make it impossible for a person to be injured.

Appeal from circuit court, Graves county.

"To be officially reported."

Separate actions by Robert A. Stewart's administrator and others against the Newport News & Mississippi Valley Company for personal injuries. Plaintiffs recovered judgment, and defendant appeals. Affirmed.

Smith, Robbins & Thomas and P. H. Darby, for appellant. R. O. Hister, H. J. Moorman, and W. H. Hister, for appellees.

GUFFY, J. The appellees, in separate suits in the Graves court of common pleas, recovered judgments against the appellant, and, appellant's motions for new trials having been overruled, they prosecuted appeals to the superior court of Kentucky, which court affirmed the judgment, and the appellant obtained appeals to this court, which appeals, upon request of parties, are heard together. It appears that W. H. Stewart, Charles Stewart, Zephyr Wyatt, and Robert Stewart attempted to cross the railroad track in a wagon, and a collision occurred between the wagon and a locomotive, resulting in the instant death of Robert Stewart, and the injury of the others. Four actions were brought against the railroad company, in which it was charged that the collision was the result of the appellant's negligence. One of the actions was by the personal representative of Robert Stewart, and one by each of the other persons injured. The defense in each case was a denial of negligence and a plea of contributory negligence on the part of the injured parties. The pleadings, the evidence, and the rulings of the court in each case were substantially

the same, and will be disposed of in one opinion.

The highway crossed the railroad a short distance north of the corporate line of Mayfield, Ky., and about 15 or 20 feet south of a deep cut. The north end is about 280 yards from the crossing. The whistling post is about 265 yards from the north end of the cut. The railroad track is considerably elevated above the highway, and in crossing the grade is steep. On account of the conformation of the surrounding country travelers upon the highway approaching this crossing from the city of Mayfield cannot see a train coming from the north until they get within 12 or 15 feet of the track; but the engineer or fireman on the locomotive can see the horses to a wagon from any point in the cut, and a little distance north of it, when the horses get within 12 or 15 feet of the track. When the wind is from the south, as it seems to have been on the evening of the injury, it sweeps through the cut, and obstructs any sound coming from the north. The highway is the only road leading from the north to Mayfield, and is a thoroughfare continuously used by people going to and returning from Mayfield. W. H. Stewart, the father of Robert and Charles, was blind. Robert was 13 years old, Charles was younger, and Zephyr Wyatt was 14 years old. The train that collided with the wagon was due at Mayfield at 7 minutes past 6 p. m. The evidence tends to show that the parties injured left Mayfield about half past 6, being past the time that the train was due at Mayfield. The testimony conduces to show that the parties in the wagon thought the train had passed, and, as they drove along, their attention was directed to a freight train near the depot, and south of the crossing, which train was moving to and fro. The old man cautioned the children to look and listen. He listened. At a point shortly before reaching the crossing they stopped, thinking that the freight train was about to run up to or beyond the crossing. Seeing that it moved back, they drove on, so as to cross before it returned towards the crossing. They did not see, nor did they hear the whistle or other sound of, the train which was approaching from the north. Just as they got on the track, and when it was too late to turn back, they saw the train almost upon them. The driver whipped up the team, and, as the rear end of the wagon was about to leave the track, it was struck by the engine. Witnesses who were just north of the cut, and saw the train as it passed, testify that no whistle was blown at the whistling post, and that none was blown until it was about to enter the cut, and then only two short blasts were made in quick succession. This evidence is contradicted by other evidence. The train was one of the fastest on the road, its schedule time being about 28 miles per hour. It was behind time, and there is evidence tending to show that it was running very fast.

Plaintiffs' evidence also tends to show that, if the engineer and fireman had been on the lookout, they could have seen the team in time to have stopped the train, or so checked its speed as to have avoided the collision. The evidence for the defendant showed that the usual sound of the whistle was made at the whistling post, and that the whistle was sounded about the time the engine entered the cut; and there is also evidence of several persons hearing the train coming, and seeing the danger the parties were in, and shouting to them, endeavoring to warn them. The engineer and fireman swear that they did not see the team until the engine was within 40 or 50 feet of the wagon, and that it was impossible to stop the train in time to avoid the collision.

Several grounds for a new trial are relied on, some of which need not be noticed. The evidence entitled the plaintiffs to go to the jury. Hence, the peremptory instruction was properly refused. The second instruction is upon the question of contributory negligence, and is in the usual form, with the exception that it submitted to the jury the question as to the intelligence of Robert Stewart, the boy who was killed. There was, in fact, no question in the evidence on this point, as all the plaintiffs' evidence showed that he was a remarkably bright and intelligent boy, and had driven on the road, hauling wood, etc., often; and therefore the jury could not have been misled or the defendant prejudiced by this portion of the instruction. The third instruction is very seriously and earnestly objected to, which is in the following language: "The court instructs the jury that if they believe, from the evidence, that by reason of the proximity of the crossing to the city of Mayfield, and the number of the traveling public crossing there, or by reason of any obstruction of view of the railroad, or of the hearing of the approach of trains, said crossing was exceptionally or unusually dangerous, then it was the duty of the defendant to use ordinary care to discover such danger, and, if necessary to avoid injury to travelers, to keep a flagman there to warn travelers of approaching trains, or to adopt and use some other reasonably safe and effectual mode of warning travelers of the approach of its trains; and if the jury believe, from the evidence, that defendant negligently failed to discover such danger, if any, or negligently failed to provide or use such means of warning as were reasonably safe and effectual to avoid injury to such travelers, and by reason thereof the injury to deceased occurred, then the defendant is liable, unless deceased negligently contributed to such injury and death, as defined in instruction No. 2." The crossing in question was near a populous town, was the only way to the town for the people in the country north of it, and was continuously used by persons on horseback and in vehicles. On account of

the elevation of the track above the highway, and the steep approaches to it, it could not be crossed at an ordinary travelling gait. The deep cut and the conformation of the surrounding country were such that a person could not see the approaching trains from the north until within 15 or 20 feet of the track, and, if driving a horse, could not see the train until his horse's head had almost reached the track, and, further, under certain conditions, which were not infrequent, many persons, especially when riding in a wagon, could not hear the approach of a train or its whistle. Under the circumstances, it was the duty of the company to use more precaution to avoid injury to persons using the highway than at ordinary crossings; and, those conditions existing, it was not improper to require the company to have a flagman at the point to warn travelers of approaching trains, or to adopt and use some other reasonably safe mode of warning travelers. *Railroad Co. v. Goetz's Adm'x*, 79 Ky. 449; *Louisville, C. & L. R. Co. v. Com.*, 80 Ky. 143. But it is still further urged that the instruction is erroneous because it required the company to use an effectual mode of warning travelers; in other words, that it made it incumbent upon the company to adopt some mode that would make it impossible for a person to be injured. We do not think that the instruction could have been so understood by the jury. The evident meaning was that the means should be reasonably effective. The other instructions given give to the plaintiffs no right to recover unless the defendant was guilty of negligence, and, manifestly, the jury believed defendant guilty of negligence in each case. The other instructions given were not prejudicial to the substantial rights of appellant in either of the cases, and those asked by appellant were properly refused. Judgment in each of the cases is affirmed.

MANION v. OHIO VAL. RY. CO.

(Court of Appeals of Kentucky. June 18, 1896.)

GUARDIAN AND WARD — POWER OF GUARDIAN TO COMPROMISE CLAIM FOR TORT.

1. Unless limited by statute, a guardian has authority to compromise and release claims or demands on behalf of his ward, and the ward will be bound thereby, unless done in bad faith and in fraud of his rights.

2. Under St. § 2030, providing that a guardian "shall receive and sue for the debts and demands owing to the ward, defend actions against him, and with leave of court may compound a debt or demand," the "debts or demands owing to the ward," to compound which leave of court is required, do not include an unliquidated claim for damages for a tort on behalf of the ward; and a settlement of such a claim by a guardian, if made in good faith, is binding on the ward.

Appeal from circuit court, Henderson county.

"Not to be officially reported."

Action by Mathew Manion, by his guard-

lan, against the Ohio Valley Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

S. B. & R. D. Vance, for appellant.

LANDES, J. The question raised in this case is whether the guardian of the infant appellant had the lawful power to bind him by compromising a claim for damages against the appellee, alleged to have been caused by reason of the negligence of the appellee. It seems that the infant appellant was in the service of the appellee company on the 27th day of July, 1892, in the capacity of watchman and fireman on one of its engines, and that on that day, at McClain station, on Green River Island, between Henderson and Evansville, he stumbled over a pile of rocks, and fell upon the railroad track in front of the engine, and his leg was run over and broken, and "so badly mutilated that it had to be amputated just below the knee." Afterwards James F. Manion, his father, was appointed and qualified as his guardian, and compromised with the company for the sum of \$400, which was paid by the company, and the receipt of the guardian taken for the amount, which reads as follows: "Received, March 31st, 1893, of the Ohio Valley Railway Company, the sum of four hundred dollars, in full compromise, satisfaction, and discharge of all claims or cause of action against it or any of its lessees, and particularly of all claims or causes of action arising out of injuries received by Mathew Manion by loss of leg by being run over by engine No. 6, on O. V. Railway, near mile 494, on or about July 27th, 1892." Action was commenced against the company by the infant, suing by his said guardian, on the 30th day of June, 1893, seeking to recover \$5,000 in damages for the alleged injury. Defense was made, in which the alleged negligence was denied, and the said compromise and payment of \$400, and receipt therefor, were set up as a full discharge of the company from all further liability to the infant appellant. In the reply it was admitted, in substance, that the compromise was made, and the \$400 were paid as alleged in the answer. But it was averred that "in consideration of the payment of said sum, and the agreement of defendant to furnish a place and employment to plaintiff, his guardian did agree that same should be a settlement of all claims and causes of action against the defendant arising out of said injury." It was then averred that the company, having paid the \$400, "refused to give employment to plaintiff as it had agreed," and that "said agreement was made by his said guardian without leave of court, and was not binding on him." A demurrer to the reply was filed, and sustained by the court, and the petition dismissed, and that judgment is before us on this appeal.

Without statutory restraint, a guardian

may compromise, settle, and release claims and demands due to, or made by or on behalf of, his ward, and the ward will be bound thereby, unless it is done in bad faith, or in fraud of his rights. Authorities on this question are collated in a valuable note to the case of *Hayes v. Insurance Co.* (decided by the supreme court of Illinois), and reported in 1 *Lawy. Rep. Ann.* 304, 18 N. E. 322. It is insisted by counsel for the appellant that the powers of guardians in this state are restricted by statute, and that the compromise made by the guardian in this case was unauthorized, and was not binding on the infant appellant. The statute relied on is section 5 of article 2 of chapter 48 of the General Statutes (St. Ky. § 2030), which contains the following provision with reference to the duties and powers of guardians, viz: "He shall receive and sue for the debts and demands owing to the ward, defend actions against him, and, with leave of court, may compound a debt or demand." The contention is that the compromise, having been made by the guardian without leave of court, was without authority, or beyond the authority conferred upon him by law, and was therefore not binding on the infant appellant. It does not appear that this question has heretofore been passed on by this court, nor do we deem it necessary in this case to determine how far the powers of guardians are restricted by the statute, with reference to the compounding of debts and demands owing to their wards; for it is manifest that the claim for damages here is not the kind of claim which is embraced in the meaning of the words "debt or demand," used in the statute, and which a guardian may not "compound" without leave of court,—the words used, in our opinion, being intended to designate or describe such claims as may be due or owing to the ward, and consequently not such as are of the nature of unliquidated damages for tort to the person or property of the ward. And, *Law Dict. in loco*, "Claim"; "Demand." We hold, therefore, that the guardian had the power and authority in law to compromise the claim, and that the court did not err in sustaining the demurrer to the reply. If the terms upon which the claim for damages was compromised have not been complied with, that is not a matter that was cognizable in this case. And, if there was bad faith or fraud in the transaction on the part of the company, it does not appear from the averments in the reply. Finding no error, the judgment is affirmed.

BERNARD LEAS MANUF'G CO. v. WALLER.

(Court of Appeals of Kentucky. June 17, 1896.)

SALE—RESCISSION—OFFER AFTER SUIT BROUGHT.

A purchaser, after being sued for the price of machinery, cannot escape liability

therefor by an offer to return the machinery, although entitled to set off damages for its failure to comply with a warranty. An offer to rescind, to be available, should have been made within a reasonable time after the discovery of the defect.

Appeal from circuit court, Union county. "Not to be officially reported."

Action by the Bernard Leas Manufacturing Company against Aaron Waller. Judgment for defendant, and plaintiff appeals. Reversed.

S. B. & R. D. Vance, for appellant. Allen D. Hughes, for appellee.

GUFFY, J. This action was instituted by the appellant to recover of appellee an alleged balance of \$516.96, due for elevator machinery for his warehouse. The substance of the defense is that the machinery was worthless, and would not at all answer the purpose, and that appellant had warranted the same, and had undertaken to erect same, and have it in full and perfect operation by a certain time; and that appellant had also failed to comply with that part of the contract. Appellee also set out specifically various items of damage, and asked \$1,275 damages. Appellant denied all the material averments of appellee as to damages, warranty, etc., as well as pleading that the failure of the machine to answer the purpose was the fault of appellee. A trial resulted in a verdict and judgment in favor of appellee for the sums of \$262.50 and \$625,—making a total of \$887.50; and to this verdict the jury added the following: "The above verdict is upon the basis that the defendant keeps the scales, and the plaintiff to take the other machinery out of the house." Judgment was suspended upon the verdict, and on the next day it appears that the defendant appeared, and consented, upon the payment of the amount of the verdict, that the plaintiff might remove the machinery except the Fairbanks wagon scales; whereupon judgment was entered in favor of appellee for \$887.50, with interest and costs, and upon payment thereof plaintiff was authorized to remove said machinery. Appellant moved for a new trial, relying upon several grounds, which motion was overruled by the court, and appellant has appealed.

It seems to us that the court erred in permitting appellee to file the amended answer averring his willingness for appellant to remove the machinery. That plea came too late. He might have, within a reasonable time after discovering the breach of warranty, or worthlessness of the machine, have offered to return the machine, and, if his cause of action was well founded, he would have been relieved from any liability for the price or value of the same, and might have had such other relief as he showed himself entitled to, but, not having done so, the verdict and judgment ought not to have been rendered or allowed to stand. The ap-

pellee should account for the value, if any, of the machinery left in the warehouse at the time and place where it was stored to be used, including the Fairbanks scales, and be allowed the amount paid by him to appellant, and also be allowed such damages, if any, as he has sustained by reason of the breach of warranty and failure of appellant to comply with the contract if such breach or failure be shown. For the reasons indicated, the judgment of the court below is reversed, and cause remanded for a new trial, upon principles consistent with this opinion.

HOLLY v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 18, 1896.)

HOMICIDE—CONSPIRACY AS A DEFENSE—EVIDENCE—INTEREST OF WITNESS—CHARACTER OF DEFENDANT—CRIMINAL LAW—CONDUCT OF JUROR—TIME OF TRIAL—TIME OF SENTENCE.

1. On a trial for homicide, where defendant claimed that a conspiracy existed between deceased and two others to kill him, one of the persons alleged to be in the conspiracy, being a witness, was asked on cross-examination whether he had not said the evening before the killing that defendant would be killed before the next night. *Held*, that the question was properly excluded as not tending to show a conspiracy so far as deceased was concerned.

2. A witness, having testified that he heard one of the alleged conspirators talking at a certain time, was asked to give the substance of what he said. *Held*, that the testimony was properly excluded, as it was not shown to refer to the question of conspiracy.

3. On cross-examination of a woman who was a witness for the defendant, it was admissible, as showing her interest and probable bias, to prove that she had been living with defendant, though not married to him.

4. Evidence having been admitted to impeach the general moral character of defendant, it was not necessary for the court to specially charge the jury that such evidence was competent only to discredit defendant's testimony.

5. Under Cr. Code, § 185, trial on an indictment for felony may be fixed for the same term of court at which the indictment was found.

6. Where defendant, on a verdict of guilty, was sentenced the next day, but was allowed time thereafter to move for a new trial and prepare a bill of exceptions, no substantial right of defendant was prejudiced, affording ground for reversal.

7. It was not error to allow one of the jurors to become separated a short distance from the other jurors; it appearing that he was in sight of the sheriff, and that no one had an opportunity to converse with him.

Appeal from circuit court, Breathitt county.

"Not to be officially reported."

Carey Holly was convicted of murder, and appeals. Affirmed.

J. C. B. Bach, G. W. Fleenor, and W. W. Vaughn, for appellant. W. S. Taylor, for the Commonwealth.

PAYNTER, J. The defendant was indicted for the murder of James Combs, tried, convicted, and sentenced to confinement in the penitentiary for 18 years. The killing

took place on the 17th of February, 1896. On the 4th day of March, 1896 (the third day of the term), the grand jury returned the indictment. The court on the same day fixed the fourteenth day of the term for the trial of the case. The trial ended on the 19th of the month. The defendant was in custody when the indictment was found. A trial of a felony case can be fixed for the same term of the court at which the indictment is found. Cr. Code, § 185.

When the case was called for trial the defendant moved the court for a continuance because he had been unable to procure counsel. Thereupon the court appointed two members of the bar to act as counsel for him. He then moved the court for a continuance of the cause, and filed his affidavit in support of the motion, and in which he named the witnesses whose testimony he desired, and set forth the facts which he expected to prove by them. Thereupon the attorney for the commonwealth agreed that the affidavit might be read as the depositions of the absent witnesses, and "that the statements therein should be taken as true." The defendant then announced "Ready for trial." It appears from the order that the court did not act upon the motion for a continuance which was made after the appointment of counsel, on account of the absent witnesses, but the defendant, upon the agreement of the commonwealth's attorney that the statements it contained should be taken as true, announced "Ready for trial." As appears from the order, the court did not have an opportunity to commit an error in refusing a continuance on account of the absence of witnesses, because, before the court acted, the defendant announced his readiness for trial. Notwithstanding it was agreed that the affidavit was to be read as the deposition of the absent witnesses, and the statements therein were to be taken as true, the defendant never offered to read the affidavit, or asked to have the statements it contained taken as true. The trial took place at the same term at which the indictment was returned, and the court could not properly have forced a trial at that term unless the attorney for the commonwealth admitted upon the trial that the facts which the affidavit stated the absent witnesses would prove were true. Cr. Code, § 189; *Hardesty v. Com.*, 88 Ky. 537, 11 S. W. 589. After counsel had been appointed to represent the defendant, it does not appear that it was suggested to the court that the case could not be tried because counsel was not prepared to go on with the trial of the case, nor does the affidavit contain any such statement.

The court did not refuse to allow defendant to prove any facts tending to show a conspiracy on the part of the deceased, Nick Combs, and James Spencer to kill the defendant. Spencer was introduced by the commonwealth. On cross-examination the defendant made him his witness to prove the gun which Nick Combs had on the day of the

killing was taken to Luther Combs by the witness, and also, by his cross-examination, had Spencer to prove that he had nothing to do with the killing. The defendant did not offer to prove that the gun found with deceased was borrowed by James Spencer for the purpose of killing defendant. Counsel for defendant did ask Spencer if he had not said, the evening before the killing, that defendant would be killed before the next night. The court properly refused to let the witness answer the question. It would have raised an immaterial issue, and would not have thrown any light on the conduct of the parties at the time of the killing, nor would it have tended to prove that the deceased or Nick Combs were conspiring to take the life of the accused. There was no evidence offered before or after the interrogatory in question which would have rendered the answer competent. The defendant had, by the cross-examination of Spencer, made him exculpate himself from the imputation made in the ground for a new trial. Jack Little was asked the question if he had heard Spencer talk any at the time suggested in the question propounded to Spencer, just referred to. He replied that he "heard him talk some." He was then asked, "Do you remember the substance of what he said?" An objection to this question was sustained, and properly so. He may have heard him talk about many things wholly disconnected with the subject under investigation. He could not have been permitted to contradict Spencer, because no foundation had been laid for it.

The bill of exceptions does not contain any part of the argument of the attorney for the commonwealth, nor any exceptions to any statements he may have made. Therefore there is nothing appearing in the record for the court to review in this particular.

It is insisted that the court erred because he passed judgment on defendant in less than three days after he was convicted. The orders do not show when the court adjourned, but they do show that, the day following the judgment sentencing the defendant to confinement in the penitentiary, grounds for a new trial were filed, and time extended for preparing and filing a bill of exceptions. The record does not show that the court remained in session two days after the verdict, and it cannot be said that the court was not about to adjourn when the judgment was rendered, as the only order made thereafter may have been the one entering motion for a new trial, and filing grounds therefor. Besides, it does not appear that the defendant has been prejudiced by the judgment being entered on the day of the verdict. *O'Brien v. Com.*, 89 Ky. 357, 12 S. W. 471. The grounds for a new trial were heard and considered as if the judgment had not been pronounced. The court still had control over the verdict and judgment.

The court did not err in refusing to set aside the verdict because one of the jurors

was permitted to separate a short distance from the other jurors. It does not appear that the juror was out of the sight of the sheriff or the balance of the jury, nor that the juror did, or had an opportunity to, converse with any one during such separation. There was no evidence of undue influence or interference by others. *Blyew v. Com.*, 91 Ky. 200, 15 S. W. 356.

Ann Johnson was introduced as a witness for defendant. It was not error, for the purpose of showing her interest and probable bias, to allow her to prove on cross-examination that she and the defendant had been living together without being married. When the court admitted the evidence to impeach the general moral character of the defendant, it was not its duty to admonish the jury that it was only competent to discredit him as a witness. The jury could not possibly have concluded it was for any other purpose.

The evidence introduced by the commonwealth, if true, showed that the defendant killed Combs without any sort of provocation or excuse; that he began to shoot at him when he was trying to avoid meeting the defendant. On the other hand, the defendant's testimony tends to show that the killing was in self-defense.

The court properly instructed the jury. They were the judges of the facts. Believing that no error was committed which prejudiced the substantial rights of the accused, the judgment is affirmed.

DAVIS v. BROWN.

(Court of Appeals of Kentucky. June 11, 1896.)

CONTRACT IN RESTRAINT OF TRADE—BREACH—LIMITATIONS—EVIDENCE—REMARKS OF COUNSEL.

1. A right of action for violation of an oral contract to cease selling buggies in a particular county accrues on the first breach, and is barred by five years' limitations provided by Gen. St. c. 71, art. 3, § 2. *Pryor, C. J.*, dissenting. 32 S. W. 614, affirmed.

2. Where it was claimed that a vendee of an undertaking business agreed, in consideration of the sale, to cease selling buggies in a particular county, it was error, in an action against him for breach of the alleged agreement, to admit evidence of a resale of the business by him to a third person, and that plaintiff, to enable him to make the resale, agreed not to engage in the undertaking business if he would renew the agreement which he had broken, especially where plaintiff alone testified to the original agreement, and defendant denied it.

3. Where limitations was one of the grounds of a demurrer to the petition, it was error to allow plaintiff's attorney, in argument, to state reasons why the suit was not brought sooner, there being no evidence presented to excuse the delay, conceding it were relevant.

"To be officially reported."

On rehearing. Reversed.

For former opinion, see 32 S. W. 614.

Lindsay & Botts and Geo. C. Drane, for appellant. E. E. Settle, for appellee.

GUFFY, J. The judgment in this case was reversed in October, 1895, after which appellee filed a petition for rehearing, and the court ordered a reargument. In the former opinion the only question considered and decided was as to the efficacy of the plea of the statute of limitation, but we will now consider at more length various contentions of the parties.

The petition is in the following language, and was filed the 29th of May, 1893. "The plaintiff, Brown, states that on or about the — day of —, 1885, he and the defendant were both engaged in business in the town of Owenton, Ky.; the plaintiff then carrying on the general furniture and undertaking business, and also the sale of wagons and buggies, and the defendant, A. B. Davis, at the time being also engaged in the selling of wagons and buggies. That, in consideration that this plaintiff would then sell out to him the furniture and undertaking business, and the further agreement on plaintiff's part not again to engage therein in Owenton and Owen county, the defendant, A. B. Davis, agreed from that date to cease to sell buggies in said county, and agreed that he would not again carry on said trade, or offer any more buggies for sale, or interfere with the plaintiff in said business. Said agreement was in parol. That thereupon, relying on said agreement and contract, this plaintiff sold out to defendant all his furniture and undertaking supplies, and in good faith abandoned said business, but that the defendant, Davis, not regarding his own promise and agreement, continued to sell buggies in said town and county from that time until the present time, to the great injury and detriment of the plaintiff's trade, and to his damage in the last 5 years in the sum of \$2,500. Wherefore he prays judgment against defendant for \$2,500 and costs. E. E. Settle, P. A."

The defendant filed a demurrer to the petition, which reads as follows: "The defendant, A. B. Davis, comes and by his attorneys demurs to plaintiff's petition because the same does not state facts sufficient to constitute a cause of action against this defendant. Lindsay & Botts, Attys. for Deft." The demurrer was overruled, and defendant excepted, after which defendant filed his answer, which is in the following language:

"The defendant denies that, in consideration that the plaintiff would then sell out to him the furniture and undertaker's business, or either, or the further agreement on plaintiff's part not again to engage therein in Owenton or Owen county, this defendant agreed from that day, viz. — day of —, 1885, or from any date or time, to cease to sell buggies in said county; or agreed that he would not again carry on said trade, or offer any buggies for sale, or interfere with plaintiff in said business; or that plaintiff relied on said agreement or contract; or that there was any such contract or agreement; or that

plaintiff, relying on any such alleged contract or agreement, sold out to defendant; or that plaintiff sold out to defendant, at all, all or any part of plaintiff's furniture or undertaking supplies; or in good faith or at all abandoned said business; or that this defendant did not regard any of his words, promises, or agreements that he made; and again denies having uttered or made any such alleged promise, word, or agreement, but admits selling buggies, wagons, etc., for the last 20 years or more. Defendant denies that plaintiff has been injured or suffered any detriment by means of any violated word, promise, or agreement of defendant, during the last five years, or any other time, in the sum of \$2,500, or in any other sum. (2) Defendant, for further answer herein, and still denying the alleged compact and agreement declared on, states that, if ever such contract had been made, it being claimed by plaintiff that it was by parol, and alleged by plaintiff to have been made in 1885, and plaintiff's petition having been first filed on May 29, 1893, and more than 8 years after the alleged contract is by plaintiff alleged to have occurred, that plaintiff's declarations being upon an alleged agreement which is not to be performed within one year from the making thereof, unless the same or some memorandum or note thereof be in writing and signed by defendant, plaintiff cannot have or longer maintain this action. (3) Defendant further states that, while still denying the alleged contract or agreement, states that more than five years have elapsed since the contract declared on by plaintiff is alleged to have been made, and next prior to the institution of plaintiff's action; and defendant pleads and relies on the statute of limitation in such cases made and provided. Wherefore defendant prays that plaintiff's petition be dismissed, for his costs, and for all further and proper relief, etc. Lindsay & Botts, Attys. for Deft."

Plaintiff then demurred to each of the three paragraphs of the answer, which, being considered by the court, was overruled as to the first paragraph and sustained as to the second and third paragraphs, with exceptions. A trial resulted in a verdict and judgment in favor of plaintiff, appellee here, for \$500, and afterwards the appellant moved for a new trial, and filed grounds in support of the motion, which are as follows: (1) Because the court erred in overruling defendant's demurrer to plaintiff's petition. (2) Because the court erred in sustaining plaintiff's demurrer to the second and third paragraphs of defendant's answer herein. (3) Because the court erred in overruling defendant's objection to and permitting incompetent evidence to be heard by the jury in this; in permitting the witness J. M. Herndon to state that he, as agent of defendant, went to plaintiff, at a time long subsequent to the making of the contract which plaintiff declared on, and in and about a con-

tract with other parties (J. C. Hartsough and others), to which ruling of the court defendant at the time excepted and still excepts. (4) Because the court erred in giving to the jury as the law of the case instructions Nos. 1, 2, 3, and 4, and to the giving of each and all of which defendant at the time excepted and still excepts. (5) Because the court erred in refusing to give to the jury as the law of this case the instructions asked for by defendant and marked Nos. 1, 2, 3, and 4. To the ruling of the court in refusing each and all of said instructions the defendant at the time excepted and still excepts. (6) Because the verdict and judgment are both and each not supported by, but are both and each flagrantly against, the evidence. (7) Because the verdict and judgment are both and each against the law and evidence. (8) Because the court erred in refusing to allow competent evidence to be heard by the jury. (9) Because the court erred in permitting, over defendant's objections, incompetent evidence to be heard by the jury. (10) Because the verdict is the result of passion and prejudice, and is excessive. (11) Because of the misconduct of plaintiff's attorney while arguing and closing the case, saying to the jury that defendant had by his attorneys contended in the argument of the demurrer to plaintiff's petition sought, and the defendant sought, to evade the contract because it was not in writing; and, inasmuch as the defendant's attorneys now thought that the contract declared on could not be enforced because it was not in writing, the plaintiff's delay in bringing this action was to be excused, because he did not know he could enforce his contract,—all which was objected to, and the court refused to rule on same; to all which defendant excepted at the time and still excepts, and by reason of which defendant was prevented from having and did not have a fair and impartial trial. (12) Because the verdict is not sustained by the evidence. (13) Because the verdict and judgment are both and each not only contrary to the law as given by the court, but contrary to the law of the commonwealth. (14) "Because the defendant, since the rendition of the judgment and verdict herein, has discovered material evidence which plaintiff could not and did not discover or produce at the trial of this cause. The affidavits that are herewith filed show the facts that J. C. Hartsough, and by Hartsough it will be proven that he (Hartsough) did, prior to his purchase of the furniture and undertakings from Mrs. Stamper, and being apprised of Brown's threat that, if Stamper sold to Hartsough, he (Brown) would engage in said business, said Hartsough expressly stated to Davis that 'if he (Brown) is trying to force you to cease the buggy business, you just let him engage in it; I will fight him, and don't you in any way make any contract with him.' (15) Because the defendant has, since the rendi-

tion of the verdict and judgment herein, discovered new, important, and material evidence in his behalf which he could not with reasonable diligence have discovered or produced at the trial. Lindsay & Botts, Attys. for Deft." The motion for a new trial being overruled, appellant excepted, and prosecutes this appeal.

The third paragraph of defendant's answer pleads or attempts to plead the five years' statute of limitation as a bar to plaintiff's claim, and he insists in his brief that the plea is a complete bar to the action, while appellee insists that the answer is no plea of the statute, because he seeks to recover only for damages sustained during the last five years, which he assumes to be his cause of action. It will be seen, from the petition, that the contract sued on or set up in the petition was in parol, and made and entered into in 1835, and that it had been continuously disregarded and violated by appellant from that date up to the institution of the suit in May, 1893, which violation was known to plaintiff. If, therefore, the statute could be interposed as a defense, the plea was sufficiently explicit; but appellee contends that he could at any time sue and recover damages for the selling of buggies accruing within 5 years prior to the institution of the suit. If that contention be sound law, then it follows that Davis might have enjoyed and exercised the right to continue the business of selling buggies for 50 years, and yet appellee could have sued him and recovered damages for the selling done the last 5 years of that period. Chapter 71, art. 3, § 1, Gen. St., which must govern the contract in question and the rights growing out of it, says: "Civil actions other than those for the recovery of real property shall be commenced within the following periods after the cause of action has accrued and not after." The section proceeds to enumerate a number of causes upon which action may be brought within 15 years. Section 2 of the article, *supra*, provides that an action upon a contract, not in writing signed by the party, shall be commenced within five years next after the cause of action accrues. By what right or authority does Brown sue Davis for carrying on the trade of selling buggies? Manifestly there can be but one answer to the question, and that must be because, for a valuable consideration, Davis contracted with Brown to quit the business, and not again engage in it, and that is just what the petition alleges that Davis did do. When was that contract made, and was it in writing? The petition says it was in parol, and made in 1835. The next question is, when, if at all, did Davis violate the contract? The petition alleges that he commenced to violate it as soon as it was made, and so continued up to the commencement of this suit, *viz.* May 29, 1893,—much more than 5 years after the breach or violation. But appellee says: "I do not seek to recover for any selling except for the last

five years." Suppose plaintiff had only alleged in his petition that defendant had for the last 5 years past sold buggies in Owenton to the damage of plaintiff in the sum of \$2,500. Could he have recovered? Certainly not. But he seeks to recover by going back and relying upon a parol contract made more than 5 years before, and continually disregarded and violated by defendant, all of which the petition and plaintiff's own testimony shows was well known to plaintiff. If Davis had taken possession of a buggy, the property of Brown, and held it five years as his own, his title would have been perfect. Is it possible that he could not, within the same length of time, acquire by use or prescription the right to sell his own buggies,—to continue the business he had theretofore followed,—even if by parol contract he agreed to cease to do such business? If appellant had taken and held adversely a house and lot, the property of appellee, for 15 years, his title would have been complete, and appellee would have been without remedy. Yet, if the law is as contended for by appellee, he could have remained quiet for 15 or 20 years, while Davis continued to disregard the contract, and then sue and recover for the violation of the last 5 years. But it is said that each selling is a violation of the contract. The same may be said as to the tortious or illegal taking and holding of the house and lot. Every day that it was so held would be a wrong for which plaintiff could have recovered, until the 15 years expired. After that time he had no title. It would be extinguished by the adverse holding, and the title and right to the same vested in the holder. Has not appellant, by the more than 5 years' adverse exercise of his trade, extinguished the right of appellee to interfere with him? It has been repeatedly held by this court that 30 years' adverse holding of real estate gives the holder a perfect right and title thereto against all the world. But, if the law of this case is as claimed by appellee, his parol contract is more efficacious than recorded title to real estate. It has been repeatedly held by this court that a party may, by 15 years' adverse use, acquire a right to a passway through another's land; and the use may be such as to imply or evidence a claim of right. *Hansford v. Berry*, 95 Ky. 56, 23 S. W. 605. But if appellee's contention be true, a party can never acquire a right to follow a trade or calling by the adverse exercise of it. Exercising the right to trade will always be presumed to be done under claim of right. In *Williams v. Williams*, 89 Ky. 385, 12 S. W. 760, this court, in discussing the statute of limitation, said: "The statute of limitation is founded upon the idea that, if one has a right and neglects to avail himself of the remedy which the law affords within the time limited, it is to be presumed he has abandoned the right." In the case at bar, appellee, by his own showing, neglected to

enforce his right or remedy for more than five years. He could not recover in the suit unless he had a valid or enforceable contract.

Appellee, in his petition for rehearing, refers to Sedg. Dam. (8th Ed.) §§ 87-89. It is true that section 89 says that, in a suit to recover for breach of contract not to engage in business, recovery can only be had for the damage sustained up to the time of institution of suit; and the only authority given for that statement is *Hunt v. Tibbetts*, 70 Me. 221, and that case is no authority in this, for there was no question of limitation involved. *Hunt v. Tibbetts* was a suit brought by plaintiff upon the written contract of defendant not to continue or engage in a certain business for a specified time, and as part of the contract between plaintiff and defendant plaintiff executed his note to defendant for a sum of money. Defendant violated his contract, and plaintiff sued. Only two questions were raised and decided. Defendant's contention was that he was not bound to quit the business until plaintiff paid the debt due him. The other question was as to the recovery. The court held that the two agreements were not dependent contracts, and that plaintiff could recover, but could only recover for damages sustained up to the time of suit. In 1 *Suth. Dam.* § 112 (not referred to by counsel), it is said: "Where the contract is indefinite as to time and negative in its character, successive actions may be brought for violation, as where one has sold his interest in a business and agreed that he would not commence again in that place violated his obligation." The only case cited by a court of last resort in support of this doctrine is *Pierce v. Woodward*, 6 Pick. 206. An examination of that case will show that no question of limitation was raised or decided. Both of the cases *supra* proceed upon the undisputed assumption that the contracts were in full force, and the doctrine therein announced is not at all in conflict with the contention of appellant that the contract in the case at bar is barred by limitation, and hence no recovery can be had for breaches of a contract barred by limitation. We have not been referred to any case in which a second recovery has been allowed for a second breach of such a contract as the case now under consideration. Many decisions may be found where one and only one recovery was allowed on continuous contract. In *Fish v. Folley*, 6 Hill, 54, it was held that where the defendant had covenanted, in 1822, that plaintiff should have a continual supply of water for a mill from his dam, and ceased to perform after 1826, and in 1835 plaintiff sued and recovered damages up to that time, it was held that his right to damages for future breaches was barred. Mr. Sedgwick says, in volume 1, that a contract to support is ordinarily a continuous one, but that a breach of the same is often of such a char-

acter that the injured party may recover for prospective as well as past losses, and cites *Wright v. Wright*, 49 Mich. 624, 14 N. W. 571; *Amos v. Oakley*, 131 Mass. 413; *Parker v. Russell*, 183 Mass. 74; *Shaffer v. Lee*, 8 Barb. 412. It has also been held that, in a case of violated contract for service, the plaintiff may usually sue before the term of service expires and recover for his whole loss. 1 *Sedg. Dam.* (8th Ed.) p. 126, and the cases there cited; *Sutherland v. Wyer*, 67 Me. 64; *Lamoreaux v. Rolfe*, 36 N. H. 33. In *Railroad Co. v. Combs*, 10 Bush, 383, it was held that, where the injury to real estate was permanent and continuous, a single recovery could be had for the whole injury to result from the acts complained of. The same is true as to personal injuries. We do not think that the contention that each sale of a buggy constituted a distinct cause of action, for which suit might be brought, is supported by sound reason nor by the weight of authority. If such contention be true, it would follow that, if appellant had lived 40 years, and sold two buggies each day, one in the forenoon and one in the afternoon, plaintiff could have maintained more than 25,000 suits against him. It seems to us that the contract in question could not have authorized such a multiplicity of suits. It is said that the law abhors a multiplicity of suits. The alleged contract relied on by appellee was an entirety, viz. that appellant would cease selling, and not again engage in that business, etc. It is alleged that appellant did not even commence to comply with the contract, but continuously violated it. For such violation appellee had a right to sue at any time within 5 years from the time that appellant was to commence performance, and instead of doing so began to violate the contract; and in such suit he could recover for such damages as he had sustained, and might also, by injunction, restrain appellant from further violation of the contract.

It is not necessary to determine whether he could recover for future damages or not. We do not think that a defendant could defeat such right by offering to perform the contract in the future, nor would the mere fact that it would be difficult to arrive at the amount of damage for the future prevent recovery therefor; for almost the same uncertainty exists as to past damages, for unless the parties who bought from appellant would otherwise have bought from appellee the latter would not have been damaged. But the real question now being considered is whether the contract relied on to enable appellee to recover was barred by the statute. It is confidently believed that no court of last resort has ever sustained the doctrine contended for by appellee. Such contracts are not entitled to any special favor. It is fair to assume that most of them are made in order to stifle competition and thereby increase the cost of the article to the con-

sumer; and, besides, it is now the settled policy of the law to look with favor upon the statute of limitation as a statute of repose. The case of *Brown v. Houdlette*, reported in 10 Me. 407, is in principle not unlike the case at bar. The plaintiff in that case had sued for damages on breach of a bond. There had been two breaches, the bond only containing one penalty. The defendant pleaded the statute of limitation. The first breach was admitted to be barred by the statute, but the other was not. The court said: "It would seem to be a correct position that, as soon as the plaintiff acquired a perfect and complete right of action, the defendant also at the same time acquired an interest in the commencing protection of the statute." If it be true that a plaintiff may bring successive actions for violations of such contracts as the one relied on here, it seems clear that he cannot bring one after the right under which he claims is barred. If he had sued before the expiration of the five years, and recovered, that would have been a judicial determination that the contract had been made, and would have been a renewal of the same, with the same effect that a judgment on a note is a renewal of the debt or obligation. A note is barred in 15 years after maturity. There is a legal obligation resting on the debtor to pay the interest that accrues thereon up to the end of 15 years. Independent of any other consideration, that liability would be enforceable for 5 years. But will any one contend that the interest for the last 5 years on a note could be collected after the note was barred? Is not appellee seeking to do the same thing in principle? It seems clear to us that appellee's contract was barred by the statute before the institution of the suit, and that the court erred in sustaining the demurrer to the paragraph pleading the bar, and also erred in refusing the peremptory instruction asked for by appellant.

Appellant complained of incompetent testimony being admitted. The appellee testified in chief as follows: "I am the plaintiff in this action. I have been living in Owenton since 1884. Was in the buggy business at first. Then went into the furniture, undertaking, and livery business, but the buggy trade was my main business, and the business was carried on under the name of R. B. Brown, my brother, who lives in Warsaw, Ky., but I owned the stock. I sold the undertaking and furniture business to A. B. Davis after running about a year. Mr. Davis asked me if I would sell. He said he wanted to buy for his daughter, Mrs. Stamper. He said to me, 'You know I have to support her and her family, and I want to buy the stock and put her in charge of it.' He said if I would sell he would quit the buggy business. I told him under those terms I would. He paid me \$500 and \$147, and gave me his individual note for \$500, due in six months. He paid the note off either

in money or check. I don't know which. It was in the bank. I made no contract with anybody else. I delivered him the goods. No one was present when we traded. I had no trade with Mrs. Stamper. He run the store a year or more. Davis never quit selling buggies. I found out he never quit selling buggies. He finally wanted to sell out his furniture and undertaker's business, and he sent J. M. Herndon to me, and communicated to me a proposition from Davis, and just after that Davis sold out to J. C. Hartsough, and I never started up the furniture and undertaking business again. I would suppose Mr. Davis has sold 300 or 400 buggies since then. I have been damaged considerably. I had pretty near the buggy trade here. Davis was in Louisville awhile, and did not sell buggies while there. I made about \$10 on a buggy; sometimes more, never less. I believe I could have sold most of the buggies he sold. Davis has had a salesroom for buggies in town for two or three years. At the time I sold out to him I was engaged in the furniture and undertaking business and livery business, and was full up with business, and that is the reason I wanted to sell to Davis." Cross-examined: "I had but one trade with Davis. That is the contract I am suing him on, and that was in the latter part of August or September, 1885. I made money in the furniture and undertaking business,—\$640. I was not anxious to sell. I had a great deal of other business. I did not get credit on my rent because I said I was not making money, but Holbrook and Davis, from whom I rented, failed to fix the house as they agreed to do is a reason why a portion of my rent was knocked off." Witness was then asked to state all the facts,—what was said by each. Witness then stated: "Mr. Davis came in my place of business, and asked me if I would sell out the business to him. I told him I would. He then said, 'If you will, I will cease selling buggies.'" Witness was then asked if that was all, and he answered, "Yes." Witness was then asked the following questions, to which he made the following answers, to wit: "Question. What were you to get for the furniture and undertaker's business? Answer. He was to give me cost and carriage,—no bonus. Q. How and when was this to be paid for? A. Cash for coffins and furniture. I was to take his note for \$500 for the hearse, and I told Mr. Davis I would show them how to trim coffins. Q. Did you not, after you sold out to Mrs. Stamper or Davis, interfere with said business, and did you not take orders for coffins elsewhere, and do all you could to injure the business? A. Some time after we made the trade I got an order from Tom Southworth for a coffin for one of his children. I took the order, and went to the business house, and said to Dick Davis: 'I understand that your father has been selling buggies. Is that true?' And Dick said: 'I

suppose it is.' I then said to Dick: 'I have an order for a coffin, but, the way your father has treated me, I don't think I am under any obligations to give it to you.' And I sent the order to New Liberty, to my cousin, who is in the business. I never interfered with his business, except this order, and I did send other parties to him." J. M. Herndon was introduced, and testified as follows: "Plaintiff asked witness, among other questions, if he had any conversation with defendant, A. B. Davis, 'in reference to selling a stock of furniture and undertaking goods to J. C. Hartsough, in which he requested you to see Brown, the plaintiff, and before Hartsough bought the goods, in which he requested you to say anything to Brown, the plaintiff, and, if so, state when it was, and what was said by Davis to you, and you to Brown, and what all parties said.' Defendant objected to said question, and the court overruled defendant's objection, and permitted witness to answer, to which ruling of the court the defendant at the time excepted and still excepts. Witness then answered as follows: 'The defendant, Davis, did come to me a short time before the furniture and undertaking goods was sold to Hartsough, and asked me if I was on good terms with Walter Brown, and had any influence with him. I told Davis I was on good terms with Brown. Davis then said that Mrs. Stamper wanted to sell her furniture and undertaking goods, and that he could effect a sale of same to J. C. Hartsough if Walter Brown would agree not to set up a furniture and undertaker's business in opposition to Hartsough; and Davis requested me to go to Brown and say to him that, if Brown would promise not to set up the furniture and undertaking business in opposition to Hartsough, that he (Davis) would not sell any more buggies. I went to Brown, saw and had a talk with him in the alley behind Herndon's hardware store and Lindsay's office, and communicated to Brown what Davis had said to me, and Brown agreed to; but I don't remember all that Brown said. I then communicated to Davis what Brown said, and shortly after that Hartsough bought out the furniture and undertaker's business.' Defendant moved the court to exclude said testimony, which motion the court overruled, to which ruling of the court the defendant at the time excepted and still excepts. Plaintiff was recalled, and testified as follows: Plaintiff asked witness to 'state any conversation which you had with Herndon at the time he came to you, as testified to by him.' Defendant objected. Court overruled defendant's objections, and permitted witness to answer, to which ruling of the court the defendant at the time and now excepts. Herndon told me that Mrs. Stamper wanted to sell out her furniture and undertaking business, and could sell to Hartsough if I would agree not to start up the undertaking

and furniture business again, and Davis would agree not to sell any more buggies if I would agree to that. I told Herndon that I had a contract with Davis once before, and he went back on it, but if he (Herndon) said so, he would try him again. Herndon then said, "Davis pledges his word," and I then said, "If you say so, I will trust him." Defendant then moved the court to exclude said testimony from the jury, which motion the court overruled, to which the defendant excepted and still excepts. Witness also stated he did not engage in the business in opposition to J. C. Hartsough." The testimony of Herndon was clearly incompetent because it related to another contract, and was calculated to mislead and confuse the jury, and the testimony of the plaintiff when recalled was wholly incompetent. He not only was permitted to state what Herndon told him, but also to state what he said to Herndon. It will be seen that appellant denied the contract, and, as a witness, testified emphatically that no such contract was ever made, and the only person who testified to the existence of the contract was the appellee himself. It is therefore plain that the incompetent evidence was prejudicial to appellant's substantial rights. Hence the ninth ground for a new trial was well founded, and should have been sustained.

The eleventh ground for new trial is on account of misconduct of appellee's attorney. If it was competent at all for appellee to give any reason why he had not sued sooner, it should only have been allowed to be given by him, or some one else who knew the facts, on oath. It was error to allow plaintiff's attorney to comment before the jury on the demurrer of appellant. The other grounds relied on need not be discussed. For the reasons indicated, the judgment of the court below is reversed, and cause remanded, with directions to set aside the verdict and judgment, and award appellant a new trial, and for proceedings consistent with this opinion.

PRYOR, C. J., concurs in reversal, but dissents from the reasons given.

PRYOR, C. J. The facts alleged in the petition are these: Brown, the plaintiff, was engaged in selling furniture and in the undertaker's business in the town of Owenton, and the defendant, Davis, was in the business of selling buggies. Davis agreed with Brown, and Brown with Davis, that he (Brown) would cease to sell furniture and the business of undertaker in the town of Owenton and Owen county, and Davis agreed, in consideration thereof, to cease to sell buggies in said county, and agreed that he would not again carry on said trade, or offer any more buggies for sale, or interfere with the plaintiff in said business. Relying on said agreement, the plaintiff sold out his furniture, etc., to the defendant, and in good faith abandoned said

business; but the defendant, not regarding his promise, continued to sell buggies in the town and county from that time until the present time, to the injury of plaintiff's trade, and to his damage, for the last five years, in the sum of \$2,500. There was a demurrer to the petition, which was overruled. Whether or not the petition was defective because of the failure of the plaintiff to allege that he had continued in the business of selling buggies up to the time of the action, or should have been more specific as to the buggies sold for the last five years, are questions not discussed in the principal opinion, and I am inclined to think such averments should have been made, but concur with the majority in holding that certain testimony was incompetent, but dissent from the conclusion that the cause of action originating from the first breach enabled the defendant to plead the statute of limitation of five years when sued for a breach committed within five years. Such a contract as is alleged to have been made in the petition is what is denominated a continuing contract, and for every violation of it an action may be maintained. It is unlike a breach of the covenant of seisin, or cases where from the nature of the agreement full damages may be recovered for all the injury sustained, present and prospective, —such as injuries to buildings by running so near with a steam engine as to make the injury permanent. In all such cases, one recovery is a bar to the same cause of action. Here the sale of one or a half dozen buggies would not authorize a recovery of a sum sufficient in damages to compensate plaintiff for the injury. The defendant might answer and admit the breach, and allege that he would thereafter cease to sell buggies, and the only recovery would be for the damages sustained up to that time, or the plaintiff might so frame his petition as to recover all the damages he had sustained or might thereafter sustain because of the purpose of the defendant to continue the business; but such is not the petition in this case, and, when the plaintiff sues for the violation of the contract within five years, the defense interposed is that there was a breach of the contract on the day it was made, and a breach every day since. The defendant starts the statute to running by committing a breach of which the plaintiff does not complain, and which, if knowing of its commission, he is willing to condone. If this contract had been in writing, and the plaintiff had alleged that, after the expiration of 15 years from its execution, the defendant sold buggies in violation of the agreement, would it have been competent for the appellant to have relied on the statute of limitation by pleading that he committed a breach every day of the week following the execution of the agreement, and that more than 15 years had elapsed from the date of those several breaches to the breach complained of? Or, if there had been no allegation in the present petition of a breach on

the day it was made, but an action to recover for breaches within five years next prior to the institution of the suit, could the defendant rely on the statute of limitation by pleading that he had committed breach after breach any day for a year after the contract had been made, and that from those violations or from the last breach up to the one complained of more than five years had elapsed, and therefore time is a bar to the recovery? I am satisfied no such defense could be interposed, and, if so, the fact that breaches are assigned or alleged in the petition, and for which no recovery is sought, cannot be held to aid the plea of the statute by the defendant. In other words, if the pleader had set forth the parol contract and its breach every year for several years, and further alleged that within the last year prior to the institution of the action he had sold buggies 1. 2. 3. and 4, he could recover, although more than five years had elapsed from the date of the breaches for which no recovery had been sought. The constant breaches might show an abandonment of the contract, or conduce to show that no such contract was ever made. —a question not necessary or proper that I should determine. In *Howe v. Harding*, 84 Tex. 74, 19 S. W. 363, the West Texas Railway Company made a contract with one Harding by which the latter agreed to and did relinquish the right of way in consideration that the company would erect and maintain a water tank, to be used by the railway company, and for which appellee was to be paid as much as the company paid any other person on the line. The company removed the tank, and the appellee sued for the breach, alleging that other persons received \$50 per month for such a privilege. After the removal the appellee sued the company for the \$50 per month up to a certain time, and recovered. He then brought another action for the consideration arising subsequent to the first suit, and to this last action the plea of *res adjudicata* was interposed. It was held the appellant was using the right of way for the compensation agreed to be paid, and was liable as long as the company used appellee's land. In the case before us the appellee ceased the business of selling furniture, and, as long as he does so, the appellant, if such a contract was made, is guilty of a breach of his contract every time he disposes of a buggy in the county of Owen, and can prevent a multiplicity of suits by complying with his contract; and, if no breach had been committed for 20 years after the contract, the appellant is liable for that breach, and cannot rely on the statute by pleading a continuous breach, but may rely upon such facts as show an abandonment, or that no such contract was ever made. Sedgwick on Damages, says (8th Ed., p. 124): "Both in contract and tort, where the injury for which suit has been brought is repeated, a new action must be brought to recover for the new injury. No action can be brought to redress an injury before it transpires. Con-

sequently no injury will be redressed which was inflicted after the date of the writ," etc. I dissent from the opinion.

TODD, Mayor, et al. v. DUNLAP et al.

SAME v. TILFORD et al.

(Court of Appeals of Kentucky. June 13, 1896.)

MUNICIPAL OFFICERS—REMOVAL BY MAYOR AND ALDERMEN—NOTICE AND TRIAL.

1. Const. § 160, provides that the mayor, police judges, and members of the councils of cities of the first, second, and third classes shall be elected, and that like officers of towns and cities of inferior classes may be appointed or elected as provided by law; that other officers of towns and cities shall be elected, or appointed by the local authorities, as the general assembly may provide; that when elected by the voters their terms of office shall be four years, and until their successors are qualified; and that the general assembly "shall prescribe the qualifications of all officers of towns and cities, the manner in and cause for which they may be removed from office." St. § 2781, provides that "executive and ministerial officers, unless otherwise provided in this act, shall be removable by the board of aldermen * * * upon charges preferred by the board of councilmen." *Held*, that the members of the boards of public safety and public works, who are appointed by the mayor, with the concurrence of the board of aldermen, for a definite term, and at a fixed salary, cannot be removed by the appointing power, except for cause, after notice and an opportunity to be heard.

2. St. § 2794, providing that the mayor may, by a written order, "giving the reasons therefor," remove from office any head of department, director, or other officer appointed by him, does not authorize the removal of officers appointed for a fixed term, without notice and opportunity to be heard.

Du Belle, J., dissenting.

Appeal from circuit court, Jefferson county. To be officially reported."

Two actions,—one in the law and equity division, by John S. Dunlap and other members of the board of public safety of said city, against G. D. Todd, mayor of Louisville, and others; the other in the common pleas division, by one Tilford and others, members of the board of public works, to enjoin defendants from removing complainants from office. Judgments were entered for complainants, and defendants appeal. *Affirmed*.

H. S. Barker, John Marshall, D. W. Fairbigh, and Barnett, Miller & Barnett, for appellants. Pirtle & Trabue and Humphrey & Davie, for appellees.

PRYOR, C. J. The board of public safety and the board of public works, executive boards of the government of the city of Louisville, instituted these actions in equity in the court below, in which it is alleged the mayor and board of aldermen were about to remove the members constituting the two boards from office without cause, and the sole question in each case is, has the mayor the power, with the approval of the board

of aldermen, to remove these officials without notice and trial, and without assigning any cause for their action? The judge of the law and equity court decided the one case, and the judge of the common pleas court the other, each holding the mayor had no such power. These executive boards, composed of three members each, are appointed by the mayor, with the approval of the aldermen, for a term of four years, with a salary each of not less than \$2,500. The board of public works are invested with the control of all the public ways of the city, the construction of streets and their reconstruction, the supervision of the public buildings, the lighting of public places, with the power of contracting with reference to such matters, and in fact with powers unlimited in this regard, subject to the supervision of the mayor, and when not in conflict with the organic law of the city. To the board of public safety is given the exclusive control, under the ordinances of the council, of the fire department, the police department, the health department, the department of buildings, of all the charitable, reformatory, and penal institutions of the city, with many other powers given by statute, investing the two boards with the execution and control of nearly all the departments of the city government, and to carry into effect the legislation of the municipality. They are the creatures of the legislature, and their term of office, as is contended, may be extended at the legislative will. They have neither a freehold in their office nor a vested right that places their official existence beyond legislative control, yet they are officers of the city, with a responsibility and duty resting upon them that renders their position as important as any other in the conduct of the municipal government. Section 160 of the state constitution is as follows: "The mayor or chief executive, police judges, members of city councils of towns and cities, shall be elected by the qualified voters thereof, provided the mayor or chief executive, and police judges of towns of the fourth, fifth and sixth classes may be appointed or elected as provided by law. The terms of office of mayor or chief executive or police judges shall be four years, and until their successors be qualified and of members of legislative boards two years. When any city of the first or second class is divided into wards or districts, members of legislative boards shall be elected at large by the qualified voters of said city, but so selected that an equal proportion thereof, shall reside in each of said wards or districts, but when in any city of the first, second or third class, where there are two legislative boards, the less numerous shall be selected from, and elected by the voters at large of said city, but officers of towns and cities shall be elected by the qualified voters therein, or appointed by the local authorities thereof, as the general assembly may by a general law provide, but when elected by the

voters of a town or city their terms of office shall be four years, and until their successors shall be qualified. No mayor or chief executive or fiscal officer of any city of the first class, after the expiration of the term of office to which he has been elected under this constitution, shall be eligible for the succeeding term; fiscal officers shall not include auditor or assessor, or any other officer whose duty is not the collection of, or holding of public monies. The general assembly shall prescribe the qualifications of all officers of towns and cities, the manner in and cause for which they may be removed from office, and how vacancies in such offices shall be filled." It is claimed by counsel for the two boards that under this provision of the constitution the legislature must prescribe the manner in and cause for which city officials may be removed, and, the legislature having failed to comply with the constitution in this regard, the common-law rule must prevail, and the party sought to be removed is therefore entitled to notice of the charges against him, and to a hearing in his defense; and by the appellant, the mayor, it is insisted, this provision of the constitution does not embrace or affect any officer of a town or city except those specially mentioned in that section, and its operation confined to the officers therein named. It must be readily seen by a casual reading of this section that many of the most important offices connected with a city government, and indispensable to its existence, are omitted to be mentioned in the section of the constitution referred to, and the creation of such offices confided by that instrument to the wisdom of the legislative branch of the government, with the duty of prescribing their qualifications, and the cause or causes for which they may be removed. The mayor, police judges, and members of legislative councils of cities of the first, second, and third classes must be elected by the people, and like officers of towns and cities of inferior classes may be appointed or elected as provided by law; and the same section, after defining the mode in which these constitutional officers are to be chosen, and knowing that other officers must of necessity be created, further provided: "But other officers of towns or cities shall be elected by the qualified voters therein, or appointed by the local authorities thereof, as the general assembly may by a general law provide, but when elected by the voters * * * their term of office shall be four years, and until their successors are qualified," and concluding the section by vesting in the legislature the power to prescribe the qualifications of all officers of towns and cities, the manner in and cause for which they may be removed from office, the provision evidently applying to all offices of towns and cities, whether created by the constitution or the legislature; and in carrying into effect this provision of the constitution in regard to removal from

office the general assembly enacted under the title of "Municipal Corporations" the following section (2781): "Executive and ministerial officers, unless otherwise provided this act, shall be removable by the board of aldermen, sitting as a court, under oath of affirmation, upon charges preferred by the board of councilmen. No person so charged shall be removed from office without the concurrence of two thirds of the aldermen, and when a person has been so removed from office, he shall be ineligible thereto during the term for which he had been elected. This provision of the statute is sufficiently comprehensive to embrace every city office, and, although the charges for which the removal may be made are not specified, they must be such as constitutes misfeasance or malfeasance in office, or that character of charge that renders the officer unfit for the position. The contention of the appellant that by a subsequent section of the statute on municipal corporations the manner of removing the members of these two boards has been otherwise provided by law. That section reads: "He [the mayor] may, by written order, giving his reasons therefor, remove from office any head of department, director, or other officer appointed by him. A copy of said order shall be sent to the board of aldermen at its next meeting—unless such order be disapproved by the board of aldermen within thirty days said order shall stand." St. Ky. § 2794. These officials having been appointed by the mayor, it is urged in his behalf that any reason satisfactory to himself, and approved by the board of aldermen, is a compliance with the statute, and that no limitation on this power of removal exists when applied to those officers holding under his appointment, and, however competent and faithful they may be in the discharge of their duties, their positions are held at the mere will of the chief executive. Counsel for the appellees maintain they are not heads of departments, or such appointees of the mayor as are embraced by section 2794; that they are placed on a level with the mayor in regard to executive duties, and, while they are subordinate in some particulars to the mayor, their executive powers are greater than his. While conceding the force of the argument, we are disposed to determine this issue on other grounds, and for the purposes of this case will assume they come within its provisions.

The case of *South v. Sinking Fund Com'rs.* reported in 86 Ky. 186, 5 S. W. 567, is relied on as sustaining the power of the mayor in the present case. In that case it will be found the statute in express terms placed the power of removal within the discretion of the commissioners. It provided: "The said commissioners shall have power at their discretion, to remove any warden unless the general assembly should refuse to concur in their action," etc. No reasons for removal were required to be given, nor was there any

constitutional prohibition to the removal without cause. In the absence of a constitutional inhibition, an office created by the legislature in a municipality might, by the terms of the act creating it, vest the power in the mayor to remove without cause, leaving the reasons for the removal within his own breast. This is not denied. Mechem, in his work on Public Officers, says (section 445): "Where, therefore, the term of office is not fixed by law, and no other provision is made for removal, either by constitution or statute, it is said to be a sound and necessary rule to consider the power of removal as incident to the power of appointment; but this power of removal is limited to these circumstances, and, if the term is fixed by law, or if the officer is appointed to hold during the pleasure of some other officer or board than that appointing him, the appointing power cannot arbitrarily remove him." And it might be said that where the term is fixed the power to remove at will might be added, for, in the absence of any constitutional prohibition, the power of the legislature in this regard is not to be restricted. Our attention has been called to the case of *People v. Higgins*, 15 Ill. 110, as sustaining the contention of the appellant. In that case the act created the Illinois Hospital for the Insane, and authorized the trustees to appoint a medical superintendent, subject to removal only for infidelity to the trust reposed in him. There was no mode of proceeding in such cases provided by the Illinois statute, and the trustees, being satisfied of the incompetency of the appointee, removed him without notice or trial. It was held that this power was with the trustees, and the opinion based principally on the ground of the necessity for prompt action on the part of the trustees; the court saying: "Circumstances may require, and even the very existence of the institution may demand, the most prompt and energetic action on the part of the trustees in the removal of the superintendent; and the law did not design to leave them powerless to act in such an emergency; and, the law being silent as to the manner of proceeding, the nature of the case must determine what course of justice the trustees should pursue in exercising the power of removal." That case can be easily distinguished from the case before us, but even in such a case as the well-considered case of *Lease v. Freeborn*, reported in 52 Kan. 750, 35 Pac. 817, a different rule prevailed. The plaintiff in that case, Mary Lease, was a member of the state board of charities, and was removed without cause, or at least without notice or trial. The constitution of Kansas provided: "The term of any office not herein provided for, may be declared by law; when not so declared such office shall be held during the pleasure of the authority making the appointment." Const. art. 15, § 2. A statute of that state, subsequently passed, declared that the terms of office of

the trustees should be three years. The statute was silent as to any cause of removal, notice, or trial, and the court held: "The mere silence of the statute with respect to notice and hearing will not justify the removal of an officer whose term is declared by law, without knowledge of the charges, and an opportunity to explain his or her conduct, and defend his or her course and character." It is urged, however, in this case that the cause of removal (the statute being silent on the subject) is with the mayor and the board of aldermen, and no court can supervise their action; that, the constitution having required the legislature to prescribe the causes, and that body having failed to comply with its provisions, the power of removal becomes discretionary with the mayor and board; and the cases of *People v. Stout*, reported in 19 How. Prac. 171, Mayor, etc., of Hoboken v. Gear, 27 N. J. Law, 265, and *People v. Whitlock*, 92 N. Y. 191, as well as other cases, are referred to as sustaining this view. It was held in the case of *People v. Stout* that the exercise of such a power (removal for cause) "is judicial in its nature, and therefore not the subject of review by any other tribunal, either in respect to the cause, its sufficiency, or existence in any respect whatever." In the case of *Mayor, etc., of Hoboken v. Gear*, it was held that, although the appointment to the office was for a fixed term, and the removal for cause, it meant only such cause as was satisfactory to the council. Other cases follow the authorities referred to, some of them holding—and to which we assent—that the legislature, when not forbidden by the organic law, having been given the authority to create an office for a term, may in express terms authorize the removal of the incumbent without notice or hearing. In looking to the doctrine on the question of the removal from office found in the elementary books, as well as the weight of authority in the adjudged cases, we are not disposed to recognize the rule contended for by the appellant in the construction of our state constitution or the statute creating municipal offices. The general power to remove an officer who holds for a definite term carries with it the power to remove for cause, upon notice and trial; and it is only in cases where this power to remove without a trial is expressly given that it can be exercised. This doctrine is elementary, and sustained by the decided weight of modern authority. In the case of *State v. City of St. Louis*, reported in 90 Mo. 19, 1 S. W. 757, a police justice had been appointed by the council and confirmed by the mayor for the term of four years. The validity of his removal was tested. The charter was silent as to notice and trial when one had been appointed to office, but it did require notice and hearing to those who had been elected to office. It was contended that, inasmuch as the charter required notice to elective officers before removal, it must nega-

tive the idea that any notice was required to be given appointed officers. The court held that no inference dispensing with notice arose from the failure of the charter to require it; and, further, that the removal of the justice without an opportunity to be heard was invalid. See, also, *State v. Brown*, 57 Mo. App. 199. In the case of *Hallgren v. Campbell*, reported in 82 Mich. 255, 46 N. W. 381, the charter of the city of Menominee prohibited in express terms the removal of elective officers, except for cause, and it was argued in that case the presumption must follow the legislature intended that appointed officers should be removed without cause, or at the pleasure of the appointing power, but the court held that no such presumption would be indulged to enable those in power to exercise such arbitrary power, and the appointee was entitled to be heard. In the case of *Speed v. Common Council of Detroit* (Mich.) 56 N. W. 570, the office of city counsellor was filled by appointment from the mayor for a fixed term, and the charter of that city provided: "Any officer holding office by appointment, unless otherwise provided by law or ordinance, may be removed at any time by the council without charges and a trial thereof, by a vote of a majority of the members elect, except the controller, receiver of taxes," etc. The appointee was not within the exception. The court held that such power was inconsistent with the power of appointment by the mayor for a fixed term, and therefore the removal was invalid, the officer being entitled to notice, and an opportunity to be heard. The court in that case referred to the case of *Ex parte Hennen*, 13 Pet. 230, in which it is said: "We have not found any case where an officer who was appointed for a fixed term, and where the power of removal was not expressly declared by law to be discretionary, has been held to be removable except for cause; and when cause is to be assigned the party is entitled to an opportunity to be heard."

But it is further contended that the legislature, by section 2794 of the Kentucky Statutes applying to the cities of the first class, has given the express power of removal without cause, and for any reason the mayor might suggest, if approved by the board of aldermen. We cannot assume that this is the legislative meaning of that section, or that such a construction should be given it, or that the exercise of such an arbitrary power arises by implication. The members of these executive boards carry into execution nearly the entire legislation of the municipal government, and are intrusted with the performance of duties requiring the exercise of the highest judgment, and the assumption of grave responsibilities. They are appointed for the fixed term of four years, with a salary commensurate with the duties they are to discharge; and to concede the power of the mayor to expel these boards from office, with

or without cause, in the absence of a trial or an opportunity to be heard, would be to recognize the existence of an arbitrary power that never entered the mind of the legislature, and in direct antagonism with the entire policy of the state in reference to such officials. The legislature, in failing to comply with the provisions of the constitution in not assigning causes for removal of its officials, attempted to transfer the exercise of this legislative power to the mayor, and left with that officer and the board of aldermen the right of determining the reasons for which the members of these boards should be removed, and, if such a power could be delegated (and we think it could not), a removal for reasons given must be based on some neglect of duty, or want of capacity to conduct the office, or such other causes as unfit the member for holding the place. If the legislative purpose had been to give the power to the mayor to remove at pleasure, with no constitutional provision against its exercise, they would have said so, for in sections of the same general act the power to remove at pleasure is given in express terms; and when empowering the mayor to remove for reasons given the legislative meaning was a removal for cause, for legal reasons, based on a sufficient cause. And when removed for reasons given or for cause, the party is entitled to a hearing, and to be proceeded against as provided in section 2781 of the chapter on "Municipal Corporations." The act also, under which this power is claimed, plainly indicates the legislative policy as to the removal of the city officials, and goes so far as to require the board of safety, when investigating charges against the members of the police force, its own appointees, to give reasonable notice to the accused that they may be heard; and yet it is attempted to be maintained that these executive officers, because they were appointed by the mayor, can be removed for any cause, however trivial, or for charges odious and degrading, without the opportunity of making defense and of disproving the charges made. We cannot assent to the exercise of such a power, and the necessity for some stability and independence in the discharge of the important trusts confided to these executive boards is of itself a convincing argument against the contention of the appellant, and aids much in the construction of the statute from which it is argued this arbitrary power flows. In the case of *Mundy v. Board of Fire Comrs of New York*, the charter of that city declared that the power of removal by the commissioners could not be exercised as to any regular clerk, until he has been informed of the cause of the proposed removal. The clerk was removed after notice, and without cause, and then a second notice given, and the cause assigned was that "the duties of the position could be better performed by some one else." It was held the provision of the charter necessarily implies the cause of removal must

be for some neglect of duty, or some delinquency affecting the general character of the one sought to be removed, and that some other person could more efficiently perform the duties was not sufficient. It may be contended the legislature, by section 2794, intended the removal from office by the appointing power for either a fixed or indefinite term of the appointee should be for a less cause than that authorizing an impeachment; and, while this is no doubt true, still the cause was not prescribed, and when for a fixed term, unless otherwise expressly provided, the party sought to be removed is entitled to be heard, and the attempt to confer the power (if such was the proper construction of the statute) on the mayor to remove with the consent of aldermen without trial or an opportunity to be heard is a nullity. "Where the officer is appointed for a fixed term, and removable only for cause, he can be removed only upon charges, notice, and an opportunity to be heard." Throop, Pub. Off. p. 364. This rule is fundamental, and, as both the constitution and the legislature are silent as to the cause for removal, the delinquent officer may be impeached before the aldermen with notice, and that as at the common law. That the legislature intended to place a limitation on the power of the mayor to remove these officials, if empowered by the section referred to, in requiring reasons to be given, is unquestioned, for the purpose of protecting those who are competent to fill the position, and who faithfully and honestly discharge their duties; and there is but little protection when the opportunity to be heard is denied. The judgment in each case is affirmed.

DU RELLE, J. I dissent from the opinion of the majority in these cases. In my opinion the act for government of cities of the first class (Laws 1893, p. 1265) was intended to effect a departure from the character of municipal government which had theretofore prevailed. A consideration of the whole act shows that it was intended to provide a responsible head of the executive department of the city government, accountable to the people at the polls; and that the subordinates of that department should be responsible, directly or indirectly, to the head. While the act is, in terms, a general act, there was but one city to which it could apply, and a comparison of its provisions with those of the old city charter leads inevitably to the conclusion that a change was intended whereby greater power, and at the same time greater responsibility, should attach to the office of mayor. Without attempting to state in detail the argument which might be made on this question, I shall give briefly my conclusions. The mayor, who is the head of the executive department of the city government (section 23), appoints the executive boards, which are subordinate departments or branches

of the executive, although not called "departments" in the statute (section 40). The boards, in turn, are empowered to appoint the heads of subordinate executive departments (section 48), and they also employ or appoint subordinate executive employes and officers (sections 41, 47, 100). It is made the duty of the mayor to be vigilant and active in causing the ordinances of the city and the laws of the state to be enforced. Section 29. He is required to "exercise a general supervision over all the executive and ministerial officers of the city, and see that their official duties are honestly performed. He may require from them statements in writing concerning the discharge of their duties." Section 31. He may appoint persons "to examine, without notice, the affairs and accounts of any city department, trustee, officer or employé, * * *" and to report to him the results of such investigation. If these powers were all that were attached to the office of mayor, he would be helpless to perform the duties required of him. In what way could he be vigilant and active in causing the ordinances of the city to be enforced, if the boards of his appointment, creatures of his creation, were turned, upon confirmation, into a set of Frankenstein monsters, who could set him at defiance? How could he exercise a general supervision over all the executive and ministerial officers of the city, and see that their official duties are honestly performed, if those officers are responsible alone to a tribunal over which he has no control, though appointed by him, and sharing his executive powers? What sort of statements in writing concerning the discharge of their duties might he expect from members of the boards who share his powers, and, because it was supposed that they were responsible to him, have been given greater powers than those granted to him? What benefit would he derive from statements of subordinate officials, heads of inferior departments, etc., who are responsible alone to independent, and perhaps hostile, tribunals? With what obstructions, tangible and intangible, would the examiners appointed by him meet in investigating the affairs of a city department over which he could exercise no control, or of an officer who owed allegiance to a different chief? Again (section 52), authority is given to refer any matter in dispute as to the powers or duties of said boards or the officers thereof to the mayor, who shall examine and determine the questions involved, and whose decision shall be final as between said boards or said officers. There would be little prospect of a reference of any matter in dispute to the mayor if the boards are entirely independent of his control. By section 107 it is provided that "in times of peril from riot, extensive conflagration, disorder, or the apprehension thereof, the chief of policemen shall be subordinate to the mayor and obey his orders and directions." With

the chief of police subject to removal at pleasure by the board of safety, and with the board of safety entirely independent of and hostile to the mayor, who is to determine whether peril from riot, disorder, or the apprehension thereof exists, and which of his two masters will the chief of police be likely to serve under such circumstances, —the one who has no power over him, or the one which can decapitate him at pleasure? The provision for written charges against and trial of policemen before their removal from the force, upon which some stress has been laid in argument, was not part of the original act, and no argument can justly be drawn from it as to the intent of the original act, or the intent of any part of it not affected by the amendment. This amendment (section 2, Act March 23, 1894) was passed, so far as can be inferred from its provisions, as a civil service reform measure, designed to take the police force out of politics. The suggestions which have been given, and many more which might be drawn from the provisions of the act, indicate clearly that the intent of the legislature was to adopt the theory which has in modern times become the accepted theory of municipal government,—that there should be a responsible head of the municipal executive, and that he should be clothed with authority commensurate with his responsibility. The modern theory has been well expressed by Judge Cooley: "Experience has also demonstrated the necessity of more power and more responsibility in the executive head of our municipal institutions. Too often the duties of the mayor or executive officer are only nominal, and to these he gives but little attention,—a natural result of his want of importance, and of his inability to control the administration of municipal affairs. If the office be clothed with dignity and real authority, if the mayor shall be invested with the veto power, if he shall have the sole right to appoint and the unrestricted power to suspend or remove subordinate officials or heads of departments, then the citizens can justly demand of him that he shall be individually responsible for the proper conduct of the concerns of the municipality; and, if grievances exist, they will know to whom to apply for remedy or upon whom to fix the blame." It is not necessary to suppose that the legislature had the present condition of affairs in mind in passing the act, though it is to be presumed that they considered the contingency of the death or resignation of the mayor during his term. What they probably had mainly in view was the contingency which was to be expected, namely, that the mayor and the boards of his appointment might differ in their views of what was necessary for the proper conduct of the city government, or might become engaged in a quarrel over personal matters. And so, the purpose of the legislature being

clearly deducible from the act itself, the question remains whether apt language was used to express that intention, and, if so, whether the constitution gave the right to effect the object.

Section 32 provides: "Removal of Officials Appointed by the Mayor. He may, by a written order, giving his reasons therefor, remove from office any head of a department, director, or other officer appointed by him. A copy of said order shall be sent to the board of aldermen at its next meeting. Unless such order be disapproved by the board of aldermen within thirty days, said order shall stand." It is contended for the boards that this section does not include them, upon the ground of the rule of construction that "a statute which enumerates persons or things of an inferior rank, dignity, or importance is not to be extended by the addition of general words to persons or things of a higher rank, dignity, or importance than the highest enumerated, if there are any of a lower species to which the words can apply." Black. Interp. Laws, 145. While this rule of interpretation is most generally invoked to prevent the application of a penal statute, in this case it can have no application, for the members of the boards are themselves, within the meaning of the section, heads of departments. Their duties are prescribed by the charter, and their departments are subdivided into other departments, as the police and fire, whose heads are appointed by the boards; yet the two great divisions, though not called "departments," are none the less so, and the members of the boards are none the less heads of them. It might as well be said that the mayor is not the head of the executive department of the city government. Moreover, the boards are the only heads of departments to which the legislature can be presumed to have intended the language to apply, for they are the only heads of departments (unless we may call the comptroller's office a department) "appointed by him."

It remains to be considered whether the removal provided for by section 32 was forbidden by section 100 of the constitution. That section, after providing specifically for certain named officers of municipalities, and thereby creating what was never known to any former constitution, namely, constitutional municipal officers, fixing their terms of office, and the manner of their selection under various conditions, proceeds: "The general assembly shall prescribe the qualifications of all officers of towns and cities, the manner, and causes for which they may be removed from office, and how vacancies in such offices may be filled." That section is susceptible of two interpretations: One, that the concluding clause referred only to those municipal offices which were mentioned in the constitution; that is, to the constitutional municipal offices, and has no application to municipal offices which are the mere creatures of the

legislature. The other construction is that the section was intended to be permissive, to enlarge the power of the legislature as to offices which had been made constitutional by the new constitution, and to give to the legislature a power which it otherwise would not have had, inasmuch as the offices had been made constitutional. And in the construction of the constitutional provision the language should be interpreted in its natural sense, as it was understood by the people who voted for it. It is difficult to suppose that the average voter, in considering the section which gave the legislature power to provide the manner in and causes for which officers might be removed from their offices, understood or intended that those causes were limited to such as were at common law grounds for impeachment. In theory constitutions are made by the whole people. In actual practice they are submitted to them for ratification, and the words used are to be given their common meaning, and not to be construed technically. It must be remembered that under the former constitutions it was well established and undisputed that the legislature was without power to provide qualifications for constitutional officers in addition to the qualifications provided in the constitution; or to provide for their removal for any cause other than the causes recognized by the common law at the time of the adoption of the constitution, or to provide any manner of removing a constitutional officer except upon notice and hearing. *Page v. Hardin*, 8 B. Mon. 648. On the other hand, prior to the adoption of this constitution, it was equally well settled that as to officers which were not constitutional, but wholly statutory, the legislature had full power to provide their qualifications, and the manner of their removal, whether the removal was to be with or without cause, or with or without notice and hearing. *South v. Sinking Fund Com'rs*, 86 Ky. 186, 5 S. W. 567. Before the adoption of the present constitution, the legislature was omnipotent as to municipal government and municipal officers, and when the new constitution was adopted, which created certain constitutional municipal offices, a wise provision was inserted to prevent those new constitutional offices becoming subject to the then established rule of law; and the language of this provision must be construed according to its common meaning. "In interpreting clauses we must presume that words have been employed in their natural and ordinary meaning. As Marshall, C. J., says: 'The framers of the constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have intended what they have said.' This is but saying that no forced or unnatural construction is to be put upon their language, and it seems so obvious a truism that one expects to see it universally accepted without any question; but the attempt is made so often by interested subtlety and ingenious

refinement to induce the courts to force from these instruments a meaning which their framers never held that it frequently becomes necessary to redeclare this fundamental maxim. Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government." *Cooley, Const. Lim.* (6th Ed.) p. 73. In my judgment, the constitutional provision is a wise one, and section 32 of the act under consideration was adopted in accordance with the purpose of the constitutional provision, which was intended to be permissive, and not restrictive, upon the power of the legislature. In passing upon its validity this court should be guided by the well-settled rule of statutory construction which is thus stated by Judge Cooley in his work on *Constitutional Limitations*: "It has been said by eminent jurists that when courts are called upon to pronounce the invalidity of an act of legislation, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the act be sustained. The question whether a law be void for its repugnancy to the constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes; but it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other. Mr. Justice Washington gives a reason for this rule which has been repeatedly recognized in other cases which we have cited. After expressing the opinion that the particular question there presented, and which regarded the constitutionality of a state law, was involved in difficulty and doubt, he says, 'But if I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it.' It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity until its violation of the constitution

is proved beyond all reasonable doubt." Cooley, Const. Lim. (6th Ed.) p. 216.

GUFFY, J. I concur in the affirmance of the judgments, but dissent from the reasons given in the opinion. It seems to me that the legislature, under section 160 of the constitution, has plenary power as to the manner of and cause for which city officers may be removed, and it is within the power of the legislature to authorize the mayor to remove the officers mentioned for any cause or reason to him deemed sufficient, although such cause or reason might not imply either malfeasance, misfeasance, or incompetency; and that, too, without notice or hearing; but the power of removal given in section 2794 of the Kentucky Statutes does not clearly include the power to remove the officers in question.

COURTS v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. June 24, 1896.)

CARRIERS—PASSENGERS—FARE—OVERCHARGE BY CONDUCTOR—MEASURE OF DAMAGES.

Plaintiff applied to a railroad company's agent for a ticket to a certain station. The agent, under the mistaken belief that the train on which plaintiff intended to go would not stop at plaintiff's destination, refused to sell him one. Plaintiff boarded the train, and the conductor, under the rules of the company, collected a small sum in addition to the regular fare, because plaintiff had no ticket. Plaintiff paid it under protest, and sued the company for damages. The petition did not allege any grounds for punitive damages, nor did the evidence disclose any. *Held*, that the measure of damages was the difference between the ticket fare and the amount collected by the conductor.

Appeal from circuit court, Marion county. "To be officially reported."

Action by John Courts against the Louisville & Nashville Railroad Company for damages. From a judgment in his favor, plaintiff appeals. Affirmed.

W. E. Russell & Sons, for appellant. W. J. Lisle, H. W. Bruce, and Thompson & McChord, for appellee.

LANDES, J. This was an action to recover from the appellee damages for compelling him to pay more than the regular fare from Lebanon to Chicago station on the Knoxville Branch of the appellee's railroad. Appellant boarded passenger train No. 26, that passed Lebanon regularly about 5 o'clock in the morning, on the 11th day of September, 1893, for the purpose of going to Chicago station, where he was engaged as a hand at a brickyard, without having a ticket for the passage. The regular ticket fare between the two points was 36 cents. He applied to the ticket agent at Lebanon for a ticket, but the agent refused to sell it to him, because Chicago was not a regular stop station for that train. Not having a ticket, the conduct-

or, under the rules of the company, required him to pay 47 cents for his passage, which was 11 cents more than the regular ticket rate, the distance being 12 miles. He objected to paying the extra charge, urging as a reason that he had applied to the ticket agent at Lebanon for a ticket, and he refused to sell it to him. His objection was of no avail, and he had to pay the train rate. It appeared from the evidence that, some time before this occurrence, orders had been given by the proper officials to take up passengers on train No. 26 at Chicago until further orders; but it also clearly appears that both the ticket agent and the conductor were acting in good faith, and within what they believed to be the orders of their superiors, and according to the rules of the company,—the one in refusing to sell a ticket to the appellant for that train, and the other in requiring him to pay the extra or train fare. It further appears from the evidence that after the train stopped at Lebanon on that morning the conductor discovered the appellant and another attempting to board the train by getting on at the front platform of the baggage car, and that he required them to enter a passenger car instead, and that the incident excited a suspicion that they were endeavoring to avoid paying fare, and that when he collected fare from the appellant he reminded him of this, and expressed his suspicion that he had tried to avoid paying the fare. This being substantially the state of facts brought out in the evidence, the court instructed the jury that, if the order was given to stop train No. 26 at Chicago station, which was not a regular stop station for that train, and the ticket agent refused to sell a ticket to the appellant to that point for that trip, and he was required to pay and did pay the conductor on the train more than the regular rate for a ticket from Lebanon to Chicago station, the appellant was entitled to the difference between the amount paid and the regular ticket rate, and that they should so find. At the same time the court refused to give an instruction, requested by counsel for the appellant, that the jury were not confined, in estimating the damages, if any, to the difference between the regular ticket fare and the train rate, but that they might, in addition thereto, give punitive damages. The jury having found a verdict for the appellant for 11 cents, the difference between the two rates of fare, for which a judgment was rendered, and the court having refused to grant a new trial, the case is brought before us on appeal.

The only error for which a reversal is sought is the refusal of the court to give the instruction allowing punitive damages to be assessed. But, after a careful examination of the case, we have not been able to discover any fact brought out that would have justified an instruction of the kind. In the first place, it is not clear that the allegations of the petition were sufficient to authorize anything more than actual or compensatory damages.

The substance of the case, as stated in the petition, is that the appellant applied to the ticket agent for a ticket to Chicago station; that the agent refused to sell him the ticket, the regular fare being only 36 cents; that he boarded the train without a ticket, and was compelled and required by the conductor to pay 47 cents, which he paid under protest, and went on, as his business required him to go on that train; that extortion was thus perpetrated, whereby he was harassed, vexed, and humiliated. Under the law the relief sought and adjudged must be based on the facts stated in the pleadings of the party seeking the relief. But here there is no allegation of fact showing that the conductor ought not to have required the payment of the 47 cents that was paid, or showing that he acted arbitrarily, or in an insulting or abusive manner, or in such a way as to harass or humiliate the appellant, upon which to base a recovery of any more than actual damages. But, aside from this, the evidence fails to show any fact that would have warranted the court in submitting any question besides that of compensation to the appellant for what seems to have been an honest mistake on the part of the ticket agent and conductor, whereby the appellant was required to pay more than the regular ticket fare for that trip; and, the jury having allowed the difference between the regular ticket fare and the train fare which he was required to pay, which carried the costs with it, the appellant has recovered all that the facts alleged or proved shows he was entitled to; and, finding no error, the judgment is affirmed.

NICHOLASVILLE WATER CO. v. BOARD OF COUNCILMEN, OF TOWN OF NICHOLASVILLE.

(Court of Appeals of Kentucky. June 24, 1896.)

MUNICIPAL CORPORATIONS—WATERWORKS COMPANY—INVALID FRANCHISE—CONTRACT—LIABILITY.

1. A municipal grant of a franchise to a waterworks company for a term of years, without receiving bids therefor publicly after due advertisement, as required by Const. § 164, is void.

2. A contract for water supplies, entered into by the city at the same time an invalid franchise was granted, is not separable from the grant, but both are invalid.

3. Where a city contracts to receive and pay for water furnished by a company operating under an invalid franchise, the city is bound to pay for the amount of water actually received and used, though the contract is invalid.

Appeal from circuit court, Jessamine county.

"Not to be officially reported."

Action by the Nicholasville Water Company against the board of councilmen of the town of Nicholasville to collect installments of water rent. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Breckenridge & Shelby, for appellant. Ben P. Campbell, for appellees.

HAZELRIGG, J. The grant of the franchise by the town of Nicholasville to the Kentucky Water, Heating & Illuminating Company in June, 1892, may be treated as void because of the failure of the municipality to receive bids publicly after due advertisement as provided in section 164 of the constitution. The prohibitory provisions of that instrument became operative upon its adoption. Beard v. City of Hopkinsville, 24 S. W. 872. In September of the year named the water, heating, and illuminating company, with the approval of the city, conveyed and transferred its rights and privileges to the appellant, who erected its plant, and proceeded to supply the water for city purposes, as demanded by the original contract. The city paid two quarterly installments of water rental of \$625 each, the last one being in February, 1893, but, becoming dissatisfied, refused to pay further. The appellant then brought this suit for some four quarterly installments due up to April, 1894. Among other defenses, the city seeks to repudiate the contract, and avoid the payment of its water rental, because of the constitutional provisions indicated; and that bids were not received publicly after due advertisement is conceded, and for that reason the court upheld the defense, and dismissed the petition. However equitable may seem the right of appellant to enforce the contract of June 20, 1892, we cannot override the plain mandate of the constitution that, "before granting such franchise or privilege for a term of years, such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder." Nor can we hold the grant of the franchise and the contract for water supplies to be separable, declaring the one void and the other valid. Such a construction would fritter away the force of the entire section. Nevertheless, if in other respects the company is entitled, we are constrained to hold that the city is liable to the extent it has received its water supply from the appellant, even if the latter be regarded as an occupant of the streets, etc., of the city without lawful authority. There is nothing in the constitution denying the right of the city to pay for what it gets when the necessities of the public require the outlay. Judgment reversed for proceedings consistent with this opinion.

HAFNER v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 24, 1896.)

FALSE PRETENSES—INDICTMENT.

An indictment alleging that defendant, with intent to defraud, expressed certain boxes which he represented to the consignee contained

tobacco suitable for cigars; that the representations were false and fraudulent, and known to be such by defendant; and that the consignee was thereby deceived into paying a specified sum of money for tobacco stems and rubbish,—sufficiently charges the obtaining of money under false pretenses.

Appeal from circuit court, Daviess county.
"Not to be officially reported."

A. C. Hafner was convicted of obtaining money under false pretenses, and appeals. Affirmed.

Geo. W. Swope, for appellant. W. S. Taylor, for the Commonwealth.

PRYOR, C. J. The charge is: The defendant caused to be expressed from Louisville to Owensboro four large boxes, and represented the boxes contained cigar supplies of tobacco suitable for making cigars, and procured Dally, to whom they were consigned, to pay to the express company \$170 therefor; that the boxes only contained tobacco stems and rubbish, and were not suitable for making cigars; that he feloniously obtained from Dally, by false pretense and with the intention to commit a fraud, \$170; that the representations were false and fraudulent, and known to be so by the accused, and the said Dally was deceived and defrauded thereby. To the indictment the defendant pleaded guilty, and now insists there is no public offense charged. The defendant is charged with the false and fraudulent representation of what the boxes contained, when he knew they were false, and made them to deceive and defraud Dally, and induce him to part with his money. This was obtaining money under false pretenses, and the judgment is affirmed.

MASSIE v. COMMONWEALTH.

(Court of Appeals of Kentucky. June 18, 1896.)

HOMICIDE—MURDER—SUFFICIENCY OF EVIDENCE—INSTRUCTIONS—REMARKS OF COUNSEL—JURY FROM ADJOINING COUNTY.

1. On trial for murder it appeared that defendant had taken a gun, and started after deceased, expressing the intention to kill him. Upon meeting deceased, defendant said he meant to kill him because of certain remarks he had made. Deceased denied making the remarks, and expressed a willingness to meet his accuser. Defendant followed deceased for some distance, threatening him, whereupon deceased remarked that he was not afraid of him. Defendant threatened to shoot deceased if he repeated that remark, and, deceased having repeated it, defendant killed him. *Held*, that it was not error to instruct the jury as to the crime of murder, although the killing was not by lying in wait.

2. Remark of prosecuting attorney, intimating a motive for the killing, is not ground for reversal as prejudicial, where the evidence justifies a verdict of murder.

3. Under Cr. Code, § 194, providing that, if the judge is satisfied that an impartial jury cannot be obtained in the county where the prosecution is pending, he may summon jurors from an adjoining county in which he shall believe there is the greatest probability of obtaining an impartial jury, the fact that other jurors had

been summoned from a certain county did not establish the fact that an impartial jury could not have been gotten from that county, or that the judge did not believe that there was the greatest probability of obtaining an impartial jury from that county.

Appeal from circuit court, Owen county.
"Not to be officially reported."

J. L. Massie was convicted of murder, and appeals. Affirmed.

For former reports, see 20 S. W. 704, 24 S. W. 611, and 29 S. W. 871.

Lindsay & Botts, E. E. Settle, and James Andrew Scott, for appellant. W. S. Taylor, for the Commonwealth.

PAYNTER, J. This is the fourth appeal from judgments sentencing the accused to confinement in the penitentiary for life. His case is entitled to the same patient, earnest, and conscientious consideration on this as he received on the former appeals. Juries are triers of the facts, but until they have been permitted to hear such competent testimony which the commonwealth offers to establish his guilt, and such as he may offer for his own exculpation, and have been properly instructed by the court as to the law applicable to the state of facts presented, it cannot be said that the accused has had a fair trial,—such a trial as is guaranteed him by the constitution and laws of the land. The facts presented by this record (and by which, on this appeal, he must be judged) differ very materially from those appearing in the records on former appeals. When this court decides that instructions should or should not be given, as the case may be, it does so upon the facts then under consideration. The accused failed to testify on this trial. He did not, therefore, prove on this, as on former trials, the purpose for which he sought the accused with his gun; nor did he make it appear that he was in real or apparent danger of the loss of his life or suffering bodily harm at the hands of the deceased when the fatal shot was fired; neither was he heard to say that Honaker did not deny the slanderous words imputed to him, nor did he say that "It was not my intention to shoot him when I met him, until the shot was fired." Neither does the record show that Richardson, as on former appeals, testified that "just before the shot Honaker turned in his saddle, and placed his left hand behind him, and said you * * * something," etc. He testifies that he did not give such evidence on former trials, and he is not contradicted.

The facts preceding and attending the killing as disclosed by the record are about as follows: Massie was a reputable physician in Owen county, and his reputation as a peaceable and well-behaved citizen was established by all the witnesses who were interrogated as to it. Massie had a wife and several children. He and the deceased lived in the same neighborhood. James Hanna was his tenant, and on the 10th of October,

1891, between 3 and 4 o'clock p. m., Hanna informed Massie, in substance, that Honaker had on the previous day told him that he (Massie) had the previous year sustained improper relations with two of his cousins (who were young ladies, and had been teachers in the neighborhood the year before, and had stayed at Massie's house); that he had kept a regular house, and that Massie was bringing one of them back for the purpose of again having illicit relation with her. On receipt of this news the accused became very much excited, told Hanna to go to his house, and stay there until he came. The accused armed himself with a gun, mounted his horse, started rapidly down the road in the direction of Honaker's. He arrived there about 4 o'clock p. m. on the day named; asked Mrs. Honaker where her husband was. She informed him that her husband had gone to Monterey. On receiving this information the accused replied: "You will never see the damned son of a bitch alive again. I am going to kill him. * * * I intend to kill him if I have to waylay the road to do it." He then rode rapidly, with his gun in his right hand, towards Monterey. After riding three or four miles, he met Honaker and his brother-in-law, John Richardson, in the road, who were returning from Monterey. What occurred may be best told in the language of Richardson, who said: "I saw a man coming down the road, riding pretty fast. When he got in a short distance of us, he drew his gun on Honaker, and said: 'God damn you, I've got you now. I intend to kill you.' Jess [Honaker's given name] said: 'Hold on, doctor. What is the matter?' Massie said, 'You have been talking about me and mine.' Jess said, 'No, I havn't, doctor;' and Massie said, 'You won't face Jim Hanna and say it;' and Jess said: 'Hanna is a liar, and I will face him or anybody else, I can prove by Alex Williams that I did not say a word disrespectful of you and your family.' When Massie first came up, he rode around Honaker, and got on the left side of him, and a little behind him. I jumped off my horse, and tried to get hold of Massie's bridle, and told him to hold on. He said, 'Hold on, hell and damnation.' They rode up the road, Massie cursing all the time, and holding his gun in a position to shoot him all the way. He held the breech of the gun in his left hand, and the muzzle of the gun across the pommel of the saddle or across his right hand, the hand he held the bridle with. My horse got away, and I followed them on until I got within 20 yards of Charley Stevens' house. Saw three men in the yard. And I then turned back to get my horse. I caught my horse, and started to overtake them. At Stevens' fence I saw Massie raise his gun as though he was going to shoot. He said, 'Go on, God damn you; I will have your heart's blood before you go a mile.' I followed on, and overtook them at Stevens' barn. Massie was cursing all the time like

a wild man. Jess asked him what it was he said, and Massie said, 'You told Jim Hanna, yesterday, I had been having intercourse with my cousins.' Honaker said, 'Hanna is a liar.' Massie told him he would have to face Jim Hanna, and Jess said he would face him or anybody else; that he didn't say it. Massie said, 'You have got to go and do it.' Honaker said, 'I will go, but I don't have to go.' Jess said, 'I am not armed,' and said that he was not afraid of him if he had forty guns and pistols. Massie said, 'If you repeat that, I will kill you.' Honaker said, 'I do say it.' Then Massie shot him, and rode off. * * * It was 500 yards from where they met to the place where he was shot. Massie had the gun drawn on Honaker all the time." Richardson is corroborated by several witnesses and contradicted by none. George Lewis testified that he was riding up the pike on the evening of the killing, and heard Massie tell Honaker "that the Honaker family had been trying to get him down ever since he had been in the county, and he would stand it no longer." James Hanna was introduced as a witness for the accused, who proved that he told Massie of the conversation which he claimed he had with Honaker the day before the killing, etc., as heretofore related, and the consequent effect on the accused, his excitement, etc. Some witnesses were introduced to prove Massie's good character, and one to prove that he was in a good humor, cheerful and affable, a short time before Hanna had the interview with him. Jack Massie, as a witness for accused, testified that shortly after midnight following the evening of the shooting he found the accused at the house of Jim Barbers, and that "he did not appear to know anything; he was out of his head." This is the substance of the evidence offered by the accused. There was not a scintilla of evidence even tending to prove that the killing was done in necessary or apparently necessary self-defense. On the other hand, the evidence must have removed any suspicion in the minds of the jury, if any they had, that such necessity existed. He declared his purpose to the wife of deceased to kill her husband, started to find him, met deceased on the road, drew his gun, and threatened to shoot him, was dissuaded from then doing it by the deceased protesting his innocence of the accusation made against him, declaring his willingness to face his accuser. He then followed, abusing the deceased, until they reached a point some 40 yards beyond the place where they met, when he commanded the deceased to ride on, as he would have his heart's blood before he had ridden a mile. When the deceased had gone about 500 yards from where they met, the deceased again declared he had not had the conversation which Hanna related to the accused, and again expressed his willingness to face Hanna. He then gave the accused to under-

stand he was not afraid of his gun. The accused then threatened to shoot Honaker if he repeated that he was not afraid of his gun. He repeated he was not afraid of it. Then the accused executed his threat by shooting him, from the effects of which he soon died.

It is insisted that the court erred in giving an instruction on murder. If there could be a case other than where the assassin lays in wait for his victim and shoots him, wherein an instruction on murder should be given, this would seem to be the case. While the court gave an instruction on self-defense, the evidence showed that the accused was not entitled to it. It is not a failure to give the whole law of the case when the court refuses an instruction on self-defense in a case where there is not the slightest evidence tending to prove the act was excusable on the grounds of self-defense or circumstances which indicated that it might have been so committed; and especially in a case like this, where the proof shows that the killing was not done in self-defense. It may be doubted from the facts which appear in this record whether the accused was even entitled to an instruction on manslaughter.

It is insisted that the case should be reversed because of language used by the commonwealth's attorney in the closing argument of the case. We will not discuss the question as to whether the language used intimating a motive for the killing was improper. It is sufficient to say it did not nor could it have prejudiced the substantial rights of the accused. It seems to us, from the evidence in this case the jury could not have done otherwise than find the accused guilty of murder. The question which it is claimed the commonwealth's attorney propounded to Hanna, and which it is insisted was prejudicial to the rights of the accused, does not appear in the bill of exceptions, and therefore the court has no question to consider. The bill of exceptions fails to show that the defendant offered to read the testimony of Green Barr, given on a former trial, or that he was dead when this trial took place. Of course, it does not appear that the court had an opportunity to pass upon the question raised in argument. Section 194, Cr. Code, provides that "if the judge of the court be satisfied, after having made a fair effort, in good faith, for that purpose, that from any cause it will be impossible to obtain a jury free from bias in the county wherein the prosecution is pending, he shall be authorized to order the sheriff to summons a sufficient number of qualified jurors from some adjoining county in which the judge shall believe there is the greatest possibility of obtaining impartial jurors, and from those so summoned the jury may be formed." The court ordered the jury summoned from Carroll county. The fact that other jurors had been taken from that county did not establish the fact that an impartial jury could not be gotten from that county, or that the judge did

not believe that there was the greatest probability of obtaining impartial jurors from that county. We cannot hold that the judge abused his discretion.

The accused received all the instructions to which he was entitled, and at least one favorable to him to which he was not entitled. No error having occurred at the trial which, in our opinion, prejudiced the substantial rights of the accused, the judgment is affirmed.

On Rehearing.

James A. Scott, for appellant. W. S. Taylor, for the Commonwealth.

The court does not mean, and it cannot be fairly deduced from the opinion of the court that the court was commenting on the defendant's failure to testify as being a circumstance against him. The court referred to his (the defendant's) testimony on former trials to show that facts of the case differed from what they appeared to be on former trials, as the defendant did not testify on this trial. It was done for the purpose of showing there was an absence of proof to warrant the giving of a certain instruction to the jury which the court held to be proper on former trials, basing it on testimony which was not offered on this trial. The petition for a rehearing overruled.

McCain et al. v. PUTMAN et al.
(Court of Appeals of Kentucky. June 20, 1896.)

APPEAL—INSUFFICIENCY OF RECORD.

A judgment refusing to open a road will not be disturbed on appeal, where the record does not show the grounds upon which such refusal was based, nor the grounds upon which the circuit court affirmed the judgment of refusal.

Appeal from circuit court, Marion county.
"Not to be officially reported."

Action by M. A. McCain and others against C. F. Putman and others for the opening of a road. From a judgment refusing to open the road, plaintiffs appeal. Affirmed.

H. P. Cooper, for appellants. S. A. Russell, for appellees.

LANDES, J. There is not enough in the record before us in this case to enable us to pass upon the merits of this controversy with reference to the establishment of the proposed new road in Marion county from the old Jarboe road to the new Market and Lebanon turnpike; nor does the record show upon what the county court based its judgment refusing to open the road, nor what the circuit court based its judgment on dismissing the appeal and proceedings, except that the latter judgment is stated to have been "on the face of the papers." The statement, in the brief of counsel for the appellants, that "it would be difficult to picture greater necessities for a road than such as appear in this case," does not aid the court,

In the absence from the record of evidence to show the propriety of establishing the road, based on the necessity of the case. The court did not act on the motion of appellees to quash the report of the viewers. If the circuit court, on appeal, had undertaken to pass on the question of the sufficiency of the viewers' report and the amendment to it, and of the regularity of the proceedings, it must have quashed the proceedings, even if the county court had established the road, instead of refusing to establish it, without regard to the real merits of the application. If the appeal were from such a judgment, we would be constrained to affirm it upon the record before us. The same result, precisely, must follow now, although the judgment appealed from dismissed "the appeal and proceedings" without showing the questions which were passed upon by the court. But it is proper to say that neither the judgment of the county court nor that of the circuit court will be a bar to other or new proceedings by appellants to establish the road under the statute now in force, if the facts authorize it. The judgment is affirmed.

FINNELL v. LOUISVILLE & S. R. CO.

(Court of Appeals of Kentucky. June 23, 1896.)

VENDORS' LIEN — FORECLOSURE — RAILROAD ON LAND — RIGHTS OF RAILROAD COMPANY.

1. Where a railroad company, with consent of a vendee, has constructed its road over the land, in an action by the vendor to enforce his lien, to which the company is a defendant, after judgment has been entered directing the land on each side of its right of way to be first sold, and declaring that, if the proceeds were insufficient to satisfy the lien, the court would then proceed to make the balance out of the right of way, the company should be allowed by a cross petition to set up its claim to the right of way under the agreement with the vendee, in order to enable the court to determine the mode in which the right of way should be disposed of to satisfy the lien for the balance of the price.

2. Where a railroad company, with consent of the vendee, constructs its road over the land, and in an action to foreclose the vendor's lien the proceeds of the land outside the right of way are insufficient to satisfy the lien, the right of way, with the improvements thereon, should not be sold to satisfy the lien for the balance, but should be condemned, the value thereof being ascertained by taking value of the land and damages to the rest of the tract caused by the taking, and judgment with a lien on the roadbed to secure its payment entered against the company for the amount so ascertained.

Appeal from circuit court, Mercer county.
"Not to be officially reported."

Action by John W. Finnell's administrator against the Louisville & Southern Railroad Company to enforce a vendor's lien. The proceeds of the land on either side of defendant's right of way being insufficient to satisfy the lien, the court refused to direct a sale of the roadbed and right of way, but directed the condemnation of the right of way, the damages to be ascertained by including with the value of the land actually

taken damages to the rest of the tract caused by the taking; and from a judgment against defendant for the sum so ascertained, but which did not create a lien on the roadbed for its payment, plaintiff appeals. Reversed.

Bell & Bell, for appellant. Frank D. Swope, Bullitt & Shield, C. A. Hardin, Sr., C. A. Hardin, Jr., and E. H. Galther, for appellee.

PRYOR, C. J. John W. Finnell owned a tract of 352 acres of land in the county of Mercer, and by an executory contract in writing sold it to Jackson Vanarsdale and John H. Finnell for \$12,300. Vanarsdale purchased of John H. Finnell his interest, and took possession of the land under this purchase. The vendor, John W. Finnell, having died, and the purchase money not having been paid, his personal representative, W. H. Terhune, instituted this action to enforce the lien of the vendor. After this sale to Vanarsdale, who was in possession, and the equitable owner, the Southern Railroad was constructed over a part of this land, and, having been made a defendant to the action, the company was allowed to make defense, or by an answer and cross petition to set up its claim to the right of way under the Vanarsdale agreement. It seems that this pleading on the part of the railway company was filed or permitted to be filed after a judgment had been rendered to sell the property. That judgment directed the land on either side of the railway to be first sold, with this proviso: "that if the land or the sale fails to bring the debt" the court will then proceed to make the unpaid purchase money out of it, viz. the said roadway. We do not see that the filing of the cross pleading by the railway was an error on the part of the court, as it might well determine the mode in which this roadway should be disposed of, or the company made to account for its full value. The commissioner sold the land on both sides of the right of way, and it lacked \$6,000 of satisfying the vendor's lien, and now it is insisted that this right of way, with the improvements upon it, in the way of rails, etc., should be sold to satisfy the lien yet due. It seems the court refused to sell the roadbed, but undertook to have it condemned by ascertaining the actual value of the land taken and the damage to the tract by reason of the taking. The jury fixed the value of the land at \$100 and the damage at \$350, making in all \$450, and for this sum gave a judgment.

It is argued by counsel for the appellant that the chancellor was without jurisdiction to have this land condemned, as under our statute there is but one way the land could be condemned, and that was by the Mercer county court. The land had in fact not been condemned, but the entry and building of this great public way were made by the consent of the owner and the party in posses-

sion. There was no appropriation of property without the consent of the owner, or any injustice to the vendor by reason of giving to him the full value, and more than the full value, of the land in discharge of his lien. It is evident the chancellor would, under the circumstances, permit the company to remove its track, and leave the land unaffected by the presence of the road upon it; and, if this equitable right exists, in what way is the party seeking to enforce his lien injured, when he obtains twice as much as the land is worth? This not being a wrongful entry, the party is not in the light of a trespasser, as in the case of *Holloway v. Railway Co.*, reported in 92 Ky. 244, 17 S. W. 572, when an ejectment was maintained because of the wrongful entry; but a case is presented in a court of equity, where an equitable adjustment becomes necessary, to prevent a sale of that in which the public has an interest, and the sacrifice of the property of the appellee. The argument that the way, and only way, to list the value is by a public sale of the tract, is fallacious, as there can be no doubt but that on the facts the party would be allowed to remove the bed of his road with the rails, etc., and no chancellor ought or would permit a great line of railway to be severed in this manner, when the right to enter on the land existed, and when a court of equity can so adjudge as to fully compensate the holder of the lien. If the chancellor had withheld his judgment until proceedings could have been had in the county court, the same objections would be urged; and when it is plain the appellant has received all and more than he is entitled to if the judgment below is enforced, it should stand. The only error is in rendering a judgment without creating a lien to that extent upon the company's roadbed. The judgment is reversed, with directions to enter a judgment requiring the payment of this money within a fixed period (say 20 days), or the lien will be enforced.

GILMOUR'S ADM'X v. KERR'S EX'R.

(Court of Appeals of Kentucky. June 23, 1896.)

COMPOUND INTEREST—PARTNERSHIP.

Where a partner has an excess of capital in the business, or retires from the firm and leaves his capital to be used by the other members of the firm, he should not be allowed compound interest, in the absence of a contract therefor.

On rehearing. For former report, see 25 S. W. 270.

PRYOR, C. J. On a reargument of this case several questions were discussed not insisted upon on the first hearing. These complicated accounts, running through a period of nearly 25 years from their inception to the filing of the petition in this case, ren-

der it difficult, if not impossible, to arrive at that accuracy of conclusion as will satisfy the parties to the litigation or meet the full justice of the case. It is argued that Hugh Kerr furnished no capital to conduct the business in which Gilmour was interested with him, and that the sum of £70,000 allotted him in the settlement of October, 1859, was a part of the profits, or the capital, that had been made by Kerr & Gilmour upon moneys borrowed from the firm of R. Kerr & Co. This entire record shows Hugh Kerr to have been a man of much means, and engaged in a much larger business, or in other enterprises, in which Gilmour had no interest, and from which Kerr derived large profits. The proof is plain that in October, 1859, there was in the hands of their commission merchants about £80,000, and that, in a settlement then made, Gilmour's share was fixed at £9,675, and £70,000 as belonging to Hugh Kerr. This settlement, made in the year 1859, was never disturbed, but acquiesced in by all the parties; and it is now claimed that, although there was this settlement made, and one again made in April, 1884, a large and fabulous amount of assets was omitted from the one or the other of these settlements, amounting to more than a quarter million of dollars. This claim, we think, is without foundation. The tobacco purchased up to the year 1857 was accounted for in the settlement of 1859, and the tobacco of 1858 and 1859 was included in the settlement of 1884. It is insisted that assets exist and are unaccounted for, and still this court has been unable to find them, unless, as is now argued, the £70,000 set apart to Hugh Kerr in 1859 is capital or profits belonging to the parties, or to the firm, instead of Hugh Kerr individually. This cannot be so, for the reason there is no proof to justify such a conclusion; but, on the contrary, the settlement itself refutes any such idea. The burden, certainly, after the appellee has produced the settlement, is on the appellant to show that this large sum belonged to the firm and not to Hugh Kerr. Then, if Kerr had £70,000 and Gilmour £9,675 when the new firm began in 1858, there is no reason why they should not receive interest, particularly when the commission merchant had paid interest on the deposit.

The only objection manifest in the final settlement now before us is that, in ascertaining the amount to which Gilmour is indebted to Hugh Kerr, the former is charged compound interest on annual rests made, as is the English custom, and in this manner the claim of Hugh Kerr is enlarged. It is said by counsel for the appellee that if Hugh Kerr had drawn from his commission merchants the sum credited to him in the "previous business," £70,000, and deposited it with the bank under an agreement or custom that he was to receive interest, and the balance due him at the end of each year with the accrued interest was to be added,

and all become principal for the next year, would not Kerr be entitled to recover it beyond question? We think clearly so. Such, however, is not the case presented here. These men were originally partners, and had been, in conjunction with others, for years. Hugh Kerr finally left the firm, and those succeeding him retained his assets and used them. They used them in purchasing tobacco in this country and not in England. There was really no contract in regard to interest, and now, after the lapse of many years, the one who has used the funds is made to account as a trustee or guardian of the funds, by annual rests compounding the interest, so as to swell the amount of the debt to a larger sum than the parties themselves ever contemplated. Kerr acquiesced in its use without asserting any such claim, and after the lapse of years, with all of those who used it in conjunction with Gilmour becoming insolvent, he is made to account for compound interest. As between partners, where one has even an excess of capital, no interest is allowed unless there is some agreement to that effect. Hugh Kerr contributed the capital to enable these firms to operate their business. He did it with a view, doubtless, of aiding Gilmour, and interest should not have been compounded, either as to the previous business or as to any subsequent loans. To the extent, therefore, that Gilmour has been charged with compound interest, either on the previous business or subsequent transactions, this judgment is erroneous. If allowed (compound interest) on the claim of Gilmour, to the extent of his interest it should be disallowed. All compound interest allowed by the one against the other in the settlement should be eliminated from it. In all other respects the judgment below is affirmed, and for this reason alone the judgment of affirmance is set aside, and the judgment reversed and remanded to correct this error only. The allowance to the commissioner, made in the order of affirmance heretofore, must be paid. This is an addenda to the original opinion.

EASTERN RY. CO. v. BROWN.

(Court of Appeals of Kentucky. June 23, 1896.)

INJUNCTION—ACTION ON BOND—ASSESSMENT FOR DAMAGES.

It is only where the enforcement of a judgment has been enjoined that the court is authorized on dissolution of the injunction to ascertain the damages; otherwise a suit on the bond is the proper remedy. *Alexander v. Gish*, 9 S. W. 801, 88 Ky. 13, followed.

Appeal from circuit court, Clark county.

"To be officially reported."

Action by the Eastern Railway Company against Andrew Brown on an injunction bond. A demurrer to the petition was sustained, and plaintiff appeals. Reversed.

Edward W. Hines, Rodney Haggard, W. H. Holt, and E. B. Wilhoit, for appellant. Wm. M. Beckner, for appellee.

PRYOR, C. J. This action is on an injunction bond and a demurrer sustained to the petition. The bond was executed in the United States circuit court for Kentucky, and by a mandatory injunction the appellant was compelled to deliver the appellee, Brown, an engine upon which it claimed a lien for repairs. It seems the state court had jurisdiction, although the bond was given in the federal court. *Meyers v. Block*, 120 U. S. 206, 7 Sup. Ct. 525. Under the rule in this court or in this state it is only where the enforcement of a judgment has been enjoined that the court at the time must ascertain the damages. *Alexander v. Gish*, 88 Ky. 13, 9 S. W. 801. The demurrer should have been overruled. Reversed and remanded, that this may be done.

NORTHUP et al. v. MOLLETT.

(Court of Appeals of Kentucky. June 24, 1896.)

"Not to be officially reported."

Petition for rehearing. Overruled.

For original opinion, see 35 S. W. 268.

PAYNTER, J. Counsel for appellee in their disappointment and zeal fancy they have discovered glaring errors in the opinion of the court in the statement of facts of the case. They criticize the court for the supposed errors which, if committed, would not be material, with the same degree of earnestness as they do those which would be material if they existed. They seem to be unable to distinguish between a statement of facts and a deduction made from them. Wherein the court differs with counsel as to the effect of facts it is gravely argued that, therefore, the court is inaccurate in the statement of facts. The court said in its opinion that "the C. C. C. Railway was a road projected from the south, the purpose being to connect with Chattaroi road." Counsel seem surprised at the statement, and say that the record does not disclose such facts. The record does show that the Chattaroi road reached Richardson, the point from which the extension was to be built to White House, by running south. Northup testifies that "the extension was intended to be the connecting link between the Chattaroi and the O. C. C. Railway Companies." Necessarily, if the extension was to be the connecting link between the two roads it is reasonable to conclude that the C. C. C. Railway was projected from the south. It would seem that counsel, in their effort to find an error in the statement of facts in the opinion of the court, were not overcritical in the examination of the record. Instead of saying the C. C. C. Railway had an option on the Chattaroi road, it should have said in

the opinion that the Massachusetts & Southern Construction Company, which was building the C. C. C. Railway, had an option on the Chattaroi. The court, in its opinion, said, "Carlisle, Northup, and their associates under the superintendency of Northup proceeded to and did extend the Chattaroi Railway from Richardson to White House Creek, long before date in the bond required it should be done;" and again it said, "As a matter of fact, the Chattaroi was extended." Counsel again are surprised at the statement of the court. The undisputed testimony of Northup is that "this extension was built as an extension of the Chattaroi Railway." Our conclusion was a legitimate deduction from the record. The court is not only correct in its statement of its deduction from the facts, but of the fact itself. The word "competition" is not used in the opinion, but the court said, to avoid "complications," the extension was made under the charter of the O. K. & V. The court, in discussing the facts as they appear in the record, said "the fact that Northup and Carlisle received the aid of other persons and corporations to enable them to perform the conditions of the bond in the extension of the Chattaroi Railway is not material." Counsel ask, "Why is this language used?" The court is not responsible for counsel's failure to see why the court was considering the case from the point of view indicated by the language quoted. If the court made the case turn upon the question as to whether Wallace had told Mollett that the Chattaroi was completed to White House, we would show that the testimony of certain witnesses relied upon for the purpose of contradicting him on this question did not have that effect. The court said, in its opinion, that it did not regard it material whether Wallace made the statement or not. Still being of that opinion, a discussion of the question would be profitless. The criticisms of counsel are not justified by the facts. After a careful consideration of the case, we adhere to the opinion. The petition is overruled.

COMMONWEALTH, to Use of CLAY COUNTY, v. HOWARD et al.

(Court of Appeals of Kentucky. June 23, 1896.)

COUNTY COURT—MINUTES—SHERIFF—BOND FOR COLLECTION OF TAXES.

1. Gen. St. c. 28, art. 17, §§ 6, 7, providing that, before every adjournment of the county court, the minutes of the proceedings shall be publicly read by the clerk, and then signed by the judge, and that no minute or order shall be valid till read and signed, do not require each day's proceedings to be read and signed from day to day, but the entire time the court is in session may be treated as one day, and a single adjourning order be made at the end of that time.

2. The fact that no order of the county court appears showing that one executed an official bond as sheriff does not affect the validity

of his bond for collection of taxes, the execution and approval of which is shown by an order of the court on its minutes.

Appeal from circuit court, Clay county.

"To be officially reported."

Action by the commonwealth, for the use of Clay county, against A. B. Howard and others. From a judgment for defendants other than Howard, plaintiff appeals. Reversed.

Tinsley & Faulkner, for appellant. Thos. H. Hines, for appellees.

GUFFY, J. This action was instituted in the Clay circuit court in the name of the commonwealth of Kentucky, for the use of Clay county, against A. B. Howard, late sheriff of Clay county, and the other named appellees, his sureties on his bond, for the collection of ad valorem taxes authorized to be levied and collected for the use and benefit of Clay county for the year 1890. It is claimed in the pleadings that the said sheriff had collected the same, and that there was due from him \$3,451.90, with interest from the 8th of May, 1893, which he on proper demand failed to pay over. Plaintiff also claims \$371 in damages. Several defenses were relied on, some of which need not be noticed. A jury trial was waived, and the law and facts submitted to the court, and the court rendered judgment in appellant's favor against Howard for the sums claimed, but dismissed the action as to the other appellees; and from that judgment, dismissing the action as to the appellees who were Howard's sureties, this appeal is prosecuted. A separate finding of law and facts was reported, and rendered by the court. Appellant's motion for new trial was overruled, and a reversal is now insisted on by appellant.

The finding of facts, as stated by the court, in substance shows that Howard was elected sheriff for 1890 and 1891, and acted as such during the year 1890, and collected the county dues sued for in this action, but that no valid order of the county court was ever made or signed accepting his bond, or approving the bond sued on herein, and no order at all accepting or approving his official bond as sheriff. The evidence introduced by the plaintiff shows that the order book of the Clay county court has a number of entries or orders on it. The commencement reads as follows: "Orders Clay county court, January special term, 1st day of January, 1890. Present: John S. Herd, P. J. C. C. C." Then follow two orders authorizing different parties to appropriate vacant land, etc. The next order recites the appearance of A. B. Howard, sheriff of Clay county, with sureties, naming them, and the execution of his revenue bond for 1890, and that the same was approved by the court. The next order recites the appearance of A. B. Howard, sheriff of Clay county, with the appellees as his sureties, and the execution and approval of his bond for the collection of the county levy for 1890. The next entry on the order book is: "January.

4th day, 1890." Then follows an order appointing a guardian. The next entry is as follows: "January special term, 4th day of January, 1890. Present: J. S. Herd, P. J. C. C. C." Then follows an order allowing some one to enter and appropriate vacant land. The next entry is: "Court adjourned until court in course. John S. Herd, P. J. C. C. C." All the foregoing orders, except the last one, are on page 286 of Order Book No. 2 of the Clay County Court. The last one is on page 287, and the signature of the judge is at the bottom of said order on page 287. The witness, who was county clerk, testified that there was no adjourning order on page 286, and that no other orders are on said pages, and the signature to the adjourning order is the signature of John S. Herd, then county judge of Clay county. Witness also stated that "the above-named orders are all the orders that appear on my order book in regard to the bond of A. B. Howard as sheriff for the year 1890."

Appellee quotes sections 6, 7, art. 17, c. 28, Gen. St., and insists that, by virtue of that statute, the purported orders of the Clay county court are nullities, and that, inasmuch as no valid bond was executed, the sureties are not liable. Section 6 reads as follows: "Before every adjournment the minutes of the proceedings of the court shall be publicly read by the clerk, and corrected if necessary, and then the same shall be signed by the judge as presiding justice." Section 7, supra, is as follows: "The minutes shall be taken in a book and carefully preserved among the records, and no minute or order shall be valid until the same be read and signed." The court below seems to have been of opinion that the proceedings of each calendar day must of necessity be read and signed; otherwise, the same would be invalid. But such is not the law. The statute quoted does not require each day's proceedings to be read and signed. In *Dye v. Knox*, 1 Bibb, 575, it was said that "county courts have the power to adjourn from day to day, but they are not required to adjourn each day when they cease to transact business. They may, if they see proper, treat the entire time they are in session as one day, and make and sign but one adjourning order." The foregoing was approved in *Garrard County Court v. McKee*, 11 Bush, 238. In the latter case the court said: "In this case the 25th and 30th days of October are treated as one day, or as one continuous session of the court, and the adjourning order and signature of the presiding officer entered of record on the 30th are a sufficient compliance with the statute." The entire proceeding of the Clay county court, from the opening of the court on the 1st of January, 1890, up to the making and signing of the order of adjournment, must be held to be one day of court. The fact that no order of court appears showing that Howard executed an official bond is not material in this case. If there had been no sheriff, the county court

could have appointed a collector of the county levy, and taken bond for the performance of that duty. It is certain that all the bonds required by law to be executed were in fact executed, and the appellees in good faith intended to bind themselves as sureties for the sheriff on the bond sued on, and had no idea but what they were so bound until some time after this suit was brought, and until after defense had been made. It results from the foregoing that the court below erred in dismissing the petition as to the appellees sued as the sureties of A. B. Howard. The judgment appealed from is therefore reversed, and cause remanded, with directions to award plaintiff a new trial, and for further proceedings consistent with this opinion.

COMMONWEALTH v. HOWARD et al.
(Court of Appeals of Kentucky. June 23, 1896.)

COUNTY COURT—ADJOURNMENT.

The county court, while in session, need not, from day to day, make orders of adjournment.

Appeal from circuit court, Clay county.
"Not to be officially reported."

Action by the commonwealth against A. B. Howard and others. From a judgment for plaintiff against defendant Howard alone, it appeals. Reversed.

Tinsley & Faulkner, for the Commonwealth.
Thos. H. Hines, for appellees.

GUFFY, J. This action was instituted by the commonwealth of Kentucky, for the use of Clay county, against A. B. Howard, sheriff, and his sureties on his bond, for the collection of the county levy of Clay county for the year 1891. Defense was made by the defendants, and the law and facts submitted to the judge, and a separate finding of law and facts asked and obtained. The trial resulted in a judgment against Howard, but the court dismissed the petition as to the other appellees. The principal defense relied on was that no valid bond had been executed. The court found as facts that, although entries had been made in the order book of the Clay county court, showing the execution of the bond sued on, yet such orders had never been signed. Appellant's motion for new trial being overruled, it prosecutes this appeal.

The questions of law involved in this case are, in substance, the same involved in the case of appellant against Howard, 36 S. W. 556 (this day decided), and the opinion in that case is adopted as the opinion herein so far as the law involved is concerned. In this case the county court met 5th of January, 1891, and transacted business, and it also appears that the justices met during the same day, after the transaction of other business of the county court. It seems that other business was done at different dates up to January 28th, at which time an order

of adjournment until court in course was made, and signed "James Eversole, J. P. C. C." The cases of *Dye v. Knox*, 1 Bibb, 575, and *Garrard County Court v. McKee*, 11 Bush, 237, 238, are conclusive as to the validity of the proceedings and orders of the Clay county court, and sustain the validity of the bond sued on. The judgment appealed from is therefore reversed, and cause remanded, with directions to award appellant a new trial, and for further proceedings consistent with this opinion.

BRIGGS v. TOWN OF RUSSELLVILLE.
TOWN OF RUSSELLVILLE v. BEALL.
 (Court of Appeals of Kentucky. June 20, 1896.)

MUNICIPAL CORPORATIONS — TAXATION — AGRICULTURAL LANDS.

Agricultural and similar lands brought within the corporate limits of a town by the extension of such limits and receiving the benefits coincident with municipal government, are subject to taxation for municipal purposes, although not strictly urban property, in that the lands are not divided into blocks and lots.

Appeals from circuit court, Logan county. "To be officially reported."

Action by J. B. Briggs, trustee, against the town of Russellville, to enjoin the collection of a town tax assessed upon the property of plaintiff. There was judgment for defendant, and plaintiff appeals. Affirmed.

Action by J. H. Beall against the town of Russellville to enjoin the collection of a tax assessed upon plaintiff's property. From a judgment for plaintiff, defendant appeals. Reversed.

Willbur F. Browder and M. P. Sloss, for Briggs and Beall. J. H. Bowden and S. R. Crewdson, for town of Russellville.

LANDES, J. These two cases originated in the Logan circuit court, involve the same questions, and stand upon substantially the same state of facts, except as to the condition, use, and situation of the parcels of land, which it is claimed on the one hand and denied on the other are subject to municipal taxation. On that account they were heard together, both in the court below and in this court. The litigation is friendly, the object being to ascertain whether or not the town of Russellville has the right to impose taxes for municipal purposes on certain land belonging to the appellant J. B. Briggs, trustee, in one case, and to the appellee, J. H. Beall, in the other case, which was originally brought within the limits of the town by an act of the general assembly entitled "An act to extend and define the corporate limits of the town of Russellville, authorize the election of a police judge, and provide a sinking fund for said town," approved March 12, 1869 (2 Sess. Acts 1869, p. 236). Previous to the passage of said act,

the boundary of the town was in a very irregular and unsatisfactory shape, and while, in 1869, it was a thrifty, though quiet town, having a population of near 2,000 souls, with a reasonable prospect of growth and of steady improvement, having the advantage of one railroad, with the prospect of the early construction of another, the main object of the extension of the limits seems to have been to correct the irregular shape of the lines defining the limits of the town, and at the same time to extend the jurisdiction of the municipal government over a considerable territory claimed to be actually suburban, although not within the lawful limits of the town. This the act accomplished by describing a perfect square of territory, each of the four sides extending 410 poles, with the county courthouse and public square in the center. By a previous act, entitled "An act to amend the charter of the town of Russellville," approved March 5, 1868 (2 Sess. Acts 1867-68, p. 219), the chairman and board of trustees of the town were authorized and empowered to assess and collect annually an ad valorem tax "of not exceeding fifty cents on the one hundred dollars worth of real and personal estate within the corporate limits of said town, and a poll-tax of not exceeding two dollars" on each titheable inhabitant of the town, for municipal purposes. Subsequently another act was passed, entitled "An act to amend and reduce into one the acts relating to the town of Russellville," approved May 1, 1890 (2 Sess. Acts 1879, p. 874), which was substantially a new charter, and under which the municipal affairs of the town were conducted, until the passage of the act for the government of towns of the fifth class, approved July 3, 1893, to which class the town of Russellville now belongs. By the act of 1880 the boundary of the town was continued as fixed by the act of 1869, and the municipal authorities were empowered to assess and collect taxes for municipal purposes annually upon all of the real and other property in the town as of the 10th day of January, upon a list of the "taxable inhabitants and owners of property in said town," and the marshal of the town was invested with "all the powers and authority within the town of Russellville to collect the town tax as sheriffs have in collecting the state tax and county revenue." Notwithstanding the ample power of taxation thus conferred on the municipal authorities to assess and collect taxes on their property within the corporate limits of the town, no effort was made by the said authorities to assess or levy or collect from the appellant Briggs and the appellee Beall taxes upon their land which was brought into the limits of the town by the act of 1869, and afterwards by the act of 1880, until the efforts made for that purpose which furnished the occasion for the present litigation. As we take it, the taxes now involved were as-

essed in 1893, under the authority of acts in force previous to the passage of the said act of July 3, 1893. Action was instituted by each of the parties seeking to enjoin the town and the collector of the town tax from proceeding to collect these taxes, which had been assessed by the municipal authorities on their said respective parcels of land within the limits of the town. The issues having been made up in each case, in the case of the appellant Briggs the court adjudged, in substance, that his land was lawfully assessed, and that he was liable for the tax, and his petition was dismissed; but in the case of the appellee Beall the court adjudged, in brief, that his land was not lawfully assessed, or subject to the tax, and that he was not liable therefor, and the municipal authorities were perpetually enjoined from proceeding to collect the tax that they were then seeking to collect from him on his said land. These appeals are prosecuted to reverse the judgment in each case.

In the case of Briggs, trustee, it appears that he was living with his family upon 12 acres of land that were included within the limits of the town by the acts of 1869 and 1880 which have been referred to, and that the dwelling house and all other improvements were erected thereon in 1872. The track of the Louisville & Nashville Railroad lies in front of this ground, and is the south boundary of it. We do not deem it necessary to go into lengthy detail of the facts material especially in the Briggs case. It is sufficient to say that the facts show that, although there was no public street or alley or sidewalk contiguous to his ground, he and his family had convenient access to the public streets of the town by a driveway out of his lawn across the said railroad track, and thence across a meadow in which Mrs. Briggs had an interest, to the Hopkinsville pike, laid down on the map of the town as "Hopkinsville Street," which leads to the public square and the principal business part of the town, and which is a prolongation of the main center street in the original boundary. His ground is 32 poles from the passenger depot of the said railroad, at which is the nearest sidewalk. The same may be said concerning the land of appellee Beall. Briggs' residence is also something more than 1,000 feet from the electric light plant which supplied the town, and from which his residence was supplied, over a line erected at his own expense, with light, which was the nearest point in the business part of town to his house. He had a number of tenement houses situated south of the said railroad track, and somewhat nearer to his ground than the electric light plant. The facts show further that his ground was not divided up into lots, but that it constituted one lot, upon which, with ample means, he had erected a splendid urban residence, where he and his family were in a position to enjoy, and had the privilege of enjoying,

if they chose to avail themselves of it, all of the advantages and conveniences which were to be afforded by or derived from the presence and energy of the municipal government, not only for comfort, but for protection as well. Appellee Beall was the owner of 180 acres of land, situated on the western and northwestern boundary of the town as established by the act of 1869, but all of his land, up to the commencement of his action, had always been used as farming lands, and only 77¼ acres of it were included in the said town boundary, through which, as shown on the map of the town, the Owensboro & Nashville Railroad track runs from north to south. No part of this land had ever been divided into lots since the act of 1869. His residence was on that part of his farm that lay outside of the limits of the town, and the approach to it was from the Hopkinsville pike, and from a point thereon beyond the west line of the town boundary. That part of his land within the town boundary, as it appears from the map of the town, is about equally divided by the track or line of the Owensboro & Nashville Railroad, but no streets or alleys had been laid out through any part of it, but that part of it east of said railroad is situated on the Greenville pike, which is a prolongation northward of Main street, and is laid down on the map as "Greenville Street," which the municipal authorities in 1882 and since improved at considerable expense for some distance out, and in front of Beall's land, but just how far, or to what point, the record does not show with certainty, but probably to a point nearly half way the length of his line fronting on said street or pike. Along this street, and on both sides of it, and adjoining Beall's land on the west side, there are several houses, which were occupied mostly by colored persons, erected on lots which were originally a part of the tract in question, but they were laid off and sold prior to 1869. The occupants of said houses used the said street as the only way of ingress and egress from the premises, and appellee Beall used it also when going to and from that part of his land which he entered through a gate opening on the said street or pike. That part of this parcel of land lying between the line of the Owensboro & Nashville Railroad and Greenville street is wet, but good meadow land, and water rises on and flows from it under a culvert constructed across the said street at the expense of the town. There is an area of 34 acres of land between appellee Beall's land and the business part of the town, upon which there were not any improved lots, except that of appellant Briggs. Appellee Beall had never voted for town officers, or held any office in said town, but was engaged in mercantile and other business in the town, and owned other property in the town. The lands of both Briggs and Beall, the taxes on which are involved in this litigation, are in the vicinity of the pas-

senger and freight depots of the Louisville & Nashville Railroad, and the shops of the Owensboro & Nashville Railroad, as shown by the map of the town, but they are situated on the side of the line or track of the former road opposite to them, which has to be crossed in passing from their lands to the business part of the town, the courthouse, and the public square.

The foregoing statement contains the principal facts that are material to the questions raised in the two cases. It is contended by counsel for the appellant Briggs and the appellee Beall that neither parcel of ground was subject to municipal taxation, briefly, because it is not urban property, and had never been used as such, or divided into lots; that the owners had never consented to the extension of the boundary of the town so as to include their land within the town limits; that they had never received any benefits from the municipal government, or consented to be taxed by it; and that to compel them to pay taxes on their said lands to the town for municipal purposes would be the taking of private property without any compensation. On the other hand, it is contended by counsel for the town that the situation of the two properties is such, with reference to the streets of the town, and with reference to other houses and lots within the limits that are subject to municipal burdens, as to make it proper and right that they should be subject to their fair proportion of these burdens, which are necessary to the maintenance of municipal government for the benefit and convenience of the inhabitants of the town, and for the preservation of public order. Numerous cases of a character similar to these cases, and in which the same questions were raised, have been decided by this court, and in no such case has it been held that the general assembly did not have the constitutional power to fix the territorial limits of municipal corporations, either by acts of original incorporation, or by subsequent acts extending their boundary lines. We do not understand counsel here to deny that the general assembly had the constitutional authority to pass the acts of 1869 and 1880 by which the limits of the town of Russellville were extended. Nor do we understand counsel to hold that the municipal power or authority within the limits of the town as defined by those acts is restricted, except in respect of the power to tax the added territory. There were other purposes for which the general assembly had the constitutional power to extend the jurisdiction of municipal government over territory contiguous to a town or city by extending its limits, besides that of taxation. This might be done in any case in anticipation of the future growth of the town or city, for the purposes of police protection, and the like. Such an exercise of legislative power was not violative of the constitutional guaranty of private property to the owners, because the land was still their own, and could not be taken or appropriated

for any public use, such as for streets or alleys, without their consent, or without just compensation therefor. *Cheaney v. Hooser*, 9 B. Mon. 330; *Swift & Co. v. City of Newport*, 7 Bush, 37. It will be found on investigation, we think, that in most of the states the courts will not interfere in such cases to relieve property owners from taxation by the municipal authorities, because, municipal government being an important part of the governmental machinery of the state, it is the peculiar province of the legislative department—the law-making power—to define or provide a method of defining the limits of municipal corporations, and to clothe them with the powers of local government, and that the propriety of legislative action in this regard may not be questioned. In this state, however, as well as in several other states, it has long been the established doctrine that the courts will relieve against the burden of municipal taxation, following the extension of the boundary lines of a town or city, in cases where “the legitimate object of improving the town” has been “palpably perverted to the unauthorized purpose only of lessening the burden of taxation on the inhabitants, who will not be otherwise benefited by the extension.” *Swift & Co. v. City of Newport*, *supra*. In the case of *Trustees of Elkton v. Gill*, 94 Ky. 138, 21 S. W. 579, following *Cheaney v. Hooser*, *supra*, and *Maltus v. Shields*, 2 Metc. (Ky.) 553, the doctrine is stated in the following language: “The protection afforded to, and advantages received by, the citizen from a municipal government are, in the meaning of the constitution, just compensation for taxation imposed in order to maintain it. And local taxation authorized by law cannot be deemed taking private property without just compensation, unless it is palpable that persons or their property are subjected to such burthen for the benefit of others for purposes in which they have no interest, and to which they are, therefore, not bound to contribute.” In that case a parcel of six acres of land, embracing the residence and lawn of the owner, which was within the limits of the town, the land being a part of a tract containing 46 acres, which was used for agricultural purposes, the part including the residence being adjacent to two streets of the town, was held to be subject to taxation by the town. In *Maltus v. Shields* it was held that a lot of about nine acres in the town of West Covington, upon which the owner resided, and part of which was in cultivation, and part containing evergreens and shrubs and a large number of fruit trees, was constitutionally subject to taxation for municipal purposes. In the case of *Sharp's Ex'r v. Dunavan*, 17 B. Mon. 223, it was held that, where a town is extended by improvement, so as to give those living adjacent to the town boundary all the advantages which the citizens enjoy from the local government of the town, the legislature had the constitutional power to extend the limits of the town and subject the owners of the property within the

extension to taxation for town purposes, and that the legislative discretion in the location of the lines of the extension could not be questioned or controlled by the courts. In that case 34 acres of land, including the residence of the owner, being a part of a tract of 140 acres which were used for agricultural purposes only, were brought within the limits of the town by the legislative act. The owner's residence was situated 25 poles from the original boundary of the town, and 155 poles from the center of the business part of the town, and near enough to enjoy the advantages of schools, churches, and the business of the town. This case and that of *Oheaney v. Hooser* arose under the act of 1846, extending the boundaries of the town of Hopkinsville. Another case—that of *Stites v. Dunnnavan* (MSS. Opin.)¹—originated under the same act, in which it was decided that the land of the owner that was brought within the limits of the town by the said act, containing 22 acres, and used as a residence, and for pasturing and other agricultural purposes, was liable to municipal taxation. The foregoing references are sufficient to show the doctrine that has prevailed in this state upon this question, and the manner in which it has been applied. Applying it to these two cases, we find that the facts exhibited by the records before us, fairly viewed, do not make out a case that would authorize the interference of the court in behalf of either appellant *Briggs* or appellee *Beall*. Considering the character and location of their property, its proximity to the two railroads, their depots and shops, running through and located in the town, and to the business portion of the town, the actual and prospective growth of the town, and the propriety, under existing conditions, of extending the police jurisdiction of the town over the locality, and the benefits and advantages necessarily afforded to and enjoyed by them, by reason of the very existence and presence of the municipal government, in common with other citizens and property owners on whom the burden of maintaining it had been cast, it was, in our opinion, reasonable and just to require them and their property to bear a due proportion of the burden. By forbearing for so many years to assess their property, it is manifest that the municipal authorities were not seeking to foster private interests, or to lighten the burden of other taxpayers, by extending the boundaries of the town; and when at last they did attempt to subject this property to taxation it was under circumstances and conditions that showed that these parties were to be equal sharers with every other property owner in the town of the benefits of the municipal government.

The taxes involved in these cases having been levied and assessed under laws existing before the passage of the act of July 3, 1893, providing for the government of towns of the fifth class, it is not necessary to pass upon

¹ Also cited in *Maltus v. Shields*, 2 Metc. (Ky.) 557.

any question that might be raised under any of the provisions of that act bearing upon the question of municipal taxation. Nor is it necessary for us to determine the effect of the provisions of our present constitution requiring that taxes shall be uniform upon all property subject to taxation "within the territorial limits of the authority levying the tax," and prohibiting the exemption from taxation of any property except such as is exempted by the constitution. *Copeland v. City of St. Joseph* (Mo. Sup.) 29 S. W. 281. It is only necessary to say that under the provisions of the constitution all property not exempted by that instrument is required to be "assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale." This plain requirement will prevent exorbitant and arbitrary valuations, and placing more than an equal and just proportion of the public burdens on any taxpayer. Finding no error in the judgment in the case of *Briggs*, trustee, the judgment is affirmed. But, for the reasons given, the judgment in the case of appellee *Beall* is reversed. It is conceded by counsel for the town that only so much of his property as lies between the Owensboro & Nashville Railroad and Greenville street or pike, ought to be subjected to taxation in this proceeding, and the cause is accordingly remanded, with directions to so adjudge.

HENDERSON BRIDGE CO. et al. v. CITY OF HENDERSON et al.

(Court of Appeals of Kentucky. June 24, 1896.)

MUNICIPAL CORPORATIONS—TAXATION—PROPERTY SUBJECT—BRIDGES.

A city whose corporate limits extended to the low-water mark on the Indiana side of the Ohio river authorized a bridge company to construct a bridge across the river, within its limits, with approaches upon its streets. The ordinance provided that the right to levy taxes on the portion of the bridge within the city limits should be reserved. Held, that the city could levy taxes on the entire portion of the bridge within its limits, for ordinary city expenses, including current expense of public schools, and for the payment of interest on water bonds, railroad aid bonds, and school bonds previously issued.

Appeal from circuit court, Henderson county.

"To be officially reported."

Action by the city of Henderson and others against the Henderson Bridge Company and others. There was a judgment for plaintiffs, and defendants appeal. Affirmed.

Yeaman & Lockett, H. W. Bruce, and Wm. Lindsay, for appellants. Clay & Clay and Montgomery Merritt, for appellees.

LEWIS, J. The Henderson Bridge Company was in 1872, by statute of this state, incorporated with power to construct and own a bridge across Ohio river. It was, however, not organized for business until 1880, when the Louisville & Nashville Railroad Company, an existing and distinct cor-

poration, became principal stockholder. In February, 1882, the city of Henderson gave the bridge company the right to build the bridge over one of its streets, and the use of another. But in the ordinance making the grant, which the company accepted and agreed to abide by, the right of the city to levy and collect taxes on that portion of the structure situated within the municipal boundary, then extending to low-water mark on the northern shore, was reserved. And the bridge, thus located, was about that date begun, and in 1885 completed. In December, 1887, the city of Henderson brought an action to recover of the bridge company the amount of taxes alleged to be due for each of the years 1886 and 1887, according to the assessed value of that portion of the bridge property within its boundary; also, prescribed penalties for nonpayment. The Louisville & Nashville Railroad Company was, upon its petition, subsequently made a party defendant; having, as stated, acquired possession of the bridge, and agreed to pay all taxes properly assessed against it. The lower court adjudged that plaintiff recover amount sued for; that it had a lien therefor upon so much of the bridge property as was assessed; and the bridge company was ruled to pay it. That judgment was in 1890, on appeal to this court, affirmed. See 90 Ky. 499, 14 S. W. 493. The present action was brought December 4, 1890, to recover the amount of like taxes and penalties for the years 1888 and 1890, and a like judgment is now before us for revision.

It appears that the taxes sued for in this, as in the former action, were levied to pay, not only ordinary municipal expenses, including current expenses of public schools, but interest on waterworks bonds, railroad bonds, and school bonds previously issued. And it is conceded by appellants that that portion of the bridge property south of low-water mark on the Kentucky shore, and within the city boundary, is subject to taxation for all the purposes mentioned. But they controvert the right of the city of Henderson to subject to taxation for municipal purposes that portion between low-water mark on the southern and low-water mark on the northern, or Indiana, shore; and, arguing that the effect of funding the original waterworks, railroad, and school bonds was to render all the new bonds municipal debts proper, they deny that said portion of the bridge is now subject to taxation for any of those purposes. But in the opinion on the former appeal the right of the city to levy taxes on the entire bridge within its boundary, to pay interest on railroad and school bonds, was recognized as still existing, and distinct from the right to levy taxes thereon for purely municipal purposes. It was held, as had been previously done by this court, that a city or town might, by statute, be constituted a taxing district, with power, as such, to impose a railroad or school

tax upon property therein, without judicial inquiry as to benefits resulting to individuals, and that, as the city of Henderson had been constituted such taxing district for both railroad and school purposes, the entire bridge property within its boundary was subject to taxation to pay interest on the railroad and school bonds. The right of the city to subject that part of the bridge within its boundary, north of low-water mark on the southern shore, to taxation for municipal purposes, was likewise recognized, but decided to exist only in virtue of the contract whereby it was reserved as consideration for the grant of way and use of the streets. It is therefore contended that the adjudication and determination of the issues in that action is conclusive of the right claimed by plaintiff in this. But defendants contend, and cite authority in support of the proposition, that a suit to recover taxes for one year is no bar to a suit for taxes of another, and then argue, very properly, that, if the state could not be bound by an erroneous decision, neither ought a citizen be estopped defending a claim of an unjust tax. Whether that plea be available in other respects, the particular defence that assessments of the bridge property for the two last years named were unjust and excessive cannot be treated as *res judicata*, because the right to collect taxes is based upon yearly assessments, each of which, in its turn, may be called in question. Appellants, however, have no right to complain of the assessments referred to; for, if either had been too high, which does not satisfactorily appear, there was opportunity to apply for correction by the proper tribunal, of which they neglected to avail themselves. Even if the question had not been directly so determined on the former appeal, we would now decide that the city of Henderson, as a taxing district, has power to subject all the bridge property within its boundary to the railroad and school taxes, for such is the settled doctrine of this court. But as counsel for appellants, with some plausibility, insist that, if the city of Henderson did not have power to tax the same property for purely municipal purposes, it could not acquire it by said contract, and state some reasons, not heretofore presented, why the power does not exist at all, we deem it proper—without, however, deciding as to the plea of *res judicata*—to reconsider and discuss the main question.

The rule recognized and applied by this court is that although power may be given by the legislature to enlarge the boundary of a city or town, and tax, for municipal purposes, persons and property thus included, the exercise of it is subject to judicial revision, and may be restrained. That rule, which is not adopted in most of the states, and the wisdom and policy of which have been criticised by eminent text writers as an encroachment upon the legislative department, was first applied in the hard case of agricultural lands being brought by

statute within a city or town boundary, and made subject to municipal taxation against the will of the owners. And it never was applied to other subjects of taxation until the case of *Louisville Bridge Co. v. City of Louisville*, 81 Ky. 189, was before this court in 1833. But even in the leading case of *Cheaney v. Hooser*, 9 B. Mon. 330, it was held "that there must necessarily be vested in the legislative department a wide range of discretion, not only as to the objects for which a tax, general or local, may be enforced, as to which its judgment would seem to be conclusive, but also as to the particular subjects or species of property which shall be liable to taxation, and as to the extent of territory within which a local tax shall operate." And it was further held that courts are authorized to interfere in such cases only when the burden, though called so, is palpably not a tax, but is, under the form of a tax, the taking of private property for use of others, or for the public, without compensation. In all such cases it was held that exact equality in the local burdens imposed should not, because unattainable, be made a test of the right to extend the corporate boundary of a city or town so as to bring in persons and property not hitherto included, but that if such persons and their property have nearly all advantages which actual citizens derive from its business, improvements, institutions, and good government, no such flagrant case is presented as authorizes the court to declare the statute unconstitutional. In none of such cases was it held allowable or proper for the court to interpose in behalf of a person who had voluntarily sought or consented to an extension of town or city boundary so as to include him and his land. If the right or propriety of this court interfering to relieve the Henderson Bridge Company from municipal taxation of that part of its bridge now in question be tested by the rule as heretofore applied in cases of agricultural lands included by extension of town or city boundary, even when done against the will of the owners, we would not be authorized to do so; for it is too plain for discussion that not only does that bridge derive benefit and protection from the municipal government, but it has obtained and now enjoys peculiar advantages and privileges, by reason of its relative position, not possessed by others who share with it the local burdens. But this is not the case of a person and his property being included by extension, against his will, of the corporate boundary of a city or town. On the contrary, the bridge company voluntarily located and constructed its bridge within the corporate boundary of the city of Henderson, that then, like the territorial limits of the state, extended to low-water mark on the northern shore. And that the benefits and advantages of such location and exceptional privileges granted by the city of Henderson, as estimated by the bridge company itself, do fully compensate it for the local burden imposed, is shown by the contract with the city,

though it is now repudiated. Applying the just and equitable rule of making burdens and benefits of government reciprocal, we think the whole bridge structure within corporate limits of the city of Henderson is liable for municipal taxes; for neither the benefits to the bridge company are lessened, nor the corresponding duty to bear its full share of the burden is impaired or affected, by the fact that a portion of the bridge is over water. And as such conclusion is inconsistent with the ruling in *Louisville Bridge Co. v. City of Louisville*, that case must be now overruled.

But it is contended by counsel for appellants that because, by what is called the contract with Virginia, navigation of the river Ohio is made free and common to the citizens of the United States, the legislature of this state could not authorize the bridge taxed by the city of Henderson. That question seems to have been made in the case of *Louisville Bridge Co. v. City of Louisville*, and properly decided contrary to the views of counsel.

It is also contended, substantially, that inasmuch as the Henderson Bridge Company accepted its charter, expended money in constructing the bridge, and upon the faith that, in the sense of previous decisions of this court, the portion of the structure north of low-water mark on the southern shore would not be subject to municipal taxation, it has acquired a contract right to exemption therefrom. A simple and sufficient answer to that proposition is that what is called a contract is wholly without consent or consideration,—essential and vital elements of every contract. Wherefore the judgment is affirmed.

LOUISVILLE INS. CO. v. MONARCH et al.
(Court of Appeals of Kentucky. June 24, 1896.)

MARINE INSURANCE—ACTION ON POLICY—EVIDENCE—SEAWORTHINESS—SUFFICIENCY OF CREW—NEGLECT—ABANDONMENT—AMOUNT OF LOSS—PLEADING—AMENDED ANSWER—WITNESS—COMPETENCY.

1. In an action on a policy of marine insurance, testimony of one of the plaintiffs as to statements by the company's agent regarding the meaning of a clause in the policy relating to the expense of recovering the property was immaterial, and its admission was error without prejudice.

2. Testimony tending to show what the general agent of the company had said regarding information received from another agent is admissible.

3. Duplicates of the evidence taken in an investigation made by the hull inspectors were inadmissible, plaintiffs not being parties thereto, nor present at such investigation.

4. It was competent for the captain of the steamer to testify that the boat carried a sufficient number of officers and men to make the trip, even though not the number required by the license.

5. It was competent for the captain of steamboat to testify that the boat might strike an obstruction, and the contact not be perceptible to those on board, his experience as a steersman enabling him to have knowledge of such matters.

6. The fact that the steamer did not carry a night crew on a run that was to be made wholly by daylight does not tend to show that the steamer was unseaworthy.

7. In an action on a policy of marine insurance on a cargo, where the answer charged that the boat was sunk because of the willful and fraudulent misconduct of the owners, officers, etc., of the boat, it was proper to allow the captain to testify as to what the boat was worth, and that she was not insured.

8. In an action on a policy of marine insurance, where the answer alleged that the officers and crew were incompetent, unskillful, and unfit for the service in which they were engaged, evidence as to their competency and fitness and as to their general reputation for competency and skill was admissible.

9. In an action upon a policy of marine insurance for loss of a cargo caused by the sinking of the boat, it appeared that the company made preparation to recover the property, but was deterred by a rise in the river, lasting two months, at the end of which time the company decided not to attempt recovery, and notified the insured that it denied all liability under the policy. The cargo was of such character that it would be destroyed by water. *Held*, that the insured was justified in abandoning the property then submerged.

10. A marine insurance company having abandoned an attempt to recover the property, in the belief that it was not liable under the policy, cannot hold the insured liable for any part of the expense incurred in the preparation for the recovery.

11. In an action on a policy of marine insurance, where a part of the property was recovered, the insurer is entitled to a reduction of the amount of the insurance due upon total loss in proportion to the value of the property recovered, less the cost of recovery.

12. Where the allegation of an amended answer offered at the close of the evidence discloses no facts but what could have been known before trial, and does not conform to the proof, it is within the discretion of the court to refuse to allow the amended answer to be filed.

13. Under Civ. Code, § 606, subd. 4, providing that no person shall testify for himself in chief in an ordinary action after introducing other testimony for himself in chief, after a party has testified for himself in chief, the fact that he has introduced other testimony did not bar his right to be recalled to give additional testimony.

Appeal from circuit court, Davless county.
"To be officially reported."

Action by R. Monarch and one Cate, co-partners as Monarch & Cate, against the Louisville Insurance Company, to recover upon a policy of marine insurance. There was judgment for plaintiffs, and defendant appeals. Modified.

Barnett, Miller & Barnett, C. S. Walker, and Walter Evans, for appellant. Fairleigh & Straus, Eli H. Brown, and Willfred Carrico, for appellees.

PAYNTER, J. Monarch & Cate owned certain woolen-mill machinery, wool, and other goods, and desired to transport it from Rumsey, Ky., on Green river, to Owensboro, on the Ohio river. Their purpose was to ship it by water, and to do so it would have to be placed upon a boat, carried down Green river to its mouth, thence up the Ohio river to Owensboro. On the 5th day of March, 1892, the Louisville Insurance Com-

pany issued to them on the property a marine insurance policy to the amount of \$5,000. The adventures and perils which the company agreed to bear and take upon itself were the "unavoidable dangers of the * * * rivers." The property was valued at \$15,000, and here it may be added that that amount is the conceded value of it. The steamboat George Strecker, under a contract which Monarch & Cate made with her owner, Capt. Crammond, was to carry the property from Rumsey to Owensboro. The policy covered the property during the voyage. The property was received on board of the boat. On the morning of the 8th day of March, 1892, the boat started on the voyage, and at a point between 10 and 11 miles below Rumsey she sank in the middle of the river, where the water was 40 feet deep, entirely submerging her, except the chimneys and the top of the pilot house. After her peril was discovered by the crew, she sank so rapidly that it was impossible to get her to the shore. There was a rise in the river soon after she sank, and she remained submerged for several months. This action was brought by Monarch & Cate to recover of the company the amount of the policy because of the alleged total loss of the property. The answer denies that there was a total loss of the property; that the sinking of the boat was a peril against which it insured; that there was an abandonment of the property or any part of it. The company alleged the loss was occasioned by the willful, fraudulent, and gross misconduct, negligence, and carelessness of the owners, officers, agents, servants, and seamen in charge of the boat. There are other matters pleaded in the answer, which at this point are not necessary to mention. The trial resulted in a judgment for the plaintiff for \$5,000.

Many errors, the appellant claims, were committed on the trial of the case, which entitled it to a reversal and a new trial. We will consider some of the questions thus raised, somewhat in the order in which counsel discuss them in their briefs. Immediately or soon after the boat sank, the company was notified of it. It sent its agent, Capt. Harpham, to the wreck, to see its condition, with the view of recovering the property under the "sue and labor" clause of the policy, which fixed the proportion of expense that should be borne respectively by the insured and company. It is insisted that the court erred in permitting Cate to tell upon his redirect examination what Harpham had said to him about the wreck after he had left it. Harpham was sent by the company to act for it in an effort to recover the property. Cate's redirect examination related to what Harpham said as to the meaning of the policy as to the expense of recovering the property, and the interest each party would have in such as was recovered. While what Harpham said as to the meaning of the policy was immaterial, as both parties conceded

their rights were to be determined by its provisions, yet the court told the jury, substantially, that if plaintiffs were entitled to recover at all, they were entitled to recover the full amount, \$5,000; and also that the company was not entitled to be allowed the expense it incurred before it determined to deny its liability for the loss and abandoned its purpose to recover the property. In view of the conclusions of the court, the evidence of Cate in his redirect examination could not have, and did not, prejudice the rights of the company.

It is complained that the court erred in permitting Monarch to tell, when recalled, what Capt. Harpham had said to Shallcross. Shallcross was the agent of the company. He was in its office, looking after its affairs; talked with Monarch about the settlement of the claim; directed the movements of Harpham in his preparations to recover the property; ordered Harpham to discontinue his preparations to recover the property, looking after the payment of the expense Harpham had incurred; he appeared in court, aiding in this case; made an affidavit for a continuance, and verified pleadings therein. There is no proof in the record showing he was an agent with limited powers. Under these circumstances it fully appeared that he was authorized to speak for the company in the adjustment of the claim in controversy. If he chose to tell Monarch, in a conversation about the settlement of the claim, that he had certain information from another agent of the company, it was not error to permit Monarch to prove the entire conversation which they had. Besides, if Shallcross was the agent of the company without limited powers, as he appears to have been, then this testimony was competent, as tending to prove that Harpham was authorized by the company to adjust the loss with Cate. There was an investigation made in the office of hull inspectors at Evansville, Ind., as to the facts attending the disaster. The testimony of certain witnesses was taken, and reduced to writing. The defendant offered as evidence the so-called duplicates of this evidence. Monarch and Cate were no parties to that proceeding, and were not even present when it took place. A mere statement of the facts shows that the court did not err in refusing to admit them as evidence. Capt. Crammond testified that the boat had a sufficient number of officers and men to make the trip. It was proper to admit this, because it appears that the boat was to make the trip in daylight, and that, therefore, an additional crew was not needed. This testimony would tend to rebut any presumption that might be indulged that the boat was unseaworthy, because the crew was not equal to the number required by the certificate of inspection and license. It could not be said that the company could defeat a recovery when there was a sufficient crew on the boat to properly handle her, although not the number designated in the license; especially when there is no evi-

dence even tending to prove that the sinking of the boat resulted from an insufficient crew. It was likewise proper to allow Crammond to testify that the boat might strike an obstruction, and the contact not be perceivable to those on board. His experience as steamboat man enabled him to have a knowledge of such matters. This testimony was relevant because the effort was being made by the company to show or to create a presumption that she was unseaworthy because of the defective condition of the hull. The answer charges that the boat was sunk because of the willful and fraudulent misconduct of the owners and officers, etc., of the boat. Crammond was allowed to testify that the boat was not insured, and that she was worth \$5,000. This evidence was properly admitted to show the owners and officers could have no desire or motive to destroy the boat. If this evidence was not relevant, it was not misleading to the jury, and we cannot, from any point of view see how it was prejudicial to the rights of the company. Testimony may be entirely irrelevant, and yet not prejudicial to the rights of the party objecting thereto.

It is insisted that the court erred in permitting the plaintiff James Cate to be recalled, and to testify for himself in chief, after having introduced the other testimony for himself in chief. Subd. 4, § 606, Civ. Code, provides that "no person shall testify for himself in chief in an ordinary action, after introducing other testimony for himself in chief." This court, in several cases, has held that, when a party has introduced other testimony for himself in chief, he should not be permitted to testify for himself in chief. We adhere to that rule. The question presented in those cases are not involved here. Cate had testified for himself in chief, before he introduced other testimony for himself in chief. After such testimony had been introduced, he was recalled as a witness to prove facts which, if competent, could have been testified to by him in chief. After a party has testified for himself in chief, the fact that he may have introduced other testimony in chief does not bar his right to be recalled to testify to such facts as are pertinent to the issues. His right to do so is in the sound discretion of the court. It is within the control of the court, as it is as to the testimony of any other witness who may have testified, except, if it was manifest the party had purposely withheld certain testimony while he was testifying for himself in chief, with a view of being recalled, after he had introduced other testimony in chief, to give additional testimony in chief, the court would not abuse its discretion in refusing to allow him to so testify. In this case no facts appear which indicate that there was any abuse of the court's discretion.

It was charged in the answer that the captain and crew of the steamboat were incompetent, unskillful, and unfit for the service in which they were engaged. It was sought to show the boat was unseaworthy

by reason thereof. The evidence as to their competency and fitness for the service in which they were engaged when the boat sank, and their general reputations as to such competency and fitness, was admissible. It was directly on the issue raised by the answer. It showed they were skillful in the service in which they were engaged, and, besides, that their general reputations were such that the owners of the boat were justified in engaging them in their respective capacities for the voyage in question.

The allegations contained in the amended answer which were offered at the close of the testimony as stated therein to conform to the proof may be summarized as follows: That more than one-half of the machinery and goods insured were received, and afterwards sold to the Owensboro Woolen Mills Company for a certain amount of the capital stock of that company; that the goods and machinery were not properly or carefully stored or loaded upon it; that the crew on the boat was not the number required by the United States laws, and that they were necessary for the proper and safe running and management of the boat; that the defendant did not learn these facts until during the trial. In the first place, there is no reason why the defendant may not have known all the facts alleged, if true, by the exercise of ordinary diligence. In the second place, they do not conform to the proof. The testimony of the parties connected with the loading of the boat was that it was properly and carefully loaded, that the carrying capacity of the boat was over 150 tons, and the highest estimate as to the weight of the cargo was something over 80 tons. This testimony is not contradicted; besides, it is not alleged in the amendments offered that the disaster resulted from the fact that the boat was not carefully and properly laden. In view of the fact that the proof in the record was insufficient to show that the boat was not carefully or properly laden, etc., the court did not abuse its discretion in refusing to allow the amended answer to be filed on account of the allegations as to lading of the boat. The proof showed, and was uncontradicted, that the crew in charge of the boat was sufficient for the voyage, as it was to be made in daylight; besides, there was not the slightest evidence tending to show that the boat sank because of the insufficiency of the crew. The court did not err in overruling the motion to file the amended answer. It was held in the case of *Leaman v. Insurance Co.*, 21 Fed. 781, that the omission of a starboard rudder at the port of departure or anywhere along the line cannot be said to be a lack of seaworthiness, when its absence did not materially affect the steering power of the vessel, or prevent the pilot from maintaining good control over its motion. Why should a recovery be defeated because the vessel did not have a night crew in a daylight run?

Their absence did not affect in any degree the control of the movements of the boat. There was no express warrant that there should be a given number of officers and seamen in charge of the boat. The implied warranty of the insured was that a sufficient number of officers and men should be in charge of the boat during the voyage, and that they should be reasonably skillful for the service. There is an obligation resting in the law on the insured to see that the vessel is seaworthy, whether provided in the contract or not. The insured warrants the vessel to be seaworthy when she leaves the port of departure. The mere negligence of the owners of the vessel or the officers in charge of it is no defense to the policy. *Insurance Co. v. Adams*, 123 U. S. 67, 8 Sup. Ct. 68. It was said in *Waters v. Insurance Co.*, 11 Pet 213: "That in marine policies, whether containing the risk of barratry or not, a loss, when the proximate cause was a peril insured against, is within the protection of the policy, notwithstanding it might have been occasioned remotely by the negligence of the master and mariners." To the same effect are *Insurance Co. v. Sherwood*, 14 How. 352; *Phoenix Ins. Co. v. Erie Transp. Co.*, 117 U. S. 312, 6 Sup. Ct. 750, 1176. The court held (123 U. S. 73, 8 Sup. Ct. 68) that the only misconduct of the master and officers which would defeat a recovery on the policy was fraud or design. When the policy insures against the perils of the river, the mere neglect of those in charge of the vessel does not free the insurer of liability, although the policy insures against the unavoidable danger of the river, as such a provision relates to the peril embraced by the policy, and not to the skill or care to be exercised by those in charge of the boat. *Pence Case*, 93 Ky. 96, 19 S. W. 10. In *Levi v. Association*, 2 Woods, 66, Fed. Cas. No. 8,290, it appeared that the custom of the river was that the ascending boats should run under the points near the shore, and the descending boats followed the main channel. The failure of the pilot to observe this rule resulted in the collision. The court held it was negligence, carelessness, and unskillfulness, but it was not willful misconduct. There was an entire failure of proof in this case to show such misconduct on the part of the officers in charge of the boat as indicated that she was sunk by their fraudulent or willful misconduct. Under the instructions of the court, before the jury was authorized to find for the plaintiff, they had to believe from the evidence that at the time the *George Strecker* departed on the voyage she was in a reasonably good condition for the voyage, and reasonably sufficient to withstand the ordinary perils of the voyage; that she was tight and staunch in hull; that she was provided with a competent master and sufficient number of competent officers and crew, and that they were competent and fit for the voyage. In view

of the pleadings and the evidence, we are of the opinion that the court's instructions were sufficient in submitting the question of seaworthiness of the boat to the jury. The plaintiffs sought to recover as for a total loss. While the company denies liability, it insists that there was only a partial loss, and, if liable, then only for the partial loss. The vessel lay submerged for many months. After the disaster, the insurance company determined to try to recover the cargo. It procured a diver, a boat, and necessary appliances for the purpose, and after getting them at the scene of the wreck the river had risen, and continued in this condition for two months. About the time it was at such stage of water that the work of recovering the property could be undertaken, it abandoned the project, and notified the insured that it was not liable in the policy. The plaintiffs soon thereafter notified the company that they abandoned the property, and for it to take charge. The cargo was of a character to be destroyed by the action of the water upon it. Its situation was such that there was no reasonable probability that it could be recovered after the company withdrew the men and means provided for the purpose. The situation, in our opinion, was such that justified the insured in abandoning the property then submerged. In determining the question of abandonment of property it is proper to take under consideration where the vessel lay, and all other attendant circumstances. 123 U. S. 75, 8 Sup. Ct. 68. The emergency of the peril and apparent extent of expenditures required to deliver the property from it will justify an abandonment. *Bradlie v. Insurance Co.*, 12 Pet. 398. The right of abandonment does not depend upon the certainty, but on the high probability, of total loss. The insured is not to act upon certainties, but upon probabilities. If the facts present a case of extreme hazard, and of probable expense exceeding half the value of the property, the insured may abandon, though it should happen that it was afterwards recovered at less expense. 3 Kent, Comm. 321. We are of the opinion that the insured would have been justified in an abandonment of all the machinery, household goods, and wool not then recovered at the time the company abandoned its purpose to recover the property, and at the time it notified the company of its purpose of abandonment. The difficulty which we see in holding it was a total or a constructive total loss is the fact that at the time of the disaster 1,089½ pounds of wool, worth \$200, was recovered, which the insured received, and appropriated to their own use; and also afterwards received some of the machinery the value of which, owing to its damaged condition, was slightly the advance of old iron, but it was appropriated by the insured. In view of these facts, we are of the opinion that there was only a partial loss. As held in the *Pence Case*, although

the action was for a total loss, there could be a recovery for a partial one. The cargo is admitted to have been of the value of \$15,000. The policy was for \$5,000. Had there been a total loss, then the company would have been liable for one-third of the value of the cargo, which is \$5,000, the exact amount of the policy. For a partial loss the company is liable in same proportion, for the policy provides: "And in all other cases the said insurance company shall be chargeable with its proportion of the loss according as the sum herein insured bears to the whole sum at risk." So the court erred in telling the jury, if the company was found to be liable under the policy, they should find the full amount of it. The petition alleged a total loss. The answer denied there was a total loss. The reply admitted there was recovered property of the value of \$800 at an expense of something over \$600. The rejoinder says that the property recovered was of a greater value than stated. There was an issue formed upon this question. But one witness testified as to the value of the property, and that was Cate, one of the insured. He testified that the value of the property in the damaged condition in which it was received was \$800, and this includes the 1,089½ pounds of wool. He testified that the necessary expense in recovering it was \$631.09. An account of this expenditure was presented. The charges for fee bills paid Miles, Walker & Carrico, amounting to \$33.50, are not allowable for expenses of recovering the property. This would leave \$597.59 as the amount of expenses incurred by the insured in recovering property, and under the policy the acts of insurer or insured in recovering the property are to be "considered as done for the benefit of all concerned." The effect of recovering any part of the property benefits the insurer, inasmuch, in this case, as he is entitled to credit for one-third of its value, less the expense of recovering it. The value of the property recovered being \$800, less \$597.59, the expense of recovering it, which makes the amount of property to be credited on amount at risk \$202.41, which makes the total loss \$14,797.59, for one-third of which, \$4,932.53, the insurer is liable, instead of \$5,000, as determined by the court below, being \$67.47 less than the verdict and judgment. The question of the liability of the company on the policy was fully tried, and the verdict of the jury and the judgment of the court were to the effect that it was liable. There was a total loss, except the value of the property recovered. There was an issue on this question, upon which the company could have introduced evidence. It failed to do so. It had its day in court on the issue. The plaintiff alone introduced evidence as to the property recovered and its value. There is no conflict in the evidence on the issue. The jury could not, under the proof, have found the facts as to the property recovered, or its value,

other than as we have fixed. As the company has had the jury to pass upon the question of its liability on the policy, and had its opportunity to contradict the evidence as to the property recovered and its value, we do not think the case should be reversed, with directions to grant a new trial. The company incurred something over \$1,000 in preparing to recover the property,—getting diver, boat, and necessary appliances, etc. This was done soon after the disaster. The river did not get in a condition for the work for about two months thereafter. Then, without consent of the insured, the purpose to recover the cargo was abandoned, and the boat and appliances, etc., which were to be used for the purpose were taken away. The company did not abandon the effort to recover the property because it could not be recovered, or because the expense of recovering it would exceed its value, but because it reached the conclusion that it was not liable under the policy. The insured received no benefit whatever from the expense incurred by the company, nor did the company encounter any obstacle which rendered it impossible to prosecute its effort to recover the property. The effort is to make the insured pay something over \$600, because the company reached the conclusion that it was not liable on the policy. The policy does not authorize the company to incur expense for which the insured is liable in a preparation to recover the property, unless it was developed that after such preparation it could not be recovered, or that the expense of recovering it would be so great that it would not be profitable to engage in the effort, or that some unforeseen casualty occurred which prevented it. When the company abandoned the purpose to recover the property, it risked its right to recover any part of the expenses of the insured on its ability to defeat a recovery on the policy; wherefore the judgment is reversed, with directions that the court set aside the judgment for \$5,000, and enter one against the defendant for \$4,932.53.

ADAMS' ADM'R v. REED.

(Court of Appeals of Kentucky. June 24, 1896.)

INSURABLE INTEREST.

Where a widow, with two unmarried children, and her son-in-law, live together as one family, both before and after the death of his wife, pursuant to a temporary and indefinite arrangement between him and his mother-in-law, and he pays no more than a reasonable price for his board, the mother-in-law has no insurable interest in his life.

Appeal from circuit court, Simpson county.
"Not to be officially reported."

Action by India Reed against the Mutual Benefit Life Insurance Company of Newark, N. J., and David C. Adams' administrator on a life insurance policy issued by such company on the life of David C. Adams, payable

to his wife, and after the death of his wife assigned to plaintiff. The defendant company answered, admitting its liability, and paid the money to a receiver under orders of the court. From a judgment for plaintiff, the administrator appeals. Reversed.

G. H. Galloway, C. W. Milliken, Whitesides & Moore, and Edward W. Hine, for appellant. Thomas H. Hines, Geo. C. Harris, and Goodnight & Roark, for appellee.

HAZELRIGG, J. In 1884, David C. Adams married the daughter of the appellee, Mrs. Reed, and shortly thereafter insured his life in the Mutual Benefit Life Insurance Company of Newark, N. J., in the sum of \$1,500. The policy was payable to his wife if living at his death, and, if she was dead, then to the children born of their marriage, and, if none, then to the executor, administrator, or assigns of the insured. In April, 1887, the wife died, childless. In September of that year the premium was in arrears, and the policy was about to become worthless. The insured, then, with the consent of the company, assigned the policy to the appellee, who paid the premium and the re-examination fee, and who continued to pay the annual premium until in 1893, when the insured died. His brother, the appellant, qualified as administrator, and set up a claim to the insurance. The appellee thereupon brought this suit against the company for the sum due on the policy, making the administrator a party. The company answered, admitting the liability, and under subsequent orders of the court paid the money to the receiver. The sole question raised by the pleadings of the appellee and the appellant administrator is whether, at the time of the assignment of the policy, the mother-in-law had an insurable interest in the life of her son-in-law. If she had not, the fund, less the amounts due appellee for premiums and interest paid by her, belong to the administrator for the payment of the debts of the insured, who died insolvent. The facts relied on to show the existence of such an interest are thus set up in the appellee's petition: That the original beneficiary, the wife of the insured, was the daughter of the appellee; that after her death the insured continued to reside and live with the plaintiff, and, as he had done before his wife's death, he continued to assist the plaintiff and her unmarried daughter to keep house, and to provide something for the family to eat, all living together as one family, each contributing to assist and help the other; that she relied upon his assistance, and he rendered it as much as he had done before his wife's death; that his relation to her was that of a kind son to his mother; that, having no husband, she was dependent on her son-in-law, and looked to him to help her in the discharge of her household duties, and to help provide for the wants of the family, consisting of herself,

the insured, an unmarried daughter of some 19 years of age, and a son of 15 years; that when the policy was about to lapse she requested the insured to have his mother or his brothers carry it or help carry it, and they declined; that at the time of the assignment, and for a considerable time thereafter, the insured continued to live with her as indicated, and to render the assistance named. In her amended petition she avers that at the time of her daughter's death, in April, 1887, she, with her family, was living with and at the house of her son-in-law, and that for himself and wife he had agreed to furnish and was furnishing one-half of all the meat, flour, meal, sugar, coffee, lard, in fact all the groceries for the entire family, and after his wife's death he agreed to continue to furnish one-half of said groceries and the plaintiff agreed to furnish the other half, and they lived as one family together, he furnishing one-half and plaintiff the other half, under an arrangement, for an indefinite length of time, and that this agreement, contract, and relation existed at the time of the assignment of the policy to her; that she owned a small farm, some five miles in the country, and her son-in-law helped her to look after that, and after its renting and the collection of its rents; that she was dependent on him as a protector of herself and family; that she was frail, had but one son, and the insured, as a dutiful and kind son, did many acts of kindness towards her; that, not knowing whether it would be the pleasure of the company to have her take the policy, she acquainted it with all the facts before the assignment was made, and it agreed to pay her the insurance upon the death of the insured; that she paid the premiums annually in good faith, and not in speculation. These averments were denied by the administrator, but the facts as alleged were established by the proof, and it further appears from the testimony that prior to the death of the wife of the insured he bought a house in Franklin, and then it was that the appellee came to live with him on the terms indicated above, and that after the wife's death the same arrangement was continued until the insured sold his house, and rented one, where the plan of living was kept up. After this the appellee bought a house, and they all moved into that, and continued the same plan; no rent being charged the appellee by the insured when she lived in his house, and none charged the insured when he lived with her. It further appears that there was no specified time for the continuance of this partnership as it is called by counsel for the appellee, but it was indefinite, and it was in fact terminated in 1888 or 1889 by the insured leaving the appellee's house because of the fact that the unmarried daughter was about to marry, and there was no longer any room for him. He himself married again shortly after this. It appears also that during the time the appellee and the insured lived together the

appellee took in a few boarders, and the "board money" was divided equally between them.

On the question of what is an insurable interest the text writers as well as the courts seem to confess an inability to suggest an entirely satisfactory answer. At least they say no accurate definition has yet been given. When we look to the cases, we find that between husband and wife and parent and child such an interest has universally been held to exist. And when a sister was poor, and altogether dependent on a rich brother, who supplied her, it was held she had an insurable interest in his life. On the other hand, it has been held that a stepson has no insurable interest in the life of his stepfather (*Aid Soc. v. McDonald* [Pa. Sup.] 15 Atl. 439), or a son-in-law in the life of his mother-in-law (*Rombach v. Insurance Co.*, 48 Am. Rep. 239), or an uncle in the life of his nephew (*Singleton v. Insurance Co.*, 66 Mo. 63). In *Price v. Supreme Lodge*, 68 Tex. 362, 4 S. W. 633, it was held that the assignee of a policy had no insurable interest in the life of the insured, who was his cousin, and with whom he lived, and upon whom he was dependent for employment and support. Here it is not seriously insisted that, because the relation of mother-in-law and son-in-law existed, the one had an insurable interest in the life of the other, but it is said that relation, coupled with other relations, as shown in the pleadings and proof, created such an interest. We have not been able to reach such a conclusion. A contract of life insurance is one of indemnity. Whatever difference may exist in the numerous cases on the general subject, it is well settled that the beneficiary must sustain towards the insured such a relation as will justify a reasonable expectation of advantage or benefit from the continuance of his life, and hence of a corresponding loss in case of his death. It is this loss against which indemnity may be lawfully provided. Even in cases where the ties of marriage and blood have been held to create such an interest, the courts have traced the foundation of the right to the previous loss the beneficiary might reasonably be expected to sustain in case of the death of the insured. Certain it is that when such domestic relations do not exist no right of indemnity can be had by one person against loss caused by the death of another, unless founded on a pecuniary interest growing out of the relation of creditor, surety, or the like. In *Basye v. Adams*, 81 Ky. 375, this court quotes with approval the definition of an insurable interest as given by the supreme court of the United States in the case of *Warnock v. Davis*, 104 U. S. 775. It is there said: "It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take a contract out of the class of wager policies. It may be stated generally, however, to be such an interest arising from the relations of the party ob-

taining the insurance either as creditor of or surety for the assured, or from ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life." Mr. May, in his work on Insurance, says: "To have an insurable interest in the life of another, one must be a creditor or surety, or be so related by ties of blood or marriage as to have reasonable anticipation of advantage from his life. Whenever there is such a relationship that the insurer has a legal claim on the insured for services or support, or when, from the personal relations between them, the former has a reasonable right to expect some pecuniary advantage from the continuance of the life of the other, or to fear loss from his death, an insurable interest exists." Under this rule it would seem that a partner having a legal claim on his co-partner for services, skill, etc., in carrying out the partnership enterprise, may have an insurable interest in his life. *Valton v. Assurance Co.*, 20 N. Y. 32. But in *Cheeves v. Anders* (Tex. Civ. App.) 25 S. W. 326, it was held that, even if two partners had an insurable interest in the lives of each other, that interest terminated when the partnership was dissolved without any indebtedness upon the part of the one to the other. Whether this be true or not, it is certain that the appellee in this case sustained no such relation towards her son-in-law as gave her a right of indemnity for any reasonably expected or anticipated loss from his death. To magnify the simple housekeeping arrangement by which the son-in-law paid at least no more than a reasonable price for his board into a partnership, would be a gross exaggeration of the facts, a mountain out of a molehill. The arrangement was merely temporary, and was so intended. This conclusion inflicts no loss on the mother-in-law, who appears to have acted in the utmost good faith, but gives to the creditors of the deceased—those who were in fact pecuniarily interested in his life, and who presumably lost by his death—the fund of indemnity provided by the policy. The judgment must be reversed for proceedings consistent with this opinion.

MASON & FOARD CO. v. COMMON-WEALTH.

(Court of Appeals of Kentucky. June 18, 1896.)

STATE — SETTLEMENT OF ACCOUNTS — REPEAL OF STATUTE — ERROR.

1. A settlement of accounts by the state, through its officers authorized to make the settlement, is, in the absence of fraud or mistake, binding on the state.

2. The penalties imposed on the contractor of prison labor for failure to return escaping prisoners cannot be enforced after the repeal of the statute imposing such penalties.

Appeal from circuit court, Franklin county.
"Not to be officially reported."

Action between the commonwealth and the Mason & Foard Company. From the judgments settling the accounts of the parties, the latter appeal, and the former takes a cross appeal. Reversed on original appeal, and affirmed on cross appeal.

W. J. Hendrick and John D. Carrall, for the Commonwealth. Wm. Lindsay, John W. Rodman, and Knott & Edelen, for defendant.

HAZELRIGG, J. This appeal involves the correctness of a judgment in four consolidated suits, rendered by the chancellor in adjusting the accounts of the appellant company as lessee of the Frankfort and Eddyville prisons. The first disputed item is one of interest, growing out of an alleged failure of the appellants to pay the sums agreed to be paid by it, when due, under the contract for the Frankfort prison of April 1, 1885. It appears that a final settlement of the accounts between the company and the commissioners of the sinking fund, growing out of this contract, was made in August, 1891: the claims of the state then amounting to some fifty-odd thousand dollars, and those of the company to thirty-odd thousand. No interest was embraced on either side of the account, but the state, after a delay of a few months for the purpose of investigating an item of some \$2,000 claimed by the company and not understood at the time of the settlement, accepted the principal sum of \$19,005.50, claimed by it under the contract, in full of its demands against the company. It is insisted for the company that, if interest be given it on its undisputed claims allowed in this settlement, the amount would approximately reach that claimed for interest by the state. But, aside from this, we are of opinion that when the state, acting through its board of sinking fund commissioners, a tribunal admittedly authorized to make this settlement, adjusted the accounts, and accepted the principal sum due, the parties are bound by it, unless, indeed, a court of equity be appealed to on the ground of mistake or fraud, and of this we hear nothing in any of the plaintiff's pleadings. In this view of the question, it is not necessary to consider further the plea of the company that it was then asserting a claim for damages growing out of the state's failure to erect buildings in lieu of those burned during the lease, and by reason of which a loss of many thousand dollars was sustained by the lessee in maintaining in idleness a large number of convicts. The company avers its willingness to open up this settlement if it shall be permitted to assert this claim for damages, based, as it contends, on the principles decided in *Com. v. Todd*, 9 Bush, 708. For the reasons given, both parties are bound by this settlement, and no claims for interest on the one hand or damages on the other are allowable, save the state is entitled to interest on the sum found due on the settlement until it was paid.

In suit No. 2 the state claims the sum of \$1,153.33 for salary for four extra guards at the Frankfort prison, and for which, if such guards were necessary, the lessee was to pay, according to the contract of April, 1889. The only defense urged against this claim is that the state failed to provide adequate cell room for confining the prisoners at night, and this necessitated the extra guards. Presumably the lessee knew the condition of the prison when it entered into the contract; and we think this claim, as well as that of \$322.85 for rewards for return of escaped convicts, and disputed for the same reason, should be allowed, with interest, as adjudged in the court below.

In case No. 3, the state asserts claim to a balance for salary of guards, but substantially admits a claim of the company for the sum of \$21,500, balance due on contract for completing the Eddyville prison, of date October 2, 1888. The state also claims the sum of \$15,459 for work and material furnished at the Eddyville prison which the lessee ought to have furnished. The proof of the state itself disposes of this claim. The articles were such as the state, and not the lessee, undertook to furnish, under the contract, in order that the prison might be equipped for the purpose for which it was built. The chief witness for the state, and himself a member of the board of commissioners, testifies, in reference to this claim, that "the items contained in this account were taken from the records of my office [auditor's office], and cover sums paid by the state under directions of the board of sinking fund commissioners as directors of the prison at Eddyville, for work done and articles furnished there to the state"; that, "as a member of the board of sinking fund commissioners, and as one of the directors of the penitentiary, it was my duty to examine fully every item of this account, and to direct its payment out of the proper fund, and to pass legally or officially upon the question as to what fund or by whom it should be paid, and I approved every item as a member of the board, acting with the board's other members as far as I could, as being proper, lawful, correct, and reasonable, and directed their payment out of the general expenditure fund"; and, further, that the items were necessary for the protection of the state's property, and as proper equipments of the prison; that the board never demanded any of them from the lessee, and the expense was incurred wholly voluntarily on the part of the state, and not at the instance of the lessee; that the board fully considered the question as to the duty to provide the items at its own expense, and ordered them at the cost of the state. While this would seem conclusive on the state, it is proper to say that we concur with the board in its construction of the contract on the question involved. The contractor, who was also the lessee, was to complete the prison ready for occupancy, but not

equip it, except with the permanent machinery, etc., and, when equipped, the lessee was to maintain and operate it free of cost to the state. No part of this claim is chargeable to the company. The company presents a claim of \$2,516.64 in this suit for labor and expenditures furnished upon the order of the warden of the prison, acting under the authority of the board; and the state's witnesses establish its correctness, save to the extent of \$200. The company's account of \$1,124.07 is rejected by the commissioner and the court because, while the items were ordered by the warden, they seem to be such as the company rather than the state should pay for, and we will not disturb this finding. The item of \$214.50 was for material for repairs on the state's property, and such as would not be affected in its use by the lessee, and was ordered by the warden under authority from the board. As to the water account of the company, little need be said. Under the original plans and specifications, the state provided for the erection of "water-works," and the arrangement seems to have been to sink a well, to be operated in connection with the engine in the power house. An immense tank was built on the apex of the adjoining hill, and it was supposed that, while the engine was running to furnish the power for the shop rooms, the pump would be running to supply the tank from which all the water would be obtained for the prison. The well, however, proved a failure, and the state abandoned the project. The board then, clearly in recognition of its contract to furnish the water supply, agreed with the company that the state would buy an engine, to be placed on the bank of the river, to force the water up, the company agreeing to charge only the actual cost of pumping the water. This agreement appears to have been in force during the creation of the account in question, and, as the charges are shown to be at actual cost, and are reasonable, the commissioner properly allowed them. A demurrer was properly sustained to the claim of the lessee to the effect that the governor and prison officials, though authorized by law to do so, failed to construct buildings sufficient for the use of the 400 convicts, the labor of which the company contracted for, and by which failure the company, it is alleged, was compelled to maintain in idleness some 150 convicts. The law, while it authorized, did not require, such buildings to be erected, and the lessee took its chances on the character of the buildings to be put up. The last item presented in this suit by the company is one for macadamizing the prison yard at Eddyville. It appears that in rainy weather the mud became very deep, and it was manifest to the board that something was necessary to be done for the comfort of the inmates of the prison, as well as for the officers and guards. It would also be greatly to the convenience of the employes of the lessee. Just what

was done by the board, however, is involved in much doubt, owing to the conflicting proof. One thing, however, is certain. The lessee, in the spring of 1892, shortly after the visit of four of the commissioners, and after notice that an order had been made by the board to do the work, proceeded during the succeeding year, in the vicinity of the prison, to have quarried, broken, and spread over the yard, containing about 13 acres, some 10,500 cubic yards of stone, a reasonable price for which is shown to be \$1.25 per yard, making the cost some \$13,000. No minute of such an order, however, appears to have been entered on the records of the board, and there is a serious conflict of proof as to whether it was in fact ordered. We need not determine the question. It is certain that, when the warden applied for advice as to permitting the lessee to take the convicts outside of the walls for the purpose of quarrying the stone, the legal adviser of the board and a member of it, in February, 1892, advised in writing that, if "the men asked for to work in the rock quarry were to be used in doing work ordered by the board of commissioners of the sinking fund for improvement of the grounds inside the prison," then the opinion already delivered to the auditor of public accounts on that behalf covered the inquiry. Other circumstances brought fully to the knowledge of the board the fact that this work was being done, and would be a permanent improvement of the state's property, and a much-needed one. We must not overlook the fact, however, that the work was also of great benefit to the lessee in operating the prison under its 10-year lease; and, without reviewing the contradictory features of the testimony adduced by the state, we are of opinion that an equitable adjustment of the dispute is to require the state to pay only one-half of this claim, the lessee being benefited to the extent of the balance by the improved condition of the premises where its men were engaged at work. Moreover, the actual cost of the work, ascertained by an estimate of time and men employed, will exceed this allowance very little, if at all.

In suit No. 4, and the last one to be considered, the state presents a claim against the lessee for its failure to capture and return a number of escaped convicts to the Frankfort prison, under the statute of May, 1880, providing for a forfeiture of \$50 in case of such failure. There is no covenant in the contract between the state and the lessee respecting this forfeiture. Nevertheless, so long as the statute was in force, the lessee, as a matter of law, was liable to the penalty prescribed. The lessee took charge of the convicts on April 1, 1885, and in May, 1886, this statute was repealed. It cannot be seriously contended that these forfeitures can be enforced after the repeal of the law authorizing them, and we can hardly see how, in the face of the plea of limitation, those can be enforced

which occurred some eight years before suit was brought to enforce them, even allowing a reasonable time for such capture and return after the escape. We think nothing is due the state on these forfeitures.

Summarizing, we think the state should be allowed as follows:

For interest in case No. 1 on balance due on settlement.....	\$ 771 11
Interest thereon to September 20, 1893, date of commissioners' report	65 54
For extra guards, Frankfort prison, case No. 2.....	1,153 21
Interest September 20, 1893.....	38 41
Escapes at Frankfort prison and interest	241 51
Guards, Eddyville	22,653 21
Interest September 20, 1893.....	771 11
Total	\$25,694 38

Due the company:

For work and materials at Eddyville	\$ 2,316 64
Interest September 20, 1893.....	52 60
Southern manufacturing account..	219 88
Balance due on prison contract..	21,500 00
Interest per commissioners' report, September 20, 1893.....	3,211 66
Water account	3,285 45
Interest, commissioners' report...	82 13
Broken stone contract.....	6,500 00
Interest to September 20, 1893....	260 00
Total	\$37,427 74

Balance due appellant, \$11,733.35.

To avoid a restatement of interest, we have adjusted the accounts as of September 20, 1893, the date of the master's report, and judgment for the above balance will be entered for the appellant as of that date. For the reasons indicated, the judgment below is reversed on the original and affirmed on the cross appeal, with directions to enter judgment in accordance with this opinion.

WEBB et al. v. SHACKELFORD.

(Court of Appeals of Kentucky. June 24, 1896.)

"Not to be officially reported."

Petition for rehearing. Overruled.

For prior report, see 30 S. W. 395.

Tinsley & Faulkner, for appellants. Thomas H. Hines, R. H. Crooke, and W. R. Shackelford, for appellee.

HAZELRIGG, J. It is insisted that the five tracts of land covered by the patents and surveys under which the appellants claim do not embrace the whole of the 300-acre patent to Daniel Bates, and for which this action was instituted, and therefore the plaintiff ought to recover the portion not so embraced. The opinion was not intended to affect, and cannot affect, any other land than that claimed by the appellants, as shown by their pleadings and exhibits of title. If these do not extend to the whole boundary sued for, the appellee may be entitled to the remainder, because not in fact in controversy in this action. Petition overruled.

RICHARDSON et al. v. HARRELL.

(Supreme Court of Arkansas. June 13, 1896.)

FORCIBLE ENTRY AND DETAINER—DAMAGES.

Act Feb. 5, 1891 (Sand. & H. Dig. §§ 3458, 3459), relating to unlawful detainer, provides that if the verdict is for plaintiff the jury shall assess the amount to be recovered for rent due and withheld up to the time of judgment, or the value of the use and occupation, or of the rents and profits during the time defendant has unlawfully detained possession, and damages for withholding the same, or the damages to which plaintiff may be entitled on account of the forcible entry and detainer; and that, where judgment is rendered either against plaintiff or defendant for any amount, judgment shall also be rendered against his sureties in the bond given under the provisions of the act. The act provides that the bond required of defendant to entitle him to retain possession of the property shall be that, if plaintiff recover, defendant will deliver possession, and satisfy any judgment the court may render against him. *Held*, that a condition in the bond given by defendant in such an action that if defendant deliver to plaintiff the possession of the premises, together with the costs and damages awarded plaintiff if so decreed by the court, the bond shall be void, etc., substantially complied with such statute, and the court properly gave judgment against the sureties for back rents. Battle, J., dissenting.

Appeal from circuit court, Garland county; Alexander M. Duffie, Judge.

Action by William Beard against H. O. Billingsly for unlawful detention of real property leased by plaintiff to defendant, and for damages for unlawful detention. A writ of possession was issued, and defendant filed a bond, with S. D. Richardson and others as sureties. Pending the action, plaintiff died, and John M. Harrell, administrator of his estate, was substituted as plaintiff. The administrator filed an amendment to the complaint, alleging a forfeiture of the lease by defendant, and claiming a certain sum for rents accrued before demand for possession. From a judgment for plaintiff against defendant and the sureties on his bond the sureties appeal. Affirmed.

Wood & Henderson, for appellants. Geo. G. Satta, for appellee.

The intestate of appellee brought his action of unlawful detainer for the property in question against H. O. Billingsly in April, 1892, alleging a lease of the premises to Billingsly in writing, a forfeiture of the lease by Billingsly, and prayed for possession, and for \$600 damages for the unlawful detention thereof. The writ of possession was issued on the same day, and on the 28th of April, 1892, Billingsly filed a bond to retain possession of the property in the sum of \$3,000, with appellants as securities, conditioned that, if Billingsly should deliver to the plaintiff the possession of the premises, together with the costs and damages awarded to the plaintiff if so decreed by the court, then the bond should be void; otherwise to be and remain in full force and effect. This bond was approved by the sheriff, 30th of April, 1892. On his motion the appellee,

Harrell, was made a party plaintiff, as administrator of William Beard, the lessor, and the cause was revived in his name as such administrator. On the 10th of December, 1892, Harrell, as administrator, amended the complaint, and alleged a forfeiture of the contract of lease by Billingsly, claimed the sum of \$1,825 for rents that had accrued before the demand for possession. The appellee, Billingsly, demurred to this amendment, and, his demurrer being overruled, the cause was tried upon the complaint and amendment thereto, the answer of Billingsly, and the testimony of John M. Harrell. Judgment was rendered upon the verdict of the jury for \$3,237.50 in favor of appellee and against Billingsly and his bondsmen. The bondsmen filed a motion for a new trial long after the time within which such a motion could be filed according to law, and upon motion of the appellee the same was stricken out, and disallowed by the court. The bondsmen appealed to this court. The motion for a new trial not having been filed in time and having been stricken out by the court, the only question presented for our determination in the case is, was it competent for the court to render judgment on the defendant's bond against the securities in this action?

HUGHES, J. (after stating the facts). The contention of the appellants is that no judgment could be rendered on their bond against them for any amount, save the damages sustained by the plaintiff by being kept out of possession of the property after the notice was served on Billingsly to quit and deliver possession to the plaintiff. To maintain this contention the appellants rely upon the act of February 8, 1883, which provides for the recovery only of damages by plaintiff for being kept out of possession, but the later act of February 5, 1891, is in conflict with this, and must prevail. By the act of February 5, 1891, it is provided that: "If upon the trial of any action under this act, the finding or verdict is for the plaintiff, the court or jury trying the same shall assess the amount to be recovered by the plaintiff for the rent due and withheld at the time of the commencement of the suit and up to the time of rendering judgment, or the value of the use and occupation, or of the rents and profits thereof during the time defendant has unlawfully detained possession, as the case may be, and damages for withholding the same, or the damages to which said plaintiff may be entitled on account of the forcible entry and detainer of said premises," etc. Sand. & H. Dig. § 3458. Section 3459, Sand. & H. Dig. (part of same act), provides that: "* * * And in all cases, where judgment is rendered either against the plaintiff or defendant, for any amount of recovery, judgment shall also be rendered against his sureties in the bond given under the provisions of this act." The condition of the bond re-

quired by statute of the defendant to retain possession of the property, as prescribed by act of February 5, 1891, is that, if the plaintiff recover in the action, he will deliver possession of the premises to the plaintiff, and satisfy any judgment the court may render against him in the action. This can mean only that, besides delivering possession of the premises, the defendant will pay any damages that may be assessed against him, and these may include rents that were due and unpaid at the time of the commencement of the suit, and up to the time of rendering judgment, or the value of the use and occupation, or of the rents and profits thereof, during the time the defendant has unlawfully detained possession, as the case may be, and damages for withholding the same, or the damages to which the plaintiff may be entitled on account of the forcible entry and detainer of said possession, as provided by section 3458 of *Sandels & Hill's Digest*. The condition of the bond given in this case by the defendant to retain possession of the property is: "Now, if the said H. C. Billingsly shall deliver to the plaintiff the possession of the premises aforesaid, together with the costs and damages awarded to the plaintiff, if so decreed by the court, then this bond shall be void; otherwise to be and remain in full force and effect." It is a mere play upon words to say that these bonds do not mean the same thing, though differing in phraseology. They both mean that the defendant, if judgment be rendered against him, shall pay the amount of the judgment, all the damages by reason of the defendant's failure to pay rents, as well before the institution of the suit as after, down to the rendition of the judgment; for they are all damages. "Damages. A pecuniary compensation or indemnity, which may be recovered in the courts by any person who has suffered loss, detriment, or injury, whether to his person, property, or rights, through the unlawful act or omission or negligence of another." *Black, Law Dict.* p. 316, tit. "Damages." The counsel for appellants maintain that there is a distinction made by the statute between a recovery for rent and a recovery for damages; one being for the unlawful withholding, and the other for rent due by contract. Yet it is plain that they are only damages arising from different wrongs suffered; that is, from the withholding of the premises after demand, and from withholding rents to the time of commencement of the suit. Though arising from different wrongs, they are nevertheless damages, and are unquestionably recoverable in the same action. A bond to "deliver to the plaintiff possession of the premises, with the costs and damages awarded to the plaintiff, if so decreed by the court," certainly, by fair and reasonable construction, provides for the payment of all damages of whatever kind, or from whatever cause accruing, that may be

awarded by the court. "It is nominated in the bond." The bond given in this case conforms to the requirement of the act of March 2, 1875, as amended by act of December 13, 1875, and differs from the one required by act of February 5, 1891, in phraseology, but not in legal effect. The parties who executed this bond are presumed to have known that the law provided that, if judgment were rendered for any amount against the defendant in the action, judgment should be rendered for the same amount against the sureties on the bond; and that judgment might be rendered in the action for rents past due when the suit was brought, as well as for damages for the unlawful withholding of the property after demand therefor made, and for any other damages sustained by the plaintiff by reason of said unlawful withholding of the possession of the premises. The act of 1891 amended the law as it existed before then so as to allow the recovery of damages for failure by the defendant to pay back rents that accrued prior to the demand for possession. We are of the opinion that the bond in this case was a substantial compliance with the requirement of the act of 5th February, 1891 (*Sand. & H. Dig.* § 3452); and that it was proper in this action to give judgments for back rents, and to render judgment for the same against the sureties on the bond. If the pleadings and proof in the case warranted.

All questions as to the evidence and instructions having been waived by the failure of the appellants to file a motion for new trial in time to have it made a part of the record in this case, there is nothing more left for determination. The error of entering judgment for a sum greater than the amount named in the bond of the appellants was cured by a remittitur of the excess. The judgment is affirmed.

BATTLE, J. (dissenting). The bond executed by the defendant and his sureties in order to retain possession of the property in controversy is not in conformity to the statute. It is conditioned that: "If the said H. C. Billingsly [defendant] shall deliver to the plaintiffs the possession of the premises aforesaid, together with the costs and damages awarded to the plaintiff, if so decreed by the court, then this bond shall be void." The condition of the bond the statute authorized him to give in this case is "that he will deliver possession of the premises to the plaintiff, if the plaintiff recovered in the action, and satisfy any judgment the court may render against him in the action." A comparison of the two conditions shows that the bond in this case is not in conformity with the statute.

The bond before us was given in accordance with section 3355, *Mansf. Dig.*, which was amended in 1891, and is in part as follows: "If the said defendants shall express

a desire to retain possession of said premises, the said sheriff shall give said defendant ten days' time within which to make his bond, with sufficient securities, in an amount equal to that named in plaintiff's bond, and conditioned that he will deliver to the plaintiff the possession of the premises, together with the costs and damages awarded to the plaintiff, if so decreed by the court." The condition of the bond under consideration was copied from this statute. What the language copied meant was clearly understood when the statute from which it was taken was in force. By it the defendant and his sureties were bound to plaintiff to pay to him all damages he suffered by withholding the land in controversy after lawful demand therefor was made. This did not include rents and profits, or any sum for the use and occupation of the land, which accrued before the demand was made. Mansf. Dig. § 3362.

On the 5th of February, 1891, the statutes were amended, and the remedies of plaintiffs in actions of unlawful detainer were so enlarged as to include damages for withholding the land already allowed, together with the rent due and withheld at the time of the commencement of the suit and up to the time of rendering judgment, or the value of the use and occupation or of the rents and profits thereof during the time the defendant has unlawfully detained possession, as the case may be. Whatever the plaintiff recovers as rent for use and occupation, or rents and profits, damages for withholding the land, is allowed eo nomine in addition thereto. In the sense that word ("damages") is used in the statutes regarding the rights of parties in actions of unlawful detainer, the amounts recoverable for rents and for use and occupation are not intended. They are kept separate and distinct in the statutes. For example, the statute says: "If upon the trial of any action under this act, the finding or verdict is for the plaintiff, the court or jury trying the same, shall assess the amount to be recovered by the plaintiff for the rent due and withheld at the time of [the] commencement of [the] suit and up to [the] time of rendering judgment, or the value of the use and occupation, or of the rents and profits thereof during the time the defendant has unlawfully detained possession, as the case may be, and damages for withholding the same, * * * and in all cases where judgment is rendered, either against the plaintiff or defendant for any amount of recovery, damages or costs, judgment shall also be rendered against his sureties in the bond given under the provisions of this act." Sand. & H. Dig. § 3458.

The bond before us and that used by the statute are not of the same legal effect. The latter binds the defendant, if the plaintiff recovers, to satisfy any judgment the court may render in the action; the former, to de-

liver to the plaintiff the possession of the premises, "together with the costs and damages awarded to the plaintiff, if so decreed by the court,"—only a part of what the latter binds him to do. The former is not a statutory bond, and no judgment can lawfully be rendered upon it in this action. *Lowenstein v. McCadden*, 54 Ark. 13, 14 S. W. 1095; *Martin v. Tennison*, 56 Ark. 291, 19 S. W. 922.

I think the judgment against the appellants should be reversed.

LOVEJOY v. STATE.

(Supreme Court of Arkansas. June 13, 1896.)

CRIMINAL LAW—INSTRUCTIONS—PREPONDERANCE OF EVIDENCE.

An instruction that if the jury believe, from a "preponderance" of the evidence, that defendant took the cattle under the honest belief that he was the owner, they should acquit, is erroneous; the state being bound to show guilt beyond a reasonable doubt.

Appeal from circuit court, Prairie county; James S. Thomas, Judge.

Al. Lovejoy was convicted of larceny, and appeals. Reversed.

J. P. Roberts, for appellant. E. B. Kinsworthy, Atty. Gen., for the State.

WOOD, J. The appellant was convicted of the larceny of two heifers. There was proof on behalf of the state to the effect that the heifers were the property of one Wood, and that appellant had taken same and sold them, appropriating the proceeds to his own use; and the state endeavored to show that appellant knew that the property belonged to another when he sold same. The appellant, on the other hand, contended that he sold the heifers in good faith, believing them to be his own; and he introduced proof tending to show that he had bought the heifers from one Conner, who claimed to own the same. The court gave the following instruction, to which appellant excepted: "(3) You are further instructed that if you believe, from a preponderance of the evidence, that the defendant took the cattle under the honest belief that he was the owner of them, by virtue of having bought them from another person, and if you believe that said defendant acted honestly and in good faith in the matter, then you would be authorized to find him not guilty, although you may believe that the seller was not the owner; and it would be for you to say, from all the facts and circumstances proven in the case, as to whether he acted honestly and in good faith in the transaction." The court correctly charged the jury as to the material allegations of the indictment, one of them being "that the defendant took the property with the felonious intent to deprive the owner of the use of it," and the court also correctly

charged the jury that these allegations must be established "beyond a reasonable doubt." But the above instruction is in conflict with these. "Preponderance" and "reasonable doubt" are not synonymous terms. It is sufficient if the proof in the whole case raises a reasonable doubt as to whether the defendant took the cattle with a felonious intent. The state would not be justified in a conviction upon a preponderance of the evidence. Yet this instruction tells the jury "that, if they believe from a preponderance of the evidence that the defendant took the cattle under the honest belief that he was the owner," they should acquit. The converse would be, "If you do not believe from a preponderance of the evidence" that defendant took the cattle under the honest belief that he was the owner, etc., you should convict. The instruction makes the question of intent, which is the very essence of the crime charged, depend upon the preponderance of the evidence to establish it, whereas it must be established by the state beyond a reasonable doubt. It must not be forgotten that in criminal cases, under the plea of not guilty, every element in the crime is controverted, and the state must affirmatively prove guilt. "It would," says Mr. Bishop, "be a wide departure from the humanity of the criminal law to compel a jury, by a technical rule, to convict one of whose guilt, upon the whole evidence, they had a reasonable doubt. And it would reverse the presumption of innocence to hold a defendant guilty unless, taking the burden on himself, he could affirmatively prove himself innocent. All evidence should be viewed in its entirety, not in detached parts. The whole of an alleged crime must be proved, just as the whole of it must have been committed. In reason, therefore, this whole and indivisible thing, the burden of proof, must be borne by the government throughout the trial." 1 Bish. Cr. Proc. § 1051. It is only in those cases where the defendant either absolutely, or for the purposes of the trial, admits all the allegations of the indictment, but sets up some special matter of defense, as license, pardon, autrefois acquit or convict, insanity, etc., that the burden is on him to maintain his defense by a preponderance. *McArthur v. State*, 59 Ark. 431, 27 S. W. 628; 1 Bish. New Cr. Proc. § 1049; *Whart. Cr. Ev.* (8th Ed.) § 720.

The defendant asked the following, among other instructions: "You are instructed that if you believe from the evidence that the defendant purchased the heifers mentioned in the indictment from one Conner, in good faith, believing Conner to be the owner of them, or if you have a reasonable doubt as to whether his purchase from Conner was in good faith, believing him to be the owner, you will find the defendant not guilty." This was the law. The refusal to give this, and the giving of the third, *supra*, was error, for which the judgment is reversed, and the cause remanded for a new trial.

FERGUSON et al. v. QUINN.

(Supreme Court of Tennessee. Feb. 22, 1896.)

TAXATION—LIFE TENANT—POSSESSION—ASSESSMENT—EXTENT OF LIEN.

1. A life tenant in possession of realty is the owner, within the meaning of Mill. & V. Code, § 625, which requires taxes on property to be assessed in the name of the owner.

2. A sale of the realty for taxes during the possession of a tenant for life reaches only the life estate.

3. Where the remainder-men pay taxes assessed against the life tenant before the life estate has been exhausted, they have no right to be substituted to the state's lien on the life estate for the amount so paid by them.

Appeal from chancery court, Shelby county; John L. T. Sneed, Chancellor.

Bill by W. H. Ferguson and others against Thomas Quinn for the appointment of a receiver to collect rents from defendant's life estate, for an injunction to restrain defendant from collecting them, and for other relief. From a decree as prayed, defendant appeals. Reversed.

Smith & Trezevant, for appellant. W. K. Poston, for appellees.

ALLEN, Special Judge. The bill in this case alleges: That, under the will of Catherine Ferguson, the defendant has a life estate in the real property described, and complainants the estate in remainder. The will referred took effect in September, 1891. That defendant has been in possession of the property since the death of Catherine Ferguson, occupying a part and collecting rents on the remainder of the property, and that defendant has failed to pay the taxes accruing since his life estate begun, and that this failure to pay the taxes endangers the remainder estate of complainants. That the property was advertised for sale, under the law of 1895, and complainants, to save said property, were forced to pay certain taxes, etc. The taxes were assessed under law prior to Act Leg. 1895. This act makes no material change in the law in respect to the question here involved. The bill prays for a receiver to collect the rent, to pay the taxes, and also for a lien to be declared upon the life estate of defendant for the taxes already paid by complainants, and for a sale of the life estate to pay complainants' claim, and for an injunction to restrain defendant from collecting the rents, which was granted and issued. A motion for dissolution of the injunction was made on the ground that the taxes were a lien only on the life estate, and that complainants' estate was not endangered by a failure to pay them. The motion was overruled. Defendant then demurred to the bill on the same ground, and the demurrer was overruled, and defendant was allowed an appeal to this court. Defendant assigned errors in this court to the ruling of the chancellor overruling his demurrer, etc.

The case presents squarely the question whether taxes accruing during a life estate are liens on that estate alone, or whether they are a lien on the fee in the property. Under section 625 of the Code and subsequent legislation, property is assessed in the name of the owner, and his personalty is liable to these taxes, and may be, and in fact should be, subjected to the payment of the taxes before resorting to the realty. When this is the case, the taxes are assessed to the life tenant in possession, and the life estate is liable for their payment. *Blackw. Tax Titles*, 548, 549. It is settled in this state, in the cases of *Mayor, etc., of Nashville v. Cowan*, 10 Lea, 209, and *Stovall v. Austin*, 16 Lea, 700-709, that the life tenant in possession is the owner to whom the property should be assessed under the statute, and that it is incumbent on the life tenant to keep down the taxes, and that the life estate is liable for the taxes, and any sale of the real property for taxes during the life of the life tenant would only reach the life estate. This court has uniformly held this to be the law. It is manifest complainants are not entitled to any relief under this bill, inasmuch as their estate in remainder is in no danger of being sold for the taxes complained of by them so long as the life estate continues good for the taxes. The life estate at bar still exists, and it is not pretended that this estate is not sufficient to pay the taxes. In any event, until the life estate shall have been exhausted, complainants can be in no danger of having their remainder estate subjected. As to whether the remainder estate would then be liable for unpaid taxes against the life tenant does not arise in this case. After the life estate has expired, then the remainder-men are entitled to possession, and it becomes incumbent on them to keep down all taxes the property is subject to, and their interest in the property may then be reached for taxes against the property. It follows, therefore, that the payment of the taxes by them was officious, and they have no right to be substituted to the state's lien on the life estate for the amount so paid by them to discharge the taxes. 24 Am. & Eng. Enc. Law, 281. Decree reversed, and bill dismissed.

HUGHES v. SETTLE et al.

(Court of Chancery Appeals of Tennessee.
Nov. 30, 1895.)

COLLATERAL SECURITY—SUBSEQUENT ACQUIRED RIGHTS—CHARGING BANK WITH NOTICE TO PRESIDENT.

1. An agent, without disclosing his principal, made a loan, and received a note therefor, with bonds as collateral. Thereafter he was notified, and through him his principal, by the accommodation indorser on the note, that, in consideration of his indorsement, the maker of the note had agreed that he should have the bonds, as security for indebtedness of the maker to him, subject to the pledge to secure the

note. *Held* that, the agent having surrendered the collateral to the maker of the note, he and his principal were liable to the accommodation indorser for any loss thereby occasioned to him.

2. Where an agent of an undisclosed principal, holding bonds as collateral, with notice that, subject to such pledge, they have been transferred as collateral to another, surrenders them to the pledgor, who, from proceeds obtained from a sale thereof, pays a debt to a bank of which such agent is president, having been urged by such president to make a payment, the bank will be liable, for the money so received, to the one having the secondary rights in the bonds as security; the president, and through him the bank, being charged with notice how the money was obtained.

Appeal from chancery court of Maury county; A. J. Abernathy, Chancellor.

Suit by George T. Hughes, in his own right and as trustee for another, against W. S. Settle and others. Decree for complainant. Certain of the defendants appeal. Modified and affirmed.

Figurs & Padgett and J. M. Anderson, for appellants. Geo. T. Hughes, for appellee.

WILSON, J. This bill was filed March 24, 1893, by complainant, Hughes, in his own right and as trustee of Mrs. A. G. Jackson, against W. S. Settle and Mrs. E. S. Gardner, of Davidson county, the City Savings Bank of Nashville, and Lucius Frierson, of Maury county, to recover the sum of \$2,500, the alleged difference between \$7,500 of the mortgage bonds of the Columbia Waterworks Company, held as collateral to secure the payment of a note for \$5,000, given Mrs. Gardner by said Frierson, and indorsed by complainant, Hughes. October 27, 1893, the death of Mrs. Gardner was suggested and admitted in the court below, and the cause was revived against W. S. Settle as her administrator. It appears that W. S. Settle was her son-in-law, but not her administrator; and, this fact being called to the attention of the court, the cause was, by consent, revived against Mrs. Laura G. Settle, the daughter of Mrs. Gardner, and the wife of W. S. Settle, as the administratrix of Mrs. Gardner. She, by agreement, as expressed in the order of the court, adopted the answer previously filed by her husband. The cause was heard by the chancellor April 17, 1895, upon the pleadings and evidence. He gave complainant a decree against all the defendants for \$1,750, the difference between the value of the waterworks bonds held by Mrs. Gardner as collateral to secure the payment of the note due her and the interest on said difference from the time said bonds were surrendered to Frierson, making together the sum of \$2,026.50. From this decree all the defendants prayed an appeal, but it was not perfected as to Mr. Frierson.

There is no material dispute as to the facts, which are as follows: Near the close of the year 1890, W. S. Settle, as the agent of Mrs. Gardner, without disclosing his prin-

cipal, negotiated a loan for her of \$5,000 to Lucius Frierson, of Columbia, Tenn. He took said Frierson's note, due in one year, and, as collateral to secure it, \$7,500 of the first mortgage bonds of the Columbia Waterworks Company, of Columbia, Tenn., with power to sell them, and apply the proceeds to the payment of the note, provided there was default in its payment at maturity. Frierson did not pay the note when it fell due, but asked for a renewal of the loan. This was declined, unless good personal security was given, in addition to the bond collaterals given to secure the first note. Frierson proposed to Mr. Settle to secure the indorsement of Mr. Hughes on the renewal note, and was informed that he would be accepted. Mr. Frierson approached complainant in Columbia, Tenn., in reference to indorsing his note for the loan negotiated through Mr. Settle; and, after some hesitation, complainant agreed to do so, provided the waterworks bonds were transferred to him, subject to the rights of the holder of the note to be indorsed by him for his indemnity, and also as security for what Frierson owed him individually, and as trustee of Mrs. Jackson, and for all sums for which he was bound for Frierson on any account. To effect the renewal of the loan, Frierson executed his note for \$5,000 to complainant, and the latter indorsed it. This note was sent by mail from Columbia to Mr. Settle, at Nashville; and, upon its reception, it was immediately delivered by him to his mother-in-law, Mrs. Gardner, who put it with the bond collaterals in her bank box in the American National Bank, of Nashville. The first note was canceled, and sent by Mr. Settle to Mr. Frierson, at Columbia. The following is a copy of the contract given by Frierson to complainant to induce him to indorse the note for \$5,000: "Columbia, Tenn., Dec. 31st, 1891. Whereas, I have this day indorsed note of Lucius Frierson for five thousand dollars, payable to me, and indorsed in blank, due Dec. 31st, 1892, which note is secured by \$7,500.00 of the first mortgage bonds of the Columbia Waterworks Co., with interest for one year of the coupons attached to said bonds, and said note provides upon its face for sale of said bonds in case of default, in form same as blank note hereto attached: Now, in consideration of said Hughes' indorsing said note and becoming bound thereon, it is agreed that said Hughes shall be entitled to have and to hold said bonds as security for any sum which I may owe said Hughes individually or as trustee for Mrs. A. G. Jackson, or for which he may be bound for me on any account, but to be subject, of course, first to the payment of the debt herein secured; and, in case of payment of the note so indorsed by said Hughes, then he is to be substituted to all the rights of indorsee under said collateral note. [Signed] Lucius Frierson." Mr. Hughes wrote Mr. Settle the fol-

lowing letter, inclosing copy of the above transfer to him: "Columbia, Tenn., Jan. 12th, 1892. W. S. Settle, Esq., Nashville, Tenn.—Dear Sir: I inclose copy of agreement executed by Mr. Frierson to myself at the time I indorsed the note for him. Please return this copy, and bear the transfer in mind. I was informed by Mr. Frierson at the time, as you will see from the agreement, that there was matured interest for one year. Will you please inform me what has become of these coupons? Very respectfully, George T. Hughes." It seems that Mr. Settle did not fully understand the purport of this letter and its inclosure, and he wrote to Mr. Frierson in reference to it, and this letter was handed or shown by Mr. Frierson to Mr. Hughes. Thereupon Mr. Hughes wrote Mr. Settle the following: "Mr. Frierson showed me your letter to him referring to my letter inclosing copy of agreement in reference to collateral. If you will read the instrument, you will see that it is intended to be subject to the claim of the holder of the note for \$5,000.00, and not in any way intended to interfere with that. Of course, the coupons maturing July, 1891, and Jan. 1st, 1892, would, under the agreement, pass to me; and I had an understanding with him to that effect. So, when you forward the coupons to Maury Bank and Trust Co., you can notify the cashier to deliver to me under Mr. Frierson's directions." This letter, as well as the previous one, inclosing copy of agreement, was shown to Mrs. Gardner; and Mr. Settle testifies that, when he showed her the letter above, she said she did not know Mr. Hughes in the transaction, and that he made a pencil memorandum at the bottom of the letter to this effect. Mr. Settle, however, replied to the letter of Hughes just copied as follows, under date January 15, 1892: "Yours to hand. I should not have asked for an explanation of that part of the contract which says he [Hughes] shall be the custodian of securities in consideration of his having indorsed. This would convey the idea that you were to hold bonds. Hence I wanted an understanding at the beginning." At the time Mr. Hughes indorsed this \$5,000 note, Mr. Frierson was indebted to him individually in the sum of \$1,000 or \$1,500, and he was also indebted to him as trustee of Mrs. Jackson for over \$4,000. In addition, Hughes was security for Frierson at a bank at Lawrenceburg for the sum of \$900 or more. Mr. Frierson came to Nashville in August, 1892, and saw Mr. Settle with reference to the payment of the \$5,000 note, there being an understanding in parol between them, from the origin of the loan, that he had a right to pay it before maturity if he so desired. Mr. Settle produced the note and collaterals, and the note was paid, and the bonds delivered to him, and he sold the bonds. Mr. Settle does not remember clearly whether the bonds were turned over to Mr. Frierson be-

fore the money was paid on the note or after, but the matter was closed the same day; and Mr. Frierson also paid a large sum on his indebtedness to the City Savings Bank of Nashville, of which Mr. Settle was president, on the same day. It is doubtless true that Mr. Settle did not at the time definitely or personally know where or from what source Frierson got the money to pay said note, and the sum he paid his bank. But it is quite manifest from this record, and we so find as a fact, that the money was derived from a sale of the \$7,500 of bonds given as collateral to secure the \$5,000 note indorsed by Hughes, and which had been transferred to him, as hereunbefore stated, by contract in writing, a copy of which had been sent to Mr. Settle. Mr. Settle, when he filed his answer to the original bill, had forgotten the fact that Mr. Hughes had notified him by letter of the transfer of the bonds held as collateral to secure the \$5,000 note, subject to the prior right of the holder of said note, and that he had sent with the letter of notification a copy of the contract evidencing the transfer and its purpose. It is also apparent that this fact was not present to his memory when he surrendered the bonds to Mr. Frierson. But, however this may be, it is certain that he delivered said bonds to Mr. Frierson, without the consent, knowledge, or acquiescence of Mr. Hughes, and that, in doing so, he acted as the agent of Mrs. Gardner, possessed, in contemplation of law, of the knowledge that said bonds had been transferred to Mr. Hughes for specified ends, in consideration of his indorsement of the note for the loan he had made to Mr. Frierson for his mother-in-law. It is further clearly proved that Mr. Frierson at this time was insolvent. After Mr. Hughes learned that Frierson had paid the note for \$5,000, he demanded the bond collaterals or the difference between the amount of the note and the face value of the bonds. At the maturity of the note, or the day thereafter, he proposed to pay the note, and demanded the collaterals, and then, or soon thereafter, first learned who held the note, and who was the principal for whom Mr. Settle acted in effecting the loan. Several letters passed between Mr. Hughes and Mr. Settle respecting the fact of his surrender of the bonds to Mr. Frierson, Mr. Hughes insisting that he had no right to deliver said bonds to Frierson; that he had suffered serious wrong in consequence thereof; and that his loss should be made good. Mr. Settle insisted that, when Mr. Frierson paid the note, he (Frierson) was entitled to the collateral, and that he had no right to withhold it under the terms of the parol understanding and agreement between him and Frierson; that the latter had the right to pay the note before it matured, and take up the collateral. It is further insisted on behalf of defendants appealing, especially on

behalf of the estate of Mrs. Gardner, that it is not bound to pay, because, when she received the note indorsed by Mr. Hughes, the collateral was not impressed with any trust in his favor of which she was informed at the time of its acceptance, and that she never agreed to hold the bonds for his benefit under the terms of the contract made with him by Frierson at the time Frierson secured his indorsement of the note she held. Mr. Settle further insists that he acted in the matter simply as the agent of his mother-in-law, Mrs. Gardner, and carried out her directions, and that he did so without compensation, and that, having acted in this relation, and in good faith, he is not liable. The City Savings Bank, admitting that Frierson, August 27, 1892, paid \$935.59 on his indebtedness to it, avers that it had no knowledge of where Frierson got the money to pay said sum, nor any notice that it was realized from a sale of the bonds in question. It also avers that it knew nothing as to when or for what purpose W. S. Settle came into possession of said bonds, nor the terms and conditions upon which he held them. Upon these grounds it denies any liability.

Three errors are assigned covering the respective contentions of the defendants. The first is that the chancellor erred in decreeing against W. S. Settle, because, in reference to the transaction in issue, he acted only as agent for Mrs. Gardner, and had finished his agency, and delivered the bonds and note to her, before he received any notice of the rights or claims to the bonds on the part of complainant, and because, while acting as such agent, he had no notice or knowledge of the claims of complainant, and because there is no proof of bad faith on his part; second, that the court erred in holding the City Savings Bank liable, because the proof shows that it had nothing to do with the transaction, and because the note and bonds were never in its possession and under its control, and because it never disposed of the bonds, or knowingly received any of the proceeds when Frierson sold them; third, the court erred in decreeing against the estate of Mrs. Gardner, because the note indorsed by Hughes and the bond collaterals were received by her, and her rights, duties, and responsibilities in reference to them were fixed before she received any notice of the claims of Hughes, her duties and liabilities being fixed under her contract with Lucius Frierson, and under the contract she was under no duty to hold the bonds for Hughes when Frierson paid the notes, and demanded them.

The insistence on behalf of Mr. Settle is not sustained by the facts, nor is it sanctioned by the law as applicable to the facts. In his answer, he states the loan to Frierson was made in his name, and that Mrs. Gardner was not known in the transaction, but that he acted as her agent in the matter. He

further states that, when the renewal note with the indorsement of Hughes was received, it was filed away by him, together with the collaterals, among the valuable papers of Mrs. Gardner. He further states in his answer that he "had no interest in the transaction further than as the agent of Mrs. Gardner, and he held the bonds merely as bailee, and under an agreement that required him to deliver them to the owner whenever demanded." He held them, under this statement, after the reception of Mr. Hughes' letter of January 12, 1892, inclosing contract of Frierson to Hughes, and especially after the letter of explanation written in reply to his letter to Mr. Frierson, which he deemed satisfactory for Mr. Hughes; for, subject to the rights of the holder of the \$5,000 note, they belonged to Mr. Hughes, as a collateral security. Beyond all question, these bonds were impressed with a known trust in favor of Mr. Hughes, whether they were in the actual custody of Mrs. Gardner or Mr. Settle; and neither, under the facts of this case, could ignore the existence of this trust, or disregard it.

It is forcibly argued by able counsel for the estate of Mrs. Gardner that she knew nothing of the trust rights of Mr. Hughes in these bonds when the note indorsed by him was received and accepted by her, and at that time she was only obligated to hold the bonds subject to the order of Mr. Frierson when the note was paid; and, this being so, it is argued that it was not competent for either Frierson or Hughes, or both, to change the nature of her relation to the bonds, or to compel her to act as bailee or holder of bonds for any one except herself as security for her note, and for Mr. Frierson upon its payment. To hold otherwise, it is said, will establish a principle that will largely interfere with the use and effectiveness of all stock and bond collaterals in the business of trade and commerce. In the first place, this contention is denied by a dominant fact in the case. Mr. Settle, who controlled, as agent, this matter for Mrs. Gardner, agreed, and hence she agreed, to hold the bonds for Mr. Hughes. This agreement is virtually implied in the letter of Mr. Settle to Mr. Hughes hereinbefore copied, of date January 15, 1892, wherein, in reply to the letter of Mr. Hughes, he says that he "wanted an understanding at the beginning." It is implied in the fact that neither legally repudiated the claims of Mr. Hughes when notified of them. As a matter of law, neither could have done so. Mrs. Gardner was pledgee of these bonds, and held them as security for the note of Frierson, indorsed by Hughes. See *Story, Bailm.* § 237; *Stearns v. Marsh*, 4 Denio, 227; *Schouler, Bailm.* § 159. In modern jurisprudence, where incorporeal chattels, such as stocks, bonds, etc., are put in pledge to secure a debt or the performance of some obligation, the more patrician expression, "collateral security," is applied to the bailment. But

the essential nature of the transaction with respect to the title of the property is the same as a pledge; and it is settled law that in the case of a pledge the title does not pass to the pledgee, but only a special property in the thing. And this is so where a chattel is delivered, with authority conferred on the bailee to sell it, and credit the amount on a debt owing to the bailee. After he has so pledged the collateral, the bailor may sell it to a third party, and vest in him a good title, subject, of course, to the rights of the pledgee; and in such case the possession of the bailee is the possession of the purchaser. *Brewster v. Hartley*, 99 Am. Dec. 237; *Garlick v. James*, 12 Johns. 146. Shares of stock in a corporation, negotiable instruments, and choses in action generally are generally pledged by a written transfer apparently passing the title where mere delivery is not sufficient to pass the power of disposition. But in all such cases, in the absence of express contract containing other and further stipulations, the title, or, more accurately speaking, the general property, as between the pledgor and pledgee, remains in the former. *Lockett v. Townsend*, 3 Tex. 119, 49 Am. Dec. 723, and full note. It follows that, as the general property remains in the pledgor, he has the right to transfer the same; and if the pledgee, having notice of the transfer, ignores or disregards the rights of the transferee, and loss is thereby caused to him, the pledgee will be liable to make good the loss. Authorities supra; *Loughborough v. McNevin*, 74 Cal. 250, 14 Pac. 368, and 15 Pac. 773; *Id.*, 5 Am. St. Rep. 435 et seq., and note. The bonds in this case were clearly, under the contract and relation of the parties, held for Mr. Hughes by Mrs. Gardner, subject to their liability to pay the debt due her, and neither she nor her agent could dispose of or surrender them in disregard of his rights. Moreover, under the facts of this case, the condition and terms on which Mr. Hughes became indorser on the note given to Mrs. Gardner, which were communicated to her through her agent, and in which she acquiesced, fixed a specific trust in the bonds in his favor, and she held them subject (her debt being preferred) to this trust.

We are unable to assent to the ingenious argument of counsel that the pledgor of stocks or bonds, as collateral security for the payment of a debt, cannot attach or fix additional instruments or burdens on the pledged property, unless assented to by the first pledgee, and that to permit him to do so would largely destroy the usefulness of such securities in the active business of trade and commerce. That he cannot attach subsequent incidents or conditions which in any way interfere with the rights of the pledgee to have satisfaction out of the pledged property for his debt or demand may be conceded; but that the owner or pledgor of the collaterals cannot himself deal with them.

subject to the rights of the pledgee under his contract of bailment, is a proposition that we have been unable to find supported in any adjudicated case coming to our attention. The fact that Mrs. Gardner said, when she was shown a certain letter of Mr. Hughes, that she did not know him in the transaction, cannot be taken as the assertion of an accepted legal fact in this case. She did not know him in the transaction. He was indorser on the very note that she held certain collaterals to secure, and the condition of his indorsement was that these collaterals, subject to their liability to pay her note, were to be held for his benefit, as collaterals to secure other debts due from Mr. Frierson. In short, these bonds, in the hands of Mrs. Gardner or her son-in-law, were impressed with certain trusts in favor of Mr. Hughes, and these trusts were known to her and her agent controlling them. This being so, if she or her agent, or both, forgetting or ignoring his rights, delivered the bonds, without his assent, to an insolvent party, whereby he lost the benefit of the security, they will be made to respond for whatever loss he sustained in consequence of the wrongful surrender of the bonds. There is no error in the decree of the chancellor holding the estate of Mrs. Gardner and W. S. Settle liable.

The case of the City Savings Bank presents a question of more difficulty. Mr. Frierson was indebted to this bank. Its officials were urging him to pay the debt or reduce it. Mr. Settle, the president of this bank, as a matter of practical fact, controlled or held \$7,500 of bonds belonging to Frierson, to secure the debt going to his mother-in-law. These bonds, subject to the prior claims for the debt of his mother-in-law, had been transferred to Mr. Hughes, of which fact he had been informed, and to which transfer he had, in legal contemplation, assented. Frierson presents himself, and proposes to pay the debt going to his mother-in-law, and demands the collateral bonds. Mr. Settle delivers them to Mr. Frierson, and the latter sells or hypothecates them to Mr. Landis, gets the money on them, and with it pays the note with accrued interest going to Mrs. Gardner, the mother-in-law of Mr. Settle, and appropriates \$935.50 out of what remains, as a payment of his debt to the bank of which Mr. Settle is president, in compliance with the request of the president. The facts and circumstances surrounding the surrender of these bonds by Mr. Settle to Mr. Frierson, and the payment of the note to Mrs. Gardner, and the debt to the bank, as disclosed in this record, were such as in law fixed notice on Mr. Settle that these payments were made from proceeds of the sale of the bonds. If Mr. Settle was affected with notice, so was the bank in this case; for what Mr. Settle knew, or ought to have known, in view of his relation to and control of these bonds and to this bank, that it also knew. It may be conceded that an officer of a bank may have dealings altogeth-

er independent of his connection with the bank, and that the bank will not be affected thereby; but we are unable to assent to the proposition that a bank can receive the proceeds of a diverted trust in payment of a debt due it, the diversion and its reception of the funds being the result of the action of its president, and then hold the fund against the rightful beneficiary under the trust, because of the averment of the corporation that it did not know that its debtor was paying the proceeds of a diverted trust asset, or because its receiving officer did not know from what source its debtor got the money he paid to it. It received part of the proceeds of the collateral held for this complainant, and this collateral was put upon the market with the assent of its president, and the president, in legal effect, at the time asked the party to whom he surrendered the collateral to use it, if necessary, in paying his debt to his bank. It is due to Mr. Settle to state, as it is apparent from this record, that his action in relation to these bonds, and the resultant diversion from the trust impressed on them in favor of Mr. Hughes, occurred in consequence of his having forgotten at the time the rights of Mr. Hughes in them. This bank is liable, under the facts, to the extent to which it received the proceeds of this collateral, but no further. This appears to be \$935.50. Mr. Frierson states that he paid from the proceeds of these bonds to this bank the sum of \$1,150; but the probability is that his memory is at fault as to the amount, and from an inspection of his deposition it would seem that he is speaking merely from memory.

The result is that the decree of the chancellor is affirmed against the administratrix of Mrs. Gardner and Mr. Settle, and his decree, in so far as the City Savings Bank is concerned, will be modified so as to hold it liable only to the extent of \$935.50, and interest thereon from the reception of said sum from Frierson, to wit, August 27, 1892; the liability of all the parties, however, not to exceed the sum decreed by the chancellor against all the defendants, and interest thereon. The defendants, except the City Savings Bank, will pay the costs of the appeal to the supreme court. The costs of the court below will be paid as adjudged by the chancellor.

NEIL and BARTON, JJ., concur.

Affirmed orally by supreme court, December 11, 1895.

LEONARD v. READ.

(Court of Chancery Appeals of Tennessee.
Dec. 23, 1895.)

DEED—RESERVATION OF ROOMS—DESTRUCTION OF BUILDING—RIGHTS OF GRANTOR.

1. An owner of a lot and a brick house partly built thereon, sold and conveyed the same, in consideration "of six hundred dollars

to me satisfactorily arranged," but the deed expressly provided that the grantee "is to complete said house and have cut off of the front on north end of said building, upstairs, twenty-eight feet, and divided into offices, as may be directed by [the grantor], and keep the same in reasonable repair for his use, which twenty-eight feet upstairs in said building is not transferred by this deed, but the absolute title to same is retained, and the building of the same is a part of the purchase consideration for said house and lot." The grantee completed the building, and the grantor went into possession of the offices. The building was afterwards destroyed by fire, and in rebuilding the grantor's claim to like office rooms reserved in the deed was ignored. *Held*, that the consideration named in the deed was fully paid by the completion of the original offices, and hence the grantor had no claim which he could enforce as a vendor's lien.

2. As the deed contained no covenant to rebuild, the grantee fulfilled his contract so long as he kept the existing offices in reasonable repair.

3. The contract in the deed was, in legal effect, simply a lease of the offices without further rent as long as the building existed, and after its destruction the lessee had no property in the brick which had inclosed the particular rooms occupied by him, but the material which remained after the fire belonged to the owner of the lot as a part of the building.

Appeal from chancery court, Marshall county; W. S. Bearden, Chancellor.

Bill by W. J. Leonard against T. E. Read to determine complainant's interest in lands under an express contract set out in a deed executed by him to defendant. A demurrer to the bill was sustained, and complainant appeals. *Affirmed*.

Armstrong, Smithson & Armstrong, for appellant. Vertrees & Vertrees, Thos. F. Baynes, and A. N. Miller, for appellee.

BARTON, J. On bill and demurrer. The demurrer was sustained, and the bill dismissed. Complainant appealed to the supreme court, and assigns errors. The question in this case is whether or not one who owns a room in a house has any interest in the land after the house has been destroyed by fire, or in the new house which the owner of the land may build.

On the 18th of October, 1890, W. J. Leonard and wife executed to W. H. Crawford the following deed: "State of Tennessee, Marshall County. Know all men by these presents, that we have this day bargained and sold, and do hereby transfer and convey, unto W. H. Crawford, for the sum of six hundred dollars to me satisfactorily arranged, the following described real estate in the town of Lewisburg, Tennessee, to wit: A lot in the said town with a brick house partly built on the same. Said lot is bounded as follows, to wit: Beginning at the N. W. corner of the lot by me transferred to L. A. Thompson, running east twenty and one-half feet to R. Warner's lot; thence south sixty-three feet; thence west twenty and one-half feet to said Thompson's lot; thence north sixty-three feet to the beginning,—on the public square of said town

of Lewisburg. Said Crawford is to complete said house and have cut off of the front on north end of said building, upstairs, twenty-eight feet, and divided into offices as may be directed by said W. J. Leonard and keep the same in reasonable repair for his use, which twenty-eight feet upstairs in said building is not transferred by this deed, but the absolute title to same is retained, and the building of the same is a part of the purchase consideration for said house and lot. We covenant with him that we are lawfully seised and possessed of said lot, and have a good right to convey the same, and that the same is unincumbered, and that we will forever defend the title to the same against all lawful claims whatsoever, subject to the reserved right and title to said twenty-eight feet upstairs heretofore set out in this deed. Witness our hands on this the 18th of Oct., 1890. W. J. Leonard. N. M. Leonard."

The bill alleges the execution of this deed, and that it was a brick house partly constructed when the deed was made by Leonard to Crawford. Alleges that by said deed complainant did not transfer the whole of said house and lot to Crawford, but retained 28 feet front of the second story, which Crawford was to build, complete, and keep in repair. The deed is referred to for a full statement of the contract. The bill further alleges that Crawford went forward and completed the house, and built the offices contracted for on the lot. Immediately after its completion the complainant went into possession and occupancy of the offices. Alleges that subsequently Hollins, Sons & Co. attached Crawford's interest in the house and lot by a bill filed in the chancery court of Marshall county, and that said cause proceeded to final judgment, and it was sold for the debt by the clerk and master of the court, purchased by Hollins, Sons & Co., and transferred by Hollins, Sons & Co. by deed to defendant, Read, with a special warranty against complainant's claim. Alleges that Read purchased the lot with full knowledge of complainant's claim. Alleges that the offices were, with the rest of the building, destroyed by fire. Alleges that Read has rebuilt the house on said lot, but now denies the right of complainant to occupy any part of the building, notwithstanding the fact that the property in the offices was that of complainant. Alleges that the building of the office and keeping it in repair was a part and parcel of the purchase consideration. Alleges that, in rebuilding the house, Read totally ignored the complainant's right and interest in the house or lot, and in the construction of the same gave or left no access to the same, nor built any office or offices for him, and that he is not now, nor has he been, keeping the same in repair for complainant's use and benefit, and that he has thus breached the warranty in the deed to Crawford and is liable to the complainant.

Alleges that complainant's claim was a vendor's lien on the lot, and was part of the purchase money for the house and lot, and that he files his bill to enforce his vendor's lien. He alleges that defendant, Read, after the house was burned down, and after he purchased the lot, went forward and rebuilt the same, and used the brick and material that was in the part of the building owned by the complainant, which was worth something like \$100, for which the defendant is liable to the complainant. The purchase of the property and use of the material was all done after notice to him that he would hold defendant responsible for all his lawful rights in the premises. Alleges that the offices were worth \$600. Alleges that the original house, with the offices, was a two-story brick, and the one now built on said lot is a two-story brick. The prayer of the bill is that a specific performance of the contract in said deed be declared and to be enforced, or, if mistaken in that, a lien be declared in said lot for the purchase price, or, at least, the value of said offices provided for and guaranteed in said deed, and also for any and all material used by the defendant in his rebuilding of said house that belongs to the complainant, and prays for general relief.

As above stated, the bill was dismissed on demurrer, which properly raises the questions. So far as we have been able to ascertain, the question is a new one in this state, and is as stated in the beginning of this opinion. Complainant, under the deed, owned a room in the house which was on the lot described in the bill. The house was destroyed by fire, and the owner has rebuilt. Has the complainant any interest in the land, or in the house rebuilt, or does the bill present any grounds for relief against the present defendant? He alleges, as one phase of the relief sought, that his claim constitutes a vendor's lien, and was a part of the consideration price or purchase money, and that a lien was retained on the land to enforce the same. On turning to the deed, the consideration is expressed as \$600, which, it is stated, has been satisfactorily arranged. There is no attempt, as we understand the deed, to retain a lien on the lot, but the statement in the deed that the vendee, Crawford, is to complete the building and offices, and that the building of the offices is a part of the consideration. The offices having been built, the consideration would seem to have been fully paid. No lien is retained on the lot, but the provision of the deed is that the 28 feet front of the second story upstairs is not conveyed. But the absolute title to that much of the building was retained. The complainant was the owner of that part of the building. So we are unable to see how any relief can be granted the complainant on the theory that it was a vendor's lien.

On the next theory of specific performance, we think the difficulties in the complainant's

way are equally great. What is there to specifically perform? The contract was that Crawford was to complete the building, building the two rooms in the second story for the complainant, and was to keep the same in reasonable repair. The bill alleges that he did complete the two rooms, and there is no allegation that he did not keep the rooms in reasonable repair while they existed; and, indeed, his failure to do so would be no cause of complaint against the present defendants. A covenant to keep in repair is not a covenant to rebuild. See 12 Am. & Eng. Enc. Law, pp. 720, 723; 20 Am. & Eng. Enc. Law, p. 1039; *Douglass v. Com.*, 2 Rawle, 264; *Naye v. Noezel*, 50 N. J. Law, 525, 14 Atl. 750; *Levey v. Dyess*, 51 Miss. 501; *Warren v. Wagner*, 75 Ala. 188; *Witty v. Matthews*, 52 N. Y. 515. And, under the allegations of the bill, there is nothing now to repair, as those rooms and that building were destroyed by fire. Upon principle we think we are forced to these conclusions, as we do not see how, on either ground, we could grant the complainant relief without forcing upon the parties a contract of more extended force and meaning than the one they made. It would have been within the power of the parties for complainant to have made a contract binding the defendant to rebuild, making this obligation a charge upon the land; but this was not done, and we cannot make contracts for the parties. This holding is not unsupported by authority. All the cases we have been cited to or have been able to find bear out the views here expressed. In *Winton v. Cornish*, 5 Ohio, 477, the court held that by the grant of the whole house the land might pass, but that by a lease of a part of a single story it does not pass, and that if the whole building is destroyed by fire all the interest of the lessee is gone. The same was the holding of the court in *Stockwell v. Hunter*, 11 Metc. (Mass.) 448.

The other point presented in the bill is a matter of more doubt to our minds; the allegation of the bill being that the brick which constituted part of the building which composed the rooms of the complainant were complainant's property, and that the defendant had used those in the erection of his building, and that their value was something over \$100, which he was entitled to recover. We have held, and the contract contained in the deed shows, that these two rooms were to be complainant's property, and it might seem to necessarily follow that the material composing them was also his property; but, on the other hand, it is alleged that the building was to be, and that when completed it was, a two-story brick building. There were two rooms claimed in the front part. The lot was 63 feet deep, and the inference is the building is about this long, though it does not positively appear. It would seem, in any event, that there were other rooms in the second story besides this. We are therefore bound to conclude that the

material, the brick composing the walls of the building surrounding these rooms, was necessary for the entire building, and not for complainant's use, benefit, and ownership alone; that, as the building stood, the complainant could not have removed this material, and done with it as he pleased, as his own, without great injury to the owner of the lot. And we think the material was that of and belonged to the owner of the lot, as a part of the building, and that the contract in the deed, when reduced to its legal effect, was simply a lease of those two offices without further rent as long as the building existed,—a lease which the destruction of the building by fire terminated.

NEIL and WILSON, JJ., concur.

Affirmed orally by supreme court, January 10, 1896.

FITCH v. STATE.

(Court of Criminal Appeals of Texas. June 27, 1896.)

MURDER—INTENT TO KILL—PRESUMPTION.

1. Where the homicide was not committed in the perpetration of a felony, and the circumstances do not show a cruel or evil disposition on the part of defendant, the intent to kill cannot, as a matter of law be inferred from a killing with a stick four feet long and two inches in diameter.

2. Where the homicide was not committed in the commission of a felony, and the circumstances do not show an evil disposition on the part of accused, there must have been an intent to kill to render accused guilty of murder.

Appeal from district court, Hopkins county; E. W. Terhune, Judge.

Henry Fitch was convicted of murder, and appeals. Reversed.

N. B. Morris, D. Thornton, and Templeton & Crosby, for appellant. Mann Trice, for the State.

HURT, P. J. Appellant was convicted of murder in the second degree, and his punishment assessed at confinement in the penitentiary for a term of six years, and he appeals to this court.

But one question is presented which we desire to notice. To constitute murder of either degree, must the accused intend to kill? When the accused, in the perpetration of a felony, kills another, the intent to kill is not necessary. Where the circumstances attending the homicide show an evil or cruel disposition, or that it was the design or intent of the person to kill, he is deemed guilty of murder or manslaughter, according to the other facts of the case, though the instrument or means used may not in their nature be such as to produce death ordinarily. This case presents no evil or cruel disposition on the part of the accused. This homicide was not committed in the perpetration of any felony. Under

this state of the case, to constitute murder or manslaughter, must the party intend to kill? We answer that he must. In passing upon the intention of the accused,—that is, whether he intended to kill the deceased or not,—the instrument or means by which the homicide was committed must be taken into consideration. If the instrument or means used be not likely to produce death, we are not permitted to presume that death was designed, unless, from the manner in which it was used, the intent to kill evidently appears. But let us suppose that the instrument be one likely to produce death, the jury may infer therefrom the intention to kill; but still it is a question for the jury as to whether the intention to kill existed or not. It does not follow that, in every killing or homicide committed with an instrument likely to produce death, the intention to kill existed. The fact of the intention to kill must be established. This can be done, however, by the character of the instrument or weapon used. If it is likely to produce death, the jury would be warranted in finding an intention to kill; but, as a matter of law, this is not the case. It is still a question of fact for the jury. The instrument used in this case was a stick of wood or piece of rail, about three or four feet long and about two inches in diameter, and weighing three or four pounds. Now, can the court assume that it was a deadly weapon, and from that assumption infer absolutely the intention to kill, and withhold that question from the jury? We think not. We are of opinion that the court should have submitted this question to the jury. This was not done. Counsel for appellant requested instructions bearing upon this question, which were refused. This, we think, was error, for which the judgment must be reversed, and the cause remanded.

EPSON v. STATE.

(Court of Criminal Appeals of Texas. June 24, 1896.)

CRIMINAL LAW—TRIAL—REMARKS OF COUNSEL—NEW TRIAL.

A new trial is properly refused on account of remarks of the prosecuting attorney, where no exception was reserved to the remarks, and nothing appears in the record to sustain the statement in the motion for a new trial that such remarks were made.

Appeal from district court, Galveston county; E. D. Cavin, Judge.

Alec Epson was convicted of murder, and appeals. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of murder in the second degree, and given a term of five years in the penitentiary. The record contains neither a statement of facts, bill of exceptions, nor assignment of er-

rors. The first ground of the motion for a new trial in the court below complained of some alleged remarks of the district attorney in his argument to the jury. If these remarks were made, no exception was reserved, and nothing to verify the statement that the remarks were made appears in the record. It is simply stated in the motion for a new trial as one of the grounds upon which said motion is predicated. The second count of the motion is based upon the supposed insufficiency of the evidence to support the conviction. As before stated, there is no statement of facts in the record, and this question cannot be revised. The judgment is affirmed.

McCULLAR v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1896.)

CRIMINAL LAW—APPEAL—REVIEW—CHARACTER—REMARKS OF COURT—SEDUCTION—EVIDENCE.

1. The exclusion of evidence cannot be reviewed unless the bill of exceptions taken thereto is approved by the trial judge.

2. In a prosecution for seduction, remarks of the court, in overruling an objection by accused to the testimony of a witness as to the reputation of prosecutrix for chastity, on the ground that the witness never heard any one speak of her reputation in that respect, that there is no higher evidence of the good character of a person than that it was never discussed, and that that fact is the best evidence of good character, is ground for reversal.

3. In a prosecution for seduction, the woman seduced is an accomplice, and therefore, to warrant a conviction, her testimony must be corroborated.

Appeal from district court, Willson county; Thomas H. Spooner, Judge.

Fred McCullar was convicted of seduction, and appeals. Reversed.

B. F. Ballard, T. P. Morris, and A. J. Williams, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of seduction, and given two years in the penitentiary, and prosecutes this appeal.

1. There is nothing in appellant's motion to quash the indictment in this case. It follows the statutes, and is in accordance with Willson's form on the subject.

2. On the trial of this case, the defendant introduced Eliza McCullar to prove that Anna May Lindsey was not a woman of virtuous character. Said witness testified on her direct examination that she knew the general reputation of Anna May Lindsey in the community in which she lived as a woman of virtue and chastity, and that such reputation was bad; and afterwards, on her cross-examination by the state, she testified that she had heard different ladies in the neighborhood speak disparagingly of her conduct as early as April, 1893. She also stated that she had "heard it said, a half dozen or more times, that Anna May Lindsey would not do, and

that her language was rough, and her manner rude, and did improper things with men." On further examination, this witness stated that she never heard any person say she was not a virtuous woman. The state then objected to said testimony, and asked to have it excluded from the jury. The court excluded the same, and the defendant reserved his bill of exceptions thereto. This bill of exceptions appears in the record, but it is not approved by the trial judge. The evidence appears to have been admissible, but, as the bill is not approved, we cannot consider it.

3. The state introduced one Chase as a witness, who testified that the reputation of Anna May Lindsey for virtue and chastity was good in the community in which she lived. On cross-examination, the said witness stated that he had never heard any one speak of the reputation of said Anna May Lindsey in that respect. Thereupon the defendant objected to said testimony, and asked that the same be excluded. The court thereupon overruled the objection of appellant, and in that connection remarked: "The authorities agree, and the courts have held, that there is no higher evidence of the good character of a person than that it was never discussed. That fact is the very best evidence of good character." Appellant objected to the remark made by the court in connection with the exclusion of said evidence, and saved his bill of exceptions thereto. It may be true, as stated by the court, that a witness may be qualified to speak of the general reputation of a person as to some quality without having heard the person's character in that respect discussed. But in this case, the character of the prosecutrix for chastity was a direct issue in the case, and for the court to remark, in the presence of the jury, in passing on the admissibility of such testimony, that the fact that the witness had never heard the reputation of the prosecutrix in that regard discussed was the very best evidence of her good character in that respect, was a remark upon the weight of the testimony made in the presence of the jury, and was calculated to impress them with the idea that the testimony of the witness as to the character of the prosecutrix in the respect inquired about was of the very highest. No doubt the learned judge simply meant to state that the predicate laid by such testimony was sufficient to enable the witness to speak as to the character of the prosecutrix. If he had said this, no evil result could have ensued; but, instead thereof, his expression was calculated to impress the jury that the evidence as to the character of the prosecutrix came from the very highest source. This, we think, was error. See *Wilson v. State*, 17 Tex. App. 525; *Crook v. State*, 27 Tex. App. 198, 11 S. W. 444; *Reason v. State* (Tex. Cr. App.) 30 S. W. 780; *Lawson v. State* (Tex. Cr. App.) 32 S. W. 895; *Kirk v. State* (Tex. Cr. App.) 32 S. W. 1045.

4. As is usual in this character of offenses, the state relied mainly on the testimony of the

prosecutrix for conviction. Under our statutes she is regarded as an accomplice, and it is imperative that the state introduce other testimony, outside of her evidence, tending to connect the defendant with the commission of the offense. The court gave a charge on this subject, but, in view of the evidence in this case, we would suggest that, on another trial thereof, the court instruct the jury clearly and explicitly that there must be testimony, outside of that of the alleged accomplice, tending to show that the defendant induced the prosecutrix to have carnal intercourse with him by reason of his promise to marry her; that is, they must believe that the defendant did promise to marry the prosecutrix, and that, by reason of such promise, she was induced to yield her virtue to him. As was said in *Putnam v. State*, 29 Tex. App. 454, 16 S. W. 97, quoting from *Boyce v. People*, 55 N. Y. 644: "The offense consists in enticing a woman from the path of virtue, and obtaining her consent to illicit intercourse by promise made at the time. The promise and yielding her virtue in consequence thereof is the gist of the offense. If she resists, but finally assents or yields thereto in reliance upon the promise made, the offense is committed."

Appellant in this case asked several special charges, which might with propriety have been given; but no exceptions were reserved to the refusal of the court to give said charges, and we do not consider them. We think the court correctly refused to give the special charge asked by the appellant on his minority. For the error of the court in his remark in passing upon the admissibility of testimony above discussed, the judgment is reversed, and the cause remanded.

SMITH v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1896.)

CRIMINAL LAW — ACCOMPLICE — CORROBORATING EVIDENCE.

In a prosecution for false swearing as to the age of a girl to secure a marriage license, it appeared that defendant and the girl eloped for the purpose of getting married, that shortly before defendant made affidavit as to her age she had done so, and that she was aware that such affidavit was necessary to secure the license. *Held*, that the girl was defendant's accomplice, so as to require her testimony to be corroborated to authorize a conviction.

Appeal from district court, Parker county; J. W. Patterson, Judge.

H. D. Smith was convicted of a crime, and appeals. Reversed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of false swearing.

1. The affidavit made by appellant was for the purpose of obtaining a marriage license to marry one Miss Mattie Liles, and is in the following language, to wit: "I, H. D.

Smith, do solemnly swear that I am twenty-one years of age, and that Miss Mattie Liles is eighteen years of age, and that there is no legal objection to our marriage. H. D. Smith." On the trial of the case it was an admitted fact—at least proved beyond contradiction—that appellant made the affidavit. By the testimony of Joe Liles, the father of Mattie Liles, and by Mattie Liles herself, it was shown that she was not 18 years of age at the time appellant made the affidavit. On the morning the affidavit was made, and before the marriage ceremony was performed, Mattie Liles made an affidavit in which she stated she was 18 years of age. She denied any knowledge of the contents of the paper on the trial, and also denied swearing to it, but the other witnesses present at the time testify most positively to the fact that she did sign and swear to it. Mattie Liles testified that she told the defendant on several occasions prior to his making the affidavit that she was not 18 years of age, and on her seventeenth birthday went with the defendant in a buggy, in company with other young people, to the town of Granbury, in Hood county. This was on the 4th of April, 1891. The affidavit was made and the marriage occurred on the 7th of September, 1891. Appellant testified that he did not know Mattie Liles' age, and did not know whether she was 18 years of age or not when he made the affidavit; and that Mattie Liles, and no one else, ever told him her age; that shortly before the marriage he and Mattie weighed, she weighing 140 pounds and he 141 pounds. The court charged the jury with reference to the law which requires that cases of this sort shall be proved by two witnesses, or by one witness and strong corroborating testimony; but we are of opinion that the testimony called for a charge upon the law applicable to accomplice's testimony. Under the facts narrated we are of opinion that Mattie Liles was an accomplice. She made an affidavit at the same time, or within a few minutes of the time, that defendant made his affidavit that she was 18 years of age. She ran away with the defendant for the purpose of obtaining a marriage license. She declined to go to Granbury, where the county clerk knew her, and doubtless her age; and she knew the defendant was going to make the affidavit that she was 18 years of age before they reached Weatherford, where the oath was taken. She went with him for the purpose of being married, and knew, or ought to have known, that a license would not be issued under the circumstances, unless affidavit was made that she was 18 years of age. And under this state of case we think she was an accomplice, and the law applicable to accomplice's testimony should have been given in the charge to the jury.

2. There are two bills of exceptions in the record, presented to the district judge for

his approval more than 10 days after the final disposition of the case. They cannot, therefore, be considered. But, if they could, the testimony set out in the bill of exceptions, we think, was clearly admissible; and the charge set out in the second bill of exceptions requested by the defendant and refused by the court was sufficiently given in the main charge of the court. For the failure of the court to charge the law with regard to accomplice's testimony, the judgment is reversed, and the cause remanded.

HURT, P. J., absent.

MARTIN v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1896.)

CRIMINAL LAW—INSTRUCTIONS—ACCOMPLICES.

Where the state introduces evidence of accomplices, the refusal of the court to charge that a conviction cannot be had on the uncorroborated testimony of accomplices is ground for reversal.

Appeal from district court, Wharton county; T. S. Reese, Judge.

Frank Martin was convicted of murder, and appeals. Reversed.

Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of murder in the first degree, and his punishment was assessed at death, and he prosecutes this appeal. There is but one bill of exceptions in the record. That is to the failure of the court to charge on accomplice's testimony. The principal state's witnesses in this case were John Rickard, Gus Colburn, and Emmett Colburn. Two of them, John Rickard and Gus Colburn, unquestionably participated in the killing of the deceased in such manner as to render them accomplices. As to Emmett Colburn, there is some testimony tending to show that he was an accomplice,—certainly enough to submit to the jury the question as to whether or not he was such. Our statute (art. 781, Code Cr. Proc. 1895) provides: "A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the offense committed, and the corroboration is not sufficient if it merely shows the commission of the offense." By a long line of decisions, it has been held that, where the state in a criminal prosecution introduces evidence of accomplices, it is incumbent on the court to give in charge to the jury the above article, and then, in all proper cases, to define who are accomplices, or what it takes to constitute persons accomplices in the commission of crime. This charge should be given, whether asked or not; but it is especially incumbent on the court, when the matter is pointed out by a bill of exceptions, to give the law on accomplice's testimony

in charge to the jury. See *Winn v. State*, 15 Tex. App. 171; *Sitterlee v. State*, 13 Tex. App. 587, *Howell v. State*, 16 Tex. App. 93; *Coffelt v. State*, 19 Tex. App. 436; *Fuller v. State*, Id. 380; *Anderson v. State*, 20 Tex. App. 312; *Stone v. State*, 22 Tex. App. 185, 2 S. W. 585; *Boren v. State*, 23 Tex. App. 28, 4 S. W. 463; *Stewart v. State* (Tex. Cr. App.) 32 S. W. 766; *Ballew v. State* (Tex. Cr. App.) 34 S. W. 616. It is not necessary to discuss the testimony of said witnesses. The evidence not only tends to show that said three witnesses were accomplices, and that their testimony was materially prejudicial to the defendant, but the record establishes that the state's case is mainly based upon their evidence; and why the learned judge should have omitted, in a case of this importance, to give to the jury a charge on accomplice's testimony, especially when an exception was taken to his charge in this regard, is to us inexplicable. The defendant in this case may be ever so guilty, but the meanest criminal in the land has an inalienable right to have his case passed upon by the jury under the known rules of evidence, and to deny him this right is to deprive him of a fair and impartial trial according to the laws of the land. For the error of the court in refusing to charge the jury on accomplice's testimony the judgment of the lower court is reversed, and the cause remanded.

WILSON v. STATE.

(Court of Criminal Appeals of Texas. June 27, 1896.)

CRIMINAL LAW—EVIDENCE—EXPERIMENTS—HOMICIDE—PROVOKING THE DIFFICULTY—SELF-DEFENSE—INSTRUCTIONS.

1. On the issue as to whether words alleged to have been spoken by defendant could have been heard by the witness testifying thereto, evidence of an experiment made under similar circumstances is admissible.

2. Where deceased threatened to build his fence so as to encroach upon defendant's land, the fact that defendant went armed to the place of the homicide, to prevent deceased from doing so, does not deprive him of the right of self-defense, on the ground that he provoked the difficulty.

3. Where the written examination of a witness is put in evidence by the state, it is error to instruct that such evidence should be regarded as evidence in the case, and should be considered like the evidence of other witnesses who testified before the jury, as giving too much prominence to such evidence.

Error from district court, Ellis county; J. E. Dillard, Judge.

W. F. Wilson was convicted of murder, and appeals. Reversed.

G. C. Groce and M. B. Templeton, for appellant. Mann Trice, for the State.

HURT, P. J. Appellant was convicted of murder in the second degree for the killing of Mrs. Emma Ratliff, and his punishment

assessed at confinement in the penitentiary for 30 years, and he prosecutes this appeal.

1. Two theories are presented by the state: First, that the appellant intentionally killed Mrs. Ratliff; and, second, that with his malice aforethought he shot at the husband of Mrs. Ratliff, and accidentally killed his wife, the deceased. The testimony of one Hanson, taken before the examining court, was introduced in evidence by the state. He swore that he heard the appellant use certain words, speaking to the deceased, Mrs. Ratliff, at the time of the shooting, to wit: "I will shoot through you. I will shoot you both." It was admitted that Hanson was 100 yards away, and that the wind was blowing the sound from, and not towards, him. To test whether from his position he could have heard the words to which he testified, a number of persons went upon the ground on a day when conditions as to wind, etc., were the same, and under practically the same conditions. These parties were placed in the position of the witness Hanson and others at the well, at which point the shooting occurred, and the words ascribed to the appellant were spoken by those at the well in different ranges of voice from the lowest to the highest; and it was proposed to be proved by these parties, and appellant alleges could have been proved by them, that they did not hear such words so spoken at the well, at the position occupied by Hanson, and that their hearing was good, which proof was rejected, and appellant excepted. The question before us is, is such testimony admissible? It was. This precise question was before the supreme court of Ohio in *Smith v. State*, 2 Ohio St. 511, and it was there held that such testimony was admissible. The question came before the supreme court of Tennessee in *Byers v. Railway Co.*, 29 S. W. 128, and there such testimony was held admissible. The same question arose in the case of *Railway Co. v. Champion* (Ind. Sup.) 32 N. E. 874, and the ruling was the same in that case.

2. The court submitted to the jury the doctrine of provoking the difficulty, to which the appellant excepted. There seemed to have been a dispute between Ratliff, the husband of Mrs. Ratliff, the deceased, and appellant, in regard to some land,—as to where the line should run. Appellant was in possession, and had been for some time, of the land in dispute. Ratliff proposed to build a fence inclosing this land. Appellant and his son went to the place armed. He had a right to be there, and had a right to go armed, to prevent the erection of that fence. He had no right to use his arms, unless forced to do so by circumstances; but he had a right to prevent the erection of that fence. All agree that he spoke to Ratliff, the husband of the deceased, asking him whether he intended to build the fence on the land. Ratliff stated that he did, as testified by some witness, and by others that he did not. The testimony is conflicting upon this point. The state's the-

ory was that when Ratliff said that he was or was not going to build the fence the defendant shot him, and in the attempt to kill him killed his wife, Mrs. Ratliff. The defendant's theory is that Ratliff was in the act of shooting him, and that he fired to save his own life. This theory is supported by the testimony of himself and his son and other witnesses. The doctrine of provoking the difficulty has no application to this state of facts. If appellant shot at Ratliff under the circumstances enumerated by Ratliff himself and some other witnesses, and accidentally killed his wife, he would be guilty of murder in the second degree. If appellant shot to save his life,—a theory supported by his testimony, his son's, and some other witnesses,—he was acting in self-defense, and that was the only issue in this case. The doctrine of provoking the difficulty can only apply when the defendant seeks to justify himself upon the ground of self-defense. The state replied to this theory by proving that he had provoked the difficulty, and was estopped from relying upon self-defense, and that he had provoked the difficulty or produced the occasion with the intention of slaying his adversary, or with some other intention. If for the purpose of killing him, it would be murder; if for the purpose of inflicting a battery upon him, and he was forced to kill to save his life, he would be guilty of manslaughter. It is in the nature of an estoppel. Now, under the circumstances of this case, if Ratliff was in the act of killing the defendant by shooting him with a gun, no one would contend that he would not be justified. If he was not, and the defendant was in no danger or apparent danger, and he shot at Ratliff with his malice aforethought, and killed his wife, he would be guilty of murder. Counsel objected to this charge. It ought not to have been given. There is not a particle of analogy between this case and the *Gilleland Case*, 44 Tex. 356. *Gilleland* not only sought the deceased, but pressed the difficulty, armed with a pistol, knowing that the deceased was armed, and knowing that he was to engage in a deadly conflict. It is remarkable that but few cases arise to-day in which the doctrine of producing the occasion or provoking the difficulty is not sought to be used by the prosecution. In *Texas* the *Gilleland Case* was among the first in which this doctrine was invoked. From this charge the jury may have inferred that when the appellant armed himself, and went to where the deceased was, that, therefore, he provoked the difficulty, and was deprived of his right to defend his life.

3. It appears by a bill of exceptions that the written testimony of J. E. Hanson, taken on an examining trial, was read in evidence. The court instructed the jury in regard to this testimony. The charge, as originally prepared, filed, and read to the jury, contained no special reference to the testimony of Hanson, the absent witness. After the charge was read to the jury, at the instance of counsel for

the state, and over the objection of counsel for appellant, the court added to the charge the words: "The jury are instructed, however, that the written testimony of J E. Hanson, taken at the examining trial, should be regarded as evidence in this case." And this addition was then read to the jury. This was about 10:30 p. m., Saturday night, and the indictment and charges were not then manually delivered to the jury, but were placed in charge of an officer until Monday morning following. On Monday morning, and before 9 o'clock, without the knowledge or consent of the appellant, and in the absence of his counsel, the court, at the instance of counsel for the state, made a further addition to the charge of the words, "And should be weighed and considered by you like the evidence of other witnesses who testified before you." As finally completed, the charge in regard to the testimony of Hanson reads: "The jury are instructed, however, that the written evidence of the witness J. E. Hanson, taken at the examining trial, should be regarded as evidence in the case, and should be weighed and considered by you like the evidence of other witnesses who testified before you." There was an objection to this by counsel for appellant. There was no necessity for the court to call the jury's attention to Hanson's testimony in any manner, shape, or form. It was in evidence before the jury, and they could give it just such weight as it was entitled to, without any aid from the court. This charge was calculated to impress the jury with the belief that something extraordinary should be attached to the testimony of Hanson, especially when the court had made additions to his charge on this question, after the charge had been read to them. We know of no law requiring the jury to weigh and consider the written testimony of any witness in the same manner as that of any other witness in the case. If there was such a law, it would be impossible for the jury to do this, because the appearance, the looks, and the manner of the absent witness (frequently a great test of truth) could not be observed by the jury. This last addition to the charge was made in the absence of counsel for the defendant. If present, he might have suggested the propriety of instructing the jury, as the court had already entered that field, not to give more credit to the testimony of the absent witness than the other witnesses, and that in passing upon the credibility of this testimony, the weight to be given to his evidence, they should look to all of the surrounding facts and circumstances. But no such opportunity to submit such a charge was given counsel for the defendant.

There are a great many other questions presented in the record, but we believe they will not arise again upon another trial. For the above reasons, the judgment is reversed, and the cause remanded.

HENDERSON, J., absent.

TRAVIS et al. v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1896.)

INTOXICATING LIQUORS—ILLEGAL SALES.

Under Acts 1893, p. 178, § 5, requiring the license for the sale of liquors to specify the house in which the liquor is to be sold, and providing that, when persons desire to change their place of business, such change may be made by having the next place of business inserted in the license by the clerk; and section 6, prohibiting the sale of liquor at any other place than that designated in the license,—a person licensed to sell liquor must confine his sales to the place designated in the license, unless he causes his license to be so changed by the clerk as provided by statute.

Appeal from Wharton county court; R. F. Bentley, Judge.

J. A. Travis and another were convicted of a crime, and appeal. Affirmed.

Mann Trice, for the State.

DAVIDSON, J. By information appellants were charged with pursuing "the occupation of selling spirituous, vinous, and malt liquors, and medicated bitters, in a place other than designated in the license issued by the clerk of the county court of Wharton county authorizing them to pursue said occupation." There are no bills of exceptions in the record, nor is the statement of the facts sent up for our inspection. The only question presented by the record is the motion in arrest of judgment, upon the broad ground that the information charges no offense known to the laws of the state of Texas. There is no particular vice or defect pointed out by the motion in arrest of judgment, the said motion being in the form of a general demurrer. We have examined the information, and think it not subject to such general demurrer. The statute provides: "Any person or persons who shall sell spirituous, vinous or malt liquors or medicated bitters, in quantities not authorized by his or their license, or who shall sell in any other place than that designated in the license, or who shall sell otherwise than authorized by the license, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined in any sum from fifty to one hundred dollars, or imprisonment in the county jail from ten to thirty days, in the discretion of the jury," etc. Laws 1893, p. 178, § 6. It would seem, from the reading of this statute, that it is an offense against the laws of this state for parties selling intoxicating liquors under a license to sell said intoxicants in any other place than that mentioned or set out in the license; and under the act of 1893, under which this prosecution is based, the party taking out such license must designate the place in which his business is to be carried on; and under the terms of this law his business is to be carried on at such place, unless he complies with the further provisions of the law in regard to moving his said place of business. See Acts 1893, p. 178, §§ 5, 6. Section

5 provides: "The particular place or house in which the liquors are to be sold shall be designated in the license, and no license shall authorize any person to sell spirituous, vinous or malt liquors or medicated bitters at any other place or house than that designated in the license,—provided, that if any person or association of persons having a license to sell such liquors, desires to change his or their place of business, such change may be made by presenting the license to the clerk of the county, and having the next place of business inserted therein; but in no case to admit of the temporary closing of one place of business to sell at another place." It is evident, from the reading of this section, together with that portion of section 6 quoted above, that a party taking out a license must not only designate the house in which his business is to be carried on, but he must confine that business to the place designated, unless, as provided in section 5, when he desires to change to another place, he may cause his license to be so changed by the clerk as to designate the place to which he proposes to remove said business. So far as we are able to see from the face of the information before us, it charges an offense in contemplation of sections 5 and 6 of the act of 1893. There was no error in the action of the court in overruling the motion in arrest of judgment, and the said judgment is affirmed.

PENNSYLVANIA FIRE INS. CO. v. BROWN.

(Court of Civil Appeals of Texas, Feb. 12,
1896.)

INSURANCE—FIRE POLICY—IRON-SAFE CLAUSE— BREACH.

Where an insured enters daily credit sales in a blotter, from which he transfers them to his regular books of account, his inability to furnish a record of the credit sales the day before the fire, because the blotter containing it had been destroyed in the fire through his failure to put it in a safe at night, will not avoid a fire policy requiring him to keep a set of books, showing both cash and credit sales, in a fire-proof safe, and providing that failure to produce such books shall avoid the policy.

Error from district court, Ellis county; J. E. Dillard, Judge.

Action by N. Brown against the Pennsylvania Fire Insurance Company on a fire policy. From a judgment for defendant, plaintiff brings error. Affirmed.

Morgan & Thompson, for plaintiff in error. M. B. Templeton and Crawford & Crawford, for defendant in error.

NEILL, J. This suit was brought by defendant in error against the plaintiff in error on the fire insurance policy described in our conclusions of fact. He recovered a judgment for \$1,806.79, from which the insurance company prosecutes this writ.

Conclusions of Fact.

On the 4th day of January, 1893, the Pennsylvania Fire Insurance Company issued to N. Brown its fire insurance policy upon a certain stock of goods for \$2,000. The goods were destroyed by fire during the continuance of the policy. At the time of the fire, defendant had \$17,500 concurrent insurance on the goods. The value of the insured property destroyed was \$20,830.13, of which value and loss the defendant in error made and furnished plaintiff in error due proof. The policy contained a one-third value clause and the "iron-safe" clause, which is as follows: "The assured under this policy hereby covenants and warrants to keep a set of books showing a record of business transacted, including all purchases and sales, both for cash and credit, together with the last inventory of stock insured; and further covenants and warrants to keep such books and inventory securely locked in a fire-proof safe at night, and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on; and in case of loss the assured warrants and covenants to produce such books and inventory, and, in the event of a failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss." Defendant in error kept a set of books showing the record of his business required, but neglected to keep his blotters containing the itemized record of his credit sales done in his business in his iron safe, with his other books, and the same were burned with the stock of goods, and were not produced after the fire, and no record was preserved and presented to plaintiff in error of the amount of the credit sales for the day preceding the fire, to wit, December 19, 1893.

Conclusion of Law.

The iron-safe clause was a part of the contract of insurance, and a promissory warranty on the part of defendant in error which required strict compliance on his part with its terms. Insurance Co. v. Brown (decided by this court on January 29, 1896) 34 S. W. 462, and authorities cited in the opinion. The failure of appellee to comply with his promise and warranty precludes his recovery on the policy. Therefore the judgment of the district court is reversed, and judgment is here rendered for plaintiff in error.

On Rehearing.
(June 27, 1896.)

On the authority of the opinion of the supreme court in Brown v. Insurance Co. (which is a companion case to this, delivered on May 25, 1896) 35 S. W. 1060, this motion is granted, and the judgment of the district court is affirmed.

SUN MUT. INS. CO. v. BROWN.

(Court of Civil Appeals of Texas. Feb. 12, 1896.)

INSURANCE—"IRON-SAFE" CLAUSE IN POLICY—FAILURE TO OBSERVE.

Under an insurance policy on a stock of goods, containing the iron-safe clause, the failure of the insured to place his blotters, containing the only record of the last day's sales, in the safe, and their consequent destruction through the stock, does not preclude his recovery. *Brown v. Insurance Co. (Tex. Sup.)* 35 S. W. 1060, followed.

Error from district court, Ellis county; J. E. Dillard, Judge.

Action by N. Brown against the Sun Mutual Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Morgan & Thompson, for plaintiff in error. M. B. Templeton and Crawford & Crawford, for defendant in error.

NEILL, J. This suit was brought by defendant in error against plaintiff in error on the policy of insurance described in our conclusions of fact. The suit resulted in a judgment for \$1,355.11 in favor of defendant in error, from which this writ is prosecuted.

Conclusions of Fact.

On March 9, 1894, the Sun Mutual Insurance Company issued to N. Brown its policy of insurance against fire for \$1,500 on a certain stock of goods which were destroyed by fire while the policy was in force. At the time the fire occurred he had \$17,000 concurrent insurance. The policy contained a three-fourth value clause, and the "iron-safe" clause which is as follows: "The assured under this policy hereby covenants and warrants to keep a set of books showing a record of business transacted, including all purchases and sales both for cash and credit, together with the last inventory of stock insured, and further covenants and warrants to keep such books and inventory securely locked in a fireproof safe at night and at all times when the store mentioned in the within policy is not actually open for business, or in some secure place not exposed to a fire which would destroy the house where such business is carried on, and in case of loss the assured warrants and covenants to produce such books and inventory; and, in the event of a failure to produce the same, this policy shall be deemed null and void, and no suit or action at law shall be maintained thereon for any such loss." Defendant in error kept a set of books showing the record of his business required, but neglected to keep his blotters, containing the itemized record of his credit sales done in his business, in his iron safe with his other books, and the same were burned with the stock of goods, and were not produced after the fire, and no record was preserved and presented to plaintiff

in error of the amount of the credit sales for the day preceding the fire, to wit, December 19, 1893.

Conclusion of Law.

The iron-safe clause was a part of the contract of insurance, and a promissory warranty on the part of defendant in error, which required strict compliance on his part with its terms. *Insurance Co. v. Brown* (decided by this court on January 29, 1896) 34 S. W. 462, and authorities cited in the opinion. The failure of appellee to comply with his promise and warranty precludes his recovery on the policy. Therefore the judgment of the district court is reversed, and judgment is here rendered for plaintiff in error.

On Rehearing.

(June 27, 1896.)

On the authority of the opinion of the Supreme Court in *Brown v. Insurance Co.* (which is a companion case to this, delivered May 25, 1896) 35 S. W. 1060, this motion is granted, and the judgment of the district court is affirmed.

ROYAL INS. CO. v. BROWN.

(Court of Civil Appeals of Texas. Jan. 29, 1896.)

INSURANCE—WARRANTY—IRON-SAFE CLAUSE—SUBSTANTIAL COMPLIANCE.

A substantial compliance, only, with the warranty in an insurance policy requiring the insured to keep certain account books in a safe, is required.

Appeal from district court, Ellis county; J. E. Dillard, Judge.

Action by N. Brown against the Royal Insurance Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Harris & Knight, for appellant. M. B. Templeton and Crawford & Crawford, for appellee.

FLY, J. The facts and the points raised in this case are identical with those in the case of *Insurance Co. v. Brown* (this day decided by this court) 34 S. W. 462, and reference is made to that decision for a full discussion of all the points raised in this case. In addition to the authorities therein cited, we call attention to the cases of *Assurance Co. v. Althelmer* (Ark.) 25 S. W. 1067; *Insurance Co. v. Parker* (Ark.) 32 S. W. 507; and 1 Wood, Ins. p. 448. The judgment of the district court will be reversed, and judgment here rendered in favor of appellant for all costs in this and the lower court expended.

On Rehearing.

(June 27, 1896.)

Appellee sued to recover insurance on certain merchandise destroyed by fire. Appel-

lant set up a forfeiture on the ground that there had been a failure to comply with the requirements of what is known as the "iron-safe clause." The trial resulted in a verdict for appellee. We adopt the findings of fact of the trial judge. He found that none of the books containing the original entries were kept in a safe, as appellee had bound himself to do, and they were destroyed by fire, and that the only book containing the entries of purchases and sales on credit for the day before the fire was not placed in the safe, and was burned. It has been held by the supreme court of Texas, however, in a companion case, that a substantial compliance with a warranty is all that is required. *Brown v. Insurance Co.* (delivered May 25, 1896) 35 S. W. 1060. While that decision seems to be in conflict with the decisions of most of the American courts, as well as the case of *Insurance Co. v. Kempner*, 87 Tex. 229, 27 S. W. 122, still, the facts being exactly the same, we deem it the law of this case. The judgment will therefore be affirmed.

BRANCH v. TRAYLOR et al.¹

(Court of Civil Appeals of Texas. Feb. 29, 1896.)

NEGOTIABLE INSTRUMENTS—TRANSFER AFTER MATURITY.

The fact that a person securing from the maker a note, paid and past due, under an agreement that it should not be so used as to involve the maker in liability, fraudulently represented to one of his creditors that the note was a valid obligation of the maker, and transferred it to him, and thereby secured a credit upon his debt, and the discharge of a lien on his homestead, did not render the maker of the note liable thereon to such creditor.

Error from district court, Dallas county; R. E. Burke, Judge.

Action by John H. Traylor against James B. Simpson, in which Wharton Branch was afterwards cited as a party defendant. From a judgment for plaintiff against defendants, and for defendant Simpson over against Branch, the latter brings error. Reversed.

Jeff Woro, for plaintiff in error. Dudley G. Wooten, for defendant in error.

FINLEY, J. On September 26, 1893, John H. Traylor filed suit against James B. Simpson in the district court of Dallas county (Fourteenth judicial district) on a certain negotiable promissory note for \$1,000; alleging that the same was made and delivered to one W. O. Watts by said Simpson, and payable to his order, dated April 2, 1892, due 60 days after date, with interest at 9 per cent. per annum, and 5 per cent. attorney's fees,—said note being indorsed in blank by said Watts before maturity and without recourse,—and which came into the hands of Wharton Branch in due course of transfer, and was

by said Branch, for a valuable consideration, indorsed and transferred to Traylor on September 12, 1893, without recourse, and Traylor brought his suit on the note in the regular form of petition on promissory note. Simpson filed an amended answer on December 21, 1893, in which he alleged, after general demurrer and general denial, that on September 23, 1892, Traylor sold to Mrs. Harriet J. Simpson, wife of said J. B. Simpson, certain real estate in the town of Rockport, Tex., for the recited consideration of \$23,333, which consideration, however, consisted of a lot of promissory notes held by said Harriet J. Simpson, of various dates and amounts, including the note of Wharton Branch for \$1,000, payable to J. B. Simpson, or order, and by said Simpson indorsed and transferred without recourse to said Traylor as a part of the consideration for the land sold by him to Mrs. Simpson; that said note was dated August 18, 1888, due August 20, 1892, and secured by vendor's lien on the homestead of Wharton Branch in the city of Dallas; that said Traylor accepted said vendor's lien note on the homestead of said Branch, subject to all payments, credits, and defenses, because the same was past due at the time said Traylor took it; that said note was entitled to a credit of \$1,000 as of date April 2, 1892, and that said Traylor, knowing all these facts, accepted the Watts note, sued on herein, as representing said omitted credit of same date as the Watts note, and did then enter on said Branch's note for \$1,000, dated August 18, 1888, the said credit of \$1,000, as of date April 2, 1892; that Traylor did not in fact purchase said Watts note from Branch, nor did said Branch sell the same to Traylor, but Traylor simply took it as evidence of said credit, and of said Branch's right to the credit; that Traylor, having acquired the note after maturity, indorsed without recourse. He took it subject to all defenses and credits, and paid nothing for it except to allow Branch a credit on the vendor's lien note, to which he was legally entitled as against Traylor. Traylor at once filed a first supplemental petition, containing general and special demurrers and general denial, and also pleading that, if any of the statements of Simpson's answer were true, then Wharton Branch should be a party defendant, and praying that he be made a co-defendant along with Simpson, and for citation to him accordingly. Branch was duly cited to the next term of court, and filed his original answer January 3, 1896. In this he set up substantially the same defense that Simpson had raised in his answer above mentioned, as well as pleading misjoinder, demurring generally and specially, and denying all of the plaintiff's allegations. He also set up that, previous to April 2, 1892, he was indebted to J. B. Simpson in the sum of two promissory notes, both dated August 18, 1888, due in four and five years, for \$1,000 each.

¹ Writ of error denied by supreme court.

secured by vendor's lien on his homestead in Dallas; that in the course of business he came into possession of the Watts note herein sued on, which became in his hands a legal offset against said two vendor's lien notes held by said Simpson, and he was entitled to be credited thereon; that Traylor became the owner of said two vendor's lien notes on September 23, 1892, after the maturity of the first of them, in a certain trade between said Traylor and Simpson and wife; that Traylor took said notes with an indorsement of the same by Simpson without recourse to his wife, and by her in blank without recourse, joined by her husband; that the first of said notes, being past due when Traylor took it, was subject in Traylor's hands to the offset of the Watts note, which said Branch had acquired against Simpson, and that Traylor did, in fact, recognize said credit, and indorsed it on the first of said vendor's lien notes on September 12, 1893, as of date April 2, 1892, and thereby extinguished and canceled said Watts note, which was surrendered to him by said Branch; that this transaction was nothing more on Traylor's part than the recognition of a credit which Simpson would have had to allow while the vendor's lien notes were in his hands, and that Traylor thus became possessed of the Watts note simply as an evidence of the transaction, and without consideration; that said Branch has paid off both of said vendor's lien notes since the institution of this suit, including the credit of \$1,000 above mentioned, and that said Traylor has released the lien securing the same. On January 22, 1895, Traylor filed an amended first supplemental petition, in which, after general and special demurrers and general denial to the answers of Simpson and Branch, he set up the following facts: That he acquired the two vendor's lien notes of said Branch on September 23, 1892, in good faith, and without any notice of any offsets or defenses thereto, from Simpson and wife, for their full face value, with accrued interest thereon, amounting at that time to considerably more than the face sums of the two notes; that said Simpson and wife represented to him that said notes were good for their full face value, principal and interest, and were not entitled to any credit, offset, or defense, and, relying on said representations, he paid the full face value of the same in property; that said notes are and were secured by vendor's lien on the homestead of said Branch, worth \$5,000; that said Branch well knew of the transfer of said notes and lien to Traylor at the time the same occurred, and made no pretense or claim that he was entitled to any credit or offset against them, or either of them, but on all occasions, and for a year afterwards, declared to said Traylor that said notes were good and valid for their full face value, and promised from time to time to pay the same in full, especially the first of said

notes, which was past due when Traylor acquired it; that about September 12, 1893, for the first time, Branch claimed and pretended that he was entitled to a credit of \$1,000 on the first of the two notes, growing out of some transaction between him and Simpson during the time Simpson held said notes, and he claimed that, as Traylor had bought the note after maturity, he must allow the said credit; that Traylor protested against allowing this pretended credit, as Simpson had represented the notes to be of full value and entitled to no credits or offsets, and stated to Branch that he could not afford to lose \$1,000 on the first of said notes; that thereupon Branch represented to plaintiff that he held the Watts note for \$1,000 against Simpson, which was unpaid and good for its full face value, and he proposed to let plaintiff (Traylor) have said Watts note if Traylor would allow the \$1,000 credit on the vendor's lien note; that Branch did not pretend to claim that said Watts note was a credit, or entitled to be applied as such, on the vendor's lien notes, or that it had anything to do with them, but represented to Traylor that it was a good and valid note of Simpson, which he had acquired in due course of business for a valuable consideration, and offered to let plaintiff have it in consideration of the proposed credit on the other note held by plaintiff against Branch's homestead; that Traylor relied upon the truth and good faith of these representations, and entered the said credit, and took the Watts note, now sued on, in consideration thereof, thereby extinguishing the valid indebtedness of said Branch to that extent, and releasing the vendor's lien on the homestead pro tanto; that plaintiff did not know, had no means of knowing, and was in no way put upon notice that the note thus acquired and herein sued upon was not a valid and bona fide note of said Simpson, which said Branch had acquired in due course and for a valuable consideration, and believed it to be so; that the acts and conduct of both Simpson and Branch in the premises constituted bad faith and fraudulent representations on their part, and that by said fraud and deceit Branch secured a credit of \$1,000 on his said note, secured by vendor's lien, and has also secured the delivery of both of said vendor's lien notes and the release of the lien by fraudulently obtaining this credit and paying the balance due on said two notes; that both of said defendants knew of the true nature of the transaction, and conspired together to defraud and deceive plaintiff, as set out, and he prayed for judgment against both of them, as well as for general relief at law and in equity. On January 23, 1895, J. B. Simpson filed his second amended original answer, in which he stated that in July, 1893, Branch came to him and procured the Watts note herein sued on, without any consideration whatever, and for the purpose, as he said, of using

it in some business transaction; that the note was an old paid-off note, which said Simpson had in his possession, and that he gave it to Branch with the distinct positive agreement and assurance that said note should not be used by said Branch in such way as to render him (Simpson) liable thereon in any way; that it was purely an accommodation note as between Simpson and Branch, but that Branch at once used it to secure from Traylor a credit of \$1,000 on a vendor's lien note which Traylor held against Branch, and which credit the last-named note was not entitled to, as Traylor had bought it from Simpson and wife for full value, and without any credit or offset being due or allowable thereon; that said Branch's conduct was a fraud on Simpson, and, in case of judgment against Simpson, he prayed for judgment over against Branch.

On the foregoing pleadings the case was tried January 24, 1895, and judgment rendered in behalf of Traylor against both Simpson and Branch for the amount of the note sued on, principal and interest and attorney's fees, and in favor of Simpson over against Branch for the same amount. The defendant Wharton Branch prosecutes this writ of error, and alone complains of the judgment rendered in the court below. Upon the trial of the cause the following facts were proven: (1) The note originally sued upon was introduced and read in evidence. (2) The entire transaction is disclosed by the testimony of two witnesses, as follows: John H. Traylor testified: That on September 23, 1892, he sold to James B. Simpson certain property at Rockport, for the sum of \$23,333, of which \$10,000 was the promissory note of Simpson and wife, Harriet J. Simpson, and \$13,333 was in promissory notes of various parties, transferred to him by Simpson and wife, among which were two notes, for \$1,000 each, executed by Wharton Branch, in favor of J. B. Simpson, dated August 18, 1888, and due, respectively, on August 20, 1892, and August 20, 1893, and both secured by vendor's lien on the homestead of said Wharton Branch in Dallas. That these notes were indorsed as follows: "Pay to the order of H. J. Simpson, as her separate estate, without recourse on me. J. B. Simpson." And also, "Without recourse. H. J. Simpson. James B. Simpson." That at the time he got the notes from Simpson the latter represented that they were as good as gold, and were entitled to no credits. That it was nearly a year afterwards before Branch claimed a credit against either of said notes. That the first of said notes was past due when witness got it from Simpson. That on September 12, 1893, witness allowed a credit of \$1,000 on the first of said notes on the strength of the Watts note here sued on, as of date April 2, 1892, that being the date of the Watts note. That at the same time Branch gave him collateral security to the

extent of \$2,500 to secure the balance due on said first note and the amount due on the second note. That Branch also delivered to witness the Watts note against Simpson. That very soon after witness got the two vendor's lien notes from Simpson, witness notified Branch that he held them. That Branch never claimed any credit on the first note until about the time the second note fell due, at which time he claimed that he was entitled to \$1,000 credit on said first note at the time Simpson held it, to wit, about April 2, 1892, and that witness was bound to allow it, as the note was past due when witness got it. That witness protested, because Simpson and wife had represented the notes to be good for their full face value, and entitled to no credits, and witness had taken them with that understanding. That Branch represented the Watts note sued on herein to be a just and valid debt of Simpson, and a bona fide note of said Simpson, and witness believed his representations in regard thereto, allowed him the \$1,000 credit on the first of the vendor's lien notes, and thereby extinguished the indebtedness of said Branch to that extent, and released the lien securing the same that much. That since the institution of this suit, and before witness became acquainted with the real nature of the note and the bad faith of the transaction, to wit, on or about November 4, 1894, witness accepted from said Branch the balance due on said two notes after allowing said credit, and executed and delivered to said Branch a release in full of the lien on his homestead which existed as security for the full amount of said notes. That witness did so before any of the pleadings of said Branch and Simpson were filed herein, disclosing the true nature of the fraud and deceit that had been practiced on witness by them, and in ignorance of the facts. That Simpson is insolvent, and witness has been defrauded out of \$1,000 and the lien securing the same by the fraudulent acts of said Branch. (3) J. B. Simpson testified to all the facts as set out in his amended answer, viz.: That the Watts note was simply an accommodation paper, lent to Branch, to be used by him in such way as not to involve witness in any liability thereon. That it was an old note that had been paid off, and that Branch paid no consideration for it whatever. That it was not a credit on the said Branch's vendor's lien notes held by Traylor. That said vendor's lien notes were good as against Branch for their full face value, and were entitled to no credits whatever. That Branch had fraudulently used said Watts note to secure a credit on the first of said vendor's lien notes by deceiving Traylor as to the true nature of the same.

Conclusions of Law.

1. The facts showing that Wharton Branch was not entitled to a credit upon his vendor lien note, executed to Simpson, and

which was held and owned by Traylor, and that he procured the credit to be entered thereon through fraudulent representations, and said note having been canceled and surrendered, he is liable to Traylor in the sum covered by the credit, and interest thereon from the date of the credit.

2. The note sued upon being past due when it was transferred by Branch to Traylor, it was subject to the defense of payment set up and proven by Simpson, and Simpson did not become liable upon the note by reason of the fraudulent acts of Branch.

3. As Simpson was not rendered liable by the acts of Branch, he is not entitled to recover against Branch.

4. The recovery of attorney's fees by the plaintiff should not have been allowed.

The judgment is reversed, reformed, and here rendered, so as to allow plaintiff to recover of Wharton Branch only the sum of \$1,000, with interest thereon from April 2, 1892, excluding the attorney's fees; appellee Traylor to pay the costs of appeal. Judgment reversed, reformed, and rendered.

HAYDEN SADDLERY HARDWARE CO. v. RAMSAY et al.¹

(Court of Civil Appeals of Texas. June 10, 1896.)

AMENDMENT OF PLEADING—PARTNERSHIP—STATE OF LIMITATIONS—NEW PROMISE—HUSBAND AND WIFE—ASSIGNMENT—ATTACHMENT—PROOF OF VALUE—CONFESSION OF JUDGMENT AFTER VERDICT—DEFAULT.

1. Where several defendants, sought to be charged as partners, answered as to the merits, it was not error to allow them to subsequently interpose an amended answer denying the partnership.

2. Where several defendants are sought to be charged as partners, a plea denying the partnership, verified and interposed by one of the defendants, inures to the benefit of all of them.

3. In an action on an account, where it is sought to charge several defendants as partners, the partnership being denied and not proved, a letter written by one of the defendants containing a new promise to pay the debt will not operate as a bar to the running of limitations as to the other defendants.

4. In an action against several defendants, where the jury returned a verdict against the plaintiff, it was not error of which plaintiff could complain for the court to allow one of the defendants to come in, after verdict, and confess judgment in favor of the plaintiff.

5. An assignment for benefit of creditors executed by a husband and wife, covering property that is actually community property, and given to secure community debts, is valid, even though the property and debts are described as being those of the wife.

6. In attachment, where the property taken is claimed by the assignee of the defendants, whose allegation in the pleadings as to the value of the property is not controverted, the return of the sheriff showing the value is sufficient proof of the same.

7. Where, on default by one of the defendants, judgment was taken for such sum as the jury might find due from her, a general verdict against the plaintiff was equivalent to a finding

that nothing was due, and no judgment could be rendered against the defendant in default.

Appeal from district court, Bexar county; Robert B. Green, Judge.

Attachment brought by the Hayden Saddlery Hardware Company against Ramsay & Ford. There was judgment for defendants, and plaintiff appeals. Affirmed.

Franklin & Cobbs and Clark, Summerlin & Fuller, for appellant. Upson, Bergstrom & Newton and Barnard & McGown, for appellees.

FLY, J. Appellant instituted suit on an open account in the sum of \$1,660.32, against Mrs. E. O. Ramsay, J. S. Ramsay, Mrs. A. G. Ford, W. H. Ford, Nettie A. Ford, Newton H. Ford, and Ellwood M. Ford, who were alleged to be partners, composing the firm of Ramsay & Ford. At the same time, an affidavit and bond for attachment were filed, and a writ issued, which was levied upon certain goods and merchandise, which were valued by the sheriff at \$1,691.50. The goods, under order of the court, were sold for \$915.40. On October 23, 1894, Nettie A. Ford, Newton A. Ford, her husband, and E. M. Ford filed an amended answer, in lieu of an answer filed on March 2, 1893, in which the partnership alleged in the petition was denied. This plea was verified by the oath of N. H. Ford. At the same time all of the defendants filed general and special demurrers and a general denial, and excepted to \$1,020 of the account, as barred by limitation, and to the item of \$378.07, interest, and to the whole account as not itemized as provided by law. A plea in reconvention was also filed by Nettie A. Ford, Newton H. Ford, and Ellwood M. Ford, assignee of first two named, in which it was alleged that Nettie A. Ford, being indebted to a number of persons (whose names and residences, with several amounts due them, were fully set out), had on February 13, 1893, conveyed certain goods, wares, and merchandise, her separate property, to Ellwood M. Ford, assignee, to secure her creditors, and that the writ of attachment aforesaid had been levied on said goods, to the damage of Nettie A. Ford in the sum of \$3,000. Newton H. Ford filed a plea, alleging, in the event the property was found not to be the separate property of his wife, Nettie A. Ford, that the same was community property, that he had executed a general assignment of the property to Ellwood M. Ford, and praying for damages for the levy of the attachment on the same. The assignee, joined by the creditors, also claimed damages for the seizure of the goods under the writ of attachment. Ross Kennedy filed a plea in intervention, claiming that he had leased a certain storehouse in San Antonio, corner of Market street and Main Plaza, to John S. Ramsay and N. A. Ford, composing the firm of Ramsay & Ford, the members of the firm being afterwards changed so that

¹ Rehearing denied.

N. H. Ford and N. A. Ford composed it; that on February 23, 1893, the property of said firm, including that levied on under the attachment, was being removed from the building, and intervener sued out a distress warrant for the rent due and to become due, and, the matter being afterwards tried, judgment was rendered in favor of intervener against Ramsay & Ford for \$1,000, under which an order of sale was issued, and the property aforesaid sold, and the proceeds deposited in the hands of the clerk of the court; and that intervener was entitled to be first paid out of said money. Appellant filed a supplemental petition, in which the plea denying the partnership was excepted to, because filed after a plea to the merits had been filed, and because the answer of Nettie A. Ford, Newton H. Ford, and Ellwood M. Ford did not present any defense to the action; and, in answer to the plea of limitation as to a part of the account, an acknowledgment of the justice of the claim in writing, and a promise to pay the same, by one of the members of the firm of Ramsay & Ford, were pleaded. In answer, it was alleged that the claim was fraudulent and fictitious, and that, after the attachment had been levied, the house had been rented by intervener to E. M. Ford & Co., a firm composed of E. M. Ford and E. M. Lemman, and that they had been paying for the same to intervener. It was asked that said E. M. Ford & Co. be cited to appear and answer, and, in case it should be determined that intervener had a lien on the property attached, that appellant have judgment against E. M. Ford & Co. for the accruing rent from February 23, 1893, for one year, covering the time that the distress warrant had been sued out for the rent claimed by the intervener. E. M. Ford & Co. answered, denying liability. On November 18, 1895, the cause was called for trial; and, all parties having announced ready for trial, appellant suggested the death of J. G. Ramsay, and stated that it had failed to obtain service upon N. G. Ford and W. H. Ford, and dismissed the suit as to them. Judgment by default was asked by appellant against Mrs. E. C. Ramsay, and was granted for such sum as the jury might find to be due by her to appellant. The motion to quash the writ of attachment was overruled. The exception setting up limitation as to \$1,020 of the account, and the exception to the item of \$378.07, interest, and the exception to the whole account as not being itemized as provided for sworn accounts, were sustained by the court. All the exceptions of appellant were overruled. The cause was submitted to a jury, and the following verdict was returned: "(1) We, the jury, find for the defendant Newton H. Ford against the plaintiff; also in favor of Nettie A. Ford and E. C. Ramsay against the plaintiff. (2) We, the jury, find in favor of E. M. Ford, assignee of N. H. Ford and Nettie A. Ford, against the plaintiff and George W. Brackenridge and

Ferdinand Herff, and assess his damages at \$2,919.50. (3) We, the jury, find in favor of Ross Kennedy, intervener, for the sum of \$1,150, and costs of suit of Ross Kennedy vs. Ramsay & Ford in suit No. 1,682, in the 45th judicial district court, Bexar county, Texas; and the same is a prior lien to all parties herein, on the property seized. (4) We, the jury, find for E. M. Ford & Company against the plaintiff. (5) We, the jury, find in favor of John P. Campbell, sheriff, against the said E. M. Ford, assignee of N. H. Ford and Nettie A. Ford." Newton H. Ford then came into court, and stated that, for the purpose of correcting the errors in the charges of the court concerning the right of appellant to recover against him without proof of the partnership, he would admit that appellant was entitled to judgment against him in the full sum sued for, and judgment was so rendered. The balance of the judgment followed the verdict. The record shows that the parties hereinbefore mentioned as being sued by appellant as partners were not partners, and none of them were indebted to appellant in any sum, except Newton H. Ford. Before the levy of the attachment, Newton H. Ford had made a valid assignment of his property for the benefit of his creditors. G. W. Brackenridge and Ferdinand Herff were sureties on the attachment bond of appellant.

The original answer is not made a part of the record in this case, and this court cannot assume that a denial of partnership was not contained therein. However, had it been in the record, and it had shown that the denial of partnership was not included in it, we would not be inclined to hold that it came too late in an amended answer. It cannot be classed either as a plea in bar or abatement, but merely as an agency that is permitted to be used at any time before the trial on the merits, to fix the burden of proving an allegation that is otherwise taken as confessed. There was no error, therefore, in overruling appellant's exception to the plea denying partnership, and it was not error to refuse the charge presenting to the jury the insufficiency of the plea denying partnership.

A judgment by default was taken by appellant against Mrs. E. C. Ramsay for such sum as the jury might find to be due by her to appellant. The jury found, in effect, that she owed nothing. That part of the verdict is claimed to be contrary to law and the evidence, and *Railroad Co. v. Edloff* (Tex. Sup.) 34 S. W. 414, is cited as authority. That case has no bearing on the proposition. The judgment by default was taken subject to the amount the jury might determine was due by her, and, if nothing was due, no judgment could be rendered against her. This would seem to be axiomatic. *Mississippi Mills v. Bauman* (Tex. Civ. App.) Id. 683; *Hall v. Jackson*, 3 Tex. 305; *Holland v. Cook*, 10 Tex. 244.

The partnership of Ramsay & Ford was denied to have ever been composed as alleged in

the petition, and that denial was verified by the affidavit of N. A. Ford. That plea inured to the benefit of all the defendants, and put appellant upon proof of the partnership. It was never contemplated by the statute that every one alleged to be a member of a firm should swear to a denial of partnership, but the affidavit can be made by one member, or even by an attorney. The denial by N. H. Ford of the partnership placed the question in issue as to all the other defendants alleged to be members of the firm. *Willis v. Morrison*, 44 Tex. 27. The statute does not require the verification of the plea by all the parties who may desire proof of the allegation of partnership. It only requires that the plea "shall be verified by affidavit." *Sayles' Civ. St. art. 1265*.

Appellant complains that the jury were not instructed to return a verdict against Newton H. Ford, and also that, after the jury had returned a verdict in favor of Newton H. Ford, he was permitted to confess judgment as to himself, and have it entered against him. The complaint is aimed at the manner in which appellant got its judgment, and not at the judgment itself. It got all it proved against Newton H. Ford, and a complaint based on the mode in which the judgment was arrived at is without merit. The action on the part of N. H. Ford in confessing judgment as to himself did not affect the verdict as to the other parties. The action of the court in permitting Newton H. Ford to confess judgment against himself after a verdict did not have the effect of granting a new trial in the case. The cases cited by appellant do not sustain such contention. It would seem clear that appellant has not been injured by the action of the court, and it has no just cause for complaint. The facts in this case fail to show liability upon the part of any one except N. H. Ford, and appellant obtained a judgment against him.

We are of the opinion that the assignment made by Nettie A. Ford, joined by her husband, for the benefit of creditors described as hers, was a valid assignment. The husband signed and acknowledged the instrument, and it was to all intents and purposes an assignment of his property for the benefit of his creditors. The wife had no power or authority to engage in a mercantile business in her own or any other name; and the property was community property, and the debts community debts. The description of the property as being that of the wife, and the debts as being those of the wife, does not alter their true status or character; and, the husband acquiescing in the act, the assignment was a valid one. *Green v. Ferguson*, 62 Tex. 525; *Epperson v. Jones*, 65 Tex. 428; *Schmick v. Bateman*, 77 Tex. 329, 14 S. W. 22; *Purdom v. Boyd*, 82 Tex. 133, 17 S. W. 606; *Wetzel v. Simon*, 87 Tex. 403, 28 S. W. 274, 942. The last case is clearly decisive of the point in question. The facts show that Newton H. Ford was a member of the firm of Ramsay &

Ford. In 1889, Mrs. Nettie A. Ford bought out the interest of Mrs. E. C. Ramsay, and Newton H. Ford had full control of the business. The goods belonged to the community, and a valid assignment was made of them to Eliwood M. Ford.

Let it be admitted that the charge complained of in the seventh assignment was erroneous, it did not harm appellant. Whether the debt was due or not, it obtained judgment against the only party shown to be liable for the amount sued for.

The partnership having been denied, and no proof of the partnership having been produced, the letter written by Newton H. Ford could bind no one but himself, as a new promise to pay the debt due appellant. In the absence of proof that the defendants were partners, it would have been erroneous to have instructed the jury to find against all the defendants on the contents of the letter of N. H. Ford. The charge asked was upon the weight of the evidence had it been correct in other particulars.

The judgment against Ramsay & Ford, in favor of Ross Kennedy, was sufficient proof of the indebtedness of that firm to him for rent.

The twentieth and twenty-eighth assignments of error are not well taken. The pleadings of E. M. Ford fully alleged the value of the goods, and there was no controversy as to value, and the return of the sheriff was sufficient proof of the same.

The verdict, taken with the pleadings and charge, forms a sufficient basis for the judgment. It is affirmed.

KEATING et al v. McCUTCHEON et al.
(Court of Civil Appeals of Texas. June 3, 1896.)

CORPORATIONS—CONTRACTS—TRANSFER OF PROPERTY FOR STOCK—CONSTRUCTION—OMISSIONS BY MISTAKE—CORRECTION.

1. A contract between an old corporation and the promoters of a new one required the promoters to capitalize the new corporation at \$100,000, and to deposit \$21,000 of the stock, paid-up and nonassessable, in trust for delivery to the old corporation on certain conditions, and required the old corporation, after the new corporation had been organized, its stock issued, and the deposit of stock provided for made, to transfer its franchises and property to the promoters, and the promoters in turn to transfer the same to the new corporation. *Held*, that the franchises and property transferred were not to be used to pay for the stock of the new corporation.

2. Where the property of an old corporation was, under a contract between it and the promoters of a new corporation, transferred to the new corporation, and the contract on its face showed that the property was not to pay for stock of the new corporation, it was error, in an action against the stockholders of the new corporation to enforce their liability as holders of stock not paid up, to strike a trial amendment offered by them, alleging that by mutual mistake an agreement that the property was to be used to pay for the stock of the new corporation was omitted from the contract, and asking

for the reformation of the contract in that respect, as insufficiently pleading the mistake claimed.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action by Mrs. Robert McCutcheon and others against C. A. Keating and others to enforce their liability as stockholders for debts of the corporation. From a judgment for plaintiffs, defendants appeal. Reversed.

Geo. H. Plowman and J. M. Cary, for appellants. Ledbetter & Bledsoe and Harris & Knight, for appellees.

JAMES, C. J. The following contract was executed by the Anadarko Coal & Mining Company and W. A. Bright, N. M. Lee, and W. A. Dennis: "This contract made entered into by and between the Anadarko Coal & Mining Company, a corporation organized and existing under the laws of the Chickasaw Nation, Indian Territory, and W. A. Bright, N. M. Lee, W. A. Dennis, and their associates, witnesseth: 1st. W. A. Bright, W. A. Dennis, N. M. Lee, and their associates agree to organize a corporation to be known and designated as the White Ash Coal & Mining Co., for the purpose of doing a mining business in the Chickasaw Nation, and to capitalize said corporation at the sum of one hundred thousand dollars. 2nd. And it is further agreed by the said W. A. Bright, N. M. Lee, W. A. Dennis, and their associates that when said corporation is organized, and its stock issued, that twenty-one thousand dollars of the stock shall be deposited in the First National Bank at Ardmore, in trust for the purposes hereinafter specified. 3rd. It is further agreed by the Anadarko Coal & Mining Co. that when said corporation shall be organized and the stock issued and deposited as provided in the above paragraph of this agreement, that said Anadarko Coal & Mining Co. will deliver to said W. A. Bright, N. M. Lee, and W. A. Dennis and their associates all the machinery, fixtures, and buildings belonging to said Anadarko Coal & Mining Co., together with all rights, privileges, and franchises granted said Anadarko Coal & Mining Co. under their charter to mine coal and other minerals in the territory covered by their charter. 4th. And it is further agreed that in the event the said W. A. Bright, N. M. Lee, and W. A. Dennis and their associates are in peaceable possession of the machinery hereby delivered to them by the said Anadarko Coal & Mining Co. for the period of two years, then the said twenty-one thousand dollars of the stock of the White Ash Coal & Mining Co. is to be delivered to and become the property of the Anadarko Coal & Mining Co., or, if in litigation, then the stock to remain in trust until finally decided, and, if adverse to the Anadarko Coal & Mining Co., it is to be retained to the White Ash Coal & Mining Co. 5th. It is agreed that this contract is to

be and remain in full force as long as the charter rights of the Anadarko Coal and Mining Co. lasts under its present charter or extensions that may be made to the same. 6th. It is agreed as soon as practicable the said White Ash Coal & Mining Co. shall pay to the Anadarko Coal & Mining Co. one-half cent a bushel as royalty, and that all royalties due by the charter from the Anadarko Coal & Mining Co. to the Chickasaw Nation shall be paid according to the terms of said charter by the said White Ash Coal & Mining Co. 7th. It is further agreed that if at the expiration of one year the said W. A. Bright, N. M. Lee, and W. A. Dennis and their associates shall fail to find coal in paying quantities, they agree to return to said Anadarko Coal & Mining Company all the machinery, fixtures, and other property in good condition, reasonable wear and tear excepted. 8th. It is agreed that in the event coal is found in paying quantities and of merchantable quality, then the said W. A. Bright, N. M. Lee, and W. A. Dennis and their associates shall be allowed until the first day of January, 1899, to develop all the other materials provided for in the charter of the Anadarko Coal & Mining Company, and to put the same on paying basis. 9th. It is further agreed that W. A. Bright, N. M. Lee, and W. A. Dennis and their associates will upon the organization of the White Ash Coal & Mining Company transfer and assign to said company all the rights and privileges given to them by this contract; and it is further agreed that, in the event that the capital stock of the said White Ash Coal & Mining Company shall at any time be increased, that the Anadarko Coal & Mining Company shall have delivered to them an amount of the stock equal to one-fifth of the whole amount of stock of said White Ash Coal & Mining Company. 10th. It is further agreed that the White Ash Coal & Mining Company shall deposit said twenty-one thousand dollars stock herein provided for with the First National Bank of Ardmore on the 27th day of January, 1892, and upon their failure so to do all rights, privileges, and franchises herein granted to W. A. Bright, N. M. Lee, and W. A. Dennis and their associates shall be forfeited and of no effect. The said twenty-one thousand dollars stock of the White Ash Coal & Mining Company to be so deposited shall be paid-up stock and non-assessable. 11th. It is further agreed that the White Ash Coal & Mining Company shall pay the Anadarko Coal & Mining Company two per cent. of the gross earnings of all natural gas, petroleum, and asphaltum, and to pay the treasurer of the Anadarko Coal & Mining Company all sums due the Chickasaw Nation as royalty on any minerals mined by the said Coal & Mining Company, and also on all petroleum, asphaltum, and natural gas. 12th. It is further agreed that if coal is found in paying quantities within one year, then said White Ash Coal & Mining Compa-

ny shall have three years from the 27th day of January, 1892, to put the coal mine on a paying basis. 13th. It is further agreed that all the royalty due on the products of the White Ash Coal & Mining Company shall be payable to the treasurer of the Anadarco Coal & Mining Company on the first day of each month, or so much thereof as has been shipped or sold the preceding month. Witness our hands and the seal of the Anadarco Coal & Mining Company, this 16th day of November, 1891, and signed in duplicate."

It appears that the three persons named organized the White Ash Coal & Mining Company, and assigned the property mentioned in the agreement to it, taking the \$100,000 of its capital stock for the property as paid-up and nonassessable stock, and deposited \$21,000 of this stock as required by the above agreement. The new company began operations, the said three persons and associates supplying five or six thousand dollars for the purpose, and suspended after a few months, owing various claims, upon which this suit is brought in the interest of plaintiffs and others who might desire to join. The main defense is that the defendant stockholders are not liable because their stock was paid-up, and not subject to assessments. It is our opinion that the contract as written did not contemplate that this property should be used as payments for the stock. There are various of its provisions that would admit of no other interpretation of its meaning. The three promoters were required by the contract to assign the property to the new corporation when organized, thus making it, so far as Bright and associates were concerned the equitable owner of the property, subject to the provisions of the contract; the assignment, therefore, being a formality. It provides also that the stock should be issued before delivery of the property to the three persons, and hence before its transfer to the new company. It provides also that the new company should be capitalized at the sum of \$100,000 by Bright, Dennis, Lee, and associates. Its (the Anadarco Coal & Mining Company's) property was to pay for the stock. Then the company would be capitalized by it, and not by the three persons who contracted to do so. Finally, there was no necessity of stipulating that the \$21,000 of the stock to go to the Anadarco Coal & Mining Company should be paid-up and nonassessable, if it had been intended that the property should be the consideration of the stock. Inasmuch as there was no pretense that more than \$6,000 had been paid in by the stockholders, we think that, if the case is to be governed by the contract as written, a verdict was properly instructed for the plaintiff. This leads us to the eighth, ninth, eleventh, and eighteenth assignments. Defendants filed a trial amendment, stating that certain matters were agreed on in the transaction between Bright and associates and the Anadarco Coal &

Mining Company, which were by mistake omitted from the written contract. Among other omissions, it was averred that it was understood and agreed that the transfer to the White Ash Coal Company of the franchises, etc., which were valued by the contracting parties at \$100,000, was to be for \$100,000 in paid-up stock. The contract was not so doubtful or ambiguous in its expression on this subject as to admit the proof by way of explanation; nor can the omitted matter be said to not vary the provisions of the contract, and to consist of additional terms not in conflict with it. The omitted expression could obtain consideration only through proper averments of fraud, accident, or mistake resulting in the contract being made to express a different agreement than that made by the parties. In such cases, as is stated in *Railroad Co. v. Shirley*, 45 Tex. 377, he who seeks to rectify an instrument on the ground of mistake must be able to prove not only that there was a mistake, but must be able to show exactly and precisely the form to which the instrument ought to be brought, in order that it may be set right according to what was really intended; and must be able to establish in the clearest and most satisfactory manner that the alleged intention of the parties to which he desires to make it conformable continued concurrently in the minds of the parties down to the time of its execution. *Moore v. Giesecke*, 76 Tex. 547, 13 S. W. 290. We think it is meant by this that it is necessary to point out distinctly the provision claimed to have been omitted, and in this respect the trial amendment was sufficient in the material matter above mentioned. It, moreover, states that it was a part of the agreement, and was omitted from the contract by mistake. This pleading was sufficient to admit the necessary proof. Although not perfect by any means, it contains the material averments that this was a part of the agreement, and that it was omitted from the writing by mutual mistake of the parties. This would have made it good as against a general demurrer. If such provision were incorporated into the agreement, it would change the effect which it would otherwise be necessary to give to it in reference to whether or not it was intended that this property should pay for the stock.

The only demurrer was a special one, on the ground that it failed to state specifically in terms in what particular the writing fails to express the contract so that the same can be reformed. This exception, although sustained by the court, was not well taken. The court, in our judgment, erred in striking out the trial amendment upon said special demurrer, and in refusing to hear evidence in support of said averments. It does not follow, however, that if the defendants be successful in establishing their averments, this would settle the case in their favor. The issue of inadequacy of the property and the

five or six thousand dollars as payment for the stock would remain, the burden of proof on this issue resting on plaintiff. The above being the only error that we think can be said to exist in the record, it is not necessary that we should discuss the case further. Reversed and remanded.

SHELBY COUNTY v. BRAGG.

(Supreme Court of Missouri, Division No. 1.
June 30, 1896.)

LIMITATION—RUNNING OF STATUTE—FRAUDULENT CONCEALMENT.

Neither Rev. St. § 6775, providing that in actions for fraud the cause of action shall not accrue until discovery of the fraud, nor section 6789, providing that if any person, by any improper act, prevent the commencement of any action, such action may be begun after the commencement of the action shall have ceased to be so prevented, stops the running of the statute against an action by the county against a clerk of the circuit court, who is also ex officio recorder, to recover fees collected in excess of the amount he was entitled to retain as salary, because the statement of the fees collected, which he was required by Act March 30, 1874, to make, was erroneous, the books kept by the clerk showing the actual amount received, and the county court being required at each session to examine such statement, and being authorized to examine any person in regard to its truth.

Appeal from circuit court, Shelby county; Andrew Ellison, Judge.

Action by the county of Shelby against John J. Bragg. There was a judgment for defendant, and plaintiff appeals. Affirmed.

V. L. Drain, Jas. T. Lloyd and Thos. H. Bacon, for appellant. R. P. Giles and W. O. L. Jewett, for respondent.

MACFARLANE, J. This suit is against defendant, as a former clerk of the circuit court, and ex officio recorder of the county, to recover an amount alleged to have been received by him in fees in excess of salary and deputy hire. It is charged that defendant held said offices for two terms or eight years, from January 1, 1875, to January 1, 1883, and during the term collected in fees the sum of \$16,108.74, which was \$3,277 in excess of the amount he was entitled to retain, and for which sum he was indebted to the county. The petition further charged, in order to avoid the operation of the statutes of limitations, that defendant, by his quarterly and annual statements, and statements made with the county court, falsely and fraudulently concealed from the court the true amount of fees received, and that the facts were not discovered until the year 1892, when this suit was at once commenced. Besides a general denial, defendant pleaded in bar of the action both the three and five years' statutes of limitation. He also pleaded the settlements in the county court as adjudications of the matter in issue. On the trial the annual reports of defendant as

made to the county court were read in evidence. These were all verified by affidavit. The aggregate of fees earned according to these reports was \$13,288.61. They show that he retained as salary \$12,000, and that he paid for clerk's hire \$1,949.70; making a total credit of \$13,949.70. The reports were all approved by the courts. These reports gave no full, itemized statement of fees collected. For example, one item of the report made for 1875 was, "All costs in criminal and civil cases for 1875, not above provided, \$405.05." Some of the statements were declared to be correct, while others were only stated to be approximately correct. In 1892 the county court, by an order of record, appointed a committee of experts to go through the books of the clerk and recorder for the eight years, and ascertain and report the fees earned by defendant during his whole term. The report of this committee, which purported to be full, made the fees earned in the two offices amount to \$15,627.94. Each year is reported separately. On the trial, plaintiff offered these reports in evidence, but, as we understand from the record, they were excluded on objection by defendant. The experts who had examined the books and made the statements were permitted to testify as to the result of their examination which corresponded with their report, though they did not profess to know that defendant had actually received all the fees earned. At the conclusion of plaintiff's evidence the court directed a verdict for defendant. Judgment was thereupon entered for defendant, and plaintiff appealed.

The record does not disclose the ground upon which the court acted in ordering a verdict for defendant. If, therefore, it can be sustained upon any one of the defenses pleaded, the judgment should be affirmed. After a careful consideration, we are of the opinion that the action, when commenced, was barred by the statutes of limitation, and for that reason the judgment should be sustained. The action is at law for money had and received for the use of the county, and does not, therefore, fall into that class of continuing trusts to which the statutes of limitations do not apply until the trust is denied. "The trusts intended by the courts of equity not to be reached or affected by the statutes of limitation are those technical trusts which are not all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of courts of equity." Johnson v. Smith, 27 Mo. 593. The rule is that "in implied trusts which grow out of the facts and circumstances of each case the statute commences to run as soon as a party has a right to commence a suit to declare and enforce it." Keeton v. Keeton, 20 Mo. 530. The act of March 30, 1874, made it the duty of the clerk of circuit courts, who were also ex officio recorders, to make out a statement, verified by their affidavits, giving the amount of each fee received by them

in each capacity during the then past years, from whom received, and for what services; also the number of assistants and deputies employed, the name of each, the length of time each was employed, and the amount paid each; and file the same with the county court at the first session of said court in each year. The county court was required at such session to examine such statement, was authorized to examine any person as to the truth of the same, and was required to allow necessary clerk hire, and deduct the same from the aggregate amount received. It was then provided that, if there should be an amount in the hands of the clerk exceeding the sum he was entitled to retain as salary, the same should be paid into the county treasury. Making a false affidavit to such statement was declared to make the party guilty of perjury. The statute also required clerks of courts of record and all other officers, at the expense of their respective counties, to procure a book, in which should be entered a correct account of all fees collected by such officer, the date when collected, in what case, and the name of the person entitled thereto. The last annual statement was made to the county court by defendant at the end of his second official term in January, 1883. This suit was not commenced until 1892. The cause of action, if any existed, accrued at the date of the final settlement, and, unless it falls within some exception, is barred by the statutes of limitation, whether the action is to be regarded as being for the omission of an officer to discharge an official duty (section 6776), or simply for money had and received (section 6775). This is conceded by plaintiff, but counsel claim that the action falls within the exceptions to the statutes of limitations found in sections 6775 and 6789. The former section provides that an action for relief on the ground of fraud shall be commenced within five years, "the cause of action in such case to be deemed not to have accrued until the discovery by the aggrieved party, at any time within ten years, of the facts constituting the fraud." Section 6789 is as follows: "If any person, by absconding or concealing himself, or by any other improper act, prevent the commencement of any action, such action may be commenced within the time herein limited, after the commencement of such action shall have ceased to be so prevented." These exceptions have been enforced by this court in a variety of circumstances, though it may well be doubted whether the former of them is not confined to equitable actions based upon fraud, and whether the latter does not refer entirely to acts of a defendant by which service of process or some other step necessary to the commencement of a suit and obtaining jurisdiction of the person or subject-matter was prevented. But it is well settled in this state, whether by force of the statute or independent of it, that a fraudulent

concealment of a cause of action will delay the operation of the statute of limitation until after discovery of the fraud. Thus, in an action to recover from a sheriff or constable money collected on process, it was held that the statute did not commence to run until return of process was made by the officer, or there had been a demand of payment by the party in interest. *State v. Minor*, 44 Mo. 373; *Kirk v. Sportsman*, 48 Mo. 383. These cases refer to no statute as a basis for the exception. Wood says: "In some of the other states, in which no statutory provision exists upon this subject, it has been held that in case of fraud, and the willful suppression of the truth, the statute does not begin to run at law until its discovery. But the statute is put in motion as soon as the fraud is discovered, though its full extent on all the facts is not known." Wood, *Lim.* 702. The question is whether the statements made by defendant were such fraudulent concealments of the facts as delayed the operation of the statute until a discovery of the truth. The question is not whether the county, or its agent, the county court, was merely ignorant of the facts constituting the cause of action. Such ignorance will not suspend the operation of the statute unless it can be properly attributed to the fraudulent concealment of the facts by defendant. *Wells v. Halpin*, 59 Mo. 97; *Garrett v. Conklin*, 52 Mo. App. 659, and cases cited; *Foley v. Jones*, 52 Mo. 64. It cannot be said that the evidence of the facts constituting plaintiff's cause of action was concealed or suppressed. The evidence all existed upon the official books and records of the office, open to the examination of the court. The expert accountants who afterwards made an examination encountered no difficulties in making an account of fees collected. They reported no destruction of books, or the suppression or concealment of no fact which could prevent an accurate statement being made.

It is insisted that the duty of this officer and his relation to the county court was such that the latter had the right to rely implicitly on the correctness of these statements, and that making a statement which did not fully and truthfully account for all fees collected is such a fraudulent concealment of the facts as would delay the running of the statute. But the county court is required to examine the statements, and see that they are correct, before approving them. It was not intended that they should accept as true any statement the officer should make. The evidence by which the truth could have been ascertained was at hand, and open to their examination. Indeed, the statements themselves did not all purport to be accurate. They do not pretend to give an itemized account of the fees collected, and from whom. They virtually refer the court to the records of the offices for the evidence. The county court is given

the power to audit the accounts of these officers, and it is made their duty to examine statements made by them, and, if necessary, to hear the evidence of witnesses. A mere examination of the statements is not a proper performance of their duty. They should see that the statements are correct. This is particularly so when the statements on their face, as in this case, are not such as the law requires. It cannot be said that the county court was ignorant of facts which were open to its examination, and which it was its duty to know. Statutes of limitation are favored in the law, and cannot be avoided unless the party seeking to do so brings himself strictly within some exception. "A party seeking to avoid the bar of the statute on account of fraud must aver and show that he used due diligence to detect it, and, if he had the means of discovery in his power, he will be held to have known it." *Wood v. Carpenter*, 101 U. S. 141; *Buckner v. Calcott*, 28 Miss. 434; *Nudd v. Hamblin*, 8 Allen, 130. A party cannot avail himself of this exception to the statute where the means of discovering the truth was within his power, and was not used. *Cole v. McGlathry*, 9 Me. 131. In *Wood v. Carpenter*, supra, these, among other conclusions, were drawn after a careful survey of the authorities: "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. There must be reasonable diligence, and the means of knowledge are the same thing, in effect, as knowledge itself." The county court had the means of knowledge at hand, it could have ascertained the truth by such an examination as duty required it to make, and we must hold that there was no such fraudulent concealment of the amount of fees collected as suspended the operation of the statute. The judgment is affirmed.

BRACE, P. J., absent. The other judges concur.

ST. JOSEPH & ST. L. R. CO. v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Missouri, Division No. 2.
March 31, 1896.)

LANDLORD AND TENANT—SUBLETTING—ACTION FOR RENT—REPAIRS—BREACH OF COVENANT—RAILROADS—RIGHT TO CONTRACT—CONTRACTS—INTERPRETATION.

1. Rev. St. 1889, § 6376, giving a landlord a lien upon crops grown upon demised premises, and Id. § 6384, providing that any person liable to pay rent shall, in certain instances, be liable to attachment, and Id. §§ 6388, 6389, providing that rent may be recovered from a lessee, his assignee or undertenant, by the remedies given in preceding sections, and that in such proceedings the lessee and sublessee may be joined, do not give the landlord a right of action at law against the undertenant for rent, unless a lien is

sought upon crops, or the right of attachment exists.

2. A railway company, lessee of plaintiff's railroad, entered into an agreement with defendant whereby defendant agreed to take and operate the company's railroads, including that leased from plaintiff, collect the revenue therefrom, and apply the same to paying cost of repairs, insurance, taxes, interest on bonds and mortgages, and expense of maintaining organization, turning the surplus, if any, over to the company, and keep account of receipts and expenses of the lines thus acquired, which should be open to inspection by the company's officers and agents. Held, that the instrument was not a sublease of plaintiff's road, but an operating contract merely, which created no privity of estate or contract between plaintiff and defendant.

3. An undertenant who covenants to keep leased premises in repair is not liable for breach of a similar covenant made by the original lessee of the premises long before the undertenant took possession.

4. A covenant to keep in repair imposes on the tenant an obligation merely to keep the premises in as good repair as they were when the agreement was made.

On Rehearing.

1. Under Rev. St. 1889, § 2588, authorizing railroad corporations to contract with each other in any manner not inconsistent with the scope, object, and purpose of their creation and management, one railroad corporation, including in its system leased lines, may make a valid contract with another to take its entire system and operate it for a term of years.

2. The fact that parties to a written instrument called it a lease is not conclusive where the instrument on its face shows that it was a different kind of a contract.

3. In an action on a written instrument, which, on its face, is an operating contract and not a lease, an admission that it is a lease is not conclusive on defendant where the admission is accompanied by a profert of the instrument itself.

Appeal from St. Louis circuit court.

Action brought by the St. Joseph & St. Louis Railroad Company against the St. Louis, Iron Mountain & Southern Railway Company to recover rental for plaintiff's line, and for breach of covenant to repair. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Prior to June, 1874, the St. Joseph & St. Louis Railroad Company owned a line of railroad from North Lexington to the city of St. Joseph, a distance of about 72 miles; and on the 1st day of June, 1874, it leased its said railroad, for a term of 99 years, to the St. Louis, Kansas City & Northern Railway Company. The St. Louis, Kansas City & Northern Railway Company was afterwards, in 1879, consolidated with the Wabash Railway Company, of Illinois, Indiana, and Ohio, thereby forming a corporation known as the Wabash, St. Louis & Pacific Railway Company, and in the further discussion of this case it will be designated the "Wabash Company." By virtue of the consolidation the Wabash became the lessee of the St. Louis & St. Joseph Railroad. By that lease, so far as it pertains to the issues of this case, the Wabash Company agreed to pay rental for the first and second years, \$10,000 per annum; for the third, fourth, and fifth years, \$35,000 per annum; and, for each subse-

quent year during the term, 30 per cent. of the gross earnings of the demised railroad,—the Wabash Company guarantying that said percentage should not in any year amount to less than \$25,000. The Wabash Company furthermore covenanted and agreed that it would put the railroad, culverts, bridges, station houses, and all other demised property, in such order and repair, at its own cost and charges, as to enable the road to be safely and successfully operated at the earliest practicable day, and operate the same, keeping it in such order and condition during the term of the lease. It was also provided that in case of default in the payment of rent the Wabash Company (but not its assigns) should pay as a penalty, in addition to the rent due, a sum equal to one-tenth of 1 per cent. on the amount due for each day during such period of default, until the lease become forfeited, or the rent should be paid; and finally it was provided that said lease should not be assignable, or the premises underlet, without the written consent of the St. Joseph & St. Louis Company, signed by its president and countersigned by its secretary, and authorized by a resolution of its board of directors, and that any attempt to sublet or assign said lease without such written consent should work a forfeiture thereof.

Second. The evidence shows that when the foregoing lease was negotiated the parties fixed upon the very low rental of \$10,000 per annum for the first two years because of the bad condition of the property, and because of a contention on the part of the Wabash Company to the effect that it would require the earnings of the road for the first few years to put it in good repair. The evidence shows that the Wabash Company did not comply with its covenant to put the road in repair, and that it did not put it in such condition, at the earliest practicable day, as would enable it to be safely and successfully operated.

Third. On the 1st day of June, 1880, the Wabash Company, to secure an intended issue of bonds to the amount of \$50,000,000 (of which \$17,000,000 were issued), conveyed all its lines of railroad, and the income and earnings thereof, including the road from North Lexington to St. Joseph, in trust, to the Central Trust Company, of New York, and James Cheney, of Indiana.

Fourth. On the 10th day of April, 1883, the Wabash Company executed an instrument, in the granting clause of which it let, demised, and leased unto the Iron Mountain Company, all and singular, the several lines of railroad then owned, leased, or otherwise held by it, including the line from North Lexington to St. Joseph, to have and to hold said property unto said Iron Mountain Company for a term of 99 years. That contract contained a covenant on the part of the Iron Mountain Company to efficiently work and operate said roads, and use reasonable diligence to collect and receive the tolls, freight charges, and

dues which should accrue from the operation of said property, and apply said revenues in the manner following, to wit: (1) To the payment of the annual cost of repairing, maintaining, and perpetuating, for public use, the said railroads, with their equipment and property; to the cost of any new equipment, side tracks, stations, depots, lands, and reasonable or necessary betterments from time to time deemed necessary; to premiums for insurance; and to the payment of all taxes and assessments lawfully levied upon said property. (2) To the payment of the necessary expenses of maintaining the organization of the Wabash, St. Louis & Pacific Railway Company, including the expenses of its general offices in the city of New York, the expenses of a transfer agency, and of paying the interest on its mortgage debt. (3) To the payment of interest, as the same become due, upon the mortgage bonds of said company, and the rents and other charges which the Wabash Company had contracted or assumed to pay as part of the consideration upon which its lines had been acquired, and other charges of like nature which the Wabash Company might authorize or direct the Iron Mountain Company to pay. (4) It was to pay any surplus remaining to the Wabash Company, or apply the same to the payment of interest on any other bonds thereafter issued by the Wabash Company, or to such other purposes as should be determined from time to time by the board of directors of the Wabash Company. The lease also contained the following provisions: "If the net earnings or revenue shall not be sufficient to provide for the fixed charges on the demised property, the lessee may elect to advance the funds required from time to time to pay interest on bonds and other fixed charges; and such advances shall be a preferred debt and lien, next to the lien of the first and general consolidated mortgages, and underlying or divisional mortgages, to be paid by the party of the first part; and the same is secured by the future net revenues of said first party, and such advances are hereby made an equitable lien on the demised property. If the lessee, however, elects not to advance any such deficit, and the interest on the first and general consolidated mortgage bonds and underlying bonds shall remain unpaid for a period of six months, the lessor company may thereupon elect to terminate this lease, and to receive back the property, on the payment of any balance of indebtedness then due from it to the lessee. The party of the second part, moreover, shall and will, at all times during the hereby demised term, keep the buildings upon the lands hereby demised insured in the usual manner against loss by fire, paying the premium therefor as aforesaid, and will keep the said demised railroad, equipment, and property in good order and repair, and will at the expiration of the hereby demised term, or other sooner determination of this lease and contract, yield and deliver up the hereby demised railroad and

appurtenances in the same good order and repair that the same are now in, or may be put in during the hereby demised term, casualties, acts of God and the elements, and reasonable wear and tear, excepted."

Fifth. On the 21st day of December, 1883, the Wabash Company mortgaged and conveyed to the Iron Mountain Company all its lines of railroad, including the line from North Lexington to St. Joseph, to indemnify and secure said Iron Mountain Company against any loss on account of the advancements it had made, or might make, under the foregoing lease of April 10, 1883. It was further provided in the contract that the Iron Mountain should keep accurate accounts of all the business, receipts, and revenues arising from the operation of the Wabash, and all the expenses of operating the same,—said accounts to be kept in such form and manner that the earnings of the Wabash might be readily ascertained and determined,—and that the Iron Mountain books relating thereto should be subject to the examination of the president and vice president of the Wabash, or any agent by them authorized to examine the same; and the Iron Mountain bound itself to furnish the Wabash monthly accounts of the gross receipts and expenditures, and a semiannual account of all the business, receipts, revenues, and expenditures under this agreement. And the president, vice president, and committees of the board of directors, and all duly-appointed agents of the Wabash, should have the right at all times to travel without charge over the said road, for the purpose of ascertaining as to the business and management of the said railroad, and reporting thereon to the officers of the Wabash.

The Wabash had possession of plaintiff's railroad from 1879 until April 10, 1883, at which time the defendant, the Iron Mountain Railroad, took charge of it under the foregoing contract of that date, and continued to operate and control it until May 29, 1884, on which date receivers appointed by the United States circuit court took charge of it, with the written consent of defendant. On the 24th of April, 1886, the plaintiff declared its lease to the Wabash forfeited, and resumed possession of its railroad, by and with the consent of the federal court.

This action is by the St. Louis & St. Joseph Railroad Company against the Iron Mountain to recover a balance of rental due March 1, 1884, and the rentals from March 1, 1884, down to April 24, 1886, when it resumed possession of its road, and for penalties accrued by reason of default of paying rent, and for expenditures in putting the road in proper condition. The cause was referred to Charles Nagel, Esq., who made a finding of facts, concluding in these words: "If, therefore, this controversy was raised between plaintiff and St. Louis, Kansas City & Northern, or the Wabash, St. Louis & Pacific Railway Company, the referee would recommend a judgment in favor of plaintiff: (1) For ex-

penditures, \$136,862.37; (2) for rental, \$121,235.05; (3) for penalties, \$30,123.26,—with interest upon these sums from the time of filing this suit." But at the same time the referee found that, under the evidence and several contracts and leases, defendant, the Iron Mountain, was not liable therefor.

E. W. Pattison, for appellant. Wells H. Blodgett, A. G. Cochran, and H. S. Priest, for respondent.

GANTT, J. (after stating the facts). Three reasons are advanced by the plaintiff to reverse the finding of the referee, and the judgment of the circuit court adopting that finding:

1. That, if the contract between the Wabash and Iron Mountain shall be construed to be a subletting, then the common-law rule which denied the lessor a right of action against an undertenant, because there was neither privity of estate nor privity of contract between them, has been abrogated by our statute (Rev. St. 1880, §§ 6388, 6389), which provides that "rent may be recovered from the lessee or person owning it, or his assignee or under-tenant, or the representative of either, by the same remedies given in the preceding sections; but no assignee or under-tenant shall be liable for rent which became due before his interest began"; and "in case any tenant shall sublet any premises or any part thereof demised or let to him, the landlord shall have the right in any action provided by this chapter, to join as party defendants his lessee and all sub-lessees in the same action." In the absence of modification by statute, the common law gave the lessor no right of action on any of the covenants of the original lease against the subtenant or underlessee of his lessee, because there was no privity of contract between the lessor and the sublessee, and because there was no privity of estate. About this there can be no controversy, nor do we understand the counsel for plaintiff contends otherwise. *Tayl. Landl. & Ten.* (5th Ed.) § 448; *1 Woodf. Landl. & Ten.* p. 265; *1 Washb. Real Prop.* (5th Ed.) p. 548, subsec. 5; *Williams, Real Prop.* 336; *Holford v. Hatch*, Doug. 187; *Grundin v. Carter*, 99 Mass. 15; *McFarlan v. Watson*, 3 N. Y. 286. What modification of the common law on this subject, then, has been wrought by sections 6388 and 6389, supra? By section 6388 the landlord is given only "the same remedies given in the preceding sections." It is essential to know what remedies "the preceding sections" give. A critical examination of the chapter "Of Landlords and Tenants" discloses only two sections that relate to remedies for recovery of rent, and they are sections 6376 and 6384. By section 6376 it is provided, "Every landlord shall have a lien upon the crops grown on the demised premises in any year for the rent that shall accrue for such year, and said lien shall con-

tinue for eight months after the rent becomes due and no longer." By section 6384: "Any person who is liable to pay rent shall be liable to attachment for such rent in the following instances: (1) Where he intends to move his property from the leased premises; (2) where he is removing his property from the leased premises; (3) where he has, within thirty days, removed his property from the leased premises; (4) when he shall in any manner dispose of the crop, or any part thereof, grown on the leased premises, so as to endanger, hinder or delay the collection of the rent; (5) when he shall attempt to dispose of the crop, or any part thereof, grown on the leased premises, so as to endanger, hinder, or delay the collection of the rent; and (6) when the rent is due and unpaid after demand thereof." And the proviso at the end of section 6384 makes "any person who shall buy any crop grown upon demised premises, upon which rent is unpaid, if he has knowledge that such crop was grown on demised premises, liable in an action for the value thereof to any party entitled thereto; or such person may be garnished in any suit for the recovery of such rent." It is evident that the section giving the owner of land a lien on the crop grown on the premises, and the other section giving the right to attach the personal property, including the crops grown on the demised premises, were remedies in addition to those afforded by the common law to the landlord against his tenant, and by section 6388 the right of lien and attachment was extended to the personal property and crops of the sublessee or undertenant; but the right to sue at common law and recover judgment against the undertenants on covenants and contracts to which they were not parties is not given by either of those sections, or any preceding section in said chapter. It is obvious these are new statutory remedies, to be enforced in statutory proceedings. *Hicks v. Martin*, 25 Mo. App. 359; *Hulett v. Stockwell*, 27 Mo. App. 328; and *Garrouette v. White*, 92 Mo. 237, 4 S. W. 681,—were all cases in which resort was had either to the attachment given by the statute, or a suit to enforce the lien secured thereby to the landlord, and must be construed in relation to the facts of each; and, while we think they were all correctly decided, they do not reach the question involved in this record. Unquestionably, it was the purpose of the statute to give the lien and attachment, in the cases specified, against the undertenant or sublessee, as well as against the original lessee, and to that extent the common law was repealed; but we do not think either of those sections can fairly be construed to give the landlord the right to sue the sublessee in an action at law upon the covenants of the lease to the tenant, when no lien is sought against the crop grown on the premises, and no right of attachment exists. It does not follow that because a lien or attachment is given against a

sublessee an action at law is given in all cases. We think the referee and circuit court correctly ruled this point against the plaintiff.

2. But the plaintiff's main insistence is that the instrument executed by the Wabash Railroad Company to the Iron Mountain, of April 10, 1883, though in form a lease, was in fact an assignment. The difference between an assignment of a lessee's term and an underletting is that an assignment is a transfer of the lessee's whole interest in the leased premises, while an underlease leaves a portion of the lessee's estate still in him, though, it has been said, it be but an interest for a day or an hour, as a reversion. 2 Thom. Co. Litt. 568, note a. If the whole of the unexpired leasehold estate is conveyed, then the party to whom it is conveyed becomes a privy in estate, whatever the form of the instrument,—whether an assignment or a lease. *Sexton v. Storage Co.*, 129 Ill. 318, 21 N. E. 290; *Craig v. Summers*, 47 Minn. 189, 49 N. W. 742; *Dunlap v. Bullard*, 131 Mass. 161; *Stewart v. Railroad Co.*, 102 N. Y. 601, 8 N. E. 200; 2 Minor, Inst. p. 718; 2 Bl. Comm. 326, 327; *Blumenberg v. Myres*, 32 Cal. 93. As to the statement of the distinction between the two, there is no conflict of authority, but in the application of the principle the cases are irreconcilable. The difficulty, to some degree, seems to have grown out of the use of the word "term." In many cases the word has been used to designate merely the length of time for which the lease is granted, but in others, and originally, it signified, not merely the time specified in the lease, but the estate and interest that passed by the lease; and therefore the term may expire during the continuance of the time, as by surrender, forfeiture, and the like. 2 Bl. Comm. 144; 1 Lomax, Dig. 174, 175; 1 Thom. Co. Litt. 630-632. In *Stewart v. Railroad Co.*, 102 N. Y. 601, 8 N. E. 200, it is stated in the majority opinion that as between the landlord and the assignee, or sublessee, "if the lessee parts with his whole term or interest as lessee, or makes a lease for a period exceeding his whole term, it will amount to an assignment of the lease; and the essence of the instrument as an assignment, so far as the original lessor is concerned, will not be destroyed by its reserving a new rent to the assignor for nonpayment, nor by its assuming, by the use of the word 'demise,' or otherwise, the character of a sublease; and the assignee, so long as he continues to hold the estate, is liable directly to the original lessor on all covenants in the original lease which run with the land, including the covenant to pay the rent." Whereas, in *Dunlap v. Bullard*, 131 Mass. 161, it is as firmly asserted that, "to constitute an assignment of a leasehold interest, the assignee must take precisely the same estate in the whole or in part of the leasehold premises which his assignor had therein." "He must not only take for the whole of the unexpired time, but he must

take the whole estate, or, in other words, the whole term." "If, by the terms of the conveyance, be it in the form of a lease or an assignment, new conditions, with a right of entry, or new causes of forfeiture, are created, then the tenant holds by different tenure, and a new leasehold interest arises, which cannot be treated as an assignment or a continuation to him of the original term." And to the same effect are *U. S. v. Hickey*, 17 Wall. 9, and *Collins v. Hasbrouck*, 56 N. Y. 157. Washburn, in his treatise on the Law of Real Property, says that in England the rule seems established that unless the sublease is less, in point of time, than the original term, it is an assignment, and not a subletting, but in the United States a different rule seems to have prevailed. After reviewing the decisions in New York, he refers to the two cases of *Collins v. Hasbrouck*, 56 N. Y. 157, and *Ganson v. Tift*, 71 N. Y. 48, and says: "In both of these cases the doctrine was maintained, unqualifiedly, that a covenant of the sublessee to deliver up the premises to the mesne lessor at the expiration of the term, and the reservation by the latter of a right of re-entry, made a lease, and not an assignment, though the demise was of the entire term." As stated by Washburn, the more recent English cases and text-books concur in holding that, where all of the lessee's estate is transferred, the instrument will operate as an assignment, notwithstanding that words of demise, instead of assignment, are used, and notwithstanding the reservation of a rent to the mesne lessor or original lessee, and a right of entry by him for the nonpayment of rent, or the nonperformance of the other covenants contained in it. 1 Platt, Leas. 1, 9, 102; Woodf. Landl. & Ten. (7th Ed.) 211; Wood, Landl. & Ten. § 93; Tayl. Landl. & Ten. (8th Ed.) 16; *Beardman v. Wilson*, L. R. 4 C. P. 57; *Doe v. Bateman*, 2 Barn. & Ald. 168; *Wollaston v. Hakewill*, 3 Scott, N. R. 616. This view, after a careful review, has been adopted by the supreme court of Illinois, in *Sexton v. Storage Co.*, 129 Ill. 318, 21 N. E. 920, and the supreme court of New York, in *Stewart v. Railroad Co.*, 102 N. Y. 601, 8 N. E. 200. It is pointed out by Judge Scholfeld, in *Sexton v. Storage Co.*, supra, that the supreme court of Massachusetts, in *Duniap v. Bullard*, supra, reached the conclusion that a demise of the entire term in that case was not an assignment, because there was a right reserved in the lease for the mesne lessor to re-enter for breach of the covenants in the sublease; but this was held upon the ground that under the decisions of that court the right to re-enter and forfeit the lease is a contingent reversionary estate in the property, and capable of devise. *Austin v. Cambridgeport*, 21 Pick. 215; *Brattle Square Church v. Grant*, 3 Gray, 142. But these decisions of the Massachusetts court have no support in the common law. The right of entry for condition broken is not an estate in lands, or even a

possibility of reverter. It is a mere chose in action. 6 Am. & Eng. Enc. Law, 903; *Schnlenberg v. Harriman*, 21 Wall. 44; *Hooper v. Cummings*, 45 Me. 359; *Tied. Real Prop.* § 277, note 1; 4 Kent, Comm. (8th Ed.) *126, 123; 1 Washb. Real Prop. 474; *Southard v. Railroad Co.*, 26 N. J. Law, 21. So that it results that, if the sublease so effectually passes the whole term that it must be held to be an assignment, then privity of estate is established, and the sublessee becomes bound by the covenants of the original lease, irrespective of his intention.

Accepting the foregoing as the test by which the liability of defendant is to be fixed, was the contract between the Wabash and the Iron Mountain Railroads an assignment of all its estate and interest in the lease of plaintiff's road? In view of the importance of a proper determination of this point, at the risk of being deemed prolix, we restate the essential features of that contract: The Iron Mountain covenants to take the Wabash Company's railroad, including plaintiff's leased line, and efficiently operate the same, with due diligence to collect and receive the tolls and freight charges which should accrue from the operation of the road, and apply the said revenues: (1) To the cost of repairing and betterments; to paying insurance and taxes on the Wabash Railroad and leased lines. (2) To paying necessary expenses of maintaining the organization of the Wabash, including its general offices in New York, and the interest on its mortgage debt, and the expense of a transfer agency. (3) To the payment of interest, as the same becomes due, upon the consolidated mortgage bonds of the Wabash, and rents and other charges contracted by the Wabash, and such other charges as the Wabash might authorize or direct the Iron Mountain to pay. (4) To pay any surplus to the Wabash Company, or apply the same to the payment of bonds thereafter issued by the Wabash, or such purposes as the board of directors of the Wabash should determine. In addition to these duties, there was a clause containing a provision that if the net earnings or revenue should not be sufficient to provide for the fixed charges on the demised premises, the Iron Mountain might elect to advance the funds required to pay interest on bonds, and other fixed charges, and have a preferred lien therefor, but if it elected not to advance such deficit, and the interest remained unpaid six months, the Wabash could elect to terminate the arrangement and receive back the property. It agreed furthermore to keep accurate accounts of all the business receipts and revenues arising from the Wabash System, and all the expenses of operating the same, and to so keep them that the earnings of the Wabash could be readily ascertained and determined; and that its books should be at all times subject to examination by the officers of the Wabash and their

agents; and to furnish monthly and semi-annual statements of all the business, receipts, and expenditures; and to furnish free transportation at all times to the officers and agents of the Wabash to examine into the management of the road. As plaintiff's right to recover on this branch of the case is bottomed upon the claim that this contract is a sublease of the entire term of the Wabash granted in the lease by plaintiff, and therefore an assignment whereby defendant was brought into privity of estate with plaintiff, the first inquiry must be, is that contract a lease or sublease? After a careful consideration of all its terms and stipulations, we are constrained to hold that it is not. Its use of the words "demise" and "lease" cannot be held to be controlling. For want of a better definition, it may be styled an operating contract, under the stipulations of which the Wabash retains all the substantial and beneficial interest in its several railroads and leased lines, and in which the Iron Mountain Railroad, under the power of attorney therein granted, assumes to operate the Wabash System, collect the tolls and freights, and disburse them for the sole use and benefit of the Wabash, subject at all times to the supervision of the board of directors of the Wabash as to its management, and the right to inspect its books and the accounts of the earnings and disbursements. It will be observed that the Iron Mountain nowhere in said contract binds itself to pay the Wabash a certain rent, unconditionally, out of its own moneys and revenues. It merely undertakes that, out of the earnings of the Wabash, it will, so far as they will suffice, pay the fixed charges which the Wabash had already assumed, and, if there is any surplus, to pay this over as directed by the board of directors of the Wabash. Under no circumstances are the earnings of the Wabash System, or any part thereof, to become the property of the Iron Mountain. All idea of individual liability of the Iron Mountain, over and beyond the earnings of the Wabash, for any of the obligations assumed, is carefully and studiously excluded. There is no right on the part of the Wabash to a certain profit issuing periodically out of its properties, as rent reserved. Instead of passing to the Iron Mountain a definite, determinate estate, of which it should be the absolute owner, it seems to us that the true effect of the whole instrument was to leave the beneficial estate in the Wabash, and to constitute the Iron Mountain its agent to manage and operate the road subject to the supervision of the Wabash, and with the right of the Wabash to know at all times that the earnings and receipts were being disbursed for its use and benefit. While it was a perfectly valid contract, it is a misnomer to call it a "lease" or "sublease." *State v. Schweickardt*, 109 Mo. 496, 19 S. W. 47; *Anglade v. St. Avit*, 67 Mo. 434. To transform this

carefully guarded undertaking merely to operate the road for the Wabash, and account to it for all the earnings, and disburse them for its sole use, into the unconditional and absolute liability assumed by the Wabash in the lease from plaintiff to it, would certainly be subversive of the clear intention of the Wabash and the Iron Mountain; and, as already said, this ought never to be done, unless the established rules of law will permit no other alternative. We are all of the opinion that the transaction was not a sublease, and hence in no sense an assignment, and that the Iron Mountain cannot be held for the rentals of plaintiff's road during the time it was in the hands of the receivers of the Wabash System. Viewed in all its aspects,—the right of forfeiture, and the right to compel the application of all the earnings of the road to its sole use and benefit,—it was the reservation in the Wabash of the real beneficial interest in said term, and falls far short of a transfer of its whole interest and estate therein; and it follows that, as it did not amount to an assignment, no privity in estate or contract was created between plaintiff and the Iron Mountain, and consequently no right of action on the covenants of the original lease against it, and no error was committed by the circuit court in so holding.

3. Still a third ground of recovery is urged by counsel for plaintiff, to wit, that the covenant made by defendant to keep the road in repair was made for the benefit of plaintiff, and plaintiff has a right to sue thereon for its breach. The covenant is as follows: "The party of the second part, moreover, shall and will at all times during the hereby demised term keep the buildings upon the lands hereby demised insured in the usual manner against loss by fire, paying the premium therefor as aforesaid, and will keep the said demised railroad, equipment, and property in good order and repair, and will at the expiration of the hereby demised term, or other sooner determination of this lease and contract, yield and deliver up the hereby demised railroad and appurtenances in the same good order and repair as the same are now in, or may be put in during the hereby demised term, casualties, acts of God and the elements, and reasonable wear and tear, excepted." The referee found that the defendant not only kept the road in as good repair as it was when it took it, but greatly improved it. He also found that the Wabash utterly failed to perform its covenant in the original lease to put plaintiff's road in such order and repair, at its own cost, as to enable said road to be safely and successfully operated "at the earliest practicable day"; that nine years had elapsed before the contract with the Iron Mountain, and this covenant had been broken long before the Iron Mountain went into possession. Upon the facts found, we think it is clear that the defendant was

not liable for the breaches in the original lease which had occurred long before it took possession. *Patten v. Deshon*, 1 Gray, 329; *Coward v. Gregory*, L. R. 2 C. P. 153; *Tillotson v. Boyd*, 4 Sandf. 521; *Churchwards v. Smith*, 3 Burrows, 1271. What is the measure, then, of its obligation on its own undertaking? A covenant to keep leased premises in repair imposes upon the tenant the obligation "to keep" the premises in as good repair as when the agreement is made. *Middlekauff v. Smith*, 1 Md. 329; *Stultz v. Locke*, 47 Md. 562; *Gutteridge v. Munyard*, 7 Car. & P. 129; 1 Wood, Landl. & Ten. § 387. Covenants "to keep in repair," and "to keep in as good repair as they now are," are held to amount to the same thing in law. Inasmuch as the railroad was confessedly out of repair when the defendant agreed to take it, and as it only bound itself "to keep it in repair, and return it in as good condition as it now is," and the referee found that it greatly improved the road, we think the plaintiff is precluded by this finding. There is, and ought to be, a marked distinction between a covenant to keep premises which are in good repair, in repair, and a similar covenant to keep an old house or dilapidated premises in good repair. The judgment is affirmed.

SHERWOOD and BURGESS, JJ., concur.

On Motion for Rehearing.

We have been moved to grant a rehearing herein. We still adhere to the view originally expressed that the litigated instrument was not a lease, but simply (for want of a better expression) "an operating contract." We attach no importance to the fact, for reasons already given, that the parties to that contract denominated it a "lease." Nor is the defendant concluded by the admission in its answer that it was a lease, since the admission was accompanied by profert of the instrument on which its admission was based. Such an admission cannot "in the smallest degree alter or affect the tenor of such instrument." This could no more be done than could the jurisdiction of a court be defeated by a failure to deny the charge that no jurisdiction existed. *Edmonson v. Phillips*, 73 Mo. 57. This principle is also illustrated by that class of cases which hold that where the truth plainly appears on the face of a deed there is no estoppel. *Bigelow, Estop.* (5th Ed.) 361. And, while on the subject of what the instrument really is, it may not be altogether inappropriate to recall a saying of Lord Brougham that he remembered a case wherein Lord Eldon referred it in succession to three courts to decide what a particular document was. The court of king's bench decided it was a lease in fee; the common pleas, that it was a lease in trial; the exchequer, that it was a lease for years.

Whereupon Lord Eldon, when it came back to him, decided for himself that it was no lease at all. *Green Bag*, April, 1806, p. 131.

Omitting, for the present, further discussion of the character of the instrument, we come to the pith of the motion for rehearing, namely, that this court ought not to hold said instrument a valid operating contract, because such an agreement was ultra vires as to the Wabash Railroad. What corporations may lawfully do is summed up in a few words by Judge Thompson in his recent Commentaries on the Law of Corporations (volume 4, § 5645), where he says: "In respect of the power of corporations to make contracts, two propositions may be stated: (1) That they have, by mere implication of law, and without any affirmative expression to that effect in their charters or governing statutes, and, of course, in the absence of express prohibitions, the same power to make and take contracts, within the scope of their creation, which natural persons have; (2) that this power, on the other hand, is restricted to the purposes for which the corporation has been created, and cannot be lawfully exercised by it for other purposes." This statement of the law accords with the general current of authority on this subject. In *Barry v. Exchange Co.*, 1 Sandf. Ch. 280, a case decided over a half century ago, and elaborately considered, it was said: "Every corporation, as such, has the capacity to take and grant property, and to contract obligations, in the same manner as an individual. And every such corporation has power to make all contracts which are necessary and usual in the course of the business it transacts, as means to enable it to effect such object, unless expressly prohibited by law or the provision of its charter." This court has frequently announced similar views. *Baile v. Insurance Co.*, 73 Mo. 371; *Liebke v. Knapp*, 79 Mo. 22; *Detweiler v. Breckenkamp*, 83 Mo. 45. As instances of the application of this doctrine, it has been held that a railroad corporation may purchase a tract of land containing gravel, in furtherance of a contract between it and a third person, whereby the gravel is to be excavated and hauled over its road to a distant place, for which it is to receive compensation; and the court decreed specific performance of the contract. *Railroad v. Evans*, 6 Gray, 23. And, though frequently doubted whether it could be legitimately done, it is now abundantly settled that an implied power exists in a railroad company to contract with another railroad company or other corporation to carry goods or passengers beyond the terminus of its own lines, even though the transit be accomplished in whole or in part by water. *Railway Co. v. McCarthey*, 96 U. S. 258; *Perkins v. Railway Co.*, 47 Me. 573. Reciprocal contracts of this nature have not infrequently been recognized by this court. *Wiggins Ferry Co. v. Chicago & A. R. Co.*, 73 Mo. 389;

Id., 128 Mo. 245, 27 S. W. 568, and 30 S. W. 430. In other cases this court has held a railroad company liable for loss of goods contracted to be transported beyond its own terminus. *McCann v. Eddy* (Mo. Sup.) 33 S. W. 71. In *Railway Co. v. Ayres*, 140 Ill. 644, 30 N. E. 687, in a sentence which embodies the whole decision, it was said: "Without attempting to determine whether, as a general proposition, corporations may contract joint obligations, there can be no doubt of the power of two or more railway companies, whose railways form a continuous line, to enter into a joint arrangement for operating their railways as one line, and to become jointly liable for money borrowed to be used in furtherance of the business of such line." *Green Bay & M. R. Co. v. Union Steam-Boat Co.*, 107 U. S. 98, 2 Sup. Ct. 221; 5 *Thomp. Corp.* §§ 5872, 5873. So, too, where a railroad company was engaged largely in the shipment of cotton, it has been ruled to be one of its implied powers to enter into a contract with a steamship company for a specified amount of space on its ships for the shipment of cotton across the ocean, to be delivered at specified times at the point of shipment. *Norfolk & W. R. Co. v. Shippers' Compress Co.*, 83 Va. 272, 2 S. E. 139. There are many other cases to the same effect. 5 *Thomp. Corp.* § 5872 et seq.

These illustrations serve to show that the vigorous rule announced by counsel, "that a railroad company possesses only the powers specified in its charter and such others as are absolutely necessary to the exercise of those powers," states the doctrine too broadly, and cannot be reconciled with current and prevalent modern authorities. On the contrary, it would seem, from these authorities, that, in regard to implied powers of corporations, such powers, in the absence of express prohibitions, may well be held to result from those specifically granted, provided, always, they be within the scope and purposes of the creation of the corporation, and fall within the reasonable contemplation of the charter. Within these bounds, a corporation is no more restricted in the exercise of its implied contractual power than a natural person.

Plaintiff urgently insists that the instrument is a lease because it is the only instrument authorized to be made by one railroad to another by the provisions of section 2568, Rev. St. 1889, and therefore it must be a lease. If this section were the only one to be looked to, there might be considerable force conceded to this contention, on the principle of "expressio unius"; but section 2588 of the same article and chapter provides that "all railroad corporations may contract with each other or with other corporations in any manner not inconsistent with the scope, object, and purpose of their creation and management." A brief his-

tory of this section, in its former and in its present condition, may be worthy of preservation. In its original legislation on this subject, the general assembly only permitted railroad companies to contract with each other for the transportation of persons and property over their respective roads. Acts Called Sess. 1860, p. 27. In 1864, a doubt having been intimated in *Missouri Coal & Oil Co. v. Hannibal & St. J. R. Co.*, 35 Mo. 84, whether a railroad company could contract with a steamboat company, whereby the latter could be bound to deliver freight for the former, the legislature, soon after said opinion, amended the statutes so as to make it as it is at present. Gen. St. 1865, p. 341, § 32; Rev. St. 1879, § 801. This section, in its present shape, may well be regarded as conferring the requisite authority to make the "operating contract" under discussion. In fact, that section is simply declaratory of the principle announced in the decisions already cited and quoted. Indeed, section 2588 would seem to expand the result even of the advanced cases, because it legitimates any contract between two railway companies "not inconsistent," etc.; so that, under this section, the given transaction need not be "absolutely necessary," nor, indeed, "necessary." It is only obnoxious when it is found to be inconsistent with the purposes of the creation and management of the corporations. The previous history of section 2588, both legislative and judicial, would seem to indicate an intention on the part of the state to further and foster transportation of freight and passengers on through lines, and certainly such inter sese arrangements between railway and other transfer corporations must greatly tend to the public convenience, and prevent delays otherwise incident to travel and transshipment. Under this section, the contract between two railway companies may be a lease, or an operating contract, or a temporary permission or parol license to use and occupy the line of one company to expedite the trains of another, because of some disaster or accident, or otherwise, provided, always, that the matter contracted about and the end sought is "not inconsistent" with the purposes for which the railroad is chartered. In making this contract, the Wabash Railroad, embarrassed by debt, was providing for the performance by another railroad of those duties for which it was created,—duties not only not inconsistent, but duties absolutely imposed upon it. By no word or stipulation did it relieve itself of its obligations to the public, and its contract was, in our opinion, *intra vires*, under the express terms of the statute.

In conclusion, we have no doubt that the result reached by us in the original opinion is correct, and we are fortified in this view by the additional reasons herein given. Accordingly, a rehearing is denied.

ROBERTSON v. STEAD.

(Supreme Court of Missouri, Division No. 1.
June 23, 1896.)

RECEIVERS—FOREIGN COURT—APPOINTMENT—POSSESSION OF PROPERTY—REPLEVIN
—JURISDICTION.

1. In replevin it appeared that a New York corporation owned and operated a railroad in Mexico; that it became insolvent, and by a decree of one of the courts of Mexico its property was placed in the hands of plaintiff as receiver; that among the property was a private car, designed for the use of officers of the corporation, in which plaintiff traveled from Mexico to St. Louis, where it was attached at the suit of creditors of the corporation. *Held*, that plaintiff had a special property in the car, authorizing him to replevy it, even against claims of citizens of the United States.

2. In the absence of proof to the contrary, evidence that a foreign court uniformly exercised jurisdiction in the appointment of receivers, and in controlling the affairs of insolvent corporations, pending a sale of their property, is sufficient to establish, prima facie, that such court had jurisdiction to place the property of an insolvent railroad company in the hands of a receiver.

Appeal from St. Louis circuit court; Daniel Dillon, Judge.

Action by Joseph A. Robertson, receiver, against Patrick M. Stead, to obtain possession of a special railroad car. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

W. C. & J. C. Jones and C. C. Kidd, for appellant. Jos. S. Laurie, for respondent.

MACFARLANE, J. This is an action of replevin to obtain the possession of a special railroad car known as the "Sierra Mojada." The Monterey & Mexican Gulf Railroad Company is a corporation of the state of New York, which owned and operated a railroad in the republic of Mexico. This corporation having become insolvent, its property was, by a decree of the federal district court for the state of Nuevo Leon, placed in the hands of plaintiff, Robertson, as receiver. Under and by authority of this decree the receiver was put into the possession of all the property of the corporation, including the car Sierra Mojada. This car was used by the managing officer of the corporation in traveling over the road and elsewhere on the business of the corporation. It was the private car of the executive officers of the company, and with the other property went into the possession of the receiver, within the jurisdiction of the court. In 1892 plaintiff brought the car from the republic of Mexico to St. Louis, where it was attached at the suit of Fairbanks, Morse & Co., creditors of said corporation, and citizens of the state of Illinois. Under a writ of attachment issued in that suit, which was against the corporation, the car in question was taken in possession by defendant, who is the sheriff of the city of St. Louis. This suit is by Robertson, as such receiver, to regain possession of the car.

1. The controlling controversy in this case is whether a receiver, appointed by a court of the republic of Mexico, can, as against an attaching creditor of the debtor who resides in the state of Illinois, recover, by a suit in a court of this state, the property of the debtor, which had come into possession of the receiver in Mexico, and which was brought into the jurisdiction of the Missouri court by the receiver himself. The general rule is that a receiver, appointed by a court of chancery, has no legal status outside the territorial jurisdiction of the court appointing him. He receives his powers from the court, and can only exercise them within its jurisdiction. The court itself has no power beyond the bounds of its jurisdiction, and can confer none upon the receiver. This strict rule of legal right is generally recognized. *Insurance Co. v. Needles*, 52 Mo. 17; *Booth v. Clark*, 17 How. 322; *Beach, Rec. § 680*, and note for cases. The rule, however, is not applied with the same strictness with which it is declared, but courts often, in the spirit of comity, recognize the rights and powers of receivers appointed in other jurisdictions, and allow them to sue for and recover property which they are entitled to hold under the order appointing them, or to pursue generally their remedies. This spirit of comity has been so generally acted upon as to create an exception to the rule almost as well established as the rule itself. In most courts of the United States it is only withheld when to allow it would contravene the laws or public policy of the state, or would defeat or impair the rights of resident creditors. *Beach, Rec. § 682*; *Gluck & B. Rec. § 57*, and cases cited in notes. So far as I am advised this court has never either recognized or denied this exception, nor do we deem it necessary to pass upon it in this case. The principle upon which we think this case must be ruled is one of law, and not of comity. The order of the federal court of Mexico required all the property of the railway corporation to be delivered into the hands of the receiver, who was directed to preserve and manage it for the benefit of all the creditors. Under this order the receiver obtained possession of the car in question within the jurisdiction of the court appointing him. The possession of the receiver was, therefore, lawful when taken. The car, with all other property of the corporation, was held for the benefit of foreign as well as domestic creditors. The creditors residing in the United States had no rights superior to those of the creditors residing within the jurisdiction of the court. It cannot be seen how those rights became paramount when the property was brought, by the lawful possessor, within the jurisdiction of the courts of the United States. Courts will protect the rights of domestic creditors, and will not permit property located in their jurisdictions to be carried away by a receiver of a foreign state or nation, until all such creditors are satisfied. But we know of

no principle upon which rights of domestic creditors can be created by reason of the property, in the lawful possession of the receiver, being brought within their jurisdiction. Such a rule would greatly embarrass the receiver in the discharge of his duties, and would in many cases affect injuriously the rights of creditors. Hence it is generally ruled that, after a receiver has obtained possession of the property of the debtor within the jurisdiction of the court appointing him, such possession will be protected, into whatever jurisdiction the property may thereafter be taken by the receiver.

The order of the court, and the subsequent possession thereunder, vested in the plaintiff a special property in the car which authorizes him to maintain this suit. *Cagill v. Woolridge*, 8 Baxt. 580; *Bank v. McLeod*, 38 Ohio St. 174; *Bagby v. Railroad Co.*, 86 Pa. St. 291; *Chicago, M. & St. P. Ry. Co. v. Keokuk*, etc., *Packet Co.*, 108 Ill. 317; *McAlpin v. Jones*, 10 La. Ann. 552; *Pond v. Cooke*, 45 Conn. 126. Henry, J., in his dissenting opinion, in argument, states the rule thus: "A suit by a receiver to recover property of which he had obtained possession, but which has been taken from him, rests upon a different ground. In such case his former possession created a special property which will support the action." *State v. Gambs*, 68 Mo. 296. This declaration, while probably not necessary to a decision of the question in issue, was not inconsistent with what was said by the majority of the court, and at least expresses the views of the learned writer. The rule is thus expressed by a recent text writer: "So long as the property is taken from the corporation and placed in the hands of the receiver, with full power, under the direction of the court, to settle the estate of the corporation, it cannot be taken from the receiver by a creditor of the corporation, but will be treated in another state precisely as it would have been by the courts of the state where the receiver was appointed, if the controversy had arisen there." *Gluck & B. Rec.* 183. In *Chicago, M. & St. P. Ry. Co. v. Keokuk*, etc., *Packet Co.*, *supra*, the controlling facts were similar to the facts in this case. The property of the packet company had been put into the hands of a receiver under an order of a court in the state of Missouri. The property, including a certain barge, came into the hands of the receiver. In conducting the business of the company the receiver sent the barge to Quincy, in the state of Illinois, where it was taken by the sheriff under attachment by an Illinois creditor of the packet company. The receiver interpleaded, claiming the property under the order of court and his possession thereunder. The court held that the suit could be maintained. Upon this state of facts the court stated the law as follows: "By taking the barge into his possession within the jurisdiction of the court that appointed him, a special property in the

barge became vested in the receiver; and it is the established rule that, where a legal title to personal property has once passed and become vested in accordance with the law of the state where it is situated, the validity of such title will be recognized everywhere." In *Pond v. Cooke*, *supra*, a receiver appointed in New Jersey transported iron to the state of Connecticut, to be used in completing a contract of the debtor made prior to the appointment of the receiver. The property was taken under attachment by a creditor of the state of Connecticut. The property was claimed by the receiver. The court, in deciding the controversy, says: "Thus it appears that the property was in possession of defendant as receiver when it came into this state. He was invested with it, and was legitimately performing the duties of his appointment in completing the contract by its use, when it was attached by the plaintiff. In these circumstances, comity among the states requires that the case should be regarded by our courts precisely as it would have been by the courts of New Jersey had the controversy arisen there." The court says, further: "When property has once vested in a trustee, assignee, or receiver by the law of the state where the property is situated, it makes no difference whether it was done under the local law of the state or under the common law. The law of another state will not divest the trustee, assignee, or receiver of his right to the property should he take it into such state in the performance of his duty." In *Brownell v. Manchester*, 1 Pick. 233, it was held that a sheriff in the state of Massachusetts who had attached property in that state did not lose his special property by removing the attached property into the state of Rhode Island for a lawful purpose. An administrator who has obtained a judgment in his representative capacity in the domestic court has been allowed to maintain an action in his own name on the judgment in a foreign court, on the ground that the title to the judgment was vested in him. *Lewis v. Adams*, 70 Cal. 403, 11 Pac. 833; *Barton v. Higgins*, 41 Md. 539; *Cherry v. Speight*, 28 Tex. 508; *Rucks v. Taylor*, 49 Miss. 552. Our opinion is that the order of the court, and the subsequent possession thereunder in Mexico vested in the plaintiff a special property in the car, and authorized him to maintain this suit for the recovery of the property, even against the claim of creditors of the United States.

2. The pleadings put in issue the jurisdiction of the court appointing the receiver. The only proof of the jurisdiction was the evidence of witnesses who had knowledge of the laws of Mexico, and of the proceedings of the courts of that country. This evidence showed that the district courts of Mexico uniformly exercised jurisdiction in the appointment of receivers, and in controlling the affairs of insolvent corporations, un-

til the property could be sold and applied to the payment of the debts. It was not shown whether or not the jurisdiction of these courts was defined by statute, or was fixed by long-continued exercise of it. The record of the proceedings appointing plaintiff receiver of the Monterey & Mexican Gulf Railroad Company discloses the fact that the appointment grew out of attachment proceedings against the corporation, and the nomination of creditors, as provided by the commercial code of Mexico. It also appears, on the face of the record, that the duty of receivers and their powers are matters of statutory regulation. It is insisted by defendant that, as the record shows that the court is governed by statute law, the jurisdiction of the court to appoint plaintiff receiver could only be established by the statute itself. As plaintiff claims a right to the possession of the property solely by virtue of the judgment of a foreign court, it was incumbent on him to prove that the court had jurisdiction to confer the right upon him. The property belonged to the corporation for whose debt the car in question was attached. The attachment is valid, and the right of defendant, as sheriff, to hold the property is complete, unless plaintiff has shown a valid transfer, not only of the possession, but the right of possession, to himself, prior to the attachment. If the court had no jurisdiction to make the appointment, the judgment conferred no right upon the receiver. Greenleaf says: "In order to found a proper ground of recognition of a foreign judgment, * * * it is indispensable to establish that the court which pronounced it had jurisdiction over the cause." 1 Greenl. Ev. § 540; Taylor v. Insurance Co., 14 Allen, 357. See, also, Kronberg v. Elder, 18 Kan. 150, in which it is held by Brewer, J., that one claiming a right as receiver must show that the court had jurisdiction to confer the right. What the laws of foreign countries are, when made an issue in a case, must be proved as other facts. If they are written, the laws themselves, or authenticated copies, must be produced. If they are not written, then they may be proved by the evidence of witnesses who are competent to testify on the question. Charlotte v. Chouteau, 25 Mo. 465; 1 Greenl. Ev. §§ 446-448; Pierce v. Indseth, 106 U. S. 551, 1 Sup. Ct. 418. If the jurisdiction of the district courts of Mexico is not defined by statute, we are of the opinion that the evidence offered by plaintiff makes, prima facie, sufficient proof of it to authorize the judgment. The fact that a foreign court uniformly exercises jurisdiction over a subject, in the absence of proof to the contrary, ought to be taken as evidence of the jurisdiction. That is about the only proof of which the fact is susceptible, except, probably, the written or published decisions of the court itself, if such should be in existence, of which there is no proof in this case. But defendant insists that the record of the judg-

ment and decree of the court appointing and confirming plaintiff as receiver shows upon its face that the court is governed by statute laws, and therefore the laws themselves should have been produced. A careful examination will show that references to a code and to the commercial law apply to the matter of procedure in court rather than the jurisdiction of the court. We are not concerned, in this collateral proceeding, about how the receiver was appointed, or what his duties are under the statutes of Mexico. If the court had jurisdiction to appoint him, the judgment itself affords at least presumptive evidence that the proper steps were taken. Greenl. Ev. § 541; Pelton v. Platner, 18 Ohio, 217. The judgment is affirmed.

ROBINSON, J., concurs. BARCLAY, J., concurs in conclusion. BRACE, C. J., absent.

CRANDALL et al. v. SMITH.

(Supreme Court of Missouri. June 15, 1896.)

RIPIARIAN RIGHTS—ACCRETION.

A riparian owner cannot claim, as accretion, land beyond a well-defined slough, 40 to 60 yards wide, which was the old channel of the river, and through which water runs at certain seasons deep enough for navigation.

In banc. Appeal from circuit court, Cole county; D. W. Shackelford, Judge.

Action by John W. Crandall and others, heirs of Floyd Crandall, against E. C. Smith. Judgment for plaintiffs. Defendant appeals. Reversed.

The surveys and plats referred to in the opinion will be found on the following page.

Silver & Brown, for appellant. Pope & Waldecker and J. R. Edwards, for respondents.

GANTT, J. This is an action of ejectment for certain lands in Cole county, Mo., described by metes and bounds. Plaintiffs claim the same as accretions to the N. $\frac{1}{2}$ of section 21, and fractional section 16, in township 45, range 12. A reference to the accompanying surveys and plats will serve to indicate the particular land which plaintiffs seek to recover. Exhibit D is a survey by Mr. Bond, surveyor of Cole county, April 10, 1891. Sloughs B and C were the old main channel of the Missouri river. Slough A connects the present channel of the river with slough C; slough A being the result of accretions above it which forced the slough channel (now slough A) down to its present position, as it appears in Exhibit D, leaving slough B as a mere depression. Sloughs A and C vary in width from 40 to 60 yards, and have water running through them at certain seasons of the year sufficiently deep for navigation purposes. It appears that these sloughs have al-

Exhibit D.

Crandall Land—Plat of fractional sections Nos. 16, 21 and 22 as surveyed by me, and accretions to said sections, surveyed April 10th, 1891. In township 45 north, range 12 west, Fifth Principal Meridian. B. C. Bond, Surveyor of Cole County, Missouri.

**Total accretions to the parts of sections here represented
is 886 82-106 acres.**

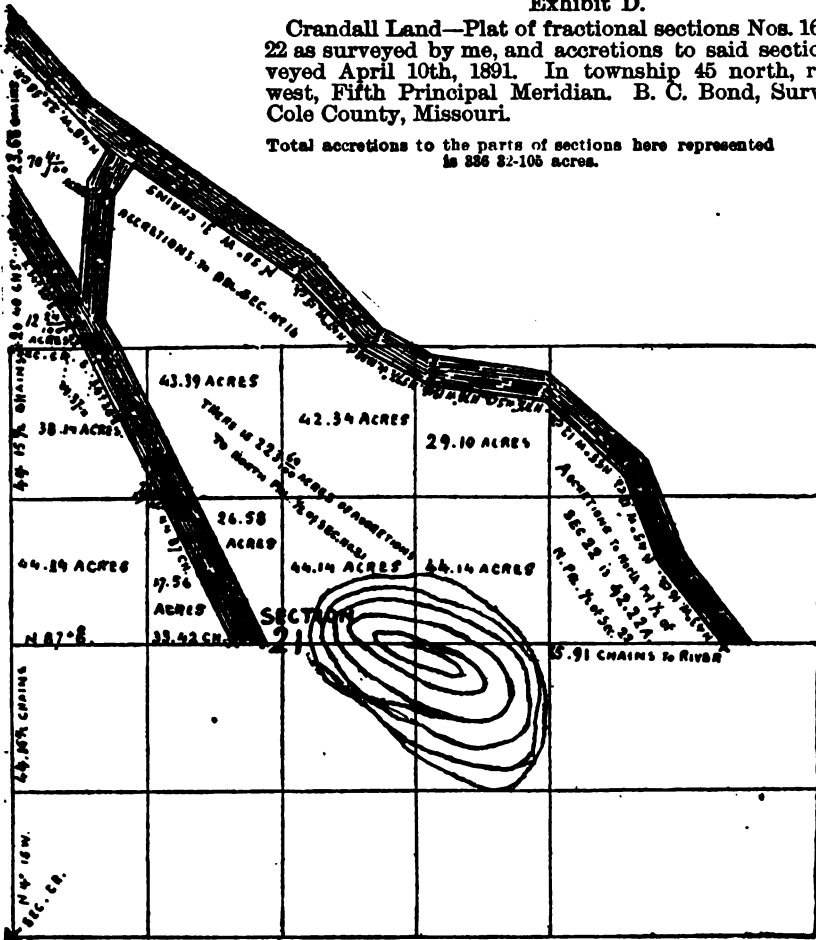
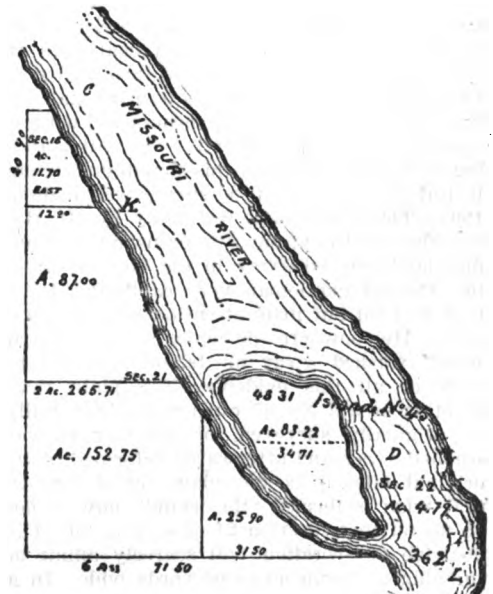
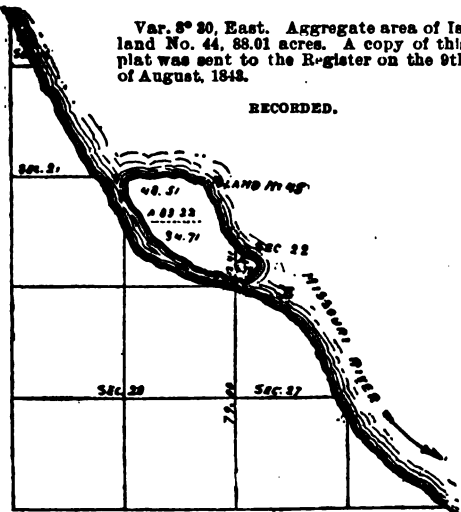


Exhibit F.

**Township 45 N., range 12 W. of the 5th P.
M., South of Missouri.**

Var. 8° 30, East. Aggregate area of Island No. 44, 88.01 acres. A copy of this plat was sent to the Register on the 9th of August, 1843.

RECORDED.



ways been located as indicated on the plat, and are still so located, except that slough A has been forced down the river by accretions above it, but continues to be the connecting channel between the river and slough O. Plaintiffs claim, in their petition, all the land east of slough B and above the middle line of section 21, and also 70.41 acres above or west of slough A, as indicated in Exhibit D. Defendant, in his answer, disclaims all title or possession of this 70.41 acres west of slough A, admits he is in possession of the land east of or below slough A, avers that the same is an accretion to United States surveyed Island No. 45, and denies generally that plaintiffs are entitled to possession. The cause was tried to the court without a jury, and a finding and judgment rendered for plaintiffs.

It will be at once seen that plaintiffs claim this land as an accretion to their lands in fractional section 16 and the N. $\frac{1}{2}$ of section 21, whereas defendant claims—First, that the land described in the petition, except the 70.41 acres, is not an accretion at all, and that it is separated from plaintiffs' lands by a well-defined slough or arm of the river; and, secondly, that it is really an accretion to surveyed Island No. 45, to which defendant has title. The several surveys show beyond all dispute that the United States government, about the year 1816 or 1817, surveyed and marked upon its plats of public lands Island No. 45. That island lay in the Missouri river opposite section 21, township 45, range 12 W., and the north end of it was north of the line dividing the north and south halves of section 21. The island contained 83.22 acres. All the surveys in evidence and all the oral testimony on both sides establish that, between this island and the mainland in section 21, one channel of the Missouri river ran. In the course of years, and the shifting of the currents of the river, what was once the main channel of the river between the mainland and the island had become merely a well-defined slough, through which boats ran in high water as late, anyway, as 1833, and perhaps later. The testimony is positive and distinct that the government corners and witness trees to the Crandall land were still standing on the west bank of this slough or original bed of the river when the survey was made in 1891. There was some testimony by Mr. Mahan that an island opposite or near the Crandall land washed away in the flood of 1844, but the old gentleman very candidly admits that he paid but little attention to these matters. He nowhere denominates the island which washed away as Island No. 45. In view of all this evidence, it is plain that, whether Island No. 45 remained substantially as originally surveyed, or whether it was washed away and afterwards reformed on its original site, it is too plain for discussion that what is termed "the island" now is not an accretion to section 21 or section 16. The doctrine of accretion will scarcely admit of jumping a slough 40 to 60 yards wide. In a

word, there is nothing saltatory about accretion. Plaintiffs' lands still come to the banks of this slough. The witness trees and corners are still to be seen. They have every foot of land deeded to their ancestors by the government and 70.41 acres more of accretions, but their lands at this point are still bounded by this original river line. Plaintiffs' line is still the bank of this slough.

The instruction given by the court of its own motion does not disclose any legal principle which guided the learned judge to his conclusion. Certainly there is no precedent for the declaration he gave. It wholly ignores the essential issues raised by the evidence, to wit, whether the land in dispute was or was not an accretion to section 21, or was a part of Island No. 45 or of an unsurveyed island. If not an accretion to plaintiffs' land, their claim to it was without right. The declaration is clearly erroneous. The instructions for defendant correctly declared the law, and should have been given. Especially should the instruction in the nature of a demurrer to the evidence have been given. The judgment should have been for defendant upon the whole evidence; it being apparent that the land in dispute was not an accretion to plaintiff's land, but was separated from it by a well-defined slough which marked the boundaries of plaintiffs' land. There is no question of invading original boundaries in the case, nor are plaintiffs cut off from the banks of the slough upon which their land bordered. The judgment is reversed, and the cause remanded.

BRACE, C. J., and BARCLAY, SHERWOOD, MACFARLANE, BURGESS, and ROBINSON, JJ., concur.

STATE ex rel. TOWN OF KIRKWOOD v. HEUGE et al.

(Supreme Court of Missouri, Division No. 1.
June 23, 1896.)

CONSTITUTIONAL LAW — AMENDATORY STATUTE —
SUBJECT—INSUFFICIENT TITLE.

The title of Act April 1, 1893, declares that it is to amend Rev. St. c. 162, art. 14, § 8553, "relating to the exemption of citizens of incorporated cities and towns, and of the property within said cities and towns, from taxation for county road purposes." The amendment was made by adding to the original section a provision that, in all counties contemplated in the provisions of Rev. St. 1889, c. 140, art. 4, § 7895, where money should thereafter be collected as county taxes, a prescribed application should be made of the road and bridge fund. Section 8553 relates exclusively to cities in counties governed by township organization, while section 7895 provides especially for the management of roads in St. Louis county, which is not so governed. *Held* that, so far as the act was intended to apply to St. Louis county, the title did not clearly express the subject, as required by Const. art. 4, § 23.

Appeal from circuit court, St. Louis county; Rudolph Herzog, Judge.

Proceedings in mandamus by the town of

Kirkwood against Theodore Heege and others, to require the county court to cause to be paid over to relator a portion of the road tax collected in St. Louis county. From a judgment in favor of respondents, relator appeals. Affirmed.

This is a proceeding by mandamus, brought at the relation of the town of Kirkwood, in the county of St. Louis, against the county court of said county and its judges. The object of the proceeding is to require said county court to cause to be paid over to the authorities of said town a portion of the road tax collected in the said county, to be applied to the improvement of its streets. The real question in issue is the constitutionality of the following act of the general assembly of the state, approved April 1, 1893:

"An act to amend section 8553, of article 14, of chapter 162, of the Revised Statutes of Missouri, relating to the exemption of citizens of incorporated cities and towns, and of the property within said cities and towns, from taxation for county road purposes.

"Be it enacted by the general assembly of the state of Missouri, as follows:

"Section 1. That section 8553, of article 14, of chapter 162, of the Revised Statutes of Missouri, be and the same is hereby amended by adding to the end of said section the words: 'And in all counties contemplated in the provisions of section 7895, of article 4, of chapter 140, of the Revised Statutes of Missouri, 1889, where money shall hereafter be collected as county taxes upon property within any incorporated town or city, the county court shall, as such taxes are collected, and as the trustees, council or other corporate authorities of such city or town, shall make application to such county court, draw warrants upon the county treasurer, payable out of the road and bridge fund, to the treasurer of such town or city, for an amount bearing such proportion to the entire amounts of the year's taxes so collected upon said property as the amounts annually appropriated for road and bridge purposes shall bear to the total county revenue for such year, and all such sums so paid out shall be expended upon the roads and streets of such town or city, as shall be directed by the trustees, council or other corporate authorities thereof,' so that said section, as amended, shall read as follows:

"Sec. 8553. Where any city or town has or may become incorporated under a special charter, or under a general law authorizing cities to become incorporated, no requisition in labor or in money from the citizens thereof, or the property within said corporation, shall be required to improve roads in the country, different from the grant in the charter, but they shall be required to work and pay a tax to improve the streets and roads, and such improvements as shall be specified

in the charter, or within the limits of the incorporation, as long as the charter or corporation shall remain in full force; and in all counties contemplated in the provisions of section 7895, of article 4, of chapter 140, of the Revised Statutes of Missouri, 1889, where money shall hereafter be collected as county taxes, upon property within any incorporated town or city, the county court shall, as such taxes are collected, and as the trustees, council, or other corporate authorities of such city or town shall make application to such county court, draw warrants upon the county treasurer, payable out of the road and bridge fund, to the treasurer of such town or city, for an amount bearing such proportion of the entire amount of the year's taxes so collected upon said property as the amounts annually appropriated for road and bridge purposes shall bear to the total county revenue for such year; and all such sums so paid out shall be expended upon the roads and streets of such town or city, as shall be directed by the trustees, council or other corporate authorities thereof.'

"Approved April 1, 1893."

Upon petition to the circuit court of said county, an alternative writ issued, which recited that the county of St. Louis had, within its territory, property whose assessed valuation was more than \$15,000,000, and more than 150 miles of macadamized and gravel road; that respondents were judges of the county court of said county; that the town of Kirkwood was incorporated under a special charter, within the limits of said county; that the county had, for the year 1893, collected, as county taxes, a large amount of money upon property situate within said town, and refused to pay over to the proper authorities of said town any portion of it, though requested. A demurrer to the return was sustained, and relator appealed.

Albert N. Edwards and O. J. & R. Lee Mudd, for relator. F. A. Heidorn, Zach. J. Mitchell, and John W. McElhinney, for respondents.

MACFARLANE, J. The first objection made to the act, and the only one we need consider, is that it is obnoxious to section 28, art. 4, of the constitution, which declares: "No bill shall contain more than one subject * * * which shall be clearly expressed in its title." The title to this act declares that section 8553 of article 14 of chapter 162 of the Revised Statutes is to be amended, and states very comprehensively the subject of that section. A mere reference to the section to be amended, without other description of the subject-matter of the amendatory law, is, under the rulings of this court, a sufficient title to an act which deals exclusively with the subject of the section amended. *State v. County Court of Marion Co.*, 128 Mo. 440, 30 S. W. 103, and 31 S. W.

23, and cases cited. But the section this act purports to amend is one which relates exclusively to cities located in counties governed by township organization. The alternative writ does not show that the county of St. Louis is governed by the township organization law. Indeed, on the hearing, it was expressly agreed that it was not so governed. Neither is said county governed altogether by the general laws applicable to most other counties, particularly in its system of working and repairing its roads. Article 4, c. 140, provides specially for the management of roads in counties wherein the assessed valuation of property is \$15,000,000 or more, and wherein there are more than 150 miles of macadamized and graveled roads. The county of St. Louis falls within this class, and the question is, does the amendatory act apply to cities located in its territory? In other words, is the title of the act sufficiently comprehensive to advise the members of the legislature, and others interested, that the legislation was intended to apply to the county of St. Louis?

The constitution prohibits the passage of a bill the subject of which is not clearly expressed in its title. This prohibition is found in most of the constitutions of the states, and, while it has generally been liberally construed, it is, nevertheless, a constitutional mandate, and is obligatory upon the legislature, and, when clearly disregarded, the legislation must be declared invalid by the courts. The purpose of this constitutional inhibition is expressed by Judge Ray in this language: "The adjudicated cases, as well as the elementary writers, all concur that it was to prevent the vicious practice of conjoining, in the same bill, incongruous matters, and subjects having no legitimate connection or relation to each other, and in no way germane to the subject expressed in the title; that its object was to prevent surprise or fraud upon members of the legislature, rather than embarrass legislation by making laws unnecessarily restrictive." *State v. Ranson*, 73 Mo. 86. See, also, *State v. County Court of Jackson Co.*, 102 Mo. 537, 15 S. W. 79. The title to this act informed the members of the legislature that a specified section of the law relating to the exemption of citizens of incorporated cities and towns, and their property within such towns, from taxation for road purposes, was to be amended. Turning to the section amended, and the reference makes it a part of the title, the legislator would find that the township organization law was referred to, and that the cities to be affected by the law were those located in counties governed by such laws. From the mere reading of the title it would be impossible to even conjecture that there was an intention to amend the law relating to counties of the class into which St. Louis falls. If the act was intended to apply to the county of St. Louis, then the title not only does not clearly express

its subject, but it is affirmatively deceptive and misleading. The title is sufficient, and the act is constitutional, when applied to counties which are governed by township organization; but it has no application to the county of St. Louis, which is not so governed. The judgment is affirmed. All concur, except BRACE, C. J., who is absent.

HANNUM v. WADDELL, Superintendent of Insurance.

(Supreme Court of Missouri, Division No. 1.
June 23, 1896.)

MUTUAL BENEFIT ASSOCIATIONS—CERTIFICATES— FORFEITURE—NONPAYMENT OF ASSESSMENTS —NOTICE—PROVINCE OF JURY.

1. In an action on a certificate of membership in a mutual benefit association, issued subject to by-laws of the association which provided that nonpayment of an assessment within 30 days after notice given should forfeit the certificate, and that notice, properly addressed and deposited in the post office, should be deemed sufficient notice, the defense of forfeiture by nonpayment of an assessment after due notice had been given was made. Defendant's secretary testified that he knew, from the methods adopted in giving notices, that notice of the assessment had been mailed, but did not claim that he remembered this particular notice. The evidence was conclusive that the deceased had not received the notice. *Held*, that a finding that the notice was never mailed was warranted.

2. Where a benefit certificate is, by its terms, forfeited by nonpayment of assessment after notice of the assessment has been given, the certificate is not forfeited by nonpayment of an assessment, if notice is not given, though the member knows that the assessment has been made, from his knowledge of the fact that other members have received notices of the assessment.

3. In an action on a benefit certificate forfeited for nonpayment of an assessment, the issue as to whether the assessment was made is for the jury, where the burden of proving it is on the defendant, and the only evidence that it has been made is testimony of the secretary of defendant that the minute book of the association contains the order for the assessment, but the entry is not in evidence.

Appeal from circuit court, Linn county; W. W. Rucker, Judge.

Action by Lillian M. Hannum against the National Temperance Relief Union on a benefit certificate. There was a judgment for plaintiff, and James R. Waddell, superintendent of insurance, prosecutes defendant's appeal from the judgment. Affirmed.

This suit was commenced against the National Temperance Relief Union, an insurance corporation, under the laws of the state of Missouri, incorporated and doing business on the assessment plan. After a trial, and judgment against the defendant, the corporation was dissolved by a decree of the circuit court, and defendant Waddell, as superintendent of insurance, has charge of its affairs and their settlement. On the 11th of September, 1889, one Addison Hannum was admitted to membership in said corporation, upon which he received a certificate under

which the corporation undertook to pay his wife \$1,000 in case of his death, provided he kept and performed the agreements required of him by the by-laws of the corporation. One of these agreements was that he should pay, within 30 days after notice, all assessments which might be levied on account of the death of other members. Section 2, art. 2, of the by-laws, provides that notices of assessments shall be sent by mail to the post-office address of each member, and that "notices deposited in the post office at St. Joseph, Missouri, shall be deemed sufficient notice." It is further provided by said section that failure to pay such assessments within 30 days after notice should work a forfeiture of all rights, benefits, and interests in the association. The said Addison Hannum died on 15th day of April, 1892, and this suit is prosecuted by his widow, on the certificate, to receive the benefits of the membership. The substantial defense made by the answer is that on the 5th day of March, 1892, assessment No. 79 was declared, and notice thereof was on that day given to said deceased, but that the same was never paid by him, and by reason thereof the said certificate, and all rights and benefits thereunder, were on the 5th day of April, 1892, forfeited, and said certificate became null and void. The reply denies that assessment No. 79 was ever made, and that notice thereof was given deceased. This is a sufficient outline of the pleadings to present the questions in issue.

On the trial, plaintiff read in evidence the certificate of membership; and it was agreed that deceased paid all assessments up to No. 79, and otherwise kept and performed all conditions and obligations of membership. To maintain its defense, defendant read in evidence the by-law heretofore mentioned, and offered evidence with a view of proving that notice of assessment No. 79 had been given. This statement or stipulation appears on the record: "It was admitted by both parties that all the assessments were paid, except No. 79, which defendant contended was not paid, and that the total amount of assessments paid was \$24.59." Plaintiff's counsel said, "Consider all the assessments in evidence, and the receipts of the various assessments are considered in evidence." The evidence offered in proof of notice will be considered in the opinion. At the close of the evidence the court gave the jury this instruction prayed by plaintiff: "The jury are instructed that in this case the defendant company rests its defense upon the alleged forfeiture of the certificate of membership or policy sued on, by reason of the nonpayment of assessment No. 79. The court further instructs you that, before the defendant can avail itself of such defense, you must find from the evidence in the case that assessment No. 79 was made by defendant on the members of the company, including Addison Hannum, to pay death losses of deceased members, as provided by the by-laws of said

company or association, and that defendant mailed said Hannum notice of such assessment in the manner required by the by-laws read in evidence; and unless you find, under the evidence, that defendant did do and perform said duties, you must find for the plaintiff." Defendant asked an instruction in the nature of a demurrer to the evidence, which being refused, this instruction was given at its request: "The court instructs the jury that it is not necessary, in order to show that the certificate of membership of Addison Hannum had lapsed at the time of his death, to prove that he had actually received the notice of assessment numbered 79. It is only necessary to prove that the notice was deposited, as first-class mail matter, in the post office at St. Joseph, Mo., directed to him at Brookfield, Mo. If, therefore, you believe from the evidence that said notice was by defendant company deposited in the post office at St. Joseph, Mo., as first-class mail matter, directed to the said Addison Hannum at Brookfield, Mo., and he failed to pay said assessment within thirty days from date of said notice, then, by the terms of the contract entered into by him, his certificate of membership lapsed, and his right to indemnity thereunder ceased and determined, and said certificate became null and void, and you should find for the defendant." The verdict was for plaintiff, and defendant appealed.

M. W. Huff and Brown & Pratt, for appellant. Lander, Johnson & Lander, for respondent.

MACFARLANE, J. (after stating the facts). Only two errors are assigned: First, refusing to instruct the jury to find for the defendant; and, second, the action of the court in requiring the jury to find from the evidence that assessment No. 79 was made.

1. Under the pleadings, the burden was placed on defendant to prove that assessment No. 79 was made by defendant, and notice thereof was given. Defendant claims that those two facts were conclusively shown, and the court should therefore have directed a verdict for defendant. The certificate of membership was accepted by the insured, under which he agreed to be governed by the constitution and by-laws of the corporation. Defendant's by-laws provided that a deposit of a notice, properly addressed, in the post office at St. Joseph, should be deemed sufficient notice. This provision became a part of the contract, and was binding upon all the members. "It is competent for the parties to agree what shall be notice, and it is enough to conform to the agreement contained in the by-laws." *Bac. Ben. Soc.* § 381, and cases cited. Defendant was then only required to prove that notice of assessment No. 79 was duly stamped, properly addressed to deceased, and deposited in the post office at St. Joseph. Was the

proof that this was done made so conclusive that the court could declare it as a matter of law? The secretary of the association testified that the notice was mailed. He did not pretend to remember this particular notice, but derived his knowledge from his careful and methodical manner of giving notices to all members, and the checks adopted to avoid omissions. His evidence was certainly very convincing, but was it conclusive? It seems to us that no regularity or method could absolutely prevent mistakes or omissions. At least, it does not appear that the method adopted by defendant was so perfect as to avoid all errors. Besides, after the notices are properly addressed they may be mislaid or lost before reaching the post office. On the other hand, the evidence is very conclusive that the notice was never received by deceased. Defendant called James Hannum, a brother of deceased, as a witness. He testified that he and his brother lived near together, and saw each other every day. Witness also had a certificate of membership in the same association. He testified further: "My brother knew before he was taken sick that assessment No. 79 had been issued by the company. He was inquiring about this assessment that I had received. I informed him that I had received it. We were talking about these assessments. I had received mine, and he had not received his. We talked about it every time one of us came to town. He would ask me if I got the mail. When I would come, I would ask him if he had received his notice." There was other evidence to the effect that deceased was constantly looking for the notice, and that it never came. We agree that, if the notice was mailed, it is immaterial whether deceased received it or not. But the fact that it never was received is evidence that it never was mailed. That it was not mailed is equally as probable as that, having been mailed, it never reached its destination. We are of the opinion that there was evidence from which the jury could have drawn the inference that the notice was never deposited in the post office, and therefore was never given.

2. But it is insisted that the deceased had actual knowledge that the assessment had been made, and plaintiff has no right to complain of the association for declaring a forfeiture, for the reason that he could have voluntarily paid the assessment. It is true, the evidence tends to prove that deceased knew that assessment No. 79 had been made on the certificate held by his brother, and from that he might have inferred that it was also made on his own; but he was nevertheless entitled to notice, under his contract with the association, as a condition precedent to a forfeiture of his membership. Forfeitures are not favored by the law, and conditions which work forfeitures should be construed strictly against the party making them. *McFarland v. Association*, 124

Mo. 217, 17 S. W. 436; 2 May, Ins. § 367. The notice provided by the by-laws is not only required to state the fact that the assessment has been made, but its amount must be stated, together with the names of the deceased members, their post-office addresses, the disease of which they died, the name of the attending physician, and of the person joining in the proof of death. The member is thus given an opportunity to make an independent investigation, and satisfy himself that the affairs of the association are honestly managed. The by-law then provides that, if the assessment be not paid within 30 days from date of notice, the members shall forfeit all benefits, etc. The notice dates from the day it is mailed. No different notice is provided. No forfeiture could have been declared until the required notice, as provided, had been given. To sustain its position the defendant cites the case of *Reichenbach v. Ellerbe*, 115 Mo. 588, 22 S. W. 573, as an authority. An examination of that case will show that the required notices could not only be served through the mail, but "by giving verbal notice of the assessment." The difference in the requirements of the by-laws of the respective associations is manifest. The by-laws having prescribed the condition upon which a forfeiture could be declared, there could be no forfeiture until the condition had been strictly complied with by the association.

3. It is very manifest from this record that the principal issue of fact tried was whether notice of the assessment was given. If that had been the only issue made by the pleadings, or if it had been admitted that the assessment had been ordered by the corporation, then it would have been improper for the court to have submitted that question to the jury, and put the burden of proving it upon the defendant. But the by-laws required the corporation, on proof of the death of a member, to order an assessment upon the living members to pay the death loss. The members had the right to require this to be done before they could be called upon to pay their proportion of the benefits. The answer charged that an assessment had been made, and the reply put the allegation in issue. The burden was on defendant to prove it. This proof doubtless could have been made by introducing the minutes or records of the corporation, and this, in the absence of fraud, would probably be conclusive upon the member. *Karcher v. Supreme Lodge Knights of Honor*, 137 Mass. 371; *Bauer v. Knights of Pythias*, 13 Am. & Eng. Corp. Cas. 618, and note. But, after a careful examination of the abstract of evidence furnished us, we find no evidence that assessment No. 79 was made. The secretary, in his testimony, says that "page 91 of the minute book contains the order for the assessment," but the minute entry was never put in evidence. There is serious doubt whether there is any competent evi-

dence that the assessment was ever ordered, and defendant surely could not complain that the question was submitted to the jury. The judgment is affirmed.

BRAOE, C. J., absent. ROBINSON, J., concurs. BARCLAY, J., concurs, except as to any intimation of approval of the Reichenbach Case; and he further holds that, as the burden of proof as to giving of the notice was upon the defendant, the credibility of the testimony offered by defendant on that issue was for the jury.

STATE v. MARSHALL.

(Supreme Court of Missouri, Division No. 2
June 30, 1896.)

SEDUCTION—AGE OF PROSECUTRIX—HEARSAY EVIDENCE.

On a prosecution for seduction under promise of marriage, which by statute can only be committed when the female is under 18 years of age, declarations of an aunt, with whom the prosecutrix, when young, went to live, as to the age of the prosecutrix when she left her, being hearsay, are not admissible to show the age of the prosecutrix. Gantt, P. J., dissents.

Appeal from circuit court, Chariton county; W. W. Rucker, Judge.

Isaac Marshall was convicted of seduction, and appeals. Reversed.

L. N. Dempsey and Crawley & Son, for appellant. The Attorney General and Morton Jourdan, for the State.

SHERWOOD, J. Indicted for and convicted of the seduction of Annie Mason under a promise of marriage, and his term of imprisonment in the penitentiary affixed at two years, defendant appeals to this court. It will be unnecessary to notice the evidence in detail. Such portions of it as occasion may require will be briefly outlined. The testimony of the girl tends to show that defendant, who at the time had not attained his majority, had become engaged to her some time before the night of the sexual encounter, and that she yielded to him because he renewed his promise to marry her; that he would do so the next ensuing Christmas; and because she loved him and wanted him; and that, influenced by all these things, she "yielded to him." This result of the testimony of the prosecutrix was only obtained, however, after many questions, strictly leading in their character, had been asked her by the prosecuting attorney, who seemed incapable of asking any questions but of the sort mentioned. But before the result aforesaid was reached, on her redirect examination, the prosecutrix admitted, in answer to the prosecuting attorney, that defendant made a bargain with her that if she would yield to him he would marry her the next Christmas. This admission was, however, after much interrogation on the part of the prosecution, so changed by the

prosecutrix in her subsequent testimony as to materially qualify her former admission, which, had it remained unaltered, would have defeated the prosecution under the rule laid down in Reeves' Case, 97 Mo. 677, 10 S. W. 614, that the acceptance of a mere offer of marriage, without more, in exchange for sexual favors, would not amount to seduction. Testifying on his own behalf, defendant told a far different story. He denied that he at any time had plighted his troth to Annie, and, though admitting that on the eventful evening he had sexual intercourse with her, yet he testified that there was no seduction about it; that he and Annie merely "met congenial, mingling flame with flame." Under our statute the crime of seduction under promise of marriage can only be committed where the female is unmarried and under the age of 18 years. The testimony of the prosecutrix on the point of her age was extremely unsatisfactory. The trial which resulted in the present appeal occurred at the April term, 1895. A former trial, it seems, had occurred in 1893. 121 Mo. 476, 26 S. W. 562. The prosecutrix testified that she knew nothing about her age; only knew as she had been told; that she was born in Missouri, but removed to Kansas when quite small, and lived with her aunt. Whether her aunt was allied to her by blood or marriage, or what her means and sources of information were as to her niece's age, she does not state, but she says that on the eve of her return to Missouri, to Chariton county, her aunt told her she was 9 years old; but how many years she had remained in Missouri before she became 16 years of age she could not tell. Nor could she tell whether she was 15 or 16 years of age when she was seduced, nor whether it was in 1891 or in 1892 that the seduction occurred. It is true, she states that she was 18 years old on the 1st day of the September next preceding the trial, but how she arrived at this result she could not explain. The testimony of the father of the prosecutrix, who would, it seems, have known the age of his daughter, was shown on cross-examination to be absolutely unreliable. He was unable to give the day, month, or year of his own birth, nor the years of the births of any of his children, nor by whom he was married to his present wife, nor the date of that marriage. He spoke of his daughter's age at a certain time, but, being closely cross-examined, he finally broke down, and in his conscious helplessness exclaimed, "I don't know anything." His wife, however, testified that the prosecutrix told her on her arrival from Kansas that she was 9 years old, and that witness had been married 2 years at that time, and that she would have been married 11 years the 27th of the next month (May); and that, according to this calculation, Annie was 18 years old the preceding September. Such, in substance, is the evidence on the point of Annie's age.

There is no question but that a witness may testify to his own age, but such witness

is, of course, subject to cross-examination, in order to ascertain the sources of his information. *State v. Congot*, 121 Mo. 463, 26 S. W. 566, and authorities cited. In the case at bar, as already noted, the cross-examination shows that the prosecutrix knew nothing as to her age of her own knowledge; that her information respecting her age at the time of her departure from Kansas for Missouri had been derived from her aunt, then living in the former state. These facts, then, present the question whether such testimony, thus derived, was admissible, or possessed any probative force, in a prosecution for seduction. The authorities are to the effect that such evidence, which would otherwise be hearsay, is confined to the proof of pedigree, and does not include the admission of hearsay to establish birth, death, or marriage when introduced for other purposes than pedigree. 1 Whart. Ev. (3d Ed.) § 209. "We think it entirely clear that from the nature of the case, as well as upon authority, a case of pedigree forms an exception to the general rule as to proof of a particular fact by hearsay, reputation, or tradition. As to what is a case of pedigree, an examination of the question shows that a case is not necessarily one of that kind because it may involve questions of birth, parentage, age, or relationship. Where these questions are merely incidental, and the judgment will simply establish a debt, or a person's liability on a contract, the case is not one of pedigree, although questions of marriage, legitimacy, death, or birth are incidentally inquired of." 1 Rice, Ev. 418. Stephens, when speaking of declarations as to pedigree, says: "Such declarations are to be deemed relevant only in cases in which the pedigree to which they relate is in issue, and not to cases in which it is only relevant to the issue." Steph. Dig. Ev. art. 31. In short, such declarations only become evidence when the fact sought to be established by hearsay is required to be proved for some genealogical purpose, and not otherwise. 1 Tayl. Ev. (from 8th Eng. Ed.) § 645. Thus, in *Haines v. Guthrie*, 13 Q. B. Div. 818, it was held, both in the queen's bench division and in the court of appeal, that the declarations of a deceased father were not admissible in evidence to prove the age of his son, who had been sued for the price of horses sold him, he having set up the defense of infancy; and this because the case was not one of pedigree. It was not at all a purely genealogical controversy, but a mere collateral issue, and hence the rule applicable alone in pedigree cases did not apply. In *Elsenlord v. Clum*, 126 N. Y. 552, 27 N. E. 1024, the subject is elaborately discussed, and the authorities ably reviewed, per Peckham, J., and the same doctrine announced as in the former case. In *Com. v. Felch*, 132 Mass. 22, where, in consequence of an operation to produce an abortion, the woman died, and it was attempted by her declara-

tions respecting the paternity of the child to cast the onus of such paternity on a person other than the defendant, and show that such person had a motive to procure such abortion, and thus to apply to the case the rule relating to pedigree, the lower court rejected the evidence of such declarations as not admissible for any purpose, and this ruling was affirmed on appeal; Lord, J., remarking: "It is not enough that the declarations tendered may relate to some question of pedigree, nor is it enough that a question of pedigree may be relevant and pertinent to the issue. The exception to the inadmissibility of hearsay evidence because it relates to pedigree is only when the question of pedigree is itself in issue." See, also, 1 Greenl. Ev. (15th Ed.) § 103; *Town of Union v. Town of Plainfield*, 39 Conn. 563; *Wise v. Wynn*, 59 Miss. 538; *Westfield v. Warren*, 8 N. J. Law, 249; *Shields v. Boucher*, 1 De Gex & S. 40; *Berkeley Peerage Case*, 4 Camp. 401; *Copes v. Pearce*, 7 Gill, 247. In *Mima Queen v. Hepburn*, 7 Cranch, 290, which was a suit for freedom by plaintiffs, it was ruled that evidence, such as would be admissible in a pedigree case was inadmissible in that one. So, also, in *Davis v. Wood*, 1 Wheat. 6, the same doctrine was again asserted. In settlement cases it was formerly the practice to admit the declarations of deceased persons as to particulars concerning their settlements, though not relating to matters of pedigree. But that such evidence is inadmissible is now well settled. 1 Phil. Ev. (Cow. H. and Edw. notes) 257; *Rex v. Inhabitants of Nuneham Courtney*, 1 East, 373; *Rex v. Inhabitants of Chadder-ton*, 2 East, 29; *Rex v. Inhabitants of Ferry Frystone*, Id. 54; *Rex v. Inhabitants of Abergwilly*, Id. 63. In *Rex v. Eriswell*, 3 Term R., the court was evenly divided on the question, but the views of cogent reasons of Grose, J., and Lord Kenyon in that case ultimately prevailed in the subsequent cases just cited, and were approvingly cited and followed by the supreme court of the United States in *Mima Queen's Case*, supra. An occasional case may be found where the point that hearsay evidence is held admissible in other than pedigree cases to establish a specific fact, but it is believed that in all such cases the distinction between matters of pedigree where the direct issue is a genealogical one and other cases where no such direct issue is presented has either been wholly overlooked, and not referred to, or else the utterance has been entirely obiter. This is notably true of *Inhabitants of North Brookfield v. Inhabitants of Warren*, 16 Gray, 174,—a settlement case,—where there was positive testimony to show that, though the marriage of the father of the alleged pauper occurred in February, 1804, yet that the pauper was born in the fall of 1803, and that, consequently, he was not entitled to a settlement in the parish where born. The witness—a stranger—who testified on the part

of the defendants to the fact of the date of the birth of the pauper was allowed to have her testimony corroborated as to that date of the birth of the pauper by the fact that witness, with her aunt, Mrs. Blair, in 1803 made a visit to a relative near the house where Ruth Richardson, the mother of the pauper, and the infant pauper, were, and that the aunt had with her at the time of such visit her infant child, an only daughter, Susana, who, born in 1802, and at the time of the visit about a year old, died on December 12, 1803. And further to corroborate the witness, and to show that her memory was accurate, and as a means of showing that she kept in remembrance the date of Susana's death, it was held admissible to show further that witness had, since that time, kept her memory refreshed as to the date of Susana's death by frequent reference to a large parchment kept in her aunt's family, bearing the inscription "Family Record," on which was inscribed the usual recitals of marriages, births, and deaths in her aunt's family, and on such "family record" was entered, among others, when said Susana was born, and that she had died on the 12th of December, 1803. And other independent evidence to show the fact of keeping such record in witness' aunt's family was held admissible, as well as to show that in the burial ground of the Blair family there was an ancient gravestone, which bore the name of Susana, and also the date December 12, 1803. But certainly none of these facts mentioned had any bearing on the question whether evidence admissible in cases of pedigree was admissible or nonadmissible in other cases than those concerning pedigree; so that the utterance in that case that there was no difference in principle between pedigree cases and others in this regard was wholly obiter. Besides, the authorities cited in support of the assertion there made are all of them pedigree cases. Nor can the principal case be reconciled with the later one of *Com. v. Felch*, supra. And it is not a little curious to note that Lord, J., who was overruled in *Inhabitants of North Brookfield v. Inhabitants of Warren*, afterwards delivered the opinion in *Felch's Case*, supra. In *Primm v. Stewart*, 7 Tex. 178, it was correctly ruled that where a person is absent for seven years without being heard from he is presumed to be dead, and this no one questions. 1 Greenl. Ev. (14th Ed.) § 41. But this point afforded no basis for the observation that evidence admissible in pedigree is equally admissible in other cases. The observation is merely obiter, nor do the authorities cited support it. It is unnecessary to cite other instances. In none of them where the question is discussed and the authorities examined, the rule that hearsay testimony is strictly confined to pedigree cases is always maintained, as appears from the above-cited authorities. But a pedigree case is not necessarily confined to civil actions, it may exist in a criminal case where re-

lationship is to be shown; for instance, in a case of incest. *State v. Bullinger*, 54 Mo. 142; *Ewell v. State*, 6 Yerg. 364. Inasmuch as in the present case there was no question of pedigree involved, the testimony of the prosecutrix was wholly inadmissible, and possessed no probative force as to the alleged declarations made to her as to her age by her aunt on the departure of the former for Missouri. Here the prosecution could only be maintained by establishing beyond reasonable doubt that the prosecutrix was under the age of 18 years at the time of her alleged seduction. The proof of this matter was vitally essential to the maintenance of the prosecution, and could not be established by mere hearsay, such as the testimony of the girl on the point of her age was. This being the case, the instruction asked by defendant in the nature of a demurrer to the evidence should have been given, and because of its refusal the judgment should be reversed, and the cause remanded.

BURGESS, J., concurs. GANTT, P. J. dissents.

MOODY et al. v. PEYTON et al.

(Supreme Court of Missouri, Division No. 2.
June 30, 1896.)

JUDGMENTS—PROBATE COURT—HEIRS—RES JUDICATA.

A judgment of the probate court, in an action against an administrator allowing, as a valid claim against the estate, a purchase note given by the intestate, secured by a vendor's lien, is conclusive on the heirs, as well as the administrator, in an action by the vendor to foreclose his lien.

Appeal from circuit court, Cass county; W. W. Wood, Judge.

Action by H. B. Moody, individually and as guardian, against Horace E. Peyton and others, to foreclose a vendor's lien. From a judgment for plaintiffs, defendants appeal. Affirmed.

Burney & Burney and Noah M. Glvan, for appellants. J. H. Kyle and R. T. Railey, for respondents.

SHERWOOD, J. Proceeding to enforce vendor's lien on the following described property in Harrisonville, Mo., to wit: The east half of blocks Nos. 185 and 186, and 10 feet off the north side of block No. 193. Plaintiff, as the guardian and curator of his son, by order of the probate court, and on his own behalf, sold the land aforesaid to Sarah E. Peyton for \$4,000, \$100 of which she paid down, and for the balance gave her promissory note, receiving in return a title bond, and was placed in possession of the land, which she continued to occupy from June 1, 1891, till August of that year, when she died, and since that time the premises

have been occupied by her children, up to 1893, and since then her administrators have rented the same; such premises having been inventoried by such administrators as the property of Sarah E. Peyton's estate. In 1892 the note aforesaid was allowed in the probate court of Cass county. On its presentation, however, for allowance, resistance thereto was made by the administrators, who filed a formal answer to the effect that Mrs. Peyton was, by reason of sickness and otherwise, incapable of making a contract at the time she contracted for the premises and gave her note therefor; that the adult plaintiff took advantage of her weakness and diseased condition, and induced her to purchase the land and to sign the note therefor; and that the title to the land was invalid, etc. To this answer a reply was filed, and the probate court found the issues for the plaintiff in that suit, and allowed the note, as already stated. From this judgment of allowance the administrators appealed to the circuit court, where they dismissed their appeal in December, 1892, when the judgment of allowance was affirmed. The answer of the administrators in the present proceeding is substantially the same as that filed in the probate court, and the children and heirs of Sarah E. Peyton also joined in said answer, in which defendants offered to rescind the contract, and to surrender possession of the premises, etc. The reply of plaintiffs to this answer was, in substance, the same as their former reply, and also pleaded as *res judicata* the judgment of allowance on the note in the probate court. From the records of the probate court offered in evidence herein, the following appeared: "The hour of 9 o'clock a. m. arrived, and come also plaintiffs and defendants, by their attorneys, and the trial of this cause is resumed. The court, having heard the evidence on behalf of defendants, introduced to sustain the issues in their answer, and considered plaintiffs' demurrer to the same, doth sustain said demurrer, and order that demand of plaintiffs be allowed, \$4,232.80, and assign to class 5; interest, 8 per cent." Plaintiffs, in their pleadings and on the hearing, tendered a deed for the premises. It was alleged in the petition that no part of the note or judgment in the probate court had ever been paid, and that the estate of Sarah E. Peyton was insolvent. The latter allegation was not contradicted in the answer, and, besides, was shown to be true; Judge Glenn, the probate judge, testifying at the trial respecting the insolvency of the estate: "My opinion is that it will not pay out; leaving out this claim, that it will fall some short." And it was also admitted at the trial that no part of the note or judgment thereon had ever been paid. On the foregoing premises the circuit court found for plaintiffs, and entered a decree enforcing a lien against the land, which was all that was asked in the petition.

As will have been observed, this controversy hinges on the point whether the judgment of allowance on the note in the probate court bound the heirs of the decedent, Sarah E. Peyton. The authorities cited on behalf of defendants establish that a judgment against an administrator is conclusive as to the personal estate, but only *prima facie* as to the realty, and that the heir has a right to his day in court to dispute the correctness of the demand allowed against the administrator. The reason given for this is that there is no privity between the administrator and the heir. In a recent work, however, it is said: "So far as the personal estate of a decedent is concerned, it does not technically descend to the heirs, but passes to the administrator or executor, through whom they take as distributees. Hence, in regard to that part of the estate, the privity between them and him is complete." 2 Van Fleet, Former Adj. § 465. In some of the states it is held that a judgment against an administrator is no evidence of a debt, as against the heirs, in a proceeding to sell land to make assets with which to pay it. In others—a majority—it is held that such judgment is *prima facie* evidence against the heirs. But in North Carolina it has been ruled that such judgment, in the absence of fraud or collusion, is conclusive on the heirs, as well as the administrator, as establishing the debt, and, this being established, subsists in full force for subjecting all the estate of a debtor, real as well as personal,—the former after the latter,—to the payment of his liabilities. *Speer v. James*, 94 N. C. 417; *Proctor v. Proctor*, 105 N. C. 222, 10 S. E. 1036. And the rule is that, when a judgment is sought to be impeached on the ground of fraud, such impeachment can only occur when satisfactory evidence is offered that such impeaching fraud occurred in the very concoction or procurement of the judgment. Nothing short of this will answer. *Bigelow, Frauds*, 86-88, 90, 94, 95, 636; *Payne v. O'Shea*, 84 Mo. 129; *McClanahan v. West*, 100 Mo. loc. cit. 320, 13 S. W. 674; *Oxley Stave Co. v. Butler Co.*, 121 Mo. loc. cit. 630, 28 S. W. 367, and cases cited; *Nichols v. Stevens*, 123 Mo. loc. cit. 118, 25 S. W. 578, and 27 S. W. 613.

In this case, as there was no attempt made to prove that fraud was exhibited, as above indicated, therefore the evidence was properly rejected on this consideration alone. The ruling in North Carolina on the point in hand commends itself to our approval, and we indorse it in blank. There is no sound reason, in our opinion, in holding that a judgment recovered against an administrator should be conclusive on the heir as to the personalty, but worthless, or only *prima facie* evidence against him, when it comes to the realty. How one and the same judicial determination could have two such distinct probative effects and consequences as to be conclusive as to one species of property, and

only *prima facie* as to another, both belonging to the same estate, is truly remarkable. At common law, the reason a judgment bound the estate under administration, to wit, the personality, but did not bind the heir at law of the real estate, was because the real estate constituted no part of the assets under an administration. *Nichols v. Day*, 32 N. H. loc. cit. 138. But here, in this state, every particle of property whereof a party dies seised or possessed (with certain exceptions, not necessary to be noted now), whether real, personal, or mixed, constitutes the assets of the estate, and has to be inventoried and sold as such whenever occasion demands; and therefore the reason of the rule existing at common law, already mentioned, no longer exists, and "*cessat ratio cessat ipsa lex*." As is well said in *Faran v. Robinson*, 17 Ohio St. 242, cited approvingly by *Burgess, J.*, in *Rogers v. Johnson*, 125 Mo. 216, 28 S. W. 635, "Under our laws the real estate of a deceased person, subject to the widow's right of dower, is, in the last resort, as much and as truly assets in the hands of his personal representatives, for the payment of debts, as his personal property is." And consequently a judgment which establishes a debt against an estate, no matter out of what assets it must ultimately be paid, should be as conclusive on the heir as on the administrator, and we hold that it is as conclusive. And in this state it is to be noted, also, that no judgment is rendered against an administrator when a claim is allowed. The judgment of allowance and classification is rendered against the estate. It is, in all of its essential incidents and consequences, a judgment *in rem* (1 *Woerner, Adm'n*, 337, 338; 2 *Woerner, Adm'n*, 1030), which, like other judgments *in rem* in similar circumstances, is binding on the whole world; and because of this, also, the same consequences cannot follow such impersonal judgment as would follow at common law a judgment *de bonis testatoris*.

Again, among the reasons mentioned in the authorities cited on behalf of defendants is that a judgment should not bind a person not a party to the suit, who cannot offer testimony, adduce evidence in opposition to the claim, nor appeal from the judgment. None of these reasons have any force in the case at bar, because the legislature has made ample provision for this class of cases as follows, to wit: "If any executor, administrator, heir or devisee of an estate shall, within four months after any demand shall have been allowed, file in the office of the probate court the affidavit of himself or some credible person, stating that the affiant has good reason to believe, and does believe, that such demand has been improperly allowed, the court shall vacate such order of allowance and try the matter anew, and allow or reject such demand, as shall be right; and if,

upon such new hearing, such demand shall be allowed, it shall be classed and paid as if such new hearing had not been granted." Section 213, Rev. St. Mo. 1889. Under the statute as it stood formerly (section 216, Rev. St. 1879), only an executor or administrator was allowed to file such an affidavit. Section 285, Rev. St. 1889, makes provision for appeals from the probate court to the circuit court in a large number of cases, and winds up by saying: "And in all other cases where there shall be a final decision of any matter arising under the provisions of this chapter. *And the right of appeal herein provided for shall extend to any heir, devisee, legatee, creditor or other person having an interest in the estate under administration." This is a new clause added to the above section, from the asterisk downwards, and first appeared in the statutes of 1889. Subsequent sections provide that, on such appeal being taken, there should be a trial *de novo*. It thus appears very clearly that the legislature intended that a judgment of allowance entered by a probate court should possess the same conclusive force as the judgments of other tribunals, and this has always been the doctrine of this court respecting such judgments of probate courts. Heirs having the right of setting aside an order of allowance, and then having done so, having the right of a trial anew, and having also the right of appeal whether they move to set aside or not, they evidently do not fall within the reason of the doctrine announced in the authorities cited for defendants. Of course, there might be cases of fraud or collusion in the very procurement of an allowance, and in such cases, doubtless, the power of a court of equity could successfully be invoked; but no such case is here made by the pleadings.

As to the description of the land, it is admitted to be correct in the answer, and on the trial it was stipulated between the parties that the \$3,900 note described in the petition was given for the balance of the purchase money from S. E. Peyton, deceased, for the real estate sought to be charged in the petition with the vendor's lien. In such circumstances, it is not seen how, in the face of their answer and stipulation, defendants could claim that plaintiffs were attempting to charge with a vendor's lien land which was not sold to Mrs. Peyton. And it is not apparent, inasmuch as plaintiffs do not seek a personal judgment against defendants, and inasmuch, also, as the estate of Mrs. Peyton is hopelessly insolvent, what concern defendants can possibly have, whether plaintiffs seek to enforce their lien on the right land or not, or whether they embraced all of the land in the suit to enforce their lien.

It is unnecessary to notice other points assigned for error. Decree affirmed. All concur.

CITY OF INDEPENDENCE v. OTT et al.
(Supreme Court of Missouri, Division No. 2.
June 30, 1896.)

BUILDING CONTRACT — JOINT LIABILITY — NEGLIGENCE.

1. O. and P., about to erect business houses on their adjoining city lots, and co-operating to secure uniformity in the architecture and to lessen the cost, agreed on a common plan as to the front, and stipulated for the use of a common stairway. There was no obligation on the part of either to pay for the house of the other, but, for convenience, they figured up the whole cost, and each was to pay in proportion to the front feet of his property. *Held* a several contract.

2. Where two adjoining lot owners contract with a third person for the building of two connecting houses on the lots, under a several contract, one of such owners is not liable for injuries caused by the negligence of the contractor and the other lot owner.

Appeal from circuit court, Jackson county; C. L. Dobson, Judge.

Action by the city of Independence against Christian Ott, Jr., and another, executors, etc., of Christian Ott, Sr., deceased, to recover the amount of a judgment paid by plaintiff for personal injuries resulting from an excavation alleged to have been made in plaintiff's street by defendant's testator and another in his lifetime. From a judgment for defendants, plaintiff appeals. *Affirmed*.

This is an action by the city of Independence, a city of the third class, under the laws of this state, to recover from the executors of Christian Ott, deceased, \$2,933.13, the amount of a judgment, costs, and expenses paid by said city on a judgment obtained against it by the guardian of one Joel Ball, an insane person, for personal injuries sustained by said Ball from a fall into an excavation alleged to have been made in the streets of said city by said Christian Ott and James E. Payne in the lifetime of said Ott. The facts upon which recovery is sought are as follows: In the year 1887 Christian Ott, Sr., and James E. Payne were the owners of two lots adjoining each other, on Liberty street, in the city of Independence. The south lot, having a frontage of 44 feet, was owned by Ott. The north of said lots, having a frontage of 25 feet, was owned by James E. Payne. Some time in the year of 1887 both Ott and Payne concluded to erect business houses on their said lots. They contracted with T. B. Smith to erect said buildings. At the trial the contract with Smith was lost, and the only evidence of its contents appears in the evidence of Mr. Payne, as follows: "We [i. e. Payne and Ott] agreed upon a plan by which a building could be erected on our two separate lots. I was to pay for the construction of that part of the building on my lot, and he was to pay for that part of the building on his lot. * * * It [the building] was begun in June, 1887. * * * The contract was made with T. B. Smith, who was to excavate for the basements and sidewalk area. * * * The building was to be

a brick, and the sidewalk protected by an area wall, and the buildings two stories high, and were to contain two rooms on Mr. Ott's lot, and one on mine, on the street floor, and were to be divided into rooms on the second floor; and a stairway was to be built between the two buildings, to be common to the hallway above. Mr. Ott was to pay in proportion to the number of front feet of his property, and I was to pay in proportion of the front feet in my property. * * * The object of the contract was to get as low a priced building as we could, and to have uniformity of architecture. * * * We agreed that one stairway would be sufficient for both buildings, and that we would unite in the construction of a stairway, and allow our tenants to use the stairway. At the time of the accident the area way was completed, and there was an 18-inch stone wall between my cellar or area way and Ott's. There was no communication between the basement inclosing the area way of my building and Ott's. There was nothing in the contract which gave Ott the right to go upon my property, and in any way interfere with, change, or alter the work that was there being done for me by Mr. Smith. There was no obligation in the contract by which Ott could have been made to pay for my building, or I for Ott's. There was nothing in the contract reserving any control in Payne or Ott over the work, or of discharging any hands employed by Smith. The lots were turned over to Smith, the contractor, for the purpose of building the buildings according to the plans and specifications, and the buildings were to be delivered when completed." While this building was under process of construction the sidewalk in front of the two lots had been excavated to its entire width, and the area walls had been built. On the 11th of September, 1887, Ball, in passing along this walk, fell into the north end of this excavation, and received injuries for which he sued the city, and recovered judgment for \$1,750. The averment of his petition was that the city wrongfully and negligently allowed and permitted this excavation to remain open and unguarded at night, by signal lights or otherwise, and that his fall and injuries were caused by this negligence. After the suit was brought the city attorney, in behalf of the city, notified Ott of the pendency of the suit, where the same was pending, and the nature of the suit, that he might appear and defend the same, but he made no appearance thereto. Subsequently Ball became insane, and John W. Modie was appointed his guardian, and the cause then proceeded in his name. At the trial the circuit court sustained a demurrer to the evidence, and the city appeals.

Flournoy & Flournoy, for appellant. Wash Adams, Elijah Robinson, and A. M. Ott, for respondents.

GANTT, P. J. (after stating the facts). The learned counsel for the city, anticipating that

the executors would attempt to justify the circuit court on various grounds, has discussed five distinct propositions upon which the court might have sustained the demurrer to the evidence. It will not be necessary for this court to determine any of those questions, if we shall conclude that, under the contract for his building, Ott did not employ Smith to excavate the area into which Ball fell and was injured. We agree with the counsel for the city that the question is not so much what was the purpose of the excavation, and not at all in front of whose building it was dug, but under whose direction and by whose authority had the contractor made this excavation under the sidewalk? And whose agent was he when he left the excavation unguarded? If the contract, fairly construed, was a several contract between Payne, Ott, and Smith,—that is to say, that Ott, while co-operating with Payne to secure uniformity in the architecture of their several buildings, simply agreed upon a common plan as to the front of the two buildings, and stipulated for the use of a common stairway, and yet there was no obligation on the part of Ott to pay for the building of Payne's house, and none whatever on the part of Payne to become liable in any way for Ott's house, but for convenience, merely, they figured upon the whole cost, and each was to pay and be responsible solely for his own building, and in no manner liable for the other's,—then it is plain that the excavation in front of Payne's lot must be held to have been made, as a matter of fact, under the authority and by the command of Payne, and Ott had no part in causing it to be made. This, we think, is the proper construction of this contract. Mr. Payne testifies: "There was nothing in the contract which gave Ott the right to go upon my property and in any way interfere with, change, or alter the work that was there being done for me by Mr. Smith. There was no obligation in the contract by which Ott could have been made to pay for my building, or I for Ott's." In the absence of an express authority, no reasonable man would presume to excavate an area way in front of another's building, and the evidence should be very clear and explicit to justify a court or jury in finding that an adjoining proprietor had purposely made and maintained a nuisance in front of his neighbor's property. We do not think the contract between Ott and Payne and Smith should be construed to impose upon Ott and Payne a joint liability for what Smith separately did for each. Stripped of the one circumstance that they desired uniformity in the architecture of their buildings, and conceived the idea that they could accomplish that better by employing the same contractor, and that they could each get his own work cheaper by each giving the same builder their jobs at the same time, there does not appear to be any principle of joint contract in the case. We draw the conclusion from Mr. Payne's evidence

that not only the building, but each man's share of the excavation, was his own separate affair, for which the other was in no sense responsible. Ott, Sr., then, having never employed Smith to make the excavation in front of Payne's lot, and having no contract with Smith, jointly or severally, to build Payne's house, it follows that any negligence of Smith or Payne in leaving the excavation unguarded cast no liability on Ott, and neither he nor his executors can be required to respond for any damages flowing therefrom. As all other questions in the case hinge upon this one, and as the plaintiff can under no circumstances recover, it is unnecessary to discuss the other points in the brief. The judgment is affirmed.

SHERWOOD and BURGESS, JJ., concur.

THOMPSON v. METROPOLITAN ST. RY. CO.

(Supreme Court of Missouri, Division No. 2.
June 30, 1896.)

STREET RAILWAYS—INJURIES TO PASSENGERS—DEFECTIVE CONSTRUCTION—PLEADING AND PROOF
—ACTION FOR INJURIES TO WIFE.

1. In an action against a street railway for injuries to plaintiff's wife, it was alleged that the defendant was negligent in the construction of its open cars, in that the wheels projected above the floor and were covered by a sheet-iron fender, leaving a space between the fender and the side of the car; that plaintiff's wife, in alighting from the car, caught her foot in this space, and was thrown to the ground. It appeared that such construction was common, and was required by the necessities of the service; that the fender was in full view of passengers; and that the construction was known to the plaintiff's wife. *Held*, that it was not error to refuse to charge that if the space left between the fender and the side of the car was dangerous to passengers alighting, and if plaintiff's wife, without fault on her part, got her foot fast in such space, causing her to fall, she was entitled to recover.

2. It was not error to charge that, for plaintiff to recover, the jury must find, from the greater weight of evidence, that the injury was caused in the manner alleged in the complaint; that the burden was on plaintiff to prove the facts as alleged; and that he could not recover if the accident happened otherwise than as alleged.

3. In an action by a husband for injuries to his wife, it was proper to charge that, when a married woman is personally injured by negligence of another, two causes of action arise,—one for the wife, for the pain and suffering and the expenses she has herself paid, and the other for the husband, in his own favor, for what he has actually lost.

Appeal from circuit court, Johnson county; W. W. Wood, Judge.

Action by William Thompson against the Metropolitan Street-Railway Company to recover damages arising from injuries to his wife. There was judgment for defendant, but on the motion of plaintiff a new trial was granted. Defendant appeals. Reversed.

Jas. W. Suddath, Jas. Black, and Pratt, Ferry & Hagerman, for appellant. O. L. Houts and Hollis & Lithgow, for respondent.

GANTT, P. J. This is an appeal from an order setting aside a verdict for defendant. Plaintiff sued for his damages, as husband, arising from injuries to his wife occasioned by a fall she received in alighting from an open summer car on defendant's street railway August 30, 1891. The issue is very simple. The platform of these open cars is about 23 inches above the level of the street, as, of course, is necessary to the operation of open street cars, and to or from which people may readily ascend or descend in passing to and from the car. In order to make an easy passageway along the side of each open car, there is what is known as a foot or running board, for the full length of the car, about halfway between the platform and the ground; making an easy step from the platform to the footboard, and from the latter to the street. Each car has two pairs of wheels, and these wheels protrude through the floor of the car, under the seats, to the height of two or three inches, and are covered with sheet iron. There is left a space of several inches between this covering and the side of the seat, where it extends down to the edge of the car. The coverings over the front wheels are under the front single seats of the grip car. On the day in question, Mrs. Thompson, who had been in the habit of riding on these cars every day for years, and was presumably familiar therewith, rode on the train, in the front small seat of the grip car, and at her destination the train stopped for her to alight. While the car was standing still, and while she was in the act of alighting, she fell to the ground and was injured; and for his damages arising from this injury the plaintiff, as the husband, sued.

Plaintiff's two witnesses testified that Mrs. Thompson caught her foot between the wheel cover and the side of the car, and this caused her fall, whereas defendant's witnesses say the lady's fall was occasioned by her attempt to step from the platform to the ground without using the footboard. At the plaintiff's request, the court gave instruction 2, which read as follows: "(2) The court instructs the jury that the defendant was on or about the 30th day of August, 1891, operating a line of street railway, by cable propelled by steam force, in Kansas City, Missouri, and was a carrier of passengers for hire; that as such it was its duty to use in its business cars so constructed as to be reasonably safe for the ingress and egress of its passengers. You are further instructed that if you find from the evidence that the wife of the plaintiff did on or about August 30, 1891, board one of defendant's cars for the purpose of being transported from one point to another on defendant's line of road; and you further find that, when she arrived at her point of destination, she attempted to

alight from said car, and that her foot slipped into a slot or crevice, and was there held, which caused her to fall and receive the injury complained of, without fault on her part; and if you further find from the evidence that the said slot or crevice was carelessly and negligently left in said car in its construction, or that said defendant negligently permitted same to remain in said car, and that the same was unnecessary and dangerous to passengers attempting to alight therefrom,—then you will find for the plaintiff." The court refused plaintiff's instruction 4, reading as follows: "(4) If the jury believe from the evidence that the car constructed with the cover of the wheel, as by the model shown, left a space between the cover and the side of the car, and that said space was dangerous to passengers, in alighting from said car; and you further find that the wife of plaintiff, without fault on her part, got her foot fast in said space between the cover and side of the car, which caused her to fall and to receive the injury complained of,—then she is entitled to recover." And gave for the defendant instructions 3 and 4, reading as follows: "(3) When a married woman, without fault on her part, is personally injured by the negligence of another, two causes of action arise,—one for the wife, for the pain and suffering and the expenses she has herself paid, and the other by the husband, in his own favor, for what he has actually lost. Now, this is the husband's suit, and not the wife's; and a decision of this case on its merits in no wise affects, or has anything to do with, the wife's case. That case must be independently tried, upon its own merits, and this case must be tried upon its merits alone, on the testimony introduced here; and none of the things mentioned above, for which the wife can sue, can be considered in this case. (4) Before, in any event, or under any circumstances, the plaintiff can recover, the jury must find, from the greater weight of all the evidence introduced before you, that Mrs. Thompson's foot caught in between the wheel box and the side of the car, and, while fastened there, she fell to the ground, with her foot so fastened. If you do not find the facts this way, plaintiff has no case, and cannot recover, no matter how you may think the accident occurred, and no matter how badly Mrs. Thompson was hurt; and in determining this question the burden of proof is upon the plaintiff to prove those facts by the greater weight of all the evidence in the case. You should consider all the evidence introduced, both by plaintiff and the defendant; and, unless the greater weight is with the plaintiff on that proposition, your verdict should be for the defendant. This question should be fairly and impartially tried and determined alone upon the testimony offered before you." The learned circuit court set aside the verdict because, in its opinion, it had erred in giving the said instructions 3 and 4

for defendant, and in refusing said instruction 4 for plaintiff.

1. There was no error in the third instruction given for defendant. It is eminently proper to inform a jury that the wife has her own action for injuries like this, and what elements enter into her case, and the grounds of her husband's action, and that each is distinct.

2. Equally unobjectionable is the fourth instruction for defendant. It is substantially the same as the second given for plaintiff, and simply confines plaintiff's right of recovery to the only ground of negligence alleged in his petition. Having adopted this theory in his petition, and his witnesses having unequivocally sustained it, there was no error in the court's submitting it to the jury on the same theory. The issue was one principally of veracity. Two witnesses for plaintiff testified that they saw her fall, and that her foot was fastened between the box covering the wheel and the side of the car; and four witnesses for defendant, also eyewitnesses, denied that her foot caught, but that she fell through her inattention, in failing to step on the footboard. We cannot see how the court could have given any other instruction. There was no other possible ground for recovery, and the court did exactly right to confine the instructions to the case alleged in the pleadings, and made by the evidence.

3. There was no error in refusing to give the fourth instruction for plaintiff. There was no evidence that the car was defective, or dangerously constructed. On the contrary, they are such as are in general use. The very necessities of the street-car service require the floor of the car to be low, and easily and safely reached, and this fact compels the wheels to come through the platform. They are covered, and this oval box is open, and obvious to every passenger. It is evident that the jury did not believe Mrs. Thompson was hurt by catching her foot in the space as alleged. She did not testify. The verdict was plainly for the right party, and the judgment awarding a new trial is reversed, with directions to enter judgment on the verdict of the jury for the defendant.

SHERWOOD and BURGESS, JJ., concur.

DONHAM v. HOOVER.

(Supreme Court of Missouri, Division No. 2.
June 30, 1896.)

EXECUTION SALE—VALIDITY.

A sale on execution against a married woman under judgments aggregating \$58, not shown to be for necessities, will be set aside as against the purchaser, where the latter, a clerk of the court, issued the executions without the knowledge or consent of the plaintiffs therein, and the property, which was occupied by the defendant as a homestead, and was worth \$5,000, was sold for \$5. in one parcel, though

susceptible of division, none of the parties to the judgment having notice of the sale, or being present, either in person or by attorney.

Appeal from circuit court, Greene county; James T. Neville, Judge.

Ejectment by W. W. Donham against Lu-lu Hoover. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action in ejectment in the ordinary statutory form for a lot of land in William McAdam's addition to the city of Springfield, 120 feet front by 110 feet deep. Ouster is laid October 16, 1892. The answer pleads an equitable defense, wherein it is averred the defendant is a married woman; that plaintiff's sole claim to said lot is based upon two sheriff's deeds thereto to Mrs. Elizabeth C. Donham; that said sheriff's deeds are founded upon two executions issued by plaintiff while circuit clerk upon two transcripts of two pretended judgments rendered against defendant,—one by C. H. Evans, a justice of the peace within and for Campbell township, for \$39.32, in favor of Eversol & Co., and the other by C. L. Dalrymple, a justice of the peace for said township, for \$19.55, in favor of one Fatum; that when said transcripts were filed all costs were paid to the date of their filing; that neither of said plaintiffs ever ordered or directed an execution to issue against defendant on either of said judgments; that plaintiff at that time was clerk of the circuit court of Greene county, Mo., and of his own volition, and without authority of law, and without any notice either to plaintiffs in said executions or to defendant, issued executions on said judgments, and procured sales to be made thereof, and, although said property was well worth \$5,000, bid the same in for \$5, and took his deed therefor to his wife; that his wife has since died, and he is claiming the same by the curtesy. Defendant avers that the said lots are her homestead; that she had no notice of said sale, no opportunity to have her homestead valued and set apart to her; that said property is susceptible of division, and the sheriff wholly neglected his duty in failing to subdivide the same; that said pretended claim is the result of a fraudulent scheme of plaintiff to prevent all bidding on said property. There was a prayer to have said sales and deeds set aside, and for general relief. The circuit court found the issues for defendant, and plaintiff appeals.

C. W. Thrasher and H. C. Young, for appellant. Rathbun & Son, for respondent.

GANTT, J. (after stating the facts). A more inequitable and unconscionable claim than plaintiff's has never come before this court. The learned circuit court very properly put the seal of his condemnation upon such practices. The evidence was overwhelming that the defendant was a married woman, the head of a family; that she was the owner of a tract of land in the city of

Springfield that was worth, at a low estimate, \$5,000, which she was during all these proceedings, and is now, occupying as a homestead; that two judgments had been obtained against her while she was a married woman. No attempt was made to prove that these judgments were for necessities for her or her family. The two judgments aggregated \$58.77. The plaintiffs in those judgments both testified unequivocally that neither ever directed an execution to issue on said judgments, and never authorized any attorney to do so for them; and neither knew nor had any notice whatever of the sale of said lot under said judgments, or either of them, until long after plaintiff had obtained his deed. It is true, one Camp testified he was a lawyer, and represented Eversol, and that he ordered an execution for Eversol; but he appears in a most unenviable light in the transaction. He thinks he notified his client when the sale was to take place, but that he himself had no intention of being present at the sale, or bid for the lot, so as to attempt to make it bring his client's judgment. In a word, he was taxing his legal acumen to its utmost to make his client's debt of less than \$40. He ordered the execution and sale, and yet neither attended the sale himself nor advised his client of the importance of so doing, and permitted the only visible property of defendant, worth \$5,000, to go for \$5. Eversol, having heard of the sale, protested, and evidently threatened to have the sale set aside, whereupon plaintiff promptly paid Eversol's judgment, and took an assignment thereof. The great preponderance of the evidence is that neither Eversol nor Fatum knew anything of the sale under Fatum's judgment; that no execution was ordered by the plaintiff in that judgment; and that defendant was never notified of her exemptions, and knew nothing of the contemplated sale. It is plain that plaintiff, without authority of law, issued the transcript execution in this case, and is now seeking to profit by his own unauthorized action. The sheriff seems also to have had a very inadequate conception of his duty in the premises. When he discovered that a valuable city lot was about to be sacrificed for five dollars, and that the creditor for whose benefit ostensibly the sale was being made was absent and the defendant also, his plain duty was to have stopped the sale, and returned it not sold for want of bidders. It has often been said that mere inadequacy of price alone will not justify a court in setting aside a sale, but the rule in this state is firmly established that when one man obtains the property of another of great value, for mere pittance, under an execution sale, and the transaction is assailed, he must have been guilty of no misconduct, and the sheriff's proceedings must have been free of irregularities. In this case the sheriff wholly failed to discharge his duty as to assign-

ing the defendant's homestead and dividing said property, and the plaintiff issued the executions without authority, either of which irregularities was sufficient to set aside the sale and deeds. The courts scan such a sale with the closest scrutiny. *Beedle v. Mead*, 81 Mo. 297; *Rogers & Baldwin Hardware Co. v. Cleveland Bldg. Co.* (Mo. Sup.) 34 S. W. 57, and cases cited. No question of innocent purchaser arises upon the record. The officer who wrongfully and without authority put the process in motion is before us seeking to avail himself of his own wrong. Neither is there any force in the suggestion that the children of plaintiff are not in court. The plaintiff alone is seeking this relief. It is perfectly competent for the court to pass upon his claim, which is severable from that of his children in this proceeding. Defendant was entitled, upon the evidence, to an affirmative decree as against plaintiff canceling said sheriff's deeds and setting aside said sale, and the decree should yet be so amended nunc pro tunc, as the findings are ample to justify such a decree. The judgment is affirmed.

BURGESS and SHERWOOD, JJ., concur.

Ex parte SMITH.

(Supreme Court of Missouri, Division No. 2.
June 30, 1896.)

ORDINANCE — CONSTITUTIONALITY — VAGRANCY —
ASSOCIATION — INTENT — HABEAS CORPUS
— PRACTICE.

1. Rev. Ord. St. Louis, c. 25, art. 6, § 1033, cl. 8, which is a part of what is known as the "Ordinance Respecting Vagrants," and which forbids any one knowingly to associate with persons having the reputation of being thieves, burglars, etc., for the purpose or with the intent to agree to commit any offense, to cheat any person of any money, property, etc., is unconstitutional, in that it invades the right of personal liberty.

2. Without some overt act done, the law will not attempt to discern and to determine the intent or purpose which actuates a person to associate with vagrants.

3. The supreme court will interfere by means of the writ of habeas corpus to look into and investigate the constitutionality of a statute or ordinance on which a judgment which results in the imprisonment of a petitioner is founded.

Proceedings in habeas corpus by Walter Smith, confined in the workhouse of the city of St. Louis under executions based on two judgments rendered against petitioner for infractions of certain ordinances. One of the sentences held invalid, and the prisoner ordered discharged after the expiration of the other.

G. B. Sidener, for petitioner. W. C. Marshall, for respondent.

SHERWOOD, J. The petitioner is confined in the workhouse of the city of St. Louis, and in his petition sets forth such

grounds as make a *prima facie* case, and accompanies the petition with a copy of the original complaint and order of commitment.

It appears, from the return made to our writ of *habeas corpus* by Nicholas Karr, superintendent of the workhouse, that he holds petitioner by virtue of two executions issued and delivered to the marshal of the city of St. Louis on the 29th day of April, 1896, by the clerk of the First district police court,—one of said executions being for the sum of \$10, with \$3 costs, and the other for the sum of \$500, with \$3 costs,—and copies of said executions were subsequently delivered on the same day by the marshal to the superintendent of the workhouse, which said executions were based on two judgments rendered against petitioner for infractions of certain ordinances of the city of St. Louis. The execution for the smaller sum need not be discussed, since the validity of the ordinance on which it is grounded stands unquestioned; but it is necessary just here, however, to say that, under the ordinances of the city of St. Louis, a prisoner committed to the workhouse is allowed to work out his fine and costs at 50 cents per day, and is charged, meanwhile, 30 cents per day for his board. Rev. Ord. 1887, c. 47, §§ 1760, 1772. So that petitioner's time under the smaller execution will last 65 days, and will expire on July 3, 1898.

The status of petitioner under his imprisonment based on the larger execution is now to be considered. That execution issued on a judgment of the First district police court, rendered on a complaint or report made and preferred by L. Harrigan, chief of police, which complaint is founded on the eighth clause of section 1033, art. 6, c. 25, Rev. Ord. 1887, which is the same as the like clause in section 1062, art. 6, c. 26, p. 889, Rev. Ord. 1892. This eighth clause is a part of what is known as the "Ordinance Respecting Vagrants," and it forbids any one "knowingly to associate with persons having the reputation of being thieves, burglars, pickpockets, pigeon droppers, bawds, prostitutes or lewd women or gamblers, [*] or any other person, for the purpose or with the intent to agree, conspire, combine or confederate, first, to commit any offense, or, second, to cheat or defraud any person of any money or property," etc. This ordinance is now attacked on the ground of its unconstitutionality, in that it invades the right of personal liberty by assuming to forbid that any person should knowingly associate with those who have the reputation of being thieves, etc. And certainly it stands to reason that, if the legislature, either state or municipal, may forbid one to associate with certain classes of persons of unsavory or malodorous reputations, by the same token it may dictate who the associates of any one may be. But if the legislature may dictate who our associates may be, then what becomes of the constitutional protection to personal liberty, which Black-

stone says "consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Bl. Comm. 134. Obviously, there is no difference in point of legal principle between a legislative or municipal act which forbids certain associations, and one which commands certain associations. We deny the power of any legislative body in this country to choose for our citizens whom their associates shall be. And as to that portion of the eighth clause which uses the words, "for the purpose or with the intent to agree, conspire, combine or confederate, first, to commit any offense," etc., it is quite enough to say that human laws and human agencies have not yet arrived at such a degree of perfection as to be able, without some overt act done, to discern and to determine by what intent or purpose the human heart is actuated. So that, did we concede the validity of the former portion of the eighth clause, which we do not, still it would be wholly impracticable for human laws to punish, or even to forbid, improper intentions or purposes; for with mere guilty intention, unconnected with overt act or outward manifestation, the law has no concern. *Howell v. Stewart*, 54 Mo. 404. In *Fitz's Case*, 53 Mo. 582, the ordinance in question, then known as the ninth clause (section 1, art. 4, c. 20, Rev. Ord. 1871), was like the present one down to the asterisk (*) just after the word "gamblers," but did not contain the words "for the purpose or with the intent to agree," etc. But in that case, however, the ordinance was so amended by judicial construction as to be held valid, and afterwards the common council, acting upon that hint, conformed the ordinance to such construction, so as to supply the words therein indicated, to wit, "for the purpose or with the intent to agree, conspire," etc. But notwithstanding such emendations and additions as aforesaid, this court, in the quite recent case of *City of St. Louis v. Roche*, 128 Mo. 541, 31 S. W. 915, held the eighth clause, in so far as heretofore quoted, invalid on the distinct ground that it invaded the constitutional right of personal liberty, and *Fitz's Case* was overruled.

It has been urged that we cannot, in *habeas corpus* proceedings, investigate and question the constitutionality of an act upon whose provisions a person has been tried and convicted; but we think otherwise. In *Ex parte Siebold*, 100 U. S. 371, it is well said that "an unconstitutional law is void, and is as no law. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment." Formerly the courts were disinclined to look into the constitutionality of a statute in *habeas corpus* proceedings to determine whether a person was lawfully convicted; but, since the decision already quoted from, the state courts have fallen into the now

prevalent practice of entertaining jurisdiction of such proceedings for the purpose mentioned. *Church, Hab. Corp.* (2d Ed.) § 83, and cases cited in note 2; *Id.* §§ 245a, 325, 349, 351, 352, and cases cited. In *Ex parte Boenninghausen*, 91 Mo. 301, 1 S. W. 761, it was indeed ruled that the constitutionality of an ordinance, where a person has been convicted thereunder, will not be tested by habeas corpus proceedings; but, in that case, an earlier one in the same volume was overlooked, in which, on habeas corpus proceedings, a party attached for contempt was discharged on the ground that the statute under which he acted was constitutional. *Ex parte Marmaduke*, 91 Mo. 228, 4 S. W. 91. In *Ex parte Swann*, 96 Mo. 44, 9 S. W. 10, the constitutionality of the local option law was tested after conviction and judgment by habeas corpus, and the petitioner remanded. So, too, in a much later case. A negro had been arrested and adjudged a vagrant under the provisions of sections 8846, 8848, 8849, Rev. St. 1889, and on application to this court he was discharged on habeas corpus because of the statute being held unconstitutional. In *re Thompson*, 117 Mo. 83, 22 S. W. 863. So that it may now be regarded as the established doctrine of this court that it will interfere by means of the writ of habeas corpus to look into and investigate the constitutionality of a statute or ordinance on which a judgment which results in the imprisonment of a petitioner is founded. And if it be true, as must be true, that an unconstitutional law is no law, then its constitutionality is open to attack at any stage of the proceedings, and even after conviction and judgment, and this upon the ground that no crime is shown, and therefore the trial court had no jurisdiction, because its criminal jurisdiction extends only to such matters as the law declares to be criminal; and, if there is no law making such declaration, or, what is tantamount thereto, if that law is unconstitutional, then the court which tries a party for such an assumed offense transcends its jurisdiction, and he is consequently entitled to his discharge, just the same as if the nonjurisdiction of such court should in any other manner be made apparent.

Under the sentence imposed of a fine of \$10 and \$3 costs on petitioner, he will have to remain in the workhouse for 65 days, which will expire on July 3, 1896. Under the sentence imposed by the \$500 fine and the \$3 costs, petitioner would have had to remain in the workhouse for 2,515 days, or 6 years 10 months and 25 days,—a longer period than he would have to remain in the penitentiary for the commission of many felonies. Inasmuch, however, as we hold that sentence invalid because of the unconstitutionality of the ordinance heretofore quoted, we order that, on expiration of the time required to satisfy the \$10 fine and costs, petitioner be discharged from the workhouse. All concur.

MERRIAM v. ST. LOUIS, C. G. & FT. S. RY. CO. et al.

(Supreme Court of Missouri. June 13, 1896.)

APPEALABLE ORDERS—RAILROAD COMPANIES—RECEIVERS—APPOINTMENT.

1. Under Act April 11, 1895, authorizing appeals from orders refusing to revoke or change an interlocutory order appointing a receiver, on appeal from an order refusing to revoke the appointment of a receiver the court is only restricted in its review to the record brought up for review.

2. The insolvency of a railroad company, and the default in the payment of interest on its mortgage bonds, do not, of themselves, authorize the appointment of a receiver for it without notice.

3. At the instance of a holder of railroad bonds secured by divisional mortgage on one-fourth of the mileage of the road, the appointment of a receiver for the whole road is unauthorized against the objection of persons holding mortgage liens on the other three-fourths of the road.

4. The holder of railroad bonds secured by a divisional mortgage on one-fourth of the mileage of the railroad filed a bill for the appointment of a receiver for the whole road. Subsequently the order appointing such a receiver was revoked, and the trustee, under mortgages covering the entire line, filed a bill in another court, praying a foreclosure of the mortgage, and appointment of a receiver for the whole road, and the latter court appointed a receiver, who took possession of the road. Afterwards the plaintiff in the first action filed an amended complaint, claiming that the mortgage by which his bonds were secured covered the entire road, and again petitioned for a receiver, and the trustee under another mortgage, who had not been served, voluntarily entered an appearance, and by cross bill sought the foreclosure of his mortgage and the appointment of a receiver. *Held*, that the appointment by the first court of a receiver for the whole road on the amended petition and cross bill was improper.

Brace, C. J., and Sherwood and Robinson, JJ., dissenting.

In banc. Appeal from circuit court, Iron county.

Bill by E. G. Merriam against the St. Louis, Cape Girardeau & Ft. Smith Railway Company and others. From an order refusing to revoke the appointment of a receiver for the defendant railway company it and certain other defendants appeal. Reversed.

M. R. Smith, R. B. Oliver, and A. N. Edwards, for appellants. Martin L. Clardy, for respondent.

GANTT, J. This is an appeal from an order of the Iron county circuit court, made August 2, 1895, refusing to revoke and set aside an order made by said circuit court on August 1, 1895, appointing Eli Klotz receiver of the St. Louis, Cape Girardeau & Ft. Smith Railway Company. The appeal is prosecuted under the act of the general assembly of Missouri of April 11, 1895, entitled "An act to amend an act to repeal section 2246, Revised Statutes of 1889 and enact in lieu thereof a new section, approved April 18, 1891, relating to the taking of appeals from interlocutory orders." By this amendment an appeal is allowed from an "order refusing to revoke, modify, or change an in-

terlocutory order appointing a receiver or receivers." Laws Mo. 1895, p. 91. The act is remedial, and must be liberally construed. It appears to have followed so closely the decisions of this court in *Greeley v. Railway Co.*, 123 Mo. 157, 27 S. W. 613, and *Merriam v. Railway Co.*, 126 Mo. 445, 29 S. W. 152, denying appeals in similar cases, that little doubt can exist of the legislative purpose. Some suggestions were made in the original brief of the respondent that it would not cover the appeal in this case, and that there might be some doubt of the constitutionality of the said act, for the reason that the amendment provided for the advancement of such appeals, and for their summary disposition in this court. That this appeal falls within the terms and spirit of the amendment admits of no serious doubt, nor does the suggestion of its unconstitutionality appear to be founded upon any sound basis, and the learned counsel, in his supplemental brief, abandons both suggestions, and contents himself with the reference to the terms of the amendment and asserting that the court in its consideration of the appeal should confine its inquiry within narrow limits. In the absence of any restrictive words it would be contrary to the general trend of construction of remedial statutes to adopt such a view. The plain purpose and intent of the legislature should always be effected by the courts when not in conflict with the organic law, and the universal rule for the construction of remedial statutes is that they should receive a liberal, not a strict, interpretation.

As our jurisdiction is appellate, we are necessarily restricted to the record brought up for review. With that limitation only, it is not only our prerogative, but obvious duty, to review the action of the circuit court, and determine from the law and the facts of the case whether the circuit court exercised a sound judicial discretion in refusing to revoke the appointment of the receiver. Unquestionably, the propriety of the appointment itself is involved in this inquiry, for on this record it is evident no change had occurred in the meantime in the relation of the parties, as the order was entered on one day and the motion to revoke was filed on the next day. The motion itself was most carefully drawn, and brought before the court substantially the whole record of the case from its inception, on March 3, 1893, in the circuit court of Stoddard county down to and including the order of August 1, 1895, made in the Iron circuit court, and all the evidence offered has been duly preserved in the record brought to this court on this appeal, so that every fact upon which the circuit court based its action is before us for review. On the 3d day of March, 1893, Edwin G. Merriam instituted an action in the circuit court of Stoddard county against the St. Louis, Cape Girardeau & Ft. Smith Railway Company, Leo Doyle, trustee, and the Mercantile Trust Company of New York,

trustee, and Edward Hidden, trustee. His petition alleged that the defendant railway company ran from the city of Cape Girardeau, through the counties of Cape Girardeau, Bollinger, Stoddard, Wayne, and Carter, to Hunter, in the last-named county; that said company, on September 1, 1880, executed its deed of trust to the defendant Leo Doyle as trustee, and thereby conveyed to him all and singular the railroad of said company as it was then constructed and was being constructed from the city of Cape Girardeau to Delta, a point on the St. Louis, Iron Mountain & Southern Railway Company, in said county, a distance of about 15 miles, together with rights of way, depot grounds, railway engines, and other property belonging to said railway company, a copy of which mortgage was made a part of said petition, to secure the payment of 100 bonds of \$1,000 each, and numbered from 1 to 100, inclusive, payable to bearer on the 1st day of September, A. D. 1900, with interest at the rate of 6 per cent. per annum, payable semiannually, a copy of which said bond is set forth in said mortgage. It is further averred that the said railway company afterwards, on July 18, 1881, made a second mortgage, whereby it conveyed to said Doyle all and singular the following property and premises, to wit: "All and singular its said railroad as the same was then constructed or being constructed from Delta, a town or point on the Belmont branch of the St. Louis, Iron Mountain and Southern Railway Company, to a point at or near Lakeville, in Stoddard county, Missouri, a distance of ten or eleven miles, together with rights of way, depot grounds, railway fences, bridges, station houses, engine houses, machine shops, etc., to secure the payment of 170 bonds of that date, of two series, respectively, series A and B; series A being from 1 to 70, and for \$1,000 each, and series B from 1 to 100, for \$100 each; all payable to bearer September 1, 1901, with interest at 6 per cent., payable semiannually." It is then averred that said plaintiff, Merriam, was the owner and holder of 27 of said bonds secured by the mortgage of September 1, 1880, for \$1,000 each, and 48 of said bonds for \$1,000 each of series A, secured by the mortgage of July 18, 1881, and 12 of the bonds of series B, secured by said mortgage of July 18, 1881, for \$100 each, aggregating bonds to the number of 87, of the par value of \$76,200. It is further alleged that in 1885 the said railway company, under the name of Cape Girardeau Southwestern Railway Company, on the 1st day of December, 1885, made still another mortgage to said Leo Doyle, the same property conveyed in the two last-described mortgages, to secure 250 bonds of \$1,000 each, therein named, series D, and 200 bonds of \$100 each, denominated series E, aggregating \$270,000. It is further averred that on the 26th day of May, 1888, the said Cape Girardeau Southwestern Railway Company conveyed to the

Mercantile Trust Company, among other property, a part of that conveyed by said two first-described mortgages, and subject to the last-named mortgages, to secure an indebtedness evidenced by bonds to the amount of \$1,000,000, of the denomination of \$1,000 each, for the purpose in part of redeeming or exchanging the bonds theretofore issued by said railway company, and for the purpose of extinguishing the floating debt of said railway company, said mortgage being designated the "consolidated mortgage"; that some of said divisional mortgage bonds had been exchanged for said consolidated bonds. Still another mortgage, for \$200,000, is alleged to have been executed to said Leo Doyle, May 27, 1882. Default in the payment of the interest on Merriam's bonds on March 1, 1892, September 1, 1892, and March 1, 1893, is then alleged, and that the interest upon all of said bonds is due and unpaid, and the company greatly indebted for wages and current expenses; also taxes and judgments. It is then charged in the bill "that the property mortgaged is, as your orator believes, wholly inadequate to secure the mortgaged indebtedness existing thereagainst, and that, although the said mortgages are a first lien in part on certain sections of their said railway and appurtenances, and second mortgages on others, that said property is a unit, and cannot, without destroying the said several division and subordinate liens, be separated, and operated in parts, but must, in order to protect the security, and perform the public obligations and functions of said property, be operated as a whole." The pleader then charges that the trustee, Doyle, being trustee in three other mortgages, is adverse to plaintiff's interest, and hence is made defendant.

The following provision is in the first mortgage: "Nothing herein shall be construed to affect or put any burden of liability on the right of way, bridges, property, or land acquired or to be acquired on and along the Lakeville Division of the road of the party of the first part, extending from said junction to Lakeville, in Stoddard county, Missouri, or beyond said point, or any donation and rights that may be made to aid in building said division of said railway." And in the second mortgage there is this provision: "And nothing herein shall be construed to affect or put any burden or liability on the right of way, bridges, property, or lands acquired or to be acquired on and along the roadway of the party of the first part lying and being southwest of Lakeville, or any donations and gifts that may be made to aid in building said railway in said direction." And in each of said mortgages express provision is made as follows: "Excluding and excepting any extension, branch, or branches which may hereafter be projected and constructed, hereafter to be owned or possessed or acquired, and all the land or real estate which said company

owns or may acquire, together with all and singular the rights, privileges, and corporate property and franchises of said railway company." The prayer of the petition was: "Wherefore your orator prays that an account be taken of all bonds issued and now outstanding, secured by the mortgages sued upon, and of the amount of interest accrued and due thereon, and that the revenues arising from the operation of said road be sequestered for the payment of all interest heretofore accrued or that may hereafter accrue upon his said bonds and those for whom he sues, secured by the mortgages aforesaid; and that a receiver may be appointed to take possession of and operate the said railroad as a unit, receiving the revenues therefrom until the arrearage of interest on all said bonds is paid, taking care to observe and protect said property from dismemberment, and the security from impairment; in all things managing the said property and appropriating the revenue derived from the operation thereof under the direction of this honorable court; and for such other relief as to the court may seem meet and just in the premises; and that said Doyle and said Mercantile Trust Company make answer, setting forth their interests and claims in and to each every part of said railway and premises." Upon the presentation of this petition to Judge John G. Wear, the regular judge of the Twenty-Second circuit, a provisional order was made by him in vacation, without notice to the defendants in the petition, appointing Eli Klotz receiver of the defendants' entire railway. On March 13, 1893, this order appointing Klotz receiver was vacated by the circuit court of Stoddard county, George Houck, special judge, presiding at the time. Afterwards, on July 24, 1893, and in vacation of the Stoddard circuit court, and again without notice to the defendants in said suit, Judge Wear appointed said Klotz receiver of said railway company. At the next regular term of the circuit court of Stoddard county, in September, 1893, the defendant railway company filed its answer, and on that day all the defendants except the Mercantile Trust Company, which had not been served, signed a stipulation with plaintiff for a change of venue to Iron county, and the venue was accordingly changed, and the transcript filed in the Iron county circuit court a few days before the October term, 1893. At that term the railway company filed its motion to vacate the said second appointment of Klotz as receiver, which was at once overruled, and from that order the railway company appealed to this court. That appeal was dismissed solely for the reason that at that time there was no statute allowing an appeal from an order of a nisi prius court refusing to revoke and vacate an order appointing a receiver. *Merriam v. Railway Co.*, 126 Mo. 445, 29 S. W. 152. After the dismissal of that appeal by this court, the parties again appeared in the Iron county circuit court on June 11, 1894, and defendant

renewed its tender to plaintiff of the amount of his interest due, with costs, to that date, which was refused. On the 11th of June, 1894, plaintiff filed an amended petition. In this amended bill plaintiff set out specifically all the mortgages executed by the railroad company during its entire existence, and the purpose and object of each, and by averments sought to extend the lien of the two mortgages on the two divisions from Cape Girardeau to Delta and from Delta to Lakeville to and over the entire railroad from Cape Girardeau to Hunter, and to all the property of defendant railway, and to have such lien declared superior and paramount to all other liens of the other mortgages hereinbefore enumerated and described. In neither petition did plaintiff pray for a foreclosure, but simply for a receiver to operate and manage the road for the purposes—First, of paying the interest on his own bonds, and, secondly, on the remaining bonds, if there were any surplus to be so applied. Prior to the filing of this amended petition, the Mercantile Trust Company, which had not been served, while the cause was pending in the Stoddard circuit, voluntarily entered its appearance in the Iron county circuit court, and filed its cross bill on May 18, 1894, which, after denying the allegations of the petition, set forth the conditions of its own consolidated mortgage, and the breaches thereof by defendant railway company, and prayed for a foreclosure of the said mortgage and a sale of the road. The railway company moved to strike out this cross bill because it was not germane to the plaintiff's petition, and for the further reason that as an original action it could not be commenced in Iron county to foreclose a mortgage on defendant's railroad, no part of which ran through or touched any part of Iron county. After the amended petition was filed by Merriam, the Mercantile Trust Company withdrew its cross bill, and refiled it, and thereupon defendant refiled a motion to strike it out a second time, because it was not germane to either the original or amended petition, and because the court could not entertain jurisdiction thereof as an original action in Iron county, no part of the mortgaged property lying or being in said county. The motion was overruled. Defendant railway company also moved to strike out the amended petition because not properly an amendment, but the substitution of a new cause of action, and an entire change of the theory of the original suit. It also filed a plea to the jurisdiction of the court, which was overruled. Exceptions were duly saved to all these adverse rulings. On the 23d and 25th days of April, 1895, motions were filed by Leo Doyle and Edward Hidden to vacate the appointment of Klotz as receiver, made by Judge Wear, July 24, 1893, which were sustained on May 2, 1895. Afterwards, on said 2d day of May, 1895, plaintiff filed a written application for the appointment of Klotz as receiver, and introduced evidence of his fit-

ness for the trust, against which Leo Doyle protested, and the matter was continued until August 1, 1895, the court setting aside its order vacating Judge Wear's appointment. On August 1st, Judge Green again sustained the motions of both Doyle and Hidden to vacate Judge Wear's appointment of Klotz, and thereupon plaintiff, Merriam, again made application for Klotz's appointment, which the court sustained. The defendants then joined in a motion to revoke this last appointment, which was overruled, from which, as already said, this appeal is taken.

While these various steps were progressing in the Stoddard and Iron circuit courts, Leo Doyle, as trustee in the various mortgages, commenced an action in the circuit court of Cape Girardeau county on December 27, 1893, returnable to the January term, 1894, of said court, to foreclose said mortgages, and for a receiver. Due notice was given to all parties, and on January 11, 1894, a provisional appointment of Louis Houck as receiver was made by said court, and on February 27, 1894, the said order was confirmed. The receiver Klotz has never been in possession of said railroad, or any part of it, but the possession of the road has been constantly in the possession of Louis Houck as receiver, first under his appointment by the Cape Girardeau court of common pleas, and afterwards by virtue of his appointment and its confirmation by the circuit court of Cape Girardeau county; and it was being operated by him as such when the circuit court of Iron county, on August 2, 1895, appointed Eli Klotz, receiver. In *Sage v. Railroad Co.*, 125 U. S. 361, 8 Sup. Ct. 887, the supreme court of the United States announced the general principle governing courts of equity in the appointment of receivers for railroads in these words: "Whether a receiver shall be appointed is always a matter of discretion, to be exercised sparingly and with great caution in the case of quasi public corporations operating a public highway, and always with reference to the special circumstances of each case as it arises." And in the same case the same learned court also said: "We do not mean to say that a single judgment creditor or any number of such creditors of a railroad company are entitled, as a matter of right, to have its property put in the hands of a receiver merely because of its failure or refusal to pay its debts." Thirty years prior to the decision of the supreme court of the United States in the last-mentioned case the supreme court of Maryland, in *Blondheim v. Moore*, 11 Md. 365, had stated the general principles applicable to such appointments as follows: "(1) That the power of appointment is a delicate one, and to be exercised with great circumspection; (2) that it must appear the claimant has a title to the property, and the court must be satisfied by affidavit that a receiver is necessary to preserve the property; (3) that there is no

case in which the court appoints a receiver, because the measure can do no harm; (4) that fraud or imminent danger, if the intermediate possession should not be taken by the court, must be clearly proved; (5) that unless the necessity be of the most stringent character, the court will not appoint until the defendant is first heard in response to the application." And in *Mississippi in Mays v. Rose*, 1 Freem. Ch. 718, it was further said: "The plaintiff must show that he has some clear right to the property or some lien upon it, or that the property constitutes a special fund to which he has a right to resort for the satisfaction of his claim." In different language many other courts have held the same way. While the discretion is lodged in the circuit court in the first instance, and is a judicial discretion, it is reviewable by the appellate courts. *Blondheim v. Moore*, *supra*; *Railway Co. v. Soutter*, 2 Wall. 523. Keeping these principles in view, and applying these tests to the original petition, filed March 3, 1893, in Stoddard county, let us first inquire what "imminent danger" was alleged in the bill which justified Judge Wear in appointing Klotz receiver without notice to the defendant. It was made to appear that the property to be taken in charge by the court was a railroad, its depots, warehouses, etc. It was principally of a purely local character, incapable of being spirited out of the jurisdiction of the court; nor was there any allegation that such a purpose existed. The bill nowhere alleges that the president or other chief officers of the road had absconded, or that their places of residence were unknown. The general office of the road was at Cape Girardeau. We fail to find in the bill any such exceptional circumstance as would have authorized the judge of Stoddard circuit court to have dispensed with notice. Kerr, in his work on Receivers, has collated the decisions showing that a receiver will not be appointed without notice, except when a pressing necessity exists, and there is clear proof of the exigency in the particular case. Kerr, Rec. (2d Ed.) p. 147, note 1.

Next, let us see what evidence of fraud is to be found in the original petition of March 3, 1893. The bill alleges the incorporation of the company, the issuance of the different series of bonds, the execution of the various mortgages to secure the same, the appointment of Leo Doyle trustee in certain of the mortgages, and the Mercantile Trust Company trustee in the consolidated mortgage, a default in interest for 18 months on plaintiff's bonds, \$76,200, and a general charge of insolvency. These constitute the whole of the substantive averments. The plaintiff merely charges upon information and belief default on all other bonds. Plaintiff says he is informed that the company is largely indebted for wages and operating expenses, and that these claims have been

assigned to the officers of the company for the purpose of asserting liens therefor prior to plaintiff's mortgages; that taxes are due and unpaid, and there is danger of the road being sold for taxes, and that the road is in danger of being segregated and dismembered; that the property is inadequate to pay the mortgages and debts. In a word, all of these allegations simply amount to a charge of insolvency and default in the payment of interest; averments, of themselves, not sufficient, without more, to justify the appointment of a receiver. *Union Trust Co. v. St. Louis, I. M. & S. R. Co.*, 4 Dill. 114, Fed. Cas. No. 14,402; *Williamson v. Railroad Co.*, 1 Biss. 198, Fed. Cas. No. 17,753. But there existed a much stronger reason why Judge Wear should have declined to appoint a receiver for the whole of said railway. The plaintiff held bonds secured by the divisional mortgage on the road from Cape Girardeau to Delta, and other bonds, secured by mortgage on that portion of the road from Delta to Lakeville. His holdings only amounted to \$76,200, and interest for 18 months, all told. Language could scarcely have been more explicit in excluding from the lien of each of said divisional mortgages any and all that part of the railroad of defendant from Lakeville to Hunter, a distance of about 75 miles. Upon this last-mentioned portion of the road plaintiff had no mortgage lien, nor was his debt a judgment debt; and yet he prayed, and the judge in vacation made, the appointment of the receiver for the whole road. It is fundamental that to authorize a receiver the plaintiff must show that he has a right either to the property itself, or that he has some lien upon it, or that it constitutes a special fund to which he has a right to resort to satisfaction of his claim. According to his own petition, there were other creditors, both general and mortgage creditors, with liens upon this line from Lakeville to Hunter. By what principle of law or equity could plaintiff ask and the judge give into the possession of a receiver the whole of this railroad, and decree that all the profits of the whole line should be diverted to the payment of the interest on plaintiff's bonds, which were secured by liens only on 26 miles, to the exclusion of the other creditors and lienors. How far short does this fall of taking defendant's line from Lakeville to Hunter without due process of law? The proposition appears too plain for argument that under the allegations of this first petition it was manifestly improper and erroneous to appoint or assume to appoint a receiver for any portion of said railroad not covered by plaintiff's mortgage, in the absence of any other lien or judgment in favor of plaintiff against it.

It is evident that Judge Wear had acquired no jurisdiction over that portion over the road lying between Lakeville and Hunter other than was authorized by the petition, and as the petition set forth the two division-

al mortgages from Cape Girardeau to Delta, from Delta to Lakeville, and no other right to a lien, the court had no power to extend those mortgages beyond their legal effect. *Railroad Co. v. Whitaker* (Tex. Sup.) 5 S. W. 451; *Union Trust Co. v. St. Louis, I. M. & S. R. Co.*, 4 Dill. 114, Fed. Cas. No. 14,402. The plaintiff was not a party to the consolidated mortgage. He had not exchanged his bonds for consolidated bonds, and his averment that he sued for himself and all others similarly situated will not enable him to avail himself of that mortgage. He was not in a like condition with the consolidated bond and mortgage creditors. The intervention of that and other mortgages on the whole road, however, did present an unanswerable objection to the judge of the circuit court of Stoddard county why he should not have appointed a receiver for the entire road at the instance of a creditor who had a lien only on 26 miles, and without notice either to the road or its other lien creditors. Moreover, there is no averment in that bill that plaintiff was without adequate remedy at law, nor a statement of such facts as of itself would show plaintiff had no adequate remedy at law. *Humphreys v. Milling Co.*, 98 Mo. 542, 10 S. W. 140; *Story Eq. Pl. (Redf. Ed.)* § 418a. And, if an equitable remedy were sought, the practice had been already marked out. A decree nisi for his interest would have been all that was necessary when we consider the small amount of the interest due, and the ample security offered by the mortgage.

We have felt impelled to examine the first petition because of its bearing upon subsequent steps in the cause. On the 13th day of March, 1893, the provisional order of Judge Wear appointing Klotz receiver was revoked by the circuit court of Stoddard county, but on July 24, 1893, Judge Wear again in vacation, and again without notice to the company or other lien creditors, and while an application for change of venue was pending because of his alleged prejudice against defendant, made another appointment of Klotz as receiver. The change of venue was duly awarded to Iron county, and, as already stated, upon the motions of Leo Doyle and Edward Hidden, Judge Green, on August 1, 1895, vacated and set aside the appointment of Klotz, last made by Judge Wear, on July 24, 1893. In the meantime, however, on June 11, 1894, plaintiff had filed an amended bill in the Iron circuit court, and the Mercantile Trust Company, which had not been served, voluntarily entered its appearance and filed both an answer and a cross bill praying for a foreclosure of the consolidated mortgage, and in the meantime Leo Doyle, on December 27, 1893, had commenced a foreclosure suit in the circuit court of Cape Girardeau county, as trustee in the several mortgages already mentioned, and prayed for a receiver, and that court, upon proof of notice to all parties had appointed a receiver,

Louis Houck, and the appointment was confirmed and the receiver qualified February 27, 1894. These, then, are the circumstances surrounding the case when on August 1, 1895, plaintiff moved the circuit court of Iron county for the appointment of a receiver, and all these facts were laid before it as reasons why it should not make such an appointment, and thus we are called upon to review the discretion of the Iron circuit court in making the appointment of August 2, 1895.

While the plaintiff's rights were the same when he filed both the original and amended petitions, the theory of his pleadings was entirely different. In his original petition he recognized that his liens were only divisional mortgages on 26 miles of railroad from Cape Girardeau to Lakeville, and the ground of his equity was that, while his lien only covered a portion of the road, yet the road was a unit and that to place a part of it in the hands of a receiver and leave the remaining 75 miles in the hands of the company or other mortgagees, would work its dismemberment and destruction. In his amended petition, founded upon identically the same mortgages and bonds, he assumes and declares that the two divisional mortgages of September 1, 1890, and of July, 1881, are the first and superior claim, lien, and charge upon all the property of said railroad from Cape Girardeau to Hunter, and prayed they might be so held to be by the court. Plaintiff alleged that his mortgages contained no provisions whereby the principal of said bonds shall become due upon default in the payment of the interest coupons annexed to said bonds as they matured. Conceding that the amended petition of plaintiff and the cross bill of the Mercantile Trust Company were sufficient, when considered solely as pleadings, to authorize the circuit court of Iron county to appoint a receiver, it was the duty of the court to whom these applications were made to consider the actual circumstances of the case. The judge of that court was confronted with a peculiar condition of affairs. Waiving all question of prior jurisdiction, it was undeniable that, in his own opinion, no receiver had been lawfully appointed for the road by the Stoddard county circuit court or the judge thereof, because he has judicially so declared on this record, and in the interim from the beginning of this suit, March 3, 1893, the actual possession of this property had never been under the control of either the Stoddard or Iron county circuit courts. It is immaterial what caused the failure to acquire the possession, further than Judge Green himself had decided that Judge Wear's appointment, July 24, 1893, was invalid. Moreover, he was not called upon to appoint a receiver upon the same petition that was filed before Judge Wear, but a new petition and a cross bill were before him, and only on August 1, 1895, was he to determine their sufficiency. Certainly it cannot be maintained that any appointment he might then make should relate to a time previous

thereto. He was to determine that day whether all the circumstances required such an appointment at his hands. The doctrine of relation is a most necessary and useful one, when properly invoked, but is ever applied with the limitation that it must not affect the rights of strangers or third persons. So that, while plaintiff was seeking only a receiver in the Stoddard court without notice to those interested in this important property, and by ill-advised action had obtained an appointment which the courts have refused to sustain, Leo Doyle, the trustee, selected to represent the bondholders in three distinct mortgages, together covering the whole road, had begun a suit for a foreclosure thereof in the circuit court of Cape Girardeau county, and upon notice to all parties that court had appointed and confirmed its own receiver, and he was in the actual possession of the road, and it was proceeding to adjust the liens thereon preparatory to a foreclosure sale. Any appointment that could be made by the Iron county court could only produce a clash of jurisdiction, and be productive of much probable inconvenience, delay, and injury to all parties interested; and, this being true, a wise discretion, it appears to us, would have dictated that the circuit court of Iron county should have refrained altogether from appointing a receiver, or if it made the appointment at all, have authorized him only to receive from the original receiver in the Cape Girardeau court, from time to time, the proportionate share of the rents and profits from the two divisions by which his bonds were secured, and on the cross bill no receiver should have been granted, as the Mercantile Trust Company had never applied for a receiver until long after the appointment and confirmation of the receiver in the Cape Girardeau court. As to that company, it was plain that the Cape Girardeau circuit court had not only first acquired jurisdiction over the road, but of that company as well, and its receiver was in actual possession. The Iron circuit court had no jurisdiction over the Mercantile Trust Company until it voluntarily entered its appearance therein, and had no jurisdiction of its cross bill until long after the Cape Girardeau court had not only the subject-matter, but the parties, before it. Under such a state of facts it was manifestly erroneous to attempt to interfere with the possession of the Cape Girardeau circuit court, and it becomes unnecessary at this time to pass upon the sufficiency of the cross bill, or whether it is germane to the amended petition. The judgment of the circuit court refusing to revoke and set aside its order appointing Eli Klotz receiver of said railroad is accordingly reversed, and the cause remanded to said court, with directions to sustain said motion.

BARCLAY, MACFARLANE, and BURGESS, JJ., concur. BRACE, C. J., and SHERWOOD and ROBINSON, JJ., dissent.

STATE ex rel. WALKER, Atty. Gen., v. BUS.
(Supreme Court of Missouri. June 30, 1896.)

OFFICE AND OFFICER — INCOMPATIBLE OFFICES — DEPUTY SHERIFF — SCHOOL DIRECTORS.

1. At common law, the acceptance by one who holds a public office of a second public office, incompatible therewith, operates ipso facto as a resignation of the first.

2. The same rule obtains where the holding of two offices by one person at the same time is forbidden by constitution or statute.

3. The incumbent's subsequent resignation of the second office would not restore him to the original office vacated by his own act.

4. The offices of deputy sheriff and school director, in the city of St. Louis, are not incompatible.

5. Deputy sheriffs appointed by the sheriff, under Rev. St. 1889, §§ 8181, 8182, which require them to take the oath of office and to perform the duties prescribed by law to be performed by the sheriff, are public officers.

6. A deputy sheriff is not a "state officer," within the meaning of Const. art. 9, § 18, which declares that, in cities or counties having more than 200,000 inhabitants, "no person shall at the same time be a state officer and an officer of any county, city or other municipality."

7. Const. art. 9, § 18 (which declares that, in cities or counties having more than 200,000 inhabitants, no person shall at the same time be a state officer and an officer of any county, city, or other municipality, nor shall at the same time fill two municipal offices, either in the same or different municipalities), does not apply to a deputy sheriff of the city of St. Louis who also holds the office of school director in said city.

8. A deputy sheriff of the city of St. Louis does not "hold office under the city," within Acts 1845, p. 182, § 1, providing that no such officer holder shall be a member of the board of school directors of said city.

In banc. Quo warranto, on the relation of the attorney general, to oust Henry Bus from the office of school director of the city of St. Louis. Judgment of ouster denied.

R. F. Walker, Atty. Gen., and Chester H. Krum, for relator. Ford Smith, for respondent.

MACFARLANE, J. On the 7th day of November, 1893, respondent was elected a director of the public schools of St. Louis, for a term of four years from that day. The public schools of St. Louis are managed and controlled by a corporation under the name of the "Board of President and Directors of the St. Louis Public Schools." Its territory is coterminous with that of the city of St. Louis, and its powers are vested in a board of 21 directors, elected for terms of four years by the qualified voters of the city. Respondent, at the time of his election, and at the time of the commencement of this proceeding, possessed all the qualifications necessary to make him eligible to take and hold the office of director. In January, 1895, he was appointed deputy sheriff of the city of St. Louis, and continued to hold that position and perform its duties until April 10, 1895, when he resigned, and has not since held the position or exercised any of the duties of such deputy. After his appointment, ac-

ceptance, and qualification as deputy sheriff, respondent continued to act as such school director. This is a proceeding in quo warranto, commenced April 14, 1896, against respondent, the purpose of which is to oust him from the office of school director, on the ground, as alleged in the information, that, by his acceptance of the position of deputy sheriff, the office of director at once became vacant. The charter of the public school corporation has this provision: "No member of the board of aldermen, or board of delegates, or any person holding office under the city of St. Louis, whether elected or appointed, shall be a member of the board of school directors of the city of St. Louis." Acts 1845, p. 182, § 1. Section 5 of the same act provides that any person violating section 1 shall be guilty of a misdemeanor, and shall, moreover, be disqualified from holding a seat in said board or acting as one of its officers. The state constitution has this provision: "In cities or counties having more than two hundred thousand inhabitants, no person shall at the same time be a state officer and an officer of any county, city or other municipality, and no person shall at the same time fill two municipal offices, either in the same or different municipalities." Section 18, art. 9.

1. The rule at common law is well settled that where one, while occupying a public office, accepts another, which is incompatible with it, the first will ipso facto terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first. *State v. Luak*, 48 Mo. 242; *Mechem, Pub. Off.* §§ 420-426; *Throop, Pub. Off.* §§ 30, 51. The rule, it is said, is founded upon the plainest principles of public policy, and has obtained from very early times. *Rex v. Paterson*, 4 Barn. & Adol. 9. "The rule has generally been stated in broad and qualified terms that the acceptance of the incompatible office, by whomsoever the appointment or election might be made, absolutely determined the original office, leaving no shadow of title in the possessor, whose successor may be at once elected or appointed, neither quo warranto nor a motion being necessary." 1 *Dill Mun. Corp.* § 225; *People v. Common Council of City of Brooklyn*, 77 N. Y. 503. Where the holding of two offices by the same person, at the same time, is forbidden by the constitution or a statute, the effect is the same as in case of holding incompatible offices at common law. In such case the illegality of holding the two offices is declared by positive law, and incompatibility in fact is not essential. In each case the holding of two offices is illegal, it is made so in one case by the policy of the law, and in the other by absolute law. In either case the law presumes the officer did not intend to commit the unlawful act of holding both offices, and a surrender of the first is implied. *State v. Draper*, 45 Mo. 355; 19 Am.

& Eng. Enc. Law, 562, and cases cited; *Mechem, Pub. Off.* §§ 429-431; *People v. Common Council of City of Brooklyn*, 77 N. Y. 503. "An exception is made to the general rule in those cases in which an officer cannot vacate an office by his own act, upon the principle that he will not be permitted to do indirectly what he could not do directly." *Mechem, Pub. Off.* § 421. Whatever doubt may exist in some jurisdictions as to the right of a public officer to resign his office without the concurrence of the officer or body which has the power to act upon it, all doubt is removed in this state by a constitutional recognition of the right. That instrument (section 5, art. 14) declares: "In the absence of any contrary provision, all officers now or hereafter elected or appointed, subject to the right of resignation, shall hold office during their official terms, and until their successors shall be duly elected and qualified." From what has been said, it follows that if the position of school director and deputy sheriff are incompatible public offices, or if the constitution or statute prohibits both positions to be held by the same person at the same time, then an acceptance of the office of deputy sheriff operated as a resignation of the office of school director. The subsequent resignation of the former office by respondent would not restore him to the latter. If the office of director became vacant, respondent "could not put himself back into it by his own act." *State v. Goff*, 15 R. I. 508, 509, 9 Atl. 226.

2. A public office is defined to be "the right, authority, and duty, created and conferred by law, by which, for a given period, either fixed by law or enduring at the pleasure of the creating power, an individual is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public." *Mechem, Pub. Off.* 1. The individual who is invested with the authority, and is required to perform the duties, is a public officer. The courts have undertaken to give definitions in many cases; and while these have been controlled more or less by laws of the particular jurisdictions, and the powers conferred and duties enjoined thereunder, still all agree substantially that if an officer receives his authority from the law, and discharges some of the functions of government, he will be a public officer. *State v. Valle*, 41 Mo. 30; *People v. Langdon*, 40 Mich. 673; *Rowland v. Mayor, etc.*, 83 N. Y. 376; *State v. May*, 106 Mo. 488, 17 S. W. 680. Deputy sheriffs are appointed by the sheriff, subject to the approval of the judge of the circuit courts. They are required to take the oath of office, which is to be indorsed upon the appointment, and filed in the office of the clerk of the circuit court. After appointment and qualification, they "shall possess all the powers and may perform any of the duties prescribed by law to be performed by the sheriff." *Rev. St.* 1889,

§§ 8181, 8182. The right, authority, and duty are thus created by statute. He is invested with some portions of the sovereign functions of the government, to be exercised for the benefit of the public, and is, consequently, a "public officer," within any definition given by the courts or text writers. It can make no difference that the appointment is made by the sheriff, or that it is in the nature of an employment, or that the compensation may be fixed by contract. The power of appointment comes from the state; the authority is derived from the law; and the duties are exercised for the benefit of the public. Chief Justice Marshall defines a public office to be "a public charge or employment." *U. S. v. Maurice*, 2 Brock, 96, Fed. Cas. No. 15,747. Whether a public employment constitutes the employé a public officer depends upon the source of the powers and the character of the duties. The constitution (article 14, § 6) requires "all officers, both civil and military, under authority of this state," before entering on the duties of their office, to take and subscribe a prescribed oath. The statute requires a deputy sheriff to take "the oath of office," and his powers and duties are made equal to those of the sheriff himself. The deputy sheriff is certainly a "public officer," under the laws of this state, and his power and authority are co-extensive with that of sheriff. *State v. Dierberger*, 90 Mo. 369, 2 S. W. 286.

3. The question involving the greatest difficulty is whether a deputy sheriff is a "state officer," within the meaning of section 18 of article 9 of the constitution, which declares: "In cities or counties having more than two hundred thousand inhabitants, no person shall at the same time be a state officer and an officer of any county, city or other municipality, and no person shall at the same time fill two municipal offices, either in the same or different municipalities; but this section shall not apply to notaries public, justices of the peace or officers of the militia." In a popular sense, a state officer is one whose jurisdiction is co-extensive with the state. In a more enlarged legal sense, a state officer is one who receives his authority under the laws of the state, and performs some of the governmental functions of the state. The constitution in defining the rights, duties, powers, and obligations of officers of the state, and in defining the jurisdiction of the courts in cases involving these rights and duties, adopts two forms of expression. Some provisions are made applicable to "state officers," and some to "officers under the state," or "under the authority of the state." The former expression has been held to apply to officers in a popular sense, while the latter has been held to apply to state officers in a legal sense. Thus, the constitution gives the supreme court appellate jurisdiction in cases where any "state officer" is a party. Section 12,

art. 6, and amendment adopted in 1883. This court held that the expression "state officers," as there used, applied only to such officers as had jurisdiction throughout the state, and did not apply to an officer whose jurisdiction was confined to a county, as a sheriff or clerk of a circuit court. *State v. Dillon*, 90 Mo. 229, 2 S. W. 417; *State v. Spencer*, 91 Mo. 206, 3 S. W. 410. The same section provides that the supreme court shall have appellate jurisdiction in cases involving "the title to any office under the state." It was held that, under the form of expression here used, the office of circuit clerk was included. *State v. Rombauer*, 101 Mo. 502, 14 S. W. 726. Here we have two expressions in the same section, and they must have been intended to have different meanings, and this court gave effect to the obvious intention. Section 6, art. 14, provides that all officers "under authority of this state" shall take a prescribed oath of office; and this court held that a deputy constable was such an officer. *State v. Dierberger*, 90 Mo. 374, 2 S. W. 286. Section 12, art. 4, of the constitution, provides: "No senator or representative shall, during the term for which he shall have been elected, be appointed to any office under this state, or any municipality thereof; and no member of congress or person holding any lucrative office under the United States, or this state, or any municipality thereof (militia officers, justices of the peace and notaries public excepted), shall be eligible to either house of the general assembly, or remain a member thereof, after having accepted any such office or seat in either house of congress." Under this section, all officers (except those under the United States) are divided into two classes, viz. "officers under the state," and officers "under a municipality thereof." The language "officers under the state" would include justices of the peace, or they would not have been excepted. Officers of a county, though not named, would be included under the expression "officers under the state." We come now to the section in question. It expressly divides the officers into three classes,—"state officers," "officers of any county," and "officers of a municipality." This section was quoted by Judge Sherwood as making plain the intention of the convention in the use of the expression "state officers," in section 12, art. 6, and as convincing that a sheriff was not a state officer, within its meaning. The learned judge says: "If there is any reliability in plain words, this language must set the point discussed at rest, and make assurance doubly sure." *State v. Spencer*, supra. When we find the constitution using in different connections the same words to designate certain officers, we ought to infer that they were used on every occasion in the same sense. If the expression "state officers," as used in this section, was intended to mean the same as "officers under the

state," as used in other sections, then it would include all officers (except municipal), from constable up to governor. What officers would, then, be included in the class "officer of any county." Can we say that the language is tautological, and should be rejected, in order to construe the section as we think it should have been written? As written, it has a clear meaning, and effect should be given to the words used. Constitutions are supposed to be carefully prepared, and effect should be given to every word, if possible. But county officers, as distinguished from state officers, are distinctly recognized by the constitution. I quote from *State v. Dillon*, supra: "Section 10, art. 9, provides that 'there shall be elected by the voters of each county * * * a sheriff and coroner.' Section 12 of the same article declares that the 'general assembly shall * * * provide for and regulate the fees of all county officers.' Section 14 of the same article is as follows: 'Except as otherwise directed by this constitution, the general assembly shall provide for the election or appointment of such other county, township and municipal officers as public convenience may require.' So that it appears from the section quoted that it in effect designates a sheriff as a county officer. After providing that a sheriff and coroner shall be elected in each county, it then provides that the legislature shall, by general law, provide for the election of such other county, township, and municipal officers, as public convenience may require." The section in question would not have been much more explicit if it had said: "No person shall at the same time be a state officer and a sheriff or deputy sheriff of a county." It must be admitted that this section, standing alone, or taken in connection with the rest of the constitution, read it as you may, does not express a very intelligent or practical purpose; but its meaning is plain enough, in the light of former decisions, and it is not our business to make it over in order to conform it to our views of practicability. But we know that the section was intended to apply alone to the county and city of St. Louis, and was intended to apply to a contemplated separation, the scheme of which had not then fully developed. It was therefore a jump in the dark, which could not be certain. It was probably prepared by those interested in the separation and in the independence of the city of St. Louis. That it was intended by the scheme of separation that what are commonly denominated "county officers" should become officers under the city is clear from the reading of section 1 of article 4 of the scheme and charter. It provides for the election of city officers, among which is named that of sheriff. If the sheriff was a municipal officer, as was contemplated he would be, then the section would be clearer and more practical. A deputy sheriff is not, in our opinion, a "state officer," within the in-

tent and meaning of said section of the constitution. In this section the officers are clearly classified by territorial jurisdiction, and a sheriff falls under the class of county officers.

4. While the city of St. Louis is strictly a municipal corporation, its territory is also a subdivision of the state, in which officers are elected to perform the functions of the state government, as distinguished from those pertaining to municipal government. Those officers are in no sense municipal officers. Their designation as officers of the city of St. Louis refers to their territorial jurisdiction, rather than to the governmental duties they perform. They are officers under the laws of the state, and perform their duties within the city limits. The sheriff of the city of St. Louis is an officer of the city in the same sense that a sheriff of a county is an officer of the county. He is no more a municipal officer than a sheriff of a county is an officer of a municipal corporation, the territory of which is included in his jurisdiction. These propositions are settled by the decisions of this court. *State v. Dillon*, 87 Mo. 490, 491; *State v. McKee*, 69 Mo. 504; *State v. Rombauer*, 101 Mo. 502, 14 S. W. 726; and, also, *State v. Mason*, 4 Mo. App. 380; *State v. Finn*, 8 Mo. App. 341. It follows from what has been said that the right to hold at the same time the office of deputy sheriff and school director is not forbidden by either section 1 of the Acts of 1845 or by section 18, art. 9, of the constitution.

5. The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two,—some conflict in the duties required of the officers, as where one has some supervision of the others, is required to deal with, control, or assist him. It was said by Judge Folger (*People v. Green*, 58 N. Y. 295): "Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that 'incompatibility' from which the law declares that the acceptance of the one is the vacation of the other. The force of the word in its application to this matter is that, from the nature and relations to each other of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one towards the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm, and

tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must per se have the right to interfere, one with the other, before they are incompatible at common law." Sheriffs are given power, and it is made their duty, to preserve the peace, arrest and commit to jail all felons and traitors, execute all process, and attend upon courts of record. The board of directors of the St. Louis public school has charge, control, and management of the public schools, and of all the property appropriated to the use of the public schools within said city. We are unable to discover the least incompatibility or inconsistency in the public functions of these two offices, or where they could by possibility come in conflict or antagonism, unless the deputy sheriff should be required to serve process upon a director as such. We do not think such a remote contingency sufficient to create an incompatibility. The functions of the two offices should be inherently inconsistent and repugnant. *State v. Goff*, 15 R. I. 507, 9 Atl. 226. It has been held in this state that the office of clerk of the circuit court was not incompatible with that of clerk of the county court. *State v. Lusk*, 48 Mo. 242. The possibility of a conflict in the duties of these two offices seems to me to be greater than in those of deputy sheriff and school director. These two offices, then, being neither repugnant to the constitutional or statutory prohibitions, nor incompatible, they may properly be held by one person. Judgment of ouster is denied. All the judges concur.

FREEMAN v. MOFFITT et al.

(Supreme Court of Missouri, Division No. 2.
June 30, 1896.)

APPEAL—REVIEW—INNOCENT PURCHASER OF LAND.

1. The findings of facts in ejectment have the effect of a special verdict, and, if sustained by substantial evidence, will not be disturbed on appeal.

2. F., the purchaser of land, was furnished an abstract of title, which his attorney correctly advised him showed a good title in the vendor, who held under foreclosure of a trust deed to a mortgage company. The fact that the record showed a good title resulted from the negligence of such company, which also held a prior trust deed. Before F. bought the land, he went with the vendor to see it; and the latter and the mortgage company's tenant, who was in possession, led F. to believe that such tenant was the vendor's tenant, and that he desired to lease from F. for another year if he bought, without intimating that the tenant held under such company. *Held*, that F. was an innocent purchaser.

Appeal from circuit court, Polk county; Argus Cox, Judge.

Ejectment by L. E. Freeman against Theodore Moffitt and Charles B. Wilkinson. From a judgment for plaintiff, defendants appeal. Affirmed.

C. W. Hamlin, for appellants. Upton & Skinker, for respondent.

GANTT, P. J. This is an action of ejectment for a farm in Polk county. This is the second appeal. The first is reported in *Freeman v. Moffitt*, 119 Mo. 280, 25 S. W. 87. The plaintiff recovered judgment again on the last trial, and defendants appealed.

The cause presents some features of the case quite differently from the case as made before. The petition is in statutory form, and the answers general denials. Reuben Lunsford is the common source of title. On September 1, 1886, Lunsford executed to the Equitable Mortgage Company his note for \$1,200, due five years after date, with interest coupons, one of which fell due each six months throughout the term of five years. To secure this note and interest, Lunsford and wife executed their deed of trust, whereby they conveyed to Henry J. Page, as trustee, the lands in controversy. This deed of trust was duly recorded in Book No. 16, at page 119, and contained the following recitals, among others: "Whereas, the said party of the first part is justly indebted unto the said party of the third part in the sum of twelve hundred dollars, according to the tenor and effect of one certain promissory note of even date herewith, duly executed by the said party of the first part, and payable on the first day of September, 1891, to the order of the Equitable Mortgage Co., at its office in Kansas City, Mo., with interest thereon from the date thereof at the rate of seven per cent. per annum, payable semi-annually on the first days of March and September in each year according to the coupons or interest notes thereto attached." "But if default be made in the payment of said note, or any part thereof, or any of the interest thereon when due, * * * then the whole amount of said note, with interest thereon, shall, at the option of the holder of said note, become immediately due and payable, without notice to said first party, and this deed shall remain in force, and the said party of the second part, or, in case of his death, inability, or refusal to act, then the (then) sheriff of said county of Polk (who shall thereupon become his successor to the title to said property), * * * may, at the request of the holder of said note, proceed to sell," etc. In April, 1889, the Equitable Mortgage Company prepared and sent to Samuel Hadlock, sheriff of Polk county, three documents, of the tenor following: First. A written refusal of Page to act as trustee, and a request by the mortgage company, as holder of the note, for the sheriff to act as trustee. The substance of this document is as follows: "Whereas, Reuben Lunsford and —, his wife, by their deed of trust, dated the first day of September, 1886, and recorded in the recorder's office in and for Polk county, Mo., in Book 16, at page 119, conveyed to Henry J. Page, trustee, the property in said deed described, in trust to secure to the Equitable Mortgage Co., of Kansas City, Mo., the payment of a certain note therein described; the

said property being [the land in controversy]. And whereas, said note has become due, and said Henry J. Page, trustee, has refused to act as such trustee, and does, by joining in the execution of this instrument, hereby refuse to act as such trustee, and assents to the appointment herein made: Now, therefore, the said Equitable Mortgage Co. does hereby appoint Samuel Hadlock to act as trustee instead of the said Henry J. Page." Also the following notice of sale: "Whereas, Reuben Lunsford and Betsy B. Lunsford, his wife, by their certain deed of trust dated September, 1886, and recorded in the recorder's office of the recorder of deeds of Polk county, Missouri, in Book 18, at page 119, conveyed to Henry J. Page, trustee, the following described real estate, situated and lying in Polk county [here follows a description of the land in suit]. In trust to secure the payment of one certain promissory note therein described, together with the interest thereon as provided in said note and deed of trust; and whereas, said Reuben Lunsford and Betsy B. Lunsford have made default in the payment of the fourth and fifth installments provided for in said note; and whereas, by reason of said default under the terms and provisions of said note and deed of trust the principal sum of said note has become due and payable; and whereas, it is provided in said deed of trust that if the said Henry J. Page, trustee, shall refuse to act, the legal holder of said note may appoint and substitute any other person as trustee to act instead of the Henry J. Page, who shall thereupon become his successor to the title of said property, and the same become vested in him in trust for the purposes and objects of said deed of trust, with all the powers, duties and obligations thereof; and whereas, the said Henry J. Page has refused to act in this behalf; and whereas, the Equitable Mortgage Company, the legal holder of said note, by its certain deed of appointment, dated April 10th, 1889, recorded in the office of recorder of deeds of Polk county, state of Missouri, in Book 28, at page 378, appointed and substituted the undersigned as trustee to act instead of said Henry J. Page: Now, therefore, at the request of the legal holder of said note, and by virtue of the powers vested in me by said deed of trust and said deed of appointment, and for the purposes of foreclosing the same, I, the undersigned, Samuel Hadlock, as trustee, do hereby give notice that I will on Saturday, June 8th, 1889, between the hours of nine o'clock a. m. and five o'clock p. m., of said day proceed to sell the property hereinbefore described at public vendue to the highest bidder for cash, at the front door of the courthouse in the county of Polk, state of Missouri, to satisfy said debt and interest and the cost of executing this trust. —, Sheriff of Polk Co." Third. A deed to be executed to the purchaser at such sale, leaving blanks only for the amount of purchase

money and name of purchaser, which said blanks were afterwards filled in with the name of "W. H. Smith," as purchaser and "one hundred and fifteen and $\frac{10}{100}$ dollars" as the amount of his bid. The deed is in these words: "Whereas, Reuben Lunsford and Betsy B. Lunsford, his wife, by their deed of trust dated the first day of Sept., A. D. 1886, and recorded in the recorder's office in Polk county, Missouri, in Book 18, page 119, conveyed to Henry J. Page, as trustee, the property hereinafter described, in trust to secure to the Equitable Mortgage Company the payment of the promissory note in said deed described. And whereas, it is provided in and by the terms of said deed of trust that in a certain contingency therein stated the acting sheriff of Polk county, Missouri, in case of the absence, death, refusal to act, or disability in any wise of the above-mentioned Henry J. Page, trustee, may act in lieu of and perform the duties and powers delegated to the said trustee in and by the terms of said deed. And whereas, Henry J. Page, the said trustee, has refused to act, and by virtue of a deed of appointment dated April 10th, 1889, recorded in the records of Polk county, Mo., in Record 28, at page 378, substituting and appointing the undersigned as trustee. And whereas, default was made in the payment of the promissory note secured by said deed, by reason whereof, I, Samuel Hadlock, sheriff of Polk county, in the state of Missouri, acting as trustee, and in the place and stead of the trustee appointed in and by said deed, in accordance with the terms of said deed, did, at the request of the legal holder of said promissory note, proceed to execute the powers to me given by said deed, and did, on Saturday, the 8th day of June, A. D. one thousand eight hundred and eighty-nine, having previously given thirty — notice of the time, terms, and place of sale, and of the property to be sold, by advertisement printed in the Bolivar Free Press, a newspaper printed and published in the city of Bolivar, county of Polk, and state of Missouri, a copy of which advertisement, with the affidavit of the printer of said newspaper, proving its publication, is hereto annexed and made part hereof, at the courthouse door in the city of Bolivar, Polk county, Mo., aforesaid, expose to sale for cash to the highest bidder, at public auction, the said property and real estate hereinafter described; and at said sale, Wm. H. Smith being the highest and best bidder for the S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of Sec. 26, the N. $\frac{1}{2}$ of N. E. $\frac{1}{4}$, the N. E. $\frac{1}{4}$ of N. W. $\frac{1}{4}$ and N. ten acres of S. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ of Sec. 35, all in T. 34 N., R. 22 W., for the sum of one hundred and fifteen and $\frac{10}{100}$ dollars, the same was struck off and sold to him at that price and sum: Now, therefore, know all men by these presents that I, Samuel Hadlock, sheriff of Polk county, Missouri, as trustee, as aforesaid, in consideration of the premises and of the sum of

one hundred and fifteen and $\frac{10}{100}$ dollars to me paid by the said Wm. H. Smith, of the county of Polk and state of Missouri, do bargain, sell, and convey unto him, the said Wm. H. Smith, the real estate in said deed described as follows, to wit: The southeast quarter of the southeast quarter of section No. (26) twenty-six; the north half of the northeast quarter, the northeast quarter of the northeast quarter, and the north ten acres of the southwest quarter of the northeast quarter of Sec. No. (35) thirty-five; all in township (34) thirty-four north, of range (22) twenty-two west of the Fifth principal meridian. To have and to hold the same unto the said Wm. H. Smith, his heirs and assigns, forever. In witness whereof I, the said Samuel Hadlock, sheriff of Polk county, Missouri, as trustee aforesaid, have hereunto set my hand and seal on this 8th day of June, A. D. 1889. Samuel Hadlock, [Seal.] Sheriff of Polk County, Mo."

Acting under these requests and instructions, the sheriff advertised the land to sell on June 8, 1889. At that sale W. H. Smith became the purchaser, and received the above deed, which was duly recorded. Smith leased the land by written lease to appellant Moffitt for a term ending March 1, 1891. Plaintiff showed a complete chain of record title from Lunsford through Smith to himself, proved damages, rents, and profits, and rested. Appellants contended and offered evidence tending to prove that the mortgage company did not intend to foreclose the deed of trust recorded in Book 16, page 119, but intended to foreclose another deed of trust executed by Lunsford and wife the same day to secure 10 installment notes for \$12 each, known as the "commission notes," and recorded in Book 16, page 122. The second deed of trust was introduced only for a special purpose, and appellants have not preserved it in their bill of exceptions; therefore neither it nor its recitals can be considered by this court. The only reference to this second deed of trust is found at the top of page 82 of the transcript, and is as follows: "By Mr. Hamlin: For the purpose of showing that there was a second mortgage on the land, given by Reuben Lunsford and wife to the same parties, Henry J. Page, trustee, and the Equitable Mortgage Co., beneficiary, I want to introduce the deed of trust dated September 1, 1886, recorded in Book 16, page 122." Defendant offered oral testimony tending to prove that prior to the sale of the lands by Hadlock to Smith, Hadlock received a letter from the attorney of the mortgage company "stating that he had made a mistake in giving book and page of the second mortgage, for it was under that mortgage he desired Hadlock to sell." He instructed the sheriff to announce on the day of sale that he was selling under the second mortgage, and not under the first, or the one described in the notice of sale, but subject to the first mortgage. Hadlock tes-

tifies he did on the day of sale publicly announce he was selling under the second mortgage. One Shriner bid at that sale for the land, and it was knocked down to him, and by his direction the deed was made to Smith. He testifies further that prior to this sale Lunsford had sold his equity of redemption to J. N. Sperry & Co., and they had assumed the mortgage. They promised to pay the interest and stop the sale, but neglected to do so, and he sold. Shellenberger, who was clerking for the sheriff, corroborates his evidence. J. N. Sperry details the subsequent manipulations of the title to this land as follows: "My name is J. N. Sperry. I reside in Bolivar, Polk county, Missouri. I was a member of the firm of J. N. Sperry & Co. during the year 1889. Our firm at that time consisted of W. R. Spoon, A. F. Shriner, W. H. Smith, and myself. I was acquainted with Reuben Lunsford. I negotiated the loan for which the Equitable Mortgage Company held the two deeds of trust introduced in evidence in this case. I was at that time acting correspondent or agent for said company. I have some recollection of promising Mr. Hadlock and Mr. Shellenberger to try to get up the money and pay off this second mortgage. I think that my firm had traded for the equity in the land in controversy from Mr. Lunsford prior to this time. It is my recollection the deed was not made directly from Lunsford to any member of our firm, but it is my impression that we made a kind of three-cornered trade, and had the equity traded off to a man in Kansas by the name of Ray, and that we had Mr. Lunsford make the deed direct to Ray. After Mr. Smith bought the land at trustee's sale, my recollection is that he made a deed to Jerry Wolf. Don't know that there was any consideration paid by Wolf. We usually paid Wolf from three to five dollars to take deed from us and execute a deed of trust back to us to secure the notes named in the deed of trust. I was president of the Bolivar Loan & Trust Company. Spoon, Smith, and Shriner and myself were the shareholders in the company. It was the understanding, if we could sell the bonds executed by Jerry Wolf, which were secured by deed of trust on the land in controversy, our company was to divide the profits. I remember, when the land was sold under the Jerry Wolf deed of trust, that Mr. McQuarry bought it in. At the time the land was sold to Smith by Hadlock as trustee at the sale and deed made to Smith, we may have had an understanding with Reuben Lunsford that we would make the land bring the whole debt against the land. I do not recollect that we had any correspondence with the Equitable Mortgage Company about this." Cross-examined: "On the 8th of June, 1889, W. H. Smith was a member of our firm. He sold out to Schofield or Bennington about January 1, 1890. I am positive that he was a member of our firm on the 8th day of June, 1889, and after-

wards. Our office was burned in December, 1890. At the time the loan was made to Reuben Lunsford, our firm was agent of the Equitable Mortgage Company. At the time of the foreclosure sale by Hadlock as trustee we were not agents of the Equitable Mortgage Company. If any of our friends desired to send money to that company, we would take the money, and forward the same to the company as a matter of accommodation. There never was any interest paid on the Jerry Wolf loan. The land was afterwards sold to satisfy that deed of trust, and J. H. McQuarry was the purchaser." The defendants' counsel has wholly omitted the testimony of Mr. Lunsford in the abstract. Wolf fully corroborated Sperry as to their dealings. He gave nothing for the land. In the abstract offered in evidence by plaintiff the deed from Reuben Lunsford to Ray appears to have been recorded March 19, 1889, Book 30, p. 430, and in defendant's evidence it is recited this deed was made January 15, 1889. Defendant also called the plaintiff as a witness. He testifies he is a locomotive engineer; that he inherited \$550 from his grandfather's estate on his mother's side, and gave it to his father; that at various other times he gave his father, who was in straitened circumstances, moneys aggregating, with the \$550, about \$1,500; that the consideration, \$3,500, in his father's deed to him, was not the true consideration, but the \$1,500 he had given his father was the real consideration. He testified he never saw the land until several months after his purchase, and that defendant Moffitt was then in possession, and notified him that the mortgage company owned the land. Plaintiff called W. B. Freeman, plaintiff's father, as a witness. He testified that he came to Polk county in the fall of 1890, and met McQuarry that time in Bolivar; that he was then the owner of some livery stock in Huntsville, and in a correspondence with Smith heard of this farm. He and McQuarry met, and McQuarry got a team, and took him out to this farm. He looked over it. "Moffitt was on the farm. McQuarry told Moffitt he had brought me out to trade for the farm, and, if the trade was made, likely Moffitt could remain on the place; and Moffitt said if I traded for it he wanted to keep the place." He testified that Moffitt made no claim that he was holding under Wilkinson. He testifies that McQuarry then went to Huntsville with him to look at the livery stock. His stock had a \$500 mortgage on it, but was worth \$2,000. McQuarry brought an abstract of title and a deed that had been executed by himself and wife at Bolivar. He took the abstract to his lawyer, Capt. Reed, in Huntsville, who pronounced the title perfect. That thereupon he traded without any knowledge of any subsequent foreclosure and purchase by Wilkinson.

Upon a request of defendant for findings of facts, the court made the following findings

of facts: "L. E. Freeman, Plaintiff, v. Theo. Moffitt and Chas. Benj. Wilkinson, Defendants. Ejectment. Finding of facts by the Court. Under the evidence, pleadings, and admissions, the court finds the facts as follows: (1) Reuben Lunsford is the common source of title. (2) That on the day —, 1886, said Lunsford borrowed of the Equitable Mortgage Co. \$1,200, for which he executed his bond, payable in five years, with interest coupons payable every six months, and secured the same by the deed of trust recorded in Book 16 at page 119. That on the same day the said Lunsford executed to said mortgage company a note for \$120, payable in semiannual installments of \$12 each, one installment falling due on same day as the interest coupons on the \$1,200 note matured. That this \$120 note was secured by a deed of trust recorded in Book 16 at page 122, which is second and subject to the mortgage on page 119. (3) That afterwards said Lunsford sold his equity in the land to J. N. Sperry & Co., a real-estate firm, who had negotiated the loan to Lunsford, and who at the time of making said loan were the local correspondents of said mortgage company. That at the request of Sperry & Co. Lunsford made his deed direct to one Albert Ray. That Sperry & Co. agreed with Lunsford to pay off the \$120 note, and hold him harmless. (4) W. H. Smith was a member of the firm of J. N. Sperry & Co. on June 8, 1889, at the time he bought the land in controversy at foreclosure sale. (5) That about the — day of —, 1889, the fourth and fifth coupons on said \$1,200 bond and the fourth and fifth installments of said \$120 note being due and unpaid, the said Equitable Mortgage Co. sent to the sheriff of Polk county, Samuel Hadlock, a notice of sale, to be published in a newspaper, and at the same time a deed, filled out except the names of the purchasers and the amount of the bid, and power of attorney authorizing the sheriff to make the sale. That said sheriff published said notice in the paper, and on the 8th day of June, 1889, sold the land. That said advertisement and deed both recited the mortgage recorded in Book 16, page 119, and contained no reference to Book 16, page 122. (6) That said mortgage company intended to foreclose the second mortgage recorded in Book 16, page 122, and discovered the error before the sale, but directed the sheriff to proceed with the sale under the advertisement. That the letter of the mortgage company to the sheriff after it discovered its mistake has been destroyed, and the evidence does not show its exact contents. That at said sale the sheriff announced that the land would be sold subject to a prior mortgage of \$1,200, and that he was selling under the second mortgage. W. H. Smith became the purchaser, and received the deed from the sheriff offered in evidence, and which had been prepared by the mortgage company. (7) That Smith knew that the mortgage company intended to foreclose the

second mortgage. (8) That W. H. Smith leased the land to defendant Moffitt, and put him in possession as his tenant. (9) That the deed of Smith to Wolf was without substantial consideration, and the deed of trust by Wolf to Spoon, trustee, was without consideration. That McQuarry bought the land of Smith with knowledge of all that Smith knew, and on foreclosure of the Wolf mortgage bought the land, and took the deed to himself. (10) There is no evidence to show that W. H. Smith was a member of the firm of Sperry & Co. at the time Lunsford made the deed to Ray, or that he was liable for any obligations of the firm to Lunsford on that account. (11) That defendant Chas. B. Wilkinson holds whatever interest he has in the lands for the benefit of the mortgage company. (12) That at the sale on the 6th day of January, 1890, Wilkinson bought the lands as agent for the mortgage company, afterwards leased it to defendant Moffitt. (13) That shortly before W. B. Freeman purchased the land he went with McQuarry to look at it, saw and talked with Moffitt, who led Freeman to believe that he was holding as McQuarry's tenant, and offered to lease the land from Freeman for another year, provided he traded with McQuarry, and wholly failed to notify Freeman that he was holding the land as the tenant of Wilkinson. (14) That after Freeman had seen the land, and talked with Moffitt, McQuarry went to Huntsville, Mo., and McQuarry saw the live stock, and the trade was consummated. That in making said trade and in examination of the title to the land Freeman used the care and prudence usually exercised by men of ordinary prudence under like circumstances. That Freeman was an innocent purchaser for value, and is not chargeable with any of the fraudulent devices of Sperry, Smith, or McQuarry. (15) That in preparing and sending to the sheriff the advertisement and deed reciting the mortgage on page 119, and after learning of their error directing the sheriff to sell under the advertisement, the mortgage company was guilty of gross negligence, which was the primary cause of the record title to the land getting in such a condition to make it easy for sharpers to impose upon an innocent man, and is now estopped from denying that the first mortgage was foreclosed at the sale under which Smith bought; hence judgment for the plaintiff." Whereupon the court, at the request of the plaintiff, gave the following declaration of law: "The court declares the law to be that, if W. B. Freeman purchased the land in good faith from McQuarry, without any knowledge of the fraudulent acts of Sperry & Co., Smith, Wolf, or McQuarry, and paid a valuable consideration for the land, and in making such purchase exercised such care and prudence as men of ordinary prudence and foresight exercise in like affairs and under like circumstances, and that he had no knowledge that Wilkinson had bought the land, or that there had been a second foreclosure of the deed of

trust to the Equitable Mortgage Company, and that Wilkinson is really holding the title, if any he acquired, for the mortgage company, and that said W. B. Freeman visited the land before he purchased and saw defendant Moffitt and talked with him, and that Moffitt proposed to rent the land of Freeman, provided he bought it, and by his acts and conduct led Freeman to believe that he was holding as McQuarry's tenant, and that by the negligence and carelessness of the mortgage company the record of title to said land became and was in such a condition as to make it easy for Sperry & Co., Smith, Wolf, and McQuarry to practice their fraudulent schemes upon a man of ordinary prudence, and to make an apparent legal title in McQuarry, then, in that event, the mortgage company must bear the loss, and the issue should be found for plaintiff."

At the request of the defendants, the court gave the following declaration of law: "(6) In order for the plaintiff to recover in this cause he must show that his title is paramount to the title of the purchaser at the foreclosure sale on January 6, 1890; and unless he has so shown the judgment must be for the defendant." Defendants further prayed the court to declare the law as follows: "(1) The court declares the law to be that a party will be charged with notice of every fact lying within his chain of title and disclosed by the record. And in this case, if there was enough disclosed by the record in the chain of plaintiff's title to have put a reasonably cautious and prudent man upon his inquiry as to whether there was not an adverse title to the one under which he claims the property in controversy, in that event he cannot be an innocent purchaser for value, and the judgment must be for the defendants. (2) The court declares the law to be that if the court, sitting as a jury, finds from the evidence in this case that there were two deeds of trust executed by Reuben Lunsford and wife, and to the same parties as trustee and beneficiary, respectively, conveying the same land, executed the same day, and recorded same day in said book and that one deed of trust was to secure a principal note of \$1,200 and the other to secure ten installment notes of \$1⁰⁰ each, and further finds that the notice of sale under which plaintiff's grantors purchased said property disclosed the fact that said land was being sold in default in the payment of the fourth and fifth installment notes in the said deed described, and that said notice was attached to and recorded with the trustee's deed under which plaintiff claims title, then, in that event, it became the duty of plaintiff to investigate the records, and see whether or not there was not another deed of trust between the same parties securing certain installment notes; and if the court, sitting as a jury, further believes from the evidence that plaintiff could by an examination of the records ascertain

that fact to be true, but did not do so, he cannot be an innocent purchaser for value, and in this case the judgment must be for the defendants. (3) That under the pleadings and evidence in this case judgment must be for the defendants. (4) The court declares the law to be that if the court, sitting as a jury, finds from the evidence that there was enough in plaintiff's chain of title which, if followed up by him, would have informed him of defendant's title, and he did not avail himself of the opportunity to investigate the condition of his title from the proper records, then, in that event, plaintiff cannot recover in this case, and judgment must be for defendants. (5) After the foreclosure sale of the land in controversy under the first deed of trust on January 6, 1890, the defendant had a right to attend to the purchaser of that sale."

1. On the former appeal it was ruled that the findings of facts by the court made and stated by it in writing had the effect of a special verdict, and, if there was substantial evidence to sustain the same, they would not be disturbed by this court. To that ruling we still adhere. *Freeman v. Moffitt*, 119 Mo. 280, 25 S. W. 87, and cases there cited. No exceptions to evidence have been saved or assigned as error. No objections were made or exceptions saved to the giving or refusing of instructions by the court. No exceptions were taken or saved to the conclusions of fact reached by the court. This case originated in the negligence of the attorney of the Equitable Mortgage Company in preparing the notice of sale and the deed to be executed by the sheriff who sold the land in controversy. That company is now here by its representative, Wilkinson, seeking to be relieved of the consequences of its own negligence. Not only did its attorney prepare the notices and deed for the foreclosure of its principal debt of \$1,200 and interest when it intended to foreclose a second mortgage for only \$120, but his attention was called to this fact before the sale occurred; and, instead of recalling that notice and blank deed, he contented himself with simply writing to the sheriff, and requesting him to announce to the bidders that he was selling under a second mortgage, under which he had given no notice and to which the notice given would not apply. In this manner it placed it in the power of Smith and his confederates in fraud to successfully concoct a scheme whereby they could delude a purchaser ignorant of the facts. The trustee's deed recited it was in foreclosure of the mortgage recorded in Book 16, p. 119. To that deed was attached the advertisement which confirmed that recital. This deed was at once put to record, and the sham proceedings begun which resulted in the deed to McQuarry. Smith, by a formal lease, rented the land to Moffitt, and placed him in possession. McQuarry, upon obtaining his deed, had Moffitt attend to him. Thereupon they opened correspondence with W.

B. Freeman, who lives at Huntsville, Mo., looking to a trade. Freeman went to Polk county to investigate. He testifies, and the court finds, that McQuarry took him out, and showed him the land; that Moffitt and McQuarry led him to believe that Moffitt was McQuarry's tenant, and did not disclose that Wilkinson or the mortgage company had any claim whatever; that thereupon McQuarry, desiring to see the stock which Freeman offered to trade for the land, returned with Freeman to Huntsville. Satisfying himself on this point, McQuarry then produced his abstract of title, and Freeman employed an old and reputable attorney to examine it. That attorney pronounced it a perfect title in McQuarry, and thereupon McQuarry delivered his deed to Freeman for this land, and Freeman turned over the stock. On the former hearing the fact of Moffitt's possession was held to be such notice as required Freeman to inquire into the state of the title. It now appears that Moffitt and McQuarry led Freeman to believe that Moffitt was McQuarry's tenant, and that Moffitt desired to lease of Freeman for another year, provided he bought of McQuarry, and at no time intimated to Freeman that he held under Wilkinson. This finding, we think, makes a showing of diligence on the part of Freeman commensurate with that of a reasonably prudent man. The abstract of McQuarry on its face showed a perfect legal title in him, and when, in addition to this, he takes the purchaser upon the land, and the tenant in possession recognizes him as his landlord, and dickers for a further tenancy of the intended purchaser, it is hard to say wherein he is blamable in the absence of notice of the fraudulent conspiracy of Smith and others. And when it is considered that all of these fraudulent pretenses were made possible by the acts of the mortgage company itself, it seems to us there was ample evidence upon which the learned judge could base his findings. We think the declaration of law given for plaintiff was correct.

The learned counsel for defendant argues at length upon the recitals in the second mortgage. That mortgage is not in evidence, and we cannot look to it. Besides, it is now made apparent that there were interest notes or coupons exactly suiting the defaulted installments in the first mortgage, and, had the plaintiff gone to the deed of trust on page 119 of Book 16, he would have ascertained that there were interest notes falling due just as recited in the notice. We remain of the same opinion that we formed on the former investigation of this case as to the fraudulent conduct of Sperry & Co., Wolf, Smith, and McQuarry; but, as we then said, if Freeman was an innocent purchaser, he is not to be affected by their misdoings. The learned circuit judge, with the witnesses before him, and an opportunity to observe them, and open an investigation of his conduct in and about the purchase of the land,

has found him to be an innocent purchaser. As the mortgage company, by its gross negligence, lent aid and assistance to the conspirators, and enabled them better to accomplish their purposes, it is in a poor position to complain that Freeman was misled into the purchase. We can find no error in the record, and the judgment is affirmed.

SHERWOOD and BURGESS, JJ., concur.

VOGG v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, Division No. 2.
June 16, 1896.)

TRIAL—INSTRUCTIONS—HARMLESS ERROR—RAILROAD COMPANIES—INJURY AT CROSSINGS—CONTRIBUTORY NEGLIGENCE.

1. An erroneous instruction is harmless if the verdict is for the right party.

2. While plaintiff was sauntering eastward along the sidewalk of a public street on which defendant's tracks were laid, looking through the open windows of a wire factory to watch the operation of the machines, a train backing in the same direction crossed the sidewalk on a spur track which led into the factory yard, and struck plaintiff in the back. The rails of the track, though sunken into the walk, could readily have been seen by plaintiff had he glanced down; and, had he looked in the direction from which the train came, he could have seen it for a distance of several blocks. *Held*, that plaintiff was guilty of contributory negligence.

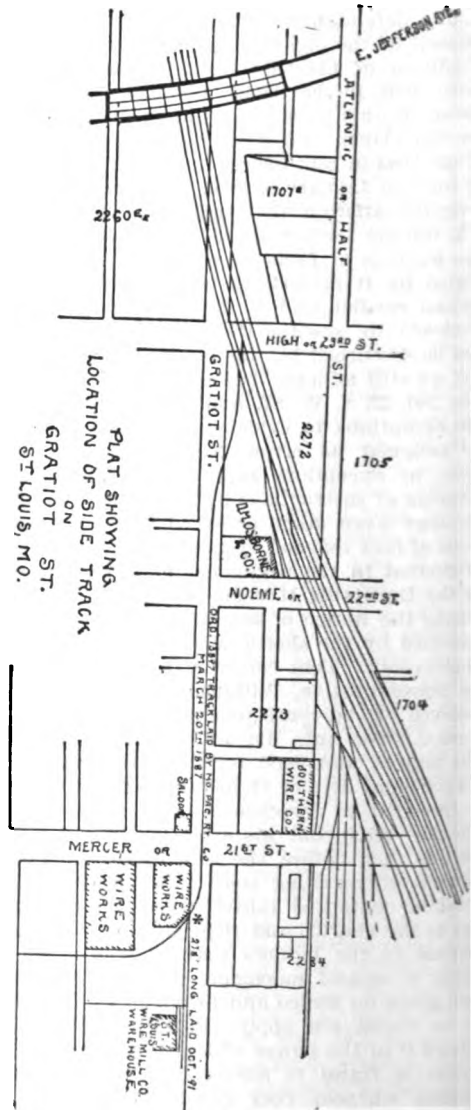
Appeal from circuit court, St. Louis county; W. W. Edwards, Judge.

Action by John Vogg against the Missouri Pacific Railway Company to recover for personal injuries. There was a verdict for defendant, and from an order granting plaintiff's motion for a new trial said defendant appeals. Reversed.

H. S. Priest and H. G. Herbel, for appellant. Sterling P. Bond and A. R. Taylor, for respondent.

SHERWOOD, J. Action by plaintiff for an injury suffered by him on the 13th day of August, 1891, in consequence of being struck in the back by a short train of cars, thrown forward on his face, and his left ankle run over, necessitating its amputation, for which injury he claimed damages in the sum of \$25,000. The trial occurred in February, 1892. This suit was instituted in the circuit court of the city of St. Louis, and was transferred to St. Louis county, by change of venue granted plaintiff, on account of the alleged prejudice of the inhabitants of the city of St. Louis against him. The negligence charged in the petition was the failure of defendant to comply with certain city ordinances requiring railroad companies to station a watchman at cross or intersecting improved streets, and to ring the bell on the engine while in motion, and to station a man on top of the car at the end of the train furthest from the engine, to give danger signals, and prohibiting them from running their trains

at a greater rate of speed than six miles per hour. Defendant's answer was a general denial and plea of contributory negligence on plaintiff's part, and authority to run its trains over the spur track at the point at which plaintiff was injured. The diagram subjoined shows the surroundings and scene of the accident, which occurred at a point on the plat marked with the asterisk(*).



Briefly presented, the facts attending the injury were these: On the 13th of August, 1891, about the middle of the afternoon, plaintiff started from where he was employed as water tender for the Municipal Electric Light & Power Company's Works (which is between Eighteenth and Nineteenth streets, on Gratiot), and went westward on the north sidewalk of Gratiot street, two blocks and a half, to a point opposite Taylor's saloon, on the southwest corner of

Gratlot and Twenty-First streets. He had been working for that company about two months and a half. When he arrived opposite that point, he crossed over to the saloon, for the purpose of getting a bottle of soda water for himself and a bucket of beer for a companion. Having procured these articles, as he went out of the saloon at the north door, he saw the railroad tracks on the street; looked west, but did not see any train; and so he turned, and walked on the shady side of the street, on the south sidewalk of Gratlot street, and had gone east some 200 feet or more, along that sidewalk, when he was struck at the point indicated. At that point a spur from the main tracks turns south, and crosses the sidewalk on a curve leading into the premises or yards of the St. Louis Wire Mills. This spur track, though sunk below the level of the sidewalk some two or three inches, was readily visible to any one who would glance downward while passing along. The wire works are located next to the sidewalk. The windows are low, nearly on a level with the sidewalk. The windows were open that day, and the nail machines in full operation; and, as plaintiff passed that point, he was seized with a curiosity to watch the operations of the nail machines, and so he peered in at them, having his attention there alone concentrated; and either while sauntering slowly along, or just as he had "kind of stopped for 10 or 15 seconds," as plaintiff himself puts it (though he does not testify directly that he was standing still at the time), but whether walking or standing, he was looking in at the nail machines when he was struck in the back by the corner of a car, which was the easternmost of three cars of coal and engine and a tender, which were being backed in on the spur track with coal for the wire mills. The force of the blow cast plaintiff down on the west sidewalk, next to the wire-mill building, and ran over his ankle. It also appeared from plaintiff's own testimony that he did not look in the direction from which the train came after he passed out of the saloon, up to the time that he was struck; that, if he had looked in that direction, he could have seen the train approaching for a distance of two blocks and a half. The testimony of Sties, a witness for plaintiff, who was in his father's blacksmith shop, only some 60 feet northeasterly across the street from where the accident occurred, looking out of the window at plaintiff, was to the effect that he had seen plaintiff go on to the saloon; noticed him on his return; saw him slowly walking along on the sidewalk by the side of the wire mill; that witness saw the three cars, etc., approaching, coming eastward, with a brakeman on the front end of the backing car, leaning on his brake; that witness then looked away for a moment, when, hearing the brakeman halloo, witness looked up again in that direction, and saw plaintiff fall over;

that he was struck just as the brakeman cried out. The testimony for plaintiff further tended to show that these cars were moving at the rate of 12 to 15 miles per hour; that none of the witnesses for plaintiff heard any bell ringing as the train was backing, though those who lived in the vicinity of the wire mills all admitted that, when the windows were open and the nail machines were at work, no other sounds could be heard at that place, nor could the sound of a voice be heard there. The testimony adduced by the defendant tended to prove that this train was moving eastward on Gratlot street at a speed of six miles per hour or less; that there was a man stationed on the end of the car furthest from the engine, and one on each of the other two cars; that as the foremost car upon which this man was stationed was about making the curve east of Twenty-First street, which curve was 48 feet from the corner of the wire-mill building where plaintiff got hurt, to go into the wire mill, plaintiff was seen standing on the pavement, looking into the mill; that he then started to walk on, and the brakeman on said car, seeing the danger of a collision with him, shouted to him as loud as he could, but, owing to the noise produced by the wire mill, he did not seem to hear him. The brakeman also gave the stop signal to the engineer, and the train was brought to a halt as speedily as possible, but not soon enough to prevent the corner of the car from striking plaintiff, and knocking him down; that the bell of the engine was constantly sounded, and plaintiff could, by looking in the direction from which the train came, have seen it for a distance of about two blocks and a half.

Defendant demurred to the evidence at the close of plaintiff's evidence, and at the close of the whole case, but unsuccessfully. The jury, after receiving most elaborate instructions on behalf of the respective parties litigant, returned a verdict for defendant. Plaintiff filed motion for a new trial, and the court granted it, "on account of an erroneous instruction given on behalf of said defendant." What instruction it was is nowhere pointed out. Owing to the facts which have already been disclosed, however, it is unnecessary to discuss whether error was committed in instructing the jury or not, since the evidence shows such a clear case of contributory negligence on the part of plaintiff, directly contributing to his injury, as to leave no doubt that the verdict of the jury was for the right party, and should not have been permitted to stand had it been otherwise than it was. This is the rule in such matters, as has been laid down by this court on many previous occasions. *Fitzgerald v. Barker*, 96 Mo. 661, 10 S. W. 45; *Noble v. Blount*, 77 Mo. 235; *Otto v. Bent*, 48 Mo. 23; *Greer v. Bank*, 128 Mo. 559, 30 S. W. 319; *Keen v. Schnedler*, 92 Mo. 516, 2 S. W. 312; *Bushey v. Glenn*, 107 Mo. 331, 17 S. W. 909; *Macfarland v. Helm*, 127 Mo. 327, 29 S. W. 1030; *Wear v.*

McCorkle, 1 Mo. 588; Swearingen v. Orne, 8 Mo. 707; Garesche v. Deane, 40 Mo. 168; and many other cases. This case, in its contributory negligence features, is strongly resemblant of that of Maxey v. Railway Co., 113 Mo. 1, 20 S. W. 654; and, for like reasons therein stated, the instruction in the nature of a demurrer should have been given. See that case and the authorities therein cited, and also the later cases of Hayden v. Railway Co., 124 Mo. 566, 28 S. W. 74; Kelsay v. Railway Co., 129 Mo. 362, 30 S. W. 339; Lane v. Railway Co. (Mo. Sup.) 33 S. W. 645. Judgment reversed, and cause remanded to the circuit court, with directions to enter a judgment for the defendant. All concur.

WARD v. BOARD OF EQUALIZATION OF GENTRY COUNTY.

(Supreme Court of Missouri, Division No. 2.
June 30, 1896.)

CERTIORARI—REVIEW—TAXATION OF BANKS—CONSTITUTIONAL LAW—TITLE OF ACT.

1. On certiorari there can be reviewed only such matters as appear from the face of the record brought up by the writ, and which go to the jurisdiction of the tribunal to which the writ is sued out.

2. That petitioner, on certiorari to the board of equalization, is permitted to read in evidence, without objection, from a so-called bill of exceptions, signed by the members of the board and purporting to contain the evidence adduced by him before it, and its action thereon, does not make it part of the record.

3. The exclusion of testimony cannot be considered unless called to the attention of the lower court by motion for new trial.

4. Act April 1, 1891, providing that the president of a bank shall deliver to the assessor a list of shares held therein, with the face value thereof, and a statement of all reserve funds, undivided profits, premiums, or earnings, and all other values belonging to it, and such statement shall, for purposes of taxation, be treated as that amount of money, less the taxable value of the real estate and fixtures, subject to the right of the parties in interest to show the impairment of such shares before the board of equalization, does not violate Const. art. 10, § 4, providing that "all property subject to taxation shall be taxed according to its value," though Rev. St. 1889, § 7518, gives power to the board of equalization to hear complaints and equalize the valuation and assessments on all real and personal property.

5. Act April 1, 1891, entitled "An act to amend article 2 of chapter 188, Revised Statutes of 1889, entitled 'The assessment and collection of the revenue'" complies with Const. art. 4, § 28, requiring the subject of an act to be clearly set forth in its title; everything in the act being germane to the assessment and collection of the revenues.

Appeal from circuit court, Gentry county; C. A. Anthony, Judge.

Certiorari by George Ward to the board of equalization of Gentry county. Proceedings dismissed. Petitioner appeals. Affirmed.

C. H. S. Goodman and J. W. Sullinger, for appellant. W. F. Dalbey and McCullough & Peery, for respondent.

BURGESS, J. The petitioner sued out of the circuit court of Gentry county a writ of certiorari, directed to the board of equalization of that county, for the purpose of reviewing the record of said board in the matter of the assessment of the First National Bank of King City, in said county, in which said bank the petitioner, Ward, is a stockholder. On a hearing in the circuit court the proceedings were dismissed, and the petitioner appealed. By the writ, which was issued on the 27th day of October, 1893, the board was commanded to send up a transcript of the record of its proceedings, and also the original assessment list filed with the assessor by the cashier or chief officer of the bank.

The original assessment list called for in the writ is as follows:

List of taxable property belonging to or under the control of First National Bank of King City, Gentry county, state of Missouri, on the first day of June, 1892:

	Valuation.
Amount of capital.....	\$50,000 00
Amount of surplus or reserve.....	9,500 00
Amount of undivided profits, premiums, or earnings.....	374 99
	59,874 99
Less real estate and furniture and fixtures.....	17,720 00
	42,154 99
Less one-half or 50 per cent. to place on same basis of other personal property.....	21,077 49
	\$21,077 50

Description of Real Estate owned by:

Lot 11 and lots 12, 14, 15 and 16, block 3, Carter's 2nd addition to King City, Mo., except 40x70 feet out of S. W. corner of said lots 12, 14, 15 and 16.

Names of Stockholders.	No. Shares.	Valuation. Dollars.	
J. H. Ward.....	187	7,954	Ellis Co., Kansas.
D. Bonham.....	10	420	Andrew Co., Mo.
George Ward.....	187	7,954	Gentry Co., "
J. H. & Geo. Ward.....	10	420	" Do "
Chase Bland.....	10	420	" Do "
A. T. Gants.....	10	420	" Do "
E. E. Blacklock.....	10	420	" Do "
Wm. Mobley.....	10	420	" Do "
Peter Hammer.....	10	420	" Do "
K. McKinney.....	5	210	" Do "
T. A. McKinney.....	10	420	" Do "
J. B. Harper.....	10	420	Dekalb Co., Mo.
M. W. Cornett.....	10	420	" Do "
E. E. Talbot.....	1	42	Jackson Co., Mo.
John Sherman.....	10	420	Andrew Co., Mo.
James O'Malley.....	10	420	Gentry Co., Mo.

Total No. of Shares. 500 \$21,000

The value of the stock of the bank for taxation, is made by deducting from the capital—First, the real estate, furniture, and fixtures; 2nd, from the amount then left 50 per cent. or one-half is taken to place the stock on the same basis or on equality with other personal property.

State of Missouri,)
County of Gentry,) ss.

George Ward, Cashier 1st Nat. Bk. of King City, Mo., being duly sworn, states upon his oath that the cash value of all the shares of stock of the First National Bank of King City, Mo., including all reserve funds, undivided profits, premiums or earnings, and all values of property belonging to said corporation, was on the first day of June, 1892, forty-two dollars per share, as per statement and explanation above.

George Ward, Cashier.

Subscribed and sworn to before me, this 27th day of Dec., 1892.

J. D. Pelly, Assessor.

By George W. Hunter.

The record of the board of equalization is as follows:

"In the county board of equalization of said county, on the 6th day of April, 1893, the following, among other, proceedings

were had, to wit: Ordered that, for the purpose of taxation, the statement of shares of stock, together with the statement of reserve funds, undivided profits, premiums or earnings, and other values, delivered to or furnished the assessor by the chief officers of the several banks in Gentry county be treated as that amount of money less the taxable value of real estate and fixtures belonging to said banks, respectively, and the county clerk is hereby directed to extend all taxes levied against said banks on the valuations that are hereby fixed as follows, in accordance with the above: Bank of Stanberry, \$13,438; Farmers' Bank of King City, \$16,887; Farmers' & Mechanics' Bank, \$14,000; Farmers' Bank of McFall, \$16,528; First National Bank of King City, \$42,155; Gentry County Bank, \$29,000; Bank of Albany, \$19,849; Commercial Bank of Stanberry, \$10,000,—and in addition thereto the taxable value of real estate and fixtures belonging to said banks, respectively, which taxable value of real estate and fixtures is hereby fixed at forty per cent. of the valuation of said real estate and fixtures as returned by said banks to the assessor, and the county clerk is directed to enter such assessment thus made upon the land assessment book for the year 1893, and extend the taxes against said valuation as against others."

"In the county board of equalization of said county, on the 6th day of April, 1893, the following, among other, proceedings were had, to wit: Ordered that the secretary give notice through the mail of the fact to all persons owning or controlling property the assessed valuation of which has been raised by this board, specifying the property and the amount raised, and that said board will on the fourth Monday in —, 1893, to hear reasons, if any may be given, why such increase should not be made."

"In the county board of equalization of said county, on the 24th day of April, 1893, the following, among other, proceedings were had, to wit: Now appear the following named banks, the First National Bank of King City, the Farmers' Bank of King City, the Farmers' & Mechanics' Bank of Stanberry, the Bank of Stanberry, the Bank of Albany, the Gentry County Bank, the Commercial Bank of Stanberry, and Farmers' Bank of McFall, by their attorneys, C. H. S. Goodman and J. W. Sullinger, and move the board to continue the hearing of their respective appeals until Saturday, the 29th day of April, 1893, which motion the board, after consideration, sustains, and the hearing of said appeals is hereby adjourned accordingly."

"In the county board of equalization of said county, on the 29th day of April, 1893, the following, among other, proceedings were had, to wit: The matter of the assessment, based on the list delivered to the assessor by the principal officers of the follow-

ing named banks to wit, the Bank of Albany, Gentry County Bank, Farmers' & Mechanics' Bank, Bank of Stanberry, First National Bank of King City, and George Ward and J. H. Ward, stockholders therein, Farmers' Bank of King City, and Farmers' Bank of McFall, coming on to be heard, and Chas. H. S. Goodman, Esq., and J. Wilford Sullinger, Esq., appearing as attorneys for said banks and the persons holding shares of stock therein, and W. F. Dalbey and James W. Witten, Esq., counsel for Gentry county, and the board having heard the objections, and reasons offered, and the testimony offered in support thereof by the said banks, orders that all further consideration of said matter be postponed, and hearing thereof continued, until Wednesday, the 3d day of May next."

"In the county board of equalization of said county, on the 4th day of May, 1893, the following, among other, proceedings were had, viz.: The matter of the assessments, based on the lists delivered to the assessor by the principal officers of the following named banks, to wit, Bank of Albany, Gentry County Bank, Farmers' & Mechanics' Bank, Bank of Stanberry, First National Bank of King City, and George and J. W. Ward, stockholders therein, Farmers' Bank of King City, and Farmers' Bank of McFall, coming on to be heard, and Chas. H. S. Goodman, Esq., and J. W. Sullinger, Esq., appearing as attorneys for said banks and the persons holding shares of stock therein, and Wm. F. Dalbey and James W. Witten on behalf of the county, and the board having heard the objection made to the action of this board heretofore taken in relation to the said assessment, and having considered the reasons offered why such action should not be rescinded, orders and directs that so much of said order as relates to the assessment and taxation of the real estate and fixtures of said bank be, and the same is hereby, rescinded and vacated, and that so much of said order as related to the assessment and taxation of the shares of said banks, and of the reserve funds, undivided profits, premiums or earnings, and other values of the said banks be, and the same is hereby, modified so as to read as follows: 'Ordered that, for the purpose of taxation, the face value of the shares of stock and all reserve funds, undivided profits, premiums or earnings, and other values, as shown by lists and statements thereof, furnished to the assessor of Gentry county, Missouri, by the chief officers of the following named banks, to wit, of the Gentry County Bank, Bank of Albany, Farmers' & Mechanics' Bank, Bank of Stanberry, First National Bank of King City, Farmers' Bank of King City, and Farmers' Bank of McFall, be, for the purpose of taxation, treated as that amount of money after deducting from the respective amounts so returned by each of said banks the value of the real estate and

fixtures belonging to said bank, as shown by the statements thereof returned as aforesaid, and that, for the purpose of taxation and assessment, the values of the shares of stock of each of said banks, except the Bank of Stanberry, shall be ascertained by dividing amounts remaining in each instance, after deducting the returned value of the real estate and fixtures as hereinbefore directed, by the whole number of shares of stock of each of said banks, respectively, and that said shares of stock of each of said banks, where the value thereof is ascertained, shall be assessed to the shareholders in each of said banks, except the Bank of Stanberry, as the same appears on and by the lists furnished as aforesaid, and the taxes thereon extended on said shares of stock at the value thereof, so ascertained in the manner heretofore described, and that the sum of — be assessed and taxed to A. L. Tomblin and Ed. Sager, proprietors of the Bank of Stanberry; and it is further ordered that the assessor's books be corrected, and the tax books so made up, and the taxes extended so they will conform to this order."

In the county court of said county, on the 4th day of May, 1893, the following, among other, proceedings were had, to wit: "Ordered that the assessor's books be changed and amended, and that the clerk of this court make up the tax books for the year 1893, and extend the taxes thereon in conformity with the actions of the county board of equalization."

All of said orders were properly certified to by the clerk of the county court of said county of Gentry.

It may be conceded that the action of the board of equalization in the assessment of the property of petitioner is subject to review in a proceeding by certiorari, and, if the assessment be erroneous, the action of the board should be quashed. *State v. Dowling*, 50 Mo. 134; *State v. St. Louis County Court*, 47 Mo. 594; *Hannibal & St. J. R. Co. v. State Board of Equalization*, 64 Mo. 294. But it is well settled that the writ of certiorari only brings up the record; and only such matters as appear from the face thereof, and which go to the jurisdiction of the tribunal to which the writ is sued out, can be reviewed by such writ. "The minutes of the proceedings cannot be gone into in a proceeding of this nature. Nothing but the record is brought up in an instance like the present." *Hannibal & St. J. R. Co. v. State Board of Equalization*, supra; *State v. Buchanan County Board of Equalization*, 108 Mo. 235, 18 S. W. 782. It must therefore follow that no error was committed in refusing to permit the petitioner to introduce evidence dehors the record with respect to what occurred before said board, nor in excluding evidence offered by him, as to the values of other property within the county. Nor did the fact that petitioner was permitted to read in evidence, without objection, from what he called a bill of exceptions, signed by

the members of said board, purporting to contain the evidence adduced by him before that body and its action thereupon, make it part of the record, as no provision is made by law, either common or statutory, for any such procedure before such a tribunal. Moreover, the action of the court in excluding the verbal testimony was one of exception, and, in order that it might be considered by this court, should have been called to the attention of the trial court in the motion for a new trial, which was not done.

It is not claimed that the county board of equalization was not properly organized, but that it exceeded its authority in raising the pro rata valuation of petitioner's shares of stock in said bank from the sum of \$42 to \$84.31 per share, being a total increase in the valuation of said shares of stock of \$8,031. The aggregate value of petitioner's shares as returned by him to the assessor, after deducting the taxable value of their ratable proportion of the real estate and fixtures of said bank, was \$7,954. This valuation seems to have been arrived at by adding together the capital stock of \$50,000, the surplus or reserve, \$9,500, and \$374.99, the amount of the undivided profits, making a total of \$59,874.99, from which was deducted the value of the real estate, furniture, and fixtures, \$17,720, leaving a balance of \$42,154.99. This last amount was by the petitioner, in his capacity of cashier, diminished 50 per cent., to place, as it is claimed, the same on an equality with other personal property returned for taxation, leaving a remainder of \$21,077.50, which, divided by 500, the number of shares in the bank, gave \$42 as the taxable value of each share, and \$7,954 as the total value of petitioner's shares. By section 7518, Rev. St. 1889, power is given said board to hear complaints and to equalize the valuation and assessments upon all real and personal property within the county which is made taxable by law, the only restriction placed upon their power being that they shall not reduce the valuation of the real or personal property of the county below the value thereof as fixed by the state board of equalization. By the section next following it is made the duty of the board to raise the valuation of all property, real and personal, which may have been, in their opinion, returned below its value according to the rules prescribed by statute, etc. In 1891, the legislature passed an act entitled "An act to amend article 2, of chapter 138, Revised Statutes of 1889, entitled 'The assessment and collection of the revenue,'" approved April 1, 1891, by which it is provided, among other things, that "persons owning shares of stock in banks, or any joint stock institution or association doing a banking business * * * incorporated under or by any law of the United States or of this state, shall not be required to deliver to the assessor a list thereof; but the president or other chief officer of such corporation, institution or association, shall, under oath, deliver to the assessor a list of all

shares of stock held therein and the names of the persons who hold the same, with the face value thereof, and shall also deliver to the assessor a complete statement of all reserve funds, undivided profits, premiums or earnings, and all other values belonging to such corporations, companies, institutions or associations. And such statement of shares of stock, together with the statement of reserve funds, undivided profits, premiums or earnings and other values so delivered to or furnished the assessor, shall, for the purposes of taxation, be treated as that amount of money, less the taxable value of the real estate and fixtures, subject to the right of the parties in interest, to show the impairment of such shares of stock before the board of equalization. Private bankers, brokers, money brokers and exchange dealers shall make like returns and be assessed and taxed thereon in like manner as hereinabove provided." It will thus be seen that the board clearly had the power and jurisdiction to increase the value which had been fixed on the petitioner's bank stock, and that they did so according to the letter and spirit of the law quoted. They had the assessment list which had been returned by the bank before them, and that furnished the necessary datum from which the assessment was increased.

But petitioner insists that as, by the order of the board of equalization of April 6, 1893, the taxable value of the real estate and fixtures of the several banks therein named was fixed at 40 per cent. of the value returned by the assessor, the value of plaintiff's shares of stock, being fixed at their face value, was one and one-half times greater than it should have been, had the mandates of section 7518, Rev. St., been obeyed, and that the act of 1891 authorizing the same was unequal taxation, and invalid, because in contravention of section 4, art. 10, of the constitution of the state, which provides that "all property subject to taxation shall be taxed in proportion to its value." It is conceded by petitioner that perfect equality of taxation is impracticable, and that much must be left to the discretion of the legislature as to the method of ascertaining and equalizing the values of property; but where a gross inequality is provided for by statute, and clearly within the inhibition of the organic law, then such statute will be declared inoperative. *Weeks v. City of Milwaukee*, 10 Wis. 242, is relied upon as sustaining his position that the law of 1891 is unconstitutional in that it discriminates in the values of taxable property. The facts in that case showed that land of the value of \$300,000 had been released from taxation, and that by reason thereof taxes on the property of plaintiff in the same municipality were largely increased, and it was rightly held to be in violation of the provision of the constitution of that state which provides that "the rate of taxation shall be uniform." The property in that case was of the same kind, while in the

case in hand no discrimination was made in the same class or character of property. By the law of 1891 the rate of taxation is not fixed, nor was there any discrimination made by the board of equalization in the rate of taxation, but it was the same on all kinds and classes of property subject to taxation; the only difference being that, on shares of stock in banking institutions and other corporations named in the act, a prima facie value is fixed by the act on such shares, while as to other properties the values are fixed by the assessor, subject to the right of the board to lower or raise the same. The face value of such stock is only a prima facie value, and is subject to the right of the parties in interest to show the impairment of such shares of stock before the board of equalization. The value fixed on such stock is not an arbitrary value, but subject to the right of the owner to appear before the board and to show its impaired value, if such be the case. To the state belongs the sovereign power of taxation, and in the exercise of this power it has the right to provide, by proper legislation, means for arriving at the values of all taxable property, and for assessing and collecting the revenues, subject only to the limitations and restrictions provided for by the constitution. And, "however much this power may be abused by the legislature, the only check upon it is the responsibility of the legislative body to its constituents. Redress against unjust taxation must be sought in the same way, and no other, as redress against unjust and oppressive legislation in the general enactment of laws is sought." *Railroad Co. v. Maguire*, 49 Mo. 490.

A still further contention is that the act of 1891 is unconstitutional because not in compliance with section 28, art. 4, of the state constitution, which requires that the subject of the act shall be clearly set forth in its title. The title to the act is as before quoted, and purports to be an amendment to article 2, c. 138, Rev. St. 1889, entitled "The assessment and collection of the revenue." Everything in the amendment is germane to the title of the act; that is, to the assessment and collection of the revenues. It contains nothing inconsistent with its title, or that might not be expected to be found under such a title. It bears no indication whatever of a purpose by the legislators to mislead or deceive, and comes clearly within the rule announced by this court in *Lynch v. Murphy*, 119 Mo. 163, 24 S. W. 774, and authorities cited. Even if there were a reasonable doubt as to the constitutionality of the act, it would have to be resolved in favor of its validity; but in our minds there exists no such doubt on the question as to the sufficiency of its title. Finding no reversible error in the record, the judgment is affirmed.

GANTT, P. J., and SHERWOOD, J., concur.

SELVEGE v. ST. LOUIS & S. F. RY. CO.

(Supreme Court of Missouri, Division No. 2.
June 30, 1896.)

CARRIERS—ESCAPE OF TEXAS CATTLE—COMMUNICATION OF FEVER—LIABILITY—STATUTE—CONSTITUTIONALITY—INTERSTATE COMMERCE.

1. Rev. St. 1889, §§ 953, 954, in so far as they prohibit the transportation through the state of Texas of Mexican, Cherokee, or Indian cattle afflicted with Texas or Spanish fever, is an interference with interstate commerce.

2. A railway company is not liable for death of stock from disease contracted from stock which escaped from its cars while being shipped through the state, unless negligence on its part is shown.

Appeal from circuit court, Laclede county; C. C. Bland, Judge.

Action by John Selvege against the St. Louis & San Francisco Railway Company to recover the value of three cows alleged to have died from a disease contracted from cattle which escaped from defendant's cars while being shipped through the state. From a judgment for plaintiff, defendant appeals. Reversed.

L. F. Parker, for appellant. J. P. Nixon and J. T. Moore, for appellee.

GANTT, P. J. This action was commenced before a justice of the peace upon the following statement: "Plaintiff, John Selvege, for his cause of action, states that the St. Louis and San Francisco Railroad Company, at the time hereinafter mentioned, was a corporation duly organized under the laws of the state of Missouri. Plaintiff further states that the said railroad company did, between the 1st day of April, 1892, and the 1st day of June, 1892, bring into, upon, and through Laclede county, Missouri, and from one part of said county to another part of said county, on its railroad, Texas, Mexican, Cherokee, or Indian cattle affected with what is commonly called Texas or Spanish fever, and with other contagious and infectious diseases. Plaintiff further states that said Texas or Spanish fever and other contagious disease was communicated from said diseased cattle to animals in the neighborhood and along the line of such transportation, and that on or about the 18th day of September, 1892, plaintiff was the owner of three cows, of the value of one hundred and five dollars; that said Texas, Mexican, Cherokee, or Indian cattle so transported by defendant company on its cars was and said cattle went at large in the neighborhood and along the line of said railroad of said defendant; and that Spanish or Texas fever and other infectious and contagious fever or disease was communicated from such diseased animals to the said three cows of plaintiff, by reason of which said cows of plaintiff became diseased and died, by which plaintiff was damaged in the sum of one hundred and five dollars, for which plaintiff prays judgment, with costs of suit."

Judgment was rendered in plaintiff's favor by the justice, and in due time the case was appealed to the circuit court, where it was tried before the judge thereof sitting as a jury, upon the following agreed statement: "It is hereby stipulated and agreed that the court shall consider the following facts in said cause, to wit: That in the month of September, 1892, after the wreck at Brush Creek hereinafter stated, the animals described in plaintiff's petition died of disease, and upon a post mortem examination their appearance indicated that they died of Texas or Spanish fever; and the value of said cows was \$105 at the time of their death. That their symptoms prior to death, and their appearance after death were those of an animal affected by Spanish or Texas fever; and that their usual range was in Clough's addition to the town of Lebanon, and particularly around and near the stock yards in said town. That several other animals which usually grazed in the same range died at about the same time, and had symptoms similar to plaintiff's cows before death, and similar appearances afterwards. That on the 22d day of June, 1892, there was a wreck on defendant's railroad near Brush Creek, in Laclede county, Mo., about seven miles west of Lebanon, by which several cars of a freight train were derailed; and that in that wreck one car loaded with cattle was broken up, and the cattle therein escaped to the adjacent county; and that no cattle escaped from any other car in said train. That said car was badly broken up, the end of it being broken out, and the running part thereof being in such a condition that it was impossible to run the same further on said road; and that the same remained upon the road-bed and track of the defendant until after the cattle were removed therefrom, as hereinafter stated; and that, by reason of said car and running gear being upon the road-bed, no other train could pass there until said car was removed; and that the cattle from said wrecked car, after the wreck, were turned out of said car by defendant's employes opening the car, and turning them out upon the right of way. That said car was marked in plain letters on the side thereof 'Southern Cattle'; and that the said cattle that so escaped had the appearance of Texas cattle, but appeared to be healthy cattle. Said cattle were collected by the employes and agents of defendant from off the range the next day afterwards, and were driven up the public road to the town of Lebanon, through Clough's addition to said town, and were there placed in the stock yards about dark the next night after the wreck, and during the night were shipped away. The stock yards in which these cattle were placed were the same stock yards as those near and around which plaintiff's animals were in the habit of grazing. That there were no deaths among native cattle at and around Lebanon, in Laclede county, Mo., with symptoms of

Texas fever, till after the wreck at Brush Creek; and that after that time a large number of native cattle in the ranges through which the Texas cattle from the wreck were driven died with symptoms of Texas fever, and no native cattle died with such symptoms except such as grazed in the ranges through which the Texas cattle passed. That after the said wreck near Brush Creek, in Laclede county, Mo., the native cattle in Laclede county, Mo., along the line and right of way of the St. Louis & San Francisco Railroad, over which the said Texas cattle were being transported, died, with all the characteristic symptoms and lesions peculiar to the Texas or Spanish fever; and that there were no native cattle died of such disease except such as passed through such ranges where the Texas cattle had been. That all the native cattle that died of Texas fever were usually kept on the range, and in the immediate vicinity of defendant's right of way in Laclede county, Mo. That said Texas cattle, while being so driven to stock yards at Lebanon, stampeded, and ran around and about the neighborhood in which plaintiff's cow was grazing, and on which she grazed until she became sick, as above stated. That it is a scientific fact that cattle from a district infected with Texas fever, though perfectly healthy themselves, can, and sometimes do, disseminate the disease known as Spanish or Texas fever among native cattle, and that the disease can be communicated by such healthy cattle from an infected district in different ways, and one of the ways is by native cattle passing along or across the range through which infected Texas cattle have passed. That the defendant operates a line of railway running from Paris, Tex., through the Indian Territory and Arkansas, and also a line from Sapulpa, in the Indian Territory, by way of Vinita, in the Indian Territory, through Missouri, to the city of St. Louis; and that said road connects with the Missouri, Kansas & Texas Railroad at Vinita; and that said lines of road meet at Monett, Mo., and cars from all of said lines pass over the main line of road from Monett to the city of St. Louis; and that said main line passes through Laclede county, Mo.; and that Brush Creek and Lebanon are both stations on said line between Monett and St. Louis. That the only car broken open in said wreck which took place near Brush Creek, Laclede county, Mo., on June 22, 1892, was stock car initialed 'C. C. C.', and numbered 2,287. That said car contained twenty-three (23) head of beef cattle, shipped by Samuel Hunnicut, from Greenville, in the state of Texas, which were consigned by Samuel Hunnicut, from Greenville, Tex., direct to Cassidy Brothers, National Stock Yards, East St. Louis, Ill. That they were shipped on a through bill of lading from Greenville, Tex., over the Missouri, Kansas & Texas Railway, to Vinita, Indian Territory, and from Vinita to St. Louis, Mo.,

over the St. Louis & San Francisco Railway, and from St. Louis, Mo., to East St. Louis, Ill., over the Bridge Terminal Company. That said cattle were unloaded and fed at Vinita, and from that point were destined direct to East St. Louis, without any intention of unloading in Missouri; and that except for the accident resulting in the wreck of June 22, 1892, the same would have passed directly through the state of Missouri without unloading, and without any delay, except such as is necessarily incident to such traffic and the transfer to and over the terminal lines; and that the cattle so shipped by the said Samuel Hunnicut, from Greenville, Tex., to Cassidy Brothers, East St. Louis, Ill., were the same cattle that escaped from the car near Brush Creek, Laclede county, Mo., on June 22, 1892, to the adjacent county, and which were gathered and put in the stock yards at Lebanon, Mo., by the employés and agents of the defendant, as above stated. That over the face of the said bill of lading was written 'Southern Cattle,' and also the word 'Quarantine'; and, if the finding shall be for plaintiff, judgment shall be entered in his favor for the sum of \$105 and costs. That it is further agreed that germs of Texas or Spanish fever are scattered or set out in ranges of native cattle by Texas or Spanish cattle passing through the ranges of native cattle, and that such germs will continue to live, and may be communicated to and thereby affect native cattle with Texas or Spanish fever at any subsequent time, until such germs are killed by freezing during the following winter."

The defendant then prayed the court to give the following instructions: "The court declares the law in this case as follows: First. Under the stipulations of the facts in this case, the plaintiff is not entitled to recover, and the finding shall be for the defendant. Second. That the provisions of section 953 of the Revised Statutes of Missouri, for the year 1889, in so far as they apply to interstate commerce, are unconstitutional and void, and are in conflict with section 8, article 1, of the constitution of the United States. Third. That the provisions of section 954 of the Revised Statutes of Missouri for the year 1889, in so far as such provisions apply to interstate commerce, are unconstitutional and void, and are in conflict with section 8, article 1, of the constitution of the United States,"—which the court refused to do, to which refusal of the court to give such instructions defendant then and there excepted at the time. The court found for the plaintiff, and rendered judgment accordingly.

It is apparent on the face of the petition that plaintiff's right to recover is bottomed upon sections 953 and 954, Rev. St. Mo. 1889.¹ It also appears beyond all cavil that

¹ Rev. St. 1889, §§ 953, 954, prohibit the transportation through the state of any Texas, Mexican, Cherokee, or Indian cattle afflicted with Texas or Spanish fever.

the cattle were shipped from Texas to Illinois, and, at the time of the accident to the car in which they were loaded, were being transported through this state, without any intention of being unloaded within our borders. Cattle thus transported are articles of interstate commerce, and such a shipment falls clearly within the authority of congress to regulate commerce between the states. In the recent case of *Grimes v. Eddy*, 126 Mo. 168, 28 S. W. 756, said sections 953 and 954 were condemned by this court in banc, as an attempt to regulate commerce between the states, and therefore in contravention of the constitution of the United States, and void. As no allegation of negligence is made in the statement, and the agreed statement discloses none, there appears to be no foundation whatever for a recovery. The judgment of the circuit court is reversed.

SHERWOOD and BURGESS, JJ., concur.

HUSTON v. TYLER.

(Supreme Court of Missouri, Division No. 2.
June 30, 1896.)

ASSUMPSIT—PLEADING—VARIANCE—PRINCIPAL AND AGENT—DISCLOSURE OF AGENCY—FRAUD OF PRINCIPAL—PROVINCE OF JURY.

1. A complaint alleged that defendant was engaged in obtaining loans for others on notes, which was well known to the plaintiff; that defendant, while so engaged, contracted with plaintiff to loan a certain sum upon the note of certain parties named, which note defendant agreed to procure for plaintiff; that thereafter defendant delivered to plaintiff a note purporting to be signed by the parties named; that plaintiff, believing defendant's representations, and being induced thereby, loaned the money, delivering the amount to defendant, and receiving the note. *Held*, that the pleading must be construed as a complaint in assumpsit on the alleged express agreement to procure and deliver to plaintiff the note of the parties named, in default of proof of which plaintiff cannot recover.

2. Defendant, having disclosed to plaintiff that he was acting only as agent for the maker of the note in procuring the loan, is not responsible for fraud of the maker rendering the note worthless.

3. The question whether the agency of defendant was made known to plaintiff, in view of a conflict of evidence, was for the jury.

4. Where there is a conflict of evidence, a peremptory instruction to find for one of the parties is error.

Appeal from circuit court, Buchanan county; H. M. Ramey, Judge.

Assumpsit by Samuel P. Huston against John F. Tyler. There was judgment for plaintiff, and defendant appeals. Reversed.

Thos. J. Porter, B. R. Vineyard, and Ben J. Woodson, for appellant. Brown & Pratt, Vinton Pike, and Willard P. Hall, for respondent.

SHERWOOD, J. Action for the sum of \$2,500. The nature of the action best appears from the petition, which, omitting caption, etc., is the following: "That the de-

fendant was at the time hereinafter mentioned, and now is, engaged, at the said city of St. Joseph, in the business of obtaining loans of money for others on their promissory notes, and that the plaintiff well knew him to be engaged in said business; that the defendant, at said city, on the 8th day of April, 1892, prosecuting the business aforesaid, * * * entered into a contract and agreement with the plaintiff by which the latter agreed to loan twenty-five hundred dollars upon the promissory note of the following parties, to wit, Thomas M. Smith, Pat Curtin, Philip Weckerlin, and Jane E. Smith, which said note the defendant undertook and agreed to procure and deliver to plaintiff; that thereafter the defendant presented and delivered to the plaintiff a promissory note for the sum of twenty-five hundred dollars, purporting to be signed by all of said parties, and represented to the plaintiff that it was the note agreed upon between them; that the plaintiff believed defendant's representation to be true, and, relying thereon, and being induced thereby, he loaned the sum of twenty-five hundred dollars upon said note, and delivered said sum to the defendant, and received said note; that the said note was not in fact signed by any of the parties whose names appear signed thereto, except Thomas M. Smith; that, on the contrary, the signatures of all the other parties to said note were forged thereto; that the said Thomas Smith was at all the times herein mentioned, and is now, insolvent; that payment of said note has been demanded of said Smith, and all the other parties whose names appear signed thereto, and payment has been refused; that no part of the said note, principal or interest, has been paid; that the plaintiff has tendered the said note to defendant, and has demanded of him payment of said sum of twenty-five hundred dollars, with interest thereon, which has been refused by defendant; that the plaintiff now tenders said note into court for the use of the defendant. Wherefore the plaintiff prays judgment against the defendant for the sum of twenty-five hundred dollars, with interest thereon at the rate of six per cent. per annum from said 8th day of April, 1892." The answer of defendant consisted, in substance, of a general denial, and then of the following: "Defendant admits that he was at the time mentioned in plaintiff's petition, engaged, at the city of St. Joseph, in the business of obtaining loans of money for others, which was known to plaintiff, and that, in the prosecution of said business, he did, on or about April 8, 1892, apply to plaintiff for a loan of twenty-five hundred dollars. But defendant states the fact to be that he did, at said time, at the instance and request of Thomas M. Smith, and as his agent only, apply to plaintiff for a loan of said sum of money for said Smith, fully informing plaintiff who his principal was, and that said Smith proposed the names of Pat Curtin,

Philip Weckerlin, and Jane E. Smith as his sureties; that, plaintiff having agreed to make said loan, defendant so informed said Smith, and received from him the note mentioned in plaintiff's petition, to be by defendant conveyed and delivered to plaintiff; that, as such agent of said Smith, defendant delivered said note to plaintiff, and received from him the amount of said loan, and paid the same to said Smith, less the commission due him for his services in negotiating said loan. Defendant states that he received said note from said Smith, believing all the signatures thereto were genuine, and plaintiff received the same from defendant, knowing at the time that defendant was acting, in the delivery thereof, and in the receipt of said money, as such agent of said Smith, and relying upon the representations of said Smith that the signatures thereto were genuine." Plaintiff's reply was a general denial, etc.

The evidence on part of plaintiff himself tended to show that, while he was in his office, on the 6th or 7th of April, 1892, he received a message over the telephone from defendant, asking if he would loan \$2,500 for three months on the following names: Thomas M. Smith, Pat Curtin, Philip Weckerlin, and Jane Smith. Defendant, being asked by plaintiff if they (the above named parties) would make a good note, replied, "It would be a A 1," or "gilt-edged," or something of that kind, but that plaintiff had better investigate the solvency for himself. On investigation plaintiff ascertained that, though Thomas Smith had nothing, yet the others were large property owners, etc. Plaintiff then called defendant by telephone, and told him he would make the loan, when defendant replied, "I will get up the note [or "get the note"], and bring it to you." On the morning the note bears date, defendant came into plaintiff's office, and said, "Here's your note [or "the note"]. I want my money [or "the money"]." That thereupon plaintiff asked to whom the check for the amount was to be given, when defendant replied, "Myself; it is to be in my name." Whereupon plaintiff said: "That is all right. You are good to me for the amount,"— and drew a check for \$2,500, payable to defendant, handed it to him, and received in return from defendant a note for a like sum, due in three months, on which note were the names which had been mentioned over the telephone. Defendant did not state to plaintiff for whom he was obtaining the money, but plaintiff did not suppose defendant was getting the money for himself, but supposed he was getting the money for those whose names were on the note. When the note fell due it was not met, and it was ascertained that the names of all on it but Thomas Smith's were forgeries; and it was admitted at the trial, on part of plaintiff, that, in all of defendant's transactions connected with the note, defendant acted in good faith, and

without knowledge of the nongenuineness of the signatures aforesaid. Testifying on his own behalf, defendant at first said: "Tom Smith came to me and said he wanted to borrow \$2,500. I told him I thought I could get the money. I went to my telephone, and telephoned Mr. Huston, and asked him if he had \$2,500 to loan. Tom told me he wanted to give, as security, his aunt, Jane Smith, Patrick Curtin, and Philip Weckerlin. I told Mr. Huston that Thomas Smith wanted to borrow \$2,500, and would give as security his aunt, Jane Smith, Patrick Curtin, and Philip Weckerlin. Mr. Huston asked me, 'Is that a good note?' I told him I thought it was, but I preferred that he would make his own examination, and see to it. He says: 'Then, I will do so. I will see to it, and let you know.' The next day Mr. Huston called me up, and said I could have the money on that Smith note." Defendant further detailed in evidence that Smith, on being informed that he could get the money, signed a note for \$2,500 prepared for him by defendant, and gave it to one Asbury to have it signed by the other parties to it, and on the return of Asbury with only two of the names of the promised parties to it, Smith went out to get his aunt's signature to it, and shortly thereafter returned with the name of his aunt on the note; that thereupon defendant took the note over to plaintiff's office, and, on being asked by him, "How will you have the check made,—to you, or to Smith?" replied: "It don't make any difference. You had just as well make it to me, and I will settle with Smith," etc. Upon the attention of defendant, however, being called to the first part of his testimony, he said, by way of correction: "I first asked him, 'Mr. Huston, have you got \$2,500 to loan?' He said he had. I told him that Tom Smith wanted to borrow that amount, and said that he would give as security on his note, his aunt, Jane Smith, Patrick Curtin, and Philip Weckerlin." In this statement defendant is fully supported as to the language he stated he used, by Miss Maggie Quinliven, who testified that defendant went to the telephone, called up Mr. Huston, and asked him if he had \$2,500 to loan, and then he said: "Tom Smith wants to borrow that amount, and says he will give as security his aunt, Mrs. Jane E. Smith, Patrick Curtin, and Philip Weckerlin." Then he says: "I think the note is perfectly good, Mr. Huston, but you had better investigate for yourself." It further appeared in evidence that defendant, on receipt of the check, took out \$150 for his commission, and turned over, by check, the residue to Tom Smith. The foregoing is a sufficient statement of the evidence for the purposes of the present occasion. On the conclusion of the testimony the court gave the jury a peremptory instruction to find for plaintiff the amount of the note with interest at 6 per cent. from its date, and a ver-

dict in accordance with this instruction was returned.

1. Chitty says: "An inducement, in an action of assumpsit, is in the nature of a preamble, stating the circumstances under which the contract was made, or to which the consideration has reference." 1 Chit. Pl. (16th Am. Ed.) *298; Id. *111 et seq.; Bliss, Code Pl. (3d Ed.) §§ 149, 150; Steph. Pl. § 53; 5 Am. & Eng. Enc. Law, 335. Under these authorities, it will readily be seen that the "matter of inducement" in this instance begins at the initial statement as quoted from the petition, and ends at the asterisk as marked after the word "aforesaid." The "gist" of the action manifestly lies in the allegation that defendant undertook and agreed to procure and deliver to plaintiff a promissory note of certain named parties for the sum of \$2,500. Were this an action at common law, it would be denominated "express assumpsit." 1 Wait, Act. & Def. 373. And, notwithstanding the common-law forms have been abolished, their substance in great part remains, and this is still true of the distinction between mere matter of inducement and the "gist" of the action, or matter of substance. Bliss, Code Pl. § 149. So that, from these considerations, it must be evident that plaintiff's contention that "the petition in this case is not based upon an agreement by Tyler to procure a note signed by the parties named," and that "the agreement is set out by way of inducement in connection with all the other facts connected with the transaction," cannot prevail. And, even if it be conceded that the words from the asterisk downward constitute only matter of inducement, still plaintiff is in no better plight, because the allegation is certainly material to plaintiff's recovery; and on this point Chitty says: "In general, however, every allegation in any inducement which is material and not impertinent and foreign to the cause, and which consequently cannot be rejected as surplusage, must be proved as alleged, and a variance would be fatal." 1 Chit. Pl. *299. We regard, however, the allegation already noted, not as mere matter of inducement, but as the gravamen of plaintiff's action; and, without proof of it, and there was none, he was not entitled to recover in this case.

2. Plaintiff having elected to sue on an alleged express contract on the part of defendant to procure and deliver to plaintiff a promissory note for \$2,500, etc., cannot enlarge his cause and basis of action by resorting to the general words of his petition, but will be confined to the act specifically assigned in his petition as his ground of action. *Schneider v. Railway Co.*, 75 Mo. 295; *Waldhler v. Railroad Co.*, 71 Mo. 514; *Fuchs v. City of St. Louis* (Mo. Sup.) 34 S. W., loc. cit. 513. And plaintiff having declared upon what is an express contract or warranty as to the genuineness of certain signatures, he was thereby precluded from relying on an implied warranty to the same effect. In-

ternational Pavement Co. v. Smith, Beggs & R. Mach. Co., 17 Mo. App. 264; *Deming v. Foster*, 42 N. H. 175; *McGraw v. Fletcher*, 35 Mich. 104; *Baldwin v. Van Deusen*, 37 N. Y. 487. Nothing is better settled in this state than that a party will not be permitted to sue upon one cause of action and recover upon another. *Clements v. Yeates*, 69 Mo. 623, and cases cited; *Carson v. Cummings*, Id. 325; *Sumner v. Rogers*, 90 Mo. 324, 2 S. W. 476. In the last case cited, it was ruled that, though our Code speaks of every suit brought thereunder as a "civil action," yet this extends only to the form of the action, and not to its substance. On a subsequent occasion it was ascertained that the same view had been expressed in a more amplified way by the court of appeals of New York, to the effect that, notwithstanding a party may move to have the pleading of his adversary made more definite and certain, yet he is not bound to do this. That is the primary duty of the party drawing the pleading, and the latter cannot cast that onus on his opponent by failing to perform his own duty in the first instance, and that duty consists in expressing his meaning clearly and unmistakably. *Snyder v. Free*, 114 Mo. 360, 21 S. W. 847; *Clark v. Dillon*, 97 N. Y. 370. See, also, *Young v. Schofield* (Mo. Sup.) 34 S. W., loc. cit. 499. In short, the cases above cited recognize the doctrine that the "fundamental requirements" of good pleading are and must remain the same, whether under Code or common law; that is to say, a pleading must be so drawn as to tender a definite issue or issues, and not have the adversary to grope in the dark as to what the meaning of the pleading is. "This is no more allowable now than formerly." *Clark v. Dillon*, *supra*. In the case at bar, therefore, it was misleading, in pleading plaintiff's cause of action, to plead an express contract, and then, on the trial, rely upon that as a matter of inducement, and also on "all the other facts connected with the transaction," whether such other facts accorded with the theory of an express contract of warranty or not.

3. The testimony of defendant as corrected by him, supported as it is by that of Miss Quinliven, doubtless establishes that defendant was acting only as the agent of Tom Smith, and this was communicated by him to plaintiff. If so, then under all the authorities he cannot be held liable for subsequent occurrences. *Whitney v. Wyman*, 101 U. S. 392; *Mechem, Ag.* § 555, and cases cited; *Bank v. Gallaudet*, 120 N. Y. 298, 24 N. E. 994; *Worthington v. Cowles*, 112 Mass. 30. In these circumstances, there being a conflict to some extent in the testimony, it should have been left to the jury to say whether the agency of defendant in the transaction had been made known by defendant to plaintiff. But it seems the authorities do not go so far as to require a direct making known of the fact of the

agency, etc.; for, in treating of this topic, it is said in a recent work of acknowledged merit, already cited: "It is material in these cases that the party complaining of a want of authority in the agent should be ignorant of the truth touching the agency. If he has full knowledge of the facts, or of such facts as are sufficient to put him on inquiry, and he fails to avail himself of such knowledge, or of the means of knowledge reasonably accessible to him, he cannot say that he was misled simply on the ground that the other assumed to act as agent without authority." *Mechem, Ag. § 546*, and cases cited; *Whart. Ag. § 531*. Now, in this case, among the concessions made during the trial by plaintiff when testifying, was this: "I supposed [Tyler] was getting it [the money] for the parties whose names were on the note. I did not suppose he was getting it for himself." So that, under the authorities just cited, even on plaintiff's own showing, it should have been left to the jury to say whether there was such knowledge on the part of plaintiff of the facts attendant on the transaction, or of such facts as were sufficient to put him on inquiry, and he failed to avail himself of such facts as were either actually or else potentially known to him. Indeed, it would seem that the bare presentation of the note to plaintiff by defendant without indorsement would be sufficient to put plaintiff on inquiry as to whether defendant was the seller of the note, or acting as the agent of the principal therein. And certainly the means of knowledge as to these were "reasonably accessible" to plaintiff, for a bare inquiry would no doubt have elicited from defendant in just what capacity he was acting.

4. There are cases where, if a broker sells a negotiable promissory note, and transfers it without indorsement and by delivery, without disclosure of his principal, he becomes liable as principal to those with whom he deals, and will be held to an implied warranty not only of his authority to sell it, but also that the signatures of all prior parties to it are genuine. *Mechem, Ag. § 929*, citing *Thompson v. McCullough*, 31 Mo. 224, and other cases. But in this case there is no charge made that defendant was the seller of the note, and if he was, and disclosed his agency, etc., he would not impliedly warrant the genuineness or value of the paper which he transferred by delivery. *Tied. Com. Paper, § 245*.

5. In addition to the reasons above given, showing that error occurred during the trial of the case at bar, may be instanced the fact that the trial court gave a peremptory instruction to the jury to find for plaintiff. Such an instruction would have been erroneous, even had there been no conflict in the testimony. This has been the uniform rule in this state since *Bryan v. Wear*, 4 Mo. 106; *Vaulx v. Campbell*, 8 Mo. 224; *Gregory v. Chambers*, 78 Mo. 294; *Wolff v. Campbell*, 110

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Mo. 114, 19 S. W. 622. And the reason given in the first-mentioned case was that such an instruction in effect told the jury "they must believe the evidence." Of course, where, as here, there is conflicting evidence, the error of such an instruction on part of plaintiff becomes of more pronounced proportions. Because of the errors mentioned, we reverse the judgment and remand the cause. All concur.

AMERICAN BREWING CO. v. TALBOT et al.

(Supreme Court of Missouri, Division No. 1.
June 30, 1896.)

SUPREME COURT — JURISDICTION—APPEAL—INSOLVENCY OF SURETY ON APPEAL BOND—VACATION OF SUPERSEDEAS.

1. Under Rev. St. 1889, § 3243, which confers on all courts power to issue all writs necessary to the exercise of their respective jurisdictions according to the principles and usages of law; and section 6561, which perpetuates the common law in so far as it is not inconsistent with state or federal laws,—the supreme court has authority, where the surety on an appeal bond becomes insolvent pending appeal, to require the appellant to furnish a new bond, and, if he fail to furnish it, to vacate the supersedeas.

2. Where the surety on an appeal bond becomes insolvent after the approval of the bond, the appellate court will require the appellant to furnish a sufficient bond, and, on his default, vacate the supersedeas.

Action by the American Brewing Company against one Talbot and others. There was a judgment for plaintiff, and, pending appeal by defendants, the surety on the appeal bond became insolvent, and plaintiff moves to vacate the supersedeas. Sustained, unless a sufficient bond is filed.

W. C. & J. C. Jones, for appellants. Lubke & Muench, for respondent.

PER CURIAM. Plaintiff has moved to vacate the supersedeas unless a new appeal bond be given. The ground of the motion is that, since the approval of the appeal bond, the surety has become insolvent. The fact is supported by affidavit, and is not disputed. But the appellants insist that this court has no power to order a new bond, or to vacate the stay order, under the statutes on the subject. Rev. St. 1889, §§ 2255, 2256. Another section of the statute law (2249) shows the facts which should exist to warrant an order staying execution, or an approval of the security offered in compliance with that section. Among the essential prerequisites of such a stay is that any needed securities should be approved by the court, and the penalty of the bond should be in double the amount of the judgment, etc. The whole tenor of the act indicates that the bond should secure what it purports to secure. But what if the sureties become insolvent after the appeal has removed the cause to the supreme court? Is the stay to continue, nevertheless? Or has the court, into which the appeal has brought the cause,

power to require the security to be kept good, under penalty of removing the stay of execution? It was held in this case at an earlier stage that, where the bond originally approved did not comply with the statute, a new one might be required in the appellate court, to keep the stay of execution in force. *Brewing Co. v. Talbot* (1894) 125 Mo. 388, 28 S. W. 585. The principle of that ruling is that the security afforded by the bond must be real, and not a sham. *State v. Dillon* (1889) 98 Mo. 90, 11 S. W. 255, never intended to declare any such proposition as that the approval of an appeal bond once obtained in the circuit court would effect a stay during all subsequent stages of the appeal, without regard to the actual security it might or might not afford meanwhile. That case simply laid down the very correct rule that the approval of the appeal bond on the circuit effected a stay of execution, and amounted to a ruling on the sufficiency of the bond. The question now under consideration was not then considered. A statutory stay of execution fills the place of the writ of supersedeas under an older system of practice, though it is of much broader scope, because of the administration of law and equity in Missouri in the same court. But we think no reasonable interpretation of the statutes on the subject will sanction the continuance of the stay where the security has become insolvent after the appeal bond has been once approved. The stay is subject to the order of the court in which the cause is pending, in accordance with the demands of justice and the obvious spirit of the statutes authorizing a stay. The order of court which produces a stay of execution is like other orders or process of the court, namely, subject to the control of the court, so that it shall not become an instrument of injustice. *Bryant v. Russell* (1895) 127 Mo. 422, 30 S. W. 107. Where the surety on an appeal bond becomes insolvent, after the bond has been duly approved, we hold that the appellate court in which the cause is pending may vacate the supersedeas unless the appellant will furnish a new bond, such as the statute obviously demands for a stay of proceedings on the judgment. Though there is no express statutory authority for such action, we think the inherent power of the court (under the general laws governing its organization) permits such an order, in the circumstances here shown. *Rev. St. 1889, §§ 3243, 6561*; *State v. Rombauer* (1891) 104 Mo. 619, 15 S. W. 850, and 16 S. W. 502. The United States supreme court has held that it had power to make such an order, although its inherent authority is probably less extensive, under the scheme of federal government created by the constitution of the United States, than the inherent

power of the supreme court in this state, under our constitution and the laws above cited. *Jerome v. McCarter* (1874) 21 Wall. 17; *Knox Co. Ct. v. U. S.* (1879) 25 U. S. (Lawy. Ed.) 191; *Williams v. Clafin* (1880) 103 U. S. 753. See, also, *Fence Co. v. Branham* (1893) 32 Mo. 289, 13 South. 281. The motion to vacate the supersedeas will be sustained unless a sufficient appeal bond be filed within 30 days, in a form and with security to be approved by one of the judges of this court or of the circuit court from which the cause came. Unless such bond be given as above, the order of supersedeas or stay of execution will be vacated at the end of that period. All concur, except BRACE, C. J., absent.

ST. LOUIS, K. & S. R. CO. et al. v. WEAR et al.

(Supreme Court of Missouri. June 30, 1896.)

RECEIVERS — COMPENSATION — INVALID APPOINTMENT.

1. Where the order appointing a receiver is adjudged to be unauthorized, the receiver is not entitled to compensation from the funds coming into his hands by virtue of the order.

2. In prohibition proceedings to check an order appointing a receiver, the receiver, after judgment, cannot object that he was an improper party defendant, and therefore claim attorney fees.

Sherwood, J., dissenting.

In banc. On receiver's motion for allowance.

For former opinion, see 33 S. W. 357.

M. R. Smith, for plaintiffs. W. S. C. Walker and Boyle, Priest & Lahman, for defendants.

PER CURIAM. In the receiver's return to the peremptory writ, it is stated that he has delivered to the plaintiff company all the property in his hands as receiver, except about \$1,455, which he holds subject to the order of the court; and he asks whether he may be allowed therefrom his costs, and a reasonable attorney's fee, for the reason that he has no personal interest in the controversy, was only an appointee of the circuit court, and was not, as he is advised, a necessary party to this action.

1. A receiver's right to compensation and allowances for expenses does not depend upon the correctness of the order of appointment, where the appointment has been made by a court having general jurisdiction to take such action. But if the appointment is merely in excess of the power of the court, because the facts and circumstances do not authorize the appointment as made, and the enforcement of the order is therefore subjected to the check of a writ of prohibition, the receiver is not entitled to retain possession of any part of the property coming to his hands by virtue of the order. The order of appointment having been adjudged to be unauthorized, he cannot claim compensation for his services out of the fund or prop-

¹ *Rev. St. 1889, § 3243*, confers on all courts power to issue all writs necessary to the exercise of the respective jurisdictions according to the principles and usages of law; and section 6561 perpetuates the common law in so far as it is not inconsistent with state or federal laws.

erty received by him under the order. His claim for allowances, etc., must be otherwise made, in an accounting with the court in the suit wherein he was appointed. The prohibition in this case does not interfere with the general course of Mr. Kerfoot's suit in Dunklin county. It forbids action upon the original orders for the receivership, and annuls what was done under those orders; but it leaves the action pending as before. The receiver's application for allowances, etc., cannot properly be granted in this court in this case as it now stands, but must be left to the circuit court for consideration, as above indicated. Meanwhile, the receiver, in pursuance of the final judgment in prohibition, should forthwith deliver to the plaintiff company any and all funds and property remaining in his hands as receiver, and make return of full compliance with the judgment within five days after service of this order.

2. Whether the receiver was a necessary party to the present action we need not inquire, at this stage of it. Proceedings in prohibition are governed by the Code of Civil Practice, except as otherwise provided in the act regulating that writ. Laws 1895, p. 95, § 3. Hence any such objection as is now suggested should have been interposed much earlier to be available. It must now be considered waived. Rev. St. 1889, §§ 2043, 2047; *Soeding v. Bartlett* (1864) 35 Mo. 90. All concur, except SHERWOOD, J., dissenting.

MORAN et ux. v. PULLMAN PALACE-CAR CO. et al.

(Supreme Court of Missouri, Division No. 2.
June 16, 1896.)

MUNICIPAL CORPORATIONS—ORDINANCES—CREATING CIVIL LIABILITY—DANGEROUS PREMISES.

1. City ordinances requiring property owners to fill excavations which are below the grade of the surrounding or adjacent streets do not apply to excavations 25 feet from the street, but only to those in such close proximity to streets as to endanger the safety of travelers, as travelers, on such thoroughfare.

2. A municipal corporation cannot create by ordinance a civil liability against a person violating an ordinance requiring property owners to fill excavations adjacent to the streets, in favor of persons injured by its violation.

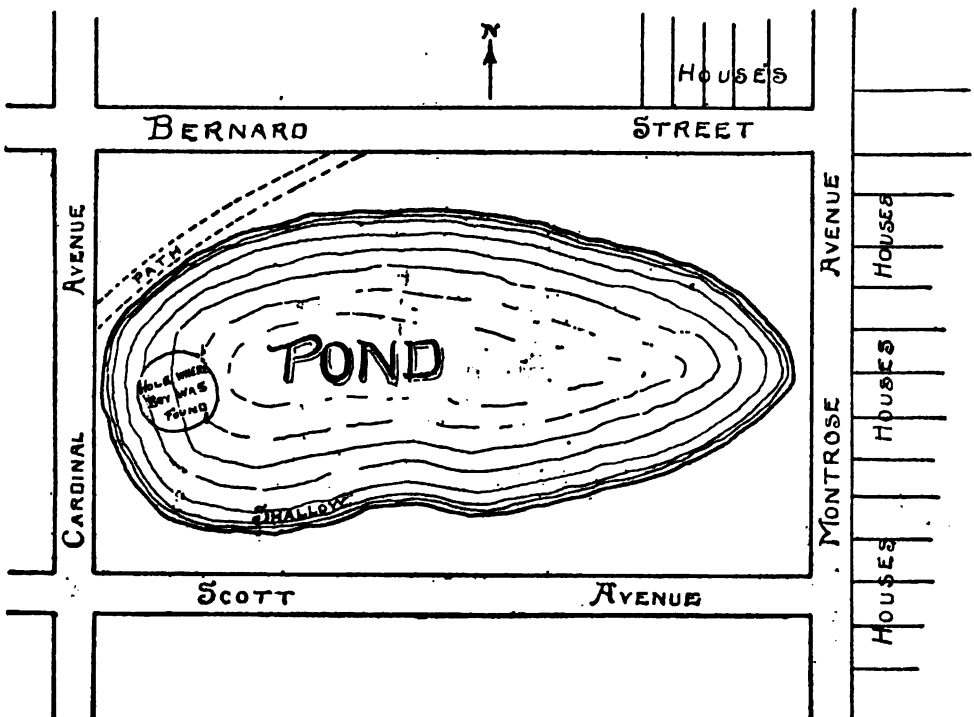
3. A municipal corporation is not liable, for failure to enforce ordinances requiring property owners to fill excavations adjacent to the streets, to persons injured by such violation.

4. A city property owner, on whose lot surface water had collected so as to form a pond in an excavation, is not liable, by reason of his failure to protect the pond by fences, for the death of a child while bathing in the pond without permission or invitation from the lot owner.

Appeal from St. Louis circuit court; Daniel Dillon, Judge.

Action by Anthony Moran and wife against the Pullman Palace-Car Company and another. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

The following is the plat referred to in the opinion:



John P. Leahy and L. Frank Ottofy, for appellants. Dickson & Smith and W. C. Marshall, for respondents.

SHERWOOD, J. The subjoined plat shows the locality and surroundings of the accident which constitutes the basis of the present action for damages caused by the drowning of plaintiffs' son in a pond. Bernard street, on the north, Montrose avenue, on the east, Scott avenue, on the south, and Cardinal avenue, on the west, are the boundary lines of a square of ground owned by the Pullman Car Company. Within that square of ground is located a pond caused by excavations in quarrying rock there. There are no houses in the immediate neighborhood, except as indicated on the plat, in the northwest corner of Bernard street and Montrose avenue, and on that avenue. With the exception of Montrose avenue, none of the streets in the vicinity have any existence, save on paper, there being nothing to indicate where they are; and westward from Montrose avenue, for more than half a mile, the country is an open prairie, crossed at will by foot passengers, and travelers on horseback or in vehicles. Along the entire front of the property thus bounded (that is to say, on the west line of the sidewalk on the west side of Montrose avenue) extended a perpendicular bank of earth, something like 6 feet high, so perpendicular as to require two footboards at the base to keep the earth from falling on the sidewalk. The pond shown by the diagram begins some 20 feet west of the west line of Montrose avenue, still further away from the south edge of the block of ground in question,—that is, on Scott avenue,—a less distance from the north side of the block on Bernard street, and some 25 feet east of the east line of Cardinal avenue. The pond is quite shallow,—not exceeding, it seems, some 3 feet deep in most places, and sloping gradually towards the Cardinal avenue side. On that side it begins quite shallow at first, grows deeper until it is about 3 feet deep some 10 or 15 feet from the shore, when there is a sudden depression, making the water some 15 feet deep. This sudden depression, however, where the water is of that depth, is, it seems, quite circumscribed in area, as indicated by the plat. For a number of years, boys in the vicinity and neighborhood of the pond had been accustomed at all hours during the day to bathing in it. Policemen would occasionally drive them away. Of evenings, men, also, would come to the pond for the purpose of bathing. In the afternoon of June 15, 1892, between 2 and 3 o'clock, plaintiffs' son, a boy some 9 years of age, went in swimming or bathing in the pond, and was drowned; his nude body being shortly afterwards found in the depression already mentioned, about 40 feet from the east line of Cardinal avenue. The boy's parents lived about a mile from the pond, and allowed him

full liberty to play with other boys on the streets. The gravamen of plaintiffs' action, in substance, is: That the pond was attractive to children, who were accustomed to bathe therein. That it was a dangerous place, by reason of the deep hole therein. That defendants knew, or might have known, of the danger of the place to children, and that they were in the habit of bathing in the pond. That defendants negligently permitted the pond to be frequented by children; to remain unguarded and unfenced; neglected to fill said excavation, and to fence the same as required by divers ordinances which were pleaded, and such failure resulted in the death of plaintiffs' son, who entering the pond where it seemed to be shallow, fell over into the deep portion, and was drowned. The answer of the city was a general denial, coupled with a plea of contributory negligence. The answer of the defendant company was, in effect, a general denial, coupled with pleas averring that plaintiffs' son was, at the time of his injury and death, trespassing on defendants' property and, while so trespassing without leave or license, was guilty of such contributory negligence, in wading or swimming about in the pond, as directly led to his death. To these answers, plaintiffs replied.

The ordinances pleaded are as follows: Section 619, c. 15, art. 4: "All holes, depressions, excavations or other dangerous places within the city of St. Louis that are below the natural or artificial grades of the surrounding or adjacent streets, shall be filled up so as to prevent persons and animals from falling into them." Section 620, c. 15, art. 4: "The street commissioner shall notify the owners or occupants of premises on which such dangerous places exist, to cause fences or walls to be built around them; or to cause the same to be filled up, within such period as he shall deem the exigencies of the case may require. In case of failure to comply by any of the owners or occupants of said premises, after the notification above required has been given, then they shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined before the police court not less than ten nor exceeding five hundred dollars." Section 621, c. 15, art. 4: "Whenever the said owner or occupant cannot be found, then the street commissioner shall cause such dangerous places to be fenced in." Section 622, c. 15, art. 4: "The expense which the street commissioner may incur in doing the work above mentioned shall be charged to, and paid out of appropriations for streets and alleys." Section 571, art. 1, c. 15: "Every person who shall cause to be made any excavation in or adjoining any public street, alley, highway or public place, shall cause the same to be fenced in with a substantial fence not less than three feet high, and so placed as to prevent persons, animals or vehicles from falling into said excavations, and every person making or causing to be made any such excavation, and every person who

shall occupy or cause to be occupied any portion of any public street, alley, highway or public place, with building materials or any obstruction, shall cause one red light to be securely and conspicuously posted on or near such excavation, building material or obstruction: provided, such obstruction does not extend more than ten feet in length, and if over ten feet and less than fifty feet, two red lights, one at each end, shall be so placed, and one additional light for each additional fifty feet or part thereof, and shall keep such lights burning during the entire night." With the exception of the last-mentioned section, the ordinances were rejected, as to both defendants, when offered in evidence. At the close of the evidence the court, of its own motion, gave instructions in the natures of demurrers to the evidence, and plaintiffs took a nonsuit, etc.

1. The ordinances which were rejected were properly rejected, and this for several reasons: In the first place, such ordinances only apply to cases where the owner's property extends up to the highway, and the excavation or depression is in such close proximity to that highway as to endanger the safety of travelers, as travelers, on such thoroughfare, and not otherwise. *Eisenberg v. Railway Co.*, 33 Mo. App. 85; *Overholt v. Vieths*, 93 Mo. 422, 6 S. W. 74; *Clark v. City of Richmond*, 83 Va. 355, 5 S. E. 369; *Barney v. Railroad Co.*, 126 Mo. 372, 28 S. W. 1069; 2 Dill. Mun. Corp. (4th Ed.) § 1005. In the second place, a municipal ordinance cannot create a civil liability against a person violating it, and in favor of persons injured by its violation, for this is a power which belongs alone to the sovereign power of the state. The only liability which attaches to the infraction of such an ordinance is the penalty it imposes. *Heeney v. Sprague*, 11 R. I. 456; *Railroad Co. v. Ervin*, 89 Pa. St. 71; *Vandyke v. City of Cincinnati*, 1 Dism. 532; *Kirby v. Association*, 14 Gray, 249; *Flynn v. Canton Co. of Baltimore*, 40 Md. 312; *Fath v. Railway Co.*, 105 Mo. 537, 16 S. W. 913. In the third place, a city is not liable for damages resulting from a failure to enforce such police regulations, such as are the ordinances in question. 15 Am. & Eng. Enc. Law, 1154, and note 3, and cases cited.

2. The last-quoted ordinance is also objectionable for like reasons as before stated, and also for the additional reason, so far as concerns defendant company, that there is no evidence tending to show that it caused to be made the excavation. And the ordinance does not apply, in any event, to one who has bought property with an excavation already upon it.

3. The views expressed in *Overholt v. Vieths*, 93 Mo. 422, 6 S. W. 74, are applicable to the case at bar, and are not rendered inapplicable by the fact that in the former case the child entered onto the premises where he was drowned through adjoining private property. The same principle applies whether the unauthorized entry be made on private grounds,

with private grounds as a medium of reaching the locality where the injury occurs, as applies where a public street is used for a like purpose. *Overholt's Case* has been recently and approvingly cited and followed in the quite recent cases of *Witte v. Stifel*, 126 Mo. 295, 28 S. W. 891, and *Barney v. Railroad Co.*, 126 Mo. 372, 28 S. W. 1069. Having fully discussed in those cases the subject here involved, it is needless to go over the same ground again. Abundant authorities in addition to those just mentioned have been collected by the industry of counsel, which fully maintain the same views as those already announced. The case of *Richards v. Connell*, 63 N. W. 915, was decided last year by the supreme court of Nebraska. The facts in that case are almost identical with those of this case. The action there, as here, was against the city (of Omaha) and the owners of certain uninclosed lots of ground. The petition there alleged that defendants had, for a long time prior to the death by drowning of a boy about 10 years old, permitted the surface water to accumulate on the lots, thereby creating a deep and dangerous pond, and that defendants had failed and neglected to fence the lots, or erect any barrier to prevent children lawfully in the vicinity from falling in the pond; that the lots were in the vicinity of a public school, and adjacent to a street, and in a public place much frequented, and were attractive to children of tender years, who were accustomed to play about and upon the water. The boy was playing upon a raft floating on the water, and fell in and was drowned. A demurrer to the petition was sustained by the lower court. The court say: "The petition, we think, fails to state a cause of action against the defendants, and the demurrers were rightly sustained. The single question presented by the record is whether the owner of a vacant lot, upon which is situated a pond of water, or a dangerous excavation, is required to fence it, or otherwise insure the safety of strangers, old or young, who may go upon such premises, not by his invitation, express or implied, but for the purpose of amusement, or from motives of curiosity." This case also approvingly cites and follows *Overholt's Case*, and distinguishes the case then in hand from what are commonly known as the "Turn-Table Cases." To the like effect, see *Ratte v. Dawson* (Minn.) 52 N. W. 965; *Charlebois v. Railroad Co.*, 91 Mich. 59, 51 N. W. 812; *Murphy v. City of Brooklyn*, 118 N. Y. 575, 23 N. E. 887; *Sterger v. Van Sicklen*, 132 N. Y. 499, 30 N. E. 987; *Greene v. Linton* (City Ct. Brook.) 27 N. Y. Supp. 892; *Clark v. Manchester*, 62 N. H. 577; *Frost v. Railroad Co.* (N. H.) 9 Atl. 790; *O'Connor v. Railroad Co.*, 44 La. Ann. 339, 10 South. 678; *Benson v. Traction Co.* (Md.) 26 Atl. 973; *Mergenthaler v. Kirby* (Md.) 28 Atl. 1065; *McGuinness v. Butler* (Mass.) 34 N. E. 259; *Clark v. City of Richmond*, 83 Va. 355, 5 S. E. 369, and other cases. For these reasons we affirm the judgment. All concur.

GARRISON v. YOUNG.

(Supreme Court of Missouri, Division No. 2.
June 30, 1896.)

DOWER—PETITION FOR ADMEASUREMENT—SUFFICIENCY.

Under Rev. St. 1889, § 4513, providing that a widow shall be endowed of a third part of all the lands whereof her husband was seised of an estate of inheritance at any time during the marriage, a petition for the admeasurement of dower, which failed to allege that, as to the lands in issue, the husband was seised of an estate of inheritance, was fatally defective.

Error to circuit court, Dekalb county.

Action by Margaret E. Garrison against William H. Young. Upon demurrer to the petition, judgment was entered for defendant, and plaintiff brings error. Affirmed.

R. A. Hewitt, Jr., for plaintiff in error.
Wm. Henry, for defendant in error.

BURGESS, J. This is an action for the admeasurement of dower in a tract of land in Dekalb county, Mo., and damages for its forfeiture. The petition, leaving off the formal parts, is as follows: "Plaintiff states: That Henry Hunter died intestate at said county of Dekalb, on the 27th day of December, A. D. 1856, seised of the following described real estate situate in the county of Dekalb, state aforesaid, viz.: The west half of the northeast quarter of section No. (20) twenty, township No. (58) fifty-eight, and in range No. (30) thirty. That said Henry Hunter left this plaintiff as his widow, and the following named children (issue of said Hunter and this plaintiff) as his sole heirs, viz.: Ellen Hunter, who afterwards intermarried with N. B. Crawford, Surrilda Hunter, who afterwards intermarried with Jefferson P. Crews, and Henry H. Hunter, which said heirs were entitled to said real estate, subject to the life estate of this plaintiff. Plaintiff says she intermarried with one Oliver Garrison September 25, 1859, and continued to live with him, said Garrison, as his wife, till the 27th day of July, A. D. 1892, at which said last date said Garrison departed this life. Plaintiff further states that defendant, William H. Young, has title to aforesaid lands, under and by virtue of deeds of conveyance from said Ellen, and husband, Crawford; Surrilda, and husband, Crews; and Henry H. Hunter,—heirs as aforesaid,—subject to this plaintiff's dower therein. Plaintiff further says that dower has not been heretofore assigned her. Plaintiff says that on the 1st day of March, 1880, defendant entered into said premises, so alienated by the heirs as aforesaid, and wrongfully deforced plaintiff of dower right therein, and has continued such possession and forfeiture ever since, to plaintiff's damage in the sum of six hundred dollars; that the monthly value of the rents and profits of her said dower estate is ten dollars per month. Wherefore plaintiff prays judgment for six hundred dollars damages for

said forfeiture, and ten dollars for the monthly rents and profits from the rendition of judgment, and for admeasurement of dower in said lands, if susceptible thereof without too great injury, and, if not, plaintiff prays judgment for the monthly rents and profits, as by the statutes made and provided, and for all other relief meet and proper." Defendant demurred to the petition upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, plaintiff refusing to plead further, judgment was rendered for defendant. Whereupon plaintiff sued out her writ of error, and brings the case to this court for review.

An objection urged against the petition is that it does not allege that Henry Hunter, the deceased husband of plaintiff, was seised of an estate of inheritance in the land described in the petition at any time during plaintiff's marriage with him. The averment is that on the 27th day of December, 1856, he died seised of said land. Section 4513, Rev. St. 1889, provides that "every widow shall be endowed of the third part of all the lands whereof her husband, or any other person to his use, was seised of an estate of inheritance, at any time during the marriage, to which she shall not have relinquished her right of dower, in the manner prescribed by law, to hold and enjoy during her natural life." "The widow has dower in all freehold estates of inheritance which her issue, if any, could have inherited as heir of her husband, and of which he was seised during coverture." Tied. Real Prop. § 116. It is not sufficient, in order to entitle her to dower, that her husband be seised—that is, possessed—of the land, but he must be seised of an estate of inheritance. An estate of inheritance is such an estate as descended to the heirs of Hunter on his decease, and, while he may have been seised of an estate in the land in question, it by no means follows that he was seised of an estate of inheritance. The one may and does often exist without the other. If Hunter's interest in the land terminated with his death, plaintiff is not entitled to dower, for the reason that he was not seised of an estate of inheritance. The averments in the petition do not show that the seisin of plaintiff's husband was of that character which entitles her to dower, and it is, we think, fatally defective. The judgment is affirmed.

GANTT, P. J., and SHERWOOD, J., concur.

JACKSON COUNTY v. ARNOLD et al.

(Supreme Court of Missouri, Division No. 2.
June 30, 1896.)

ELECTIONS—REGISTRATION.

1. The court takes judicial notice of the time when a presidential election is to be held.

2. Election Law, § 5, provides that the board of election commissioners, after its first organization, shall prepare for a new registration of voters for the next general city, state, or county election. Section 21 provides that the board shall meet four weeks preceding the first general election which may occur after the appointment of the commissioners, and make a general registration of voters, and that "a new general registration shall be made by the board of registry in every year thereafter in which a presidential election occurs, and just prior thereto—the first day of registration being on Tuesday, four weeks before such election," etc. *Held*, that a general registration must be made in every presidential year, prior to the fall election, without regard to the fact that a previous registration was made for the general city election in the spring of the same year.

Appeal from circuit court, Jackson county.

Petition by Jackson county for an injunction against H. Clay Arnold and others, constituting the board of election commissioners, to restrain defendants from making a general registration for the presidential election of 1896. From a judgment refusing an injunction, petitioner appeals. Affirmed.

L. H. Waters and R. H. Field, for appellant. Laughlin & Davis, for respondents.

GANTT, P. J. This is an appeal from a judgment of the circuit court of Jackson county denying an injunction against the election commissioners to prevent them from making a general registration this year for the general presidential election to be held in November next. This court takes judicial notice that an election for president of the United States is to be held at the general election for state and county officers on the first Tuesday in November next. The county court of Jackson county insists that, inasmuch as there was a registration in Kansas City for the municipal election in that city this last spring, there is no law for another registration this year, but that recourse must be had to the supplemental registration provided in the statute; whereas the election commissioners hold that, as there is to be a presidential election this year, they are required to make another general registration this fall.

The only provisions of the election law to be construed are as follows (Laws 1895, p. 5):

"Sec. 5. General Registration of Voters Provided for. After the first organization of such board of commissioners, it shall prepare for a new and general registration of voters for the next general city election, or general state or county election, as the case may be; and when made, such registry shall be continued and revised in the manner hereinafter provided."

"Sec. 21. When Registration of Voters Shall be Made—How Conducted. Such board of registry and the election clerks shall first meet in the precinct on Tuesday, four weeks preceding the first general city election, or the first general state or county election which may occur after the first appointment of such board of election commissioners, at

the place designated by such board of commissioners, and they shall then proceed to make a general registration of all voters in such precinct. A new general registration shall be made by the board of registry in every year thereafter in which a presidential election occurs, and just prior thereto—the first day of such registration being on Tuesday, four weeks before such election, and the second day of registration being on the Saturday following; and the third day, Tuesday, three weeks before such election."

Judge Slover denied the injunction. He held that it was the obvious purpose of the legislature to provide for a general registration in every presidential year. We fully concur in the construction given this statute by the learned judge. Indeed, but for the use of the word "thereafter" in section 21, in the last sentence of the said section, no possible doubt could exist as to the intention of the general assembly. It is apparent that the legislature intended there should be a general registration in a presidential year. It is equally apparent that, if we adopt the construction of the county court, there cannot be a general election before the presidential year 1900. This necessarily results from the effect given the one word "thereafter" by the county court. According to their reading, "thereafter" refers to the first general city election held under this statute for its predicate, and a general registration can only occur in a year, "thereafter," different from the year in which said city election is held. The word is awkwardly situated in the sentence, but by transposing it, and placing it (as we think the whole context implies it should be) as the modifier of the verb "should be made," all doubt disappears, and the section would read: "A new general registration shall thereafter be made by the board of registry in every year in which a presidential election occurs, and just prior thereto." Construing the whole statute and every part of it together, we have no doubt that the purpose was to have a general registration in every presidential year, and that the construction of the county court subordinates the principal and most important election to the charter election, which, though of great moment, must be deemed of less significance than the general presidential election. It follows that the circuit court committed no error in refusing the injunction sought, and its judgment is affirmed.

SHERWOOD and BURGESS, JJ., concur.

STATE ex rel. HAHN et al. v. CITY OF WESTPORT et al.
(Supreme Court of Missouri. June 23, 1896.)

COURTS—JURISDICTION—COLORABLE DISPUTES.

Where mandamus proceedings to compel the issuance by a municipality of new tax

bills in lieu of old ones theretofore issued for a public improvement are brought merely from the desire of all the parties to secure a ruling by the supreme court as to the validity of the old tax bills, and not on account of any real controversy over the refusal to issue the new tax bills, the proceedings are properly dismissed.

In banc. Appeal from circuit court, Jackson county.

Mandamus proceedings on the relation of August Hahn and another against the city of Westport and others. There was a judgment dismissing the proceedings, and relators appeal. Affirmed.

Moore & Vaughan and C. O. Tichenor, for appellants. A. S. Marley, Pratt, Ferry & Hagerman, Scarritt, Griffith & Jones, and F. W. Griffin, for respondents.

ROBINSON, J. This is a proceeding by mandamus, instituted at the relation of August Hahn and John O. Fielding, and directed against the city, the mayor, board of aldermen, and engineer of the city of Westport, as defendants, to compel the issuance of certain tax bills against certain tracts of lands in said city for the amount chargeable against them, to pay for the grading of Thirty-Ninth and McGee streets, in said city. The work of grading the streets was completed in 1893, and tax bills were then issued, and delivered to the contractor, Fielding, one of the relators herein, to pay the price of the work, which amounted to something over \$9,000, which, at the time of their issuance, were sold and assigned by Fielding to his co-relator, Hahn. All the bills thus issued, except those described in the alternative writ, amounting to \$2,579.08, have been paid. The alternative writ, after reciting all the ordinances of the city authorizing the doing of the work in question, and the contents of the tax bills heretofore issued to pay therefor, declares the ordinance, as passed by the city, to be insufficient to warrant the issuance of the tax bills above named, and closes with this command to the defendants: "By ordinance, levy and collect special taxes on the owner or occupier of all lots or tracts of land described in each of the tax bills hereinbefore enumerated and described, to which said tax bills, and the record thereof, reference is had for a description of such lands, for the purpose of paying the cost of the grading aforesaid, or that part of such cost which is, under the law, chargeable against the said lots or tracts of land, and that you issue and deliver to the petitioners valid special tax bills in lieu of the bills hereinbefore enumerated and described, or that you show cause to this court, at its session in the city of Independence, at 9:30 a. m. on the 9th day of September, 1895, why you have not done so." During the progress of the proceedings, and before the issues were finally made up, upon which the court acted, the personnel of several of the defendant office holders changed, by resignation and otherwise, and we give the following as a history of the different

pleadings filed by the different defendants, and the different dates thereof: September 13, 1895, F. W. Griffin, as attorney for the city of Westport, and also as attorney for Aldermen Tobin and Merriwether, filed demurrers to the alternative writ. And on the same day Aldermen McMillan, Banta, Knepp, Wheeler, and Balcolm, and Engineer Robertson, filed, by their attorney, a like demurrer. September 17, 1895, R. J. Ingraham, as city attorney, filed a written withdrawal of demurrer filed by F. W. Griffin for the city. On the same day, Slavens, as mayor, on his own behalf, and on behalf of D. D. Drake, as alderman, filed a motion to dismiss the case, on the ground that the writ was collusive and fraudulent; and on same day B. F. Jones, *amicus curiæ*, filed suggestion that the suit was collusive and fraudulent. October 18, 1895, the city of Westport, R. J. Ingraham, mayor, and D. D. Drake, as alderman, by their attorney, filed their joint return, admitting most of the facts, but claiming, as independent defenses: "First. That since the issuance of the alternative writ J. W. Slavens, as mayor, and F. T. Robertson, as engineer, original defendants, had resigned their offices, and R. J. Ingraham had been appointed mayor, and H. B. Abercrombie, city engineer. Second. No good-faith demand was ever made for new tax bills, but any demand made was pursuant to a fraudulent scheme to have instituted a collusive suit of the character hereinafter described. Third. This is a collusive and fraudulent suit, in which no adverse interests are at stake, and in which the interests of the parties are identical; certain of the defendants conspiring with relators to impose upon the court a pretended controversy for the sole purpose of obtaining a decision as to the validity of certain tax bills against third persons who are not parties to the action. The active conspirators in the fraudulent scheme are defendants Aldermen McMillan, Banta, and Tobin. Fourth. The alternative writ joins two separate and distinct pieces of work, and there is therefore an improper joinder." On the same day, October 18th, defendants McMillan, Banta, Knepp, Wheeler, and Balcolm, and Robertson, the former engineer of the city, by their attorney, filed what they call their separate return to the alternative writ, admitting the facts stated in such writ to be true, but denying the conclusion of law set out in the writ (a demurrer, in effect), and then proceeding with a denial of the allegations of fraud and conspiracy charged to them by the suggestion filed by B. F. Jones as a friend of the court, and the like charges made against themselves in the return of the city of Westport, Ingraham, as mayor, and Drake, alderman. Upon the demurrer filed by Aldermen Tobin and Merriwether, no action was ever taken, and no return was ever made. On the above pleadings the court proceeded to hear the testimony as offered by all parties pleading, on the different issues as raised by each, and, at the conclusion thereof,

entered its judgment dismissing plaintiffs' writ, and the entire proceedings; and, for its refusal to set aside its finding and judgment and award to the relators a new hearing, they have prosecuted their appeal to this court.

Just what was the moving consideration with the court, which resulted in its denial of the writ and dismissal of the proceedings, cannot be accurately determined by declarations of law given on the different issues of facts raised, as defendants asked none, and all the declarations of law, as well as the instructions in the nature of finding of facts, tendered by relators, were refused. But in their tender and refusal two pertinent facts in this inquiry are made quite manifest: First, by what relators term their refused instruction numbered 2, which reads as follows: "(2) The court declares that there is no evidence of any fraud, either on the part of relators, or on the part of any of the respondents." We know that the trial judge, who had all the parties before him, heard the testimony, and witnessed their demeanor while upon the stand, discovered some evidence of fraud on part of the relators and a part of the defendants, in the manner of getting up this, as a fictitious suit, in order to get a ruling from this court upon a question that was not a real, substantial controversy between those who appeared as adverse parties to the litigation on the face of the papers. Second, by a reading of relators' refused instructions 4 and 5, as follows: "(4) Unless the tax bills sought to be compelled to be issued will be valid, then this writ must be denied. (5) The tax bills sought to be compelled to be issued will be valid." It is equally as apparent that relators' real effort was more to secure a ruling of the court as to the validity or invalidity of the tax bills heretofore issued, than it was to secure absolutely the issuance to them of new tax bills. While the reasons that led the trial court to the judgment entered herein are not as clear as if declarations of law had been given upon all the issues of fact raised by the pleadings and testimony, still the reasons are overwhelming, from an examination of the facts as disclosed by the record, why the trial court should be sustained in its judgment denying its final writ, and dismissing the proceedings. Without going into the details of the testimony, we feel justified in announcing that upon almost every page of the record facts are disclosed that give unmistakable evidence of a mere colorable dispute between relators and defendants, and upon which relators and most of the defendants desire simply and only a ruling as to the validity of the tax bills heretofore issued to, and now held by, relators. That this is not a good-faith proceeding on the part of relators to have issued to them absolutely new tax bills, in lieu of those heretofore issued by the city and now held by relator Hahn (according to the command of

the alternative writ), is conclusively shown, in fact, is absolutely confessed, by the relator Hahn, from the witness stand, as appears by the following questions and answers thereto: "Q. Mr. Hahn, did you sign the demand that was made for the new tax bills? A. Did I sign it? Q. Yes, sir. A. Sign what? Q. Did you sign the demand that was made for the new tax bills? A. No, sir. Q. You never did? A. No, sir; for new tax bills? Q. Yes, sir. A. No, sir. Q. The demand to the city council, I mean? A. To throw the old ones away? Q. Yes, sir. A. No, sir. Q. Did you ever at any time want that done? A. I wanted it done if it could be done legally, but I understood that, if there was new tax bills issued, they would have a better way to fight them than the old ones. I did not want them if they were not legal. Q. Then do I understand you to say that you did not want the new tax bills to be issued? A. No, sir; unless the supreme court decides they are legal. There is a scheme in it, and they would fight the new ones, if they were issued, just the same as they have the old ones. That is what I understand. Q. Well, when you presented your demand, or the demand that was presented in your name and the name of Mr. Fielding, did you sign the paper? A. No, sir; I never signed it at all. Q. You never signed any demand? A. No, sir. Q. Did you ever ask the city council of Westport for new tax bills? A. No, sir. Q. You did not? A. No, sir. Q. Well, did you ever know that the council was asked? A. Well, I said one day that I wanted to know where we stood; that if they did not intend to pay the old tax bills, and we could not make them do it, I wanted to know it, so that I could tell where I stood. I said that if they would not pay the old ones, and they could not be made to pay them, that I wanted new ones issued, in such a way that there would not be any trouble about it; and I heard afterwards that certain parties would fight the new tax bills after they were issued, and they could beat them easier than the old ones. Q. Well, did you ever ask the council for new tax bills? A. No, sir. Q. You never did? A. Never. Q. Are you willing to give up your old tax bills now, and take new ones in their place? A. Yes, if the supreme court would decide that the new ones are good. Q. But, if the supreme court did not decide it, you are willing to hang onto the old ones? A. Well, I would like to hear the supreme court give a decision on the old tax bills, and say they are good. Q. Then you will hang onto the old ones? A. Yes, sir; that is the way, until the supreme court decides it. The court here in Kansas City has decided it, and I want to hear what the supreme court has to say about it. The court here in Kansas City decided they were not good, and in that asphalt case the supreme court decided they were good, and I want to know which is

right. Q. Well, answer my question, please. Do you want new tax bills, or do you want to hang onto your old ones? A. I want the supreme court to decide the case. Q. You want it decided in your favor? A. Of course. Q. Until the supreme court decides it, you will do nothing? A. No, sir. Q. And until that time you want to hang onto your old bills? A. If they will promise me they will be paid, so there will be no hereafter, then I will take new ones; but if they don't promise that, and they will fight the new ones, then I want the old ones until the supreme court decides it. Q. Well, it amounts to this: that the supreme court will have to decide this matter, one way or another, before you will give them up? A. Yes; if the council guaranties that the new ones are good, I will take them; but, if not, I will hold onto what I have got. I will let the supreme court decide it. Q. And until that time you will hang onto your old ones? A. Yes, sir."

In justice to relators, it might, perhaps, be said that he afterwards, on cross-examination by his attorney, stated that he did sign a demand to the city for the issuance of new tax bills, as appears from the following colloquy between himself and his attorney; "Q. Mr. Hahn, that is your signature? A. That there? Q. Yes, sir. A. Yes, sir. Q. That is your signature to that paper? A. Yes, sir. Q. So, if that is the petition, and that is your name, as you say it is, you did sign that paper? A. Yes, sir, I did; but I did not know that there was anything in it about the new tax bills, or not. If I did, I don't recollect it now. That is my name, though."

Still, when he admits that he did sign the petition shown to him by his attorney, that was afterwards proven to have been presented to the board of aldermen of Westport and refused, it is most manifest that it was not intended as a good-faith demand for new tax bills in lieu of those held by him. Relator was willing to give up these that he now has, and take the new ones that he was demanding, only on the condition, as he expresses it, that the supreme court would decide that the new to be issued would be valid, and were better than those he then and now holds. In other words, the demand was a sham made by Armstrong in relator's behalf, as was the refusal to issue new tax bills by the board of aldermen of Westport. Several of the board of aldermen testify that they were requested by Armstrong to vote for the resolution refusing the request of the petition presented by himself on behalf of relators, for the new tax bills, and confess that they did so in order that the case might be taken to this court to secure a ruling as to the validity of the first tax bills issued by them, similar ones to which had been declared void by the court of appeals. If, after the reading of the testimony of the board of aldermen who

were called as witnesses, and of the relator Hahn, there had remained a possible doubt in the mind of the court as to the fictitious character of these proceedings, that doubt would have been removed when we were called upon to read the following exceedingly brief and modest suggestions filed by the able counsel representing relators in their effort to reverse a judgment hostile to their clients' interest, if they or their clients desired what was commanded by the alternative writ issued herein, in the first instance, on their application: "The tax bills in controversy, held by August Hahn, are void, if the case of *City of Westport v. Mastin*, 82 Mo. App. 647, correctly states the law. If they are void, of course the city should be compelled to issue new ones in accordance with law. If they are not void, of course the city has done its duty, and the judgment should be affirmed. The relators would prefer having the old tax bills held valid, because, if new ones are issued, it may involve a loss of interest." "Instead of being abused, it seems to relators that the aldermen are simply doing their duty when they refuse to issue new bills until the highest court of the state tells them that it ought to be done. They cannot be guilty of a fraud by obeying the mandate of this court." Would one think, from the above brief suggestions to this court by counsel for relators, that they, in good faith, demanded the issuance of new tax bills in lieu of the old heretofore issued to their clients? On the contrary, counsel tell us, in unqualified words, "The relator would prefer having the old tax bills held valid, because, if new ones are issued, it may involve a loss of interest." And could we infer, so far as any suggestion of relators' counsel might reach, that the board of aldermen of Westport had refused to do any duty that would call for a mandatory order from this court commanding its performance? Counsel, in their argument to us, say that "the aldermen were simply doing their duty when they refused to issue new bills," etc. Then, if the aldermen were doing their duty when refusing to issue the new tax bills, and relators prefer to retain the old, to having issued to them new bills, we see no call for the exercise of the judgment of this court, and will decline to review, by this indirect and fictitious proceeding, the action of the Kansas City court of appeals in the case of *City of Westport v. Mastin*, involving the validity of tax bills issued under similar circumstances and under like ordinances to the tax bills now held by relators, or, rather, to decide by this indirect action whether or not the reasoning of that opinion is right or wrong, as is the manifest purpose of this proceeding. The thing relators want is not new tax bills ordered issued to them, but this writ denied, and, as a result of that denial, a declaration from this court in favor of the validity of the tax bill now held by them, adverse to the opinion of the Kansas City

court of appeals in the Mastin Case on similar tax bills. The defendant aldermen, with probably one exception, desire the same thing. The real parties to this proceeding are not adverse, but friendly. Their apparent disagreement is feigned, not real; and this court, for that reason, 'as was probably the reason for the trial court's action in denying the permanent writ, will sustain its judgment. As we understand the law, this court, as the trial court, would be wanting in authority to try and determine the issues as raised upon the writ and return made thereto by the conspiring aldermen, or any and all parties appearing, whenever the fictitious character of the proceedings was made to appear to the court. The authority of this, as of every judicial tribunal, is limited to the consideration of rights which are actually controverted. Unless some individual right directly affecting the parties litigant is thus brought in question, so that a judicial decision becomes necessary to settle the matter in controversy between those relative thereto, the courts have no jurisdiction; and it would be a perversion of the purposes for which they were instituted, and an assumption of functions that do not belong to them, to undertake to settle abstract questions of law, in whatever shape such questions may be presented. *Brewington v. Lowe*, 1 Ind. 21, and cases there cited; *Smith v. Railway Co.*, 29 Ind. 546; *State v. San Pablo & T. R. Co.*, 149 U. S. 308, 13 Sup. Ct. 876; *Ex parte Haymond*, 91 Cal. 545, 27 Pac. 859. The legislature, and not the judiciary, promulgate laws for the future guidance of the people. Courts are called upon to construe the law, and apply it to the particular facts in controversy in actual controverted cases before them. Sham proceedings and colorable disputes between parties actually friendly, to obtain the opinion of courts upon questions of law, for their own interests, or for their future guidance, have ever been condemned, and should never receive, knowingly, their approval. In *Lord v. Veazie*, 8 How. 254, Chief Justice Taney, in writing upon this question, uses this language: "It is the office of courts of justice to decide the rights of persons and property, when the persons in interest cannot adjust them by agreement between themselves, and to do this upon the full hearing of both parties. Any attempt, by mere colorable dispute, to obtain the opinion of the court upon a question of law, which a party desires to know for his own interest, or his own purpose, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as punishable contempt of court." It so clearly appearing that this is no adversary proceeding; so far as relators and the majority of the board of aldermen of the city of Westport are concerned, who could and would have issued, in lieu of the old, new tax bills,

had relators desired it, this court will refuse to discuss the issues raised by the pleadings, except as above, and will affirm the judgment of the trial court, dismissing the proceedings and denying relators' writ.

MACFARLANE, SHERWOOD, BURGESS, and GANTT, JJ., concur. BARCLAY, J., concurs in result. BRACE, C. J., absent.

PREWITT v. MISSOURI, K. & T. RY. CO.
(Supreme Court of Missouri. June 15, 1896.)

RAILROADS—INJURIES TO PERSONS ON TRACK—
VIOLATION OF ORDINANCE REGULATING SPEED—
PLEADING AND PROOF—IMMATERIAL VARIANCE—
CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. The violation of an ordinance regulating the speed of trains within the city limits is negligence per se.

2. Where defendant was negligent in running its train faster than allowed by ordinance, and by reason thereof plaintiff was injured without fault on his part, he was entitled to recover, whether the injury occurred in the particular street named in the petition, or elsewhere on defendant's road within the city.

3. Evidence that plaintiff, who was riding a mule, and had stopped at a house near the track, saw a train coming, and endeavored to get at a safe distance; that he did not know that the mule was afraid of cars; but that the whistling of the locomotive frightened the animal so that it became unmanageable, and carried his rider upon the track,—warranted a finding that plaintiff was free from negligence. *Sherwood and Robinson, JJ.*, dissenting.

In banc. Appeal from circuit court, Pettis county; Richard Field, Judge.

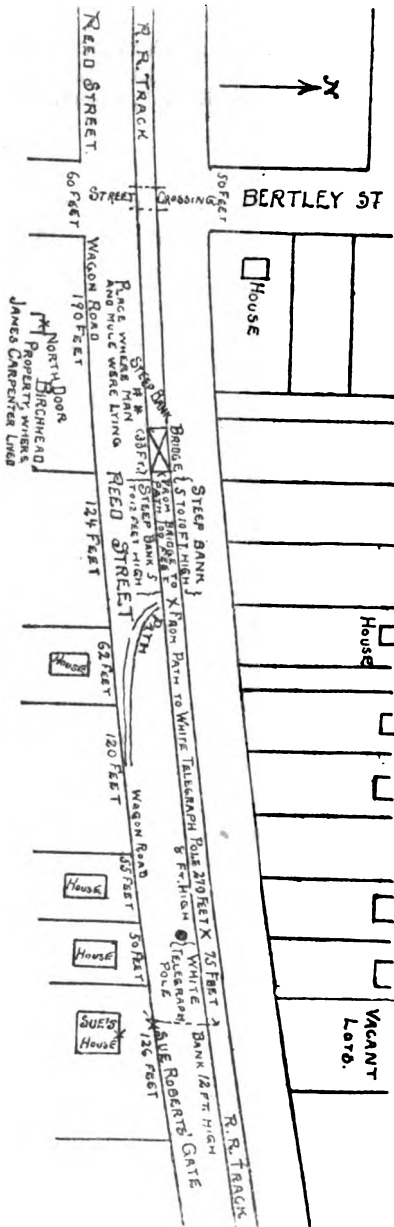
Action by Dabney Prewitt against the Missouri, Kansas & Texas Railway Company to recover for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

Jackson & Montgomery, for appellant. C. E. Yeater and Waller & Rodes, for respondent.

BURGESS, J. This is the second appeal by defendant in this case. The first judgment was in favor of plaintiff in the sum of \$8,500. The one from which the present appeal was taken is for the sum of \$6,000. When the case was here on the first appeal, it was heard in the second division, the judgment reversed, and the cause remanded, because of errors committed by the trial court in giving and refusing instructions. 115 Mo. 283, 21 S. W. 742. The suit is prosecuted to recover damages for personal injuries sustained by plaintiff by being run over by the cars of defendant in the negligent violation of an ordinance of the city of Moberly limiting the rate of speed of cars and locomotives propelled by steam to not exceeding six miles per hour. No objection was made to the petition. The defenses were a denial of the alleged negligence, and charges of contributory negligence.

There was no material difference in the facts disclosed at the last trial from the first,

which are very fully stated by Gantt, J., in the opinion then delivered, and which it is unnecessary to restate. The plat referred to by the witness Ferris is as follows:



Over the objections of defendant the court instructed the jury in behalf of plaintiff as follows: "(1) If the jury believe and find from the evidence that on August 13, 1889, locomotive engines and trains of cars were, by an ordinance of the city of Moberly, prohibited from being run within the corporate limits of said city at a greater rate of speed than six miles per hour; and that on said day defendants, by their servants, did run an engine and train of cars, known as the 'tie train,' within the corporate limits of said city, at a

place where persons were usually upon defendants' track, at a greater rate of speed than six miles per hour; and that, as said train approached, plaintiff's mule became frightened and unmanageable, and ran away with plaintiff, and against his will and efforts to prevent carried him onto said railroad track at said point ahead of said train; and that in consequence of said train being run at said time and place at a greater rate of speed than six miles per hour defendants' servants running said train were unable to stop said train, after they became aware that plaintiff was on said track and in peril, in time to avoid striking and injuring plaintiff; and that, had said train been running at said time and place at the rate of speed of six miles per hour, it could, by the exercise of ordinary care on the part of the defendants' said servants, have been stopped, after plaintiff was discovered by them on said track and in peril, in time to have avoided striking and injuring plaintiff, —then the jury may find defendant guilty of negligence. And if the jury so find the defendant guilty of negligence, and further find that in direct and immediate consequence of said negligence, and without negligence on plaintiff's part contributing thereto, plaintiff was struck by said train, and received the injuries complained of in his petition, then the verdict of the jury must be for the plaintiff. (2) If the jury find for the plaintiff, then, in estimating his damages, they may take into consideration all of the mental and physical pain and anguish already suffered by him, and all future mental and physical pain and anguish, if any, that will result to him from said injury; also his loss of time, and the value thereof, since the date of his injury; and if the jury find that his injuries are permanent and lasting in their character and effect, and that they will in the future disable him from earning money and making a support, or will impair his ability to do so, they should take these facts into consideration, and should estimate the value of the time and services that he may thereby lose during his life; and the jury should assess plaintiff's damages at such sum as, in their judgment, will compensate him for all his losses and sufferings, both past and future, that has or will result to him by reason of his injury, not exceeding the sum of \$25,000, the amount claimed in plaintiff's petition."

Defendant's first insistence is that the action is based upon the theory that the injury occurred in a public street, where plaintiff had a right to be, and those in charge of the train should have been on the lookout for him, and if, because of their failure to do so, he was injured, he was entitled to recover; while the evidence showed that the injury did not occur at a public street, and, in the absence of evidence showing use of the track by license or acquiescence of the defendant, the court erred in submitting the case to the jury, because there was not sufficient evidence to warrant it in so doing. If this contention can be main

tained, it must not only be upon the ground of the want of substantial evidence that the injury occurred in Reed street, but it must also appear that, unless so shown, plaintiff is not entitled to recover. The facts that plaintiff was not injured in Reed street, and that he was on the track without license from defendant, do not, we think, necessarily preclude his recovery. Defendant was guilty of negligence per se in running its train at a rate of speed exceeding six miles per hour within the corporate limits; and if, by reason thereof, plaintiff, without fault or negligence on his part contributing directly thereto, was run over and injured, he was entitled to recover, whether the injury occurred in Reed street or elsewhere on defendant's road in the city.

Plaintiff's first instruction is assailed upon the ground that the petition alleges that the collision occurred along Reed street, while this instruction submitted the case to the jury on the theory that plaintiff was injured at a place not within any street. This contention is sufficiently answered by what has already been said with respect to the sufficiency of the evidence to authorize the submission of the case to the jury. The variance was not material, as it made no difference whether the injury occurred in the street or elsewhere within the city limits on defendant's road.

Another objection to the instruction is that, in order to entitle the plaintiff to recover, it simply required the jury to find that the plaintiff was struck by defendant's train within the corporate limits of said city "at a place where persons are usually upon defendant's track." It is argued by defendant that by this instruction the simple fact of people being on the track is made the test for imposing the same liability at a place other than a street that would attach to the movement of a train within the limits of a street. Conceding this contention to be true, we are unable to see how defendant is injured thereby. It simply required more of plaintiff than it was necessary for him to prove in order to entitle him to recover. If an error at all, it was in favor of defendant, and it should not be heard to complain upon that ground. Under our view of the case as before indicated, it was not necessary to plaintiff's recovery that he prove that the accident occurred "at a place where persons are usually upon defendant's track."

A still further objection to the instruction is that it did not properly explain contributory negligence, to which it alludes. It is not claimed that it was incumbent upon plaintiff to allege or prove that he was free from negligence, but, having elected to introduce that element into his own instruction, it is insisted that it was his duty to see that the jury were properly told what constituted contributory negligence. A sufficient answer to this contention is that, whatever may have been plaintiff's duty in this regard, no error was committed by his failure to do so in this case, as in five out of eight instructions given on be-

half of defendant the jury were told, in unmistakable terms, what the rights of defendant were with respect to its track, the duties of those in the management of the train which caused the injury, as well also as what acts on the part of plaintiff, if true, constituted negligence upon his part, and precluded his recovery; thus presenting the rights of defendant, and what acts on the part of the plaintiff, if found to be true, constituted contributory negligence on his part, in every conceivable form, and absolutely fair to both parties.

It is further insisted that the running of defendant's train, at the place where plaintiff was struck, at a rate of speed exceeding the limit prescribed by ordinance, was not negligence, although within the corporate limits of the city. This question seems to have been settled adversely to this contention by recent adjudications of this court. *Bludorn v. Railway Co.*, 108 Mo. 439, 18 S. W. 1103; *Merz v. Railway Co.*, 88 Mo. 672; and *Grube v. Railway Co.*, 98 Mo. 330, 11 S. W. 736. But a distinction is attempted to be drawn between the facts in those cases and the case in hand, in that the accidents out of which the litigation in those cases grew occurred in the private switch yards of the defendant therein, or on its private property, while in the case at bar the collision occurred not within the switch yards, or on the private grounds of defendant. The ordinance, in terms, applies to all trains running within the city limits, and does not restrict their speed to any particular locality, but fixes the maximum rate of speed at not exceeding six miles per hour within the city limits. The power of the city under its charter to pass such an ordinance as a police regulation is not questioned, but it is argued that it should be confined in its application to streets and crossings. The purpose of the ordinance was to protect life and property within the city on railroad tracks, on and along public streets, at the crossings of such streets, as well as in switch yards and on private grounds; and, even if the collision occurred elsewhere than on a street, plaintiff was entitled to recover, unless by his negligence he contributed to his injury. In the *Merz Case* there is quoted with approval from the decision of the St. Louis court of appeals in the same case the following: "That when a railroad company lays down its tracks in a populous city, not within any inclosure, but on ground open to the public, the mere fact that the rails are not laid over a public street or highway, but on private property of the company, ought not to be held to relieve it of its obligation to observe all reasonable municipal regulations as to the movement of trains within the limits of the corporation." Our attention has not been called to any authority which tends in the remotest degree to sustain the position of defendant upon this question.

It is also contended that there was no negligence shown on the part of the defendant, because the excessive rate of speed com-

plained of, even if illegal, was not the proximate cause of plaintiff's injury; that the evidence clearly establishes that, if the train had been running but six miles an hour, it could not have been stopped in time to have avoided the collision with the plaintiff, after he was discovered on the track, or even after he went upon the track in front of the approaching train. That defendant was guilty of negligence per se in running its train within the corporate limits at a rate of speed in excess of that fixed by ordinance is indisputable, but whether such negligence was the proximate cause of the injury was a different question. With respect to this issue the witnesses differed very materially as to the distance the train was from plaintiff at the time he went upon the track and his perilous position became known by those in charge of the train, as well also as to its rate of speed, and whether it could have been stopped, if it had been running at not exceeding six miles per hour, in time to have avoided the collision. These were questions, under the evidence, upon which reasonable minds might well differ, and were, under the circumstances, properly submitted to the jury.

A final contention is that plaintiff is not entitled to recover, because of his contributory negligence. This contention is predicated upon the fact that plaintiff was wrongfully on the track, and the assumption that he went there voluntarily, and that he did not use the ordinary precaution to avoid danger. Plaintiff testified in his own behalf, and, after explaining how he came to be at the house of Sue Roberts on the evening of the accident, and stating that he asked her for some tobacco, he testified as follows: "Q. What took place next? A. Well, while she was gone in the house to get the tobacco, she never came out with the tobacco, she got to the door, and the car whistled; not whistled, but came in sight; and I says to the nigger man, 'I see I must get away from here,' and started to ride away, and went about two or three steps right ahead, which used to be a way to go out; and the nigger woman says, 'There is no way to get out of there now,' and I hurled the mule back and came back the other way. Q. Had there been a way to get out there, east? A. Yes, sir. Q. How far was it from her house,—how far away to turn out? A. Not only just a little piece. Q. Where did you go after you turned back? A. I went and turned and started off in a lope when I turned back, and went on up there by Dick Coates' house, and the mule then commenced running sideways, and run out of the road, and run upon the track. Q. What did you do to keep him off the track? A. Done all I could, pulled on the left rein with all the strength I had, but I could not keep him off of it. Q. Where did the mule go? You say he run off with you. Where did he take you? A. Run upon the track, and run to the culvert there, and I was struck by the train and knocked off. Q. About the time the mule

carried you upon the track, when you first got upon the track, where was the engine of the train? A. Down about Sue Roberts', right along about her house, little below somewhere, as good as I could tell you. * * * Q. Well, what happened after you got on the track? A. The mule run down to the culvert, and I was caught there. * * * Q. State whether or not you heard that train whistling any. A. Yes, sir; heard it give three little short whistles when I run upon the track. Q. When you run upon the track? State whether or not it was before or after you got up there. A. It was just when I went up there. Q. What did the mule do when the short whistles were made? A. Then he commenced worse than ever, doing bad enough when he first commenced running. Q. State whether he was running. A. He was running, jumping, and bucking. They said he was jumping about 15 feet. Q. What do you say? A. That is what I say; that he jumped about 15 feet at a jump, they say. Q. Never mind what any one else said. A. I know it myself. Q. What did the mule do when he got on the track? A. He run and bucked and done all he could do. Q. State what efforts you made, if any, to get him off of the track. A. I done all I could do; pulled on him; done every way to get him off, and could not get him off. Q. Now, when the mule got down to the culvert, what took place there? State that to the jury. A. There is where the train struck us. * * * On cross-examination he testified as follows: "Q. The man didn't have any tobacco? A. No, sir. Sue said she had some long green in the house. She went in there to get it, and while she was gone in there after the tobacco the train popped around the curve, and I says, 'I must get away from here,' and started to ride away from there. Q. Why did you want to get away from there? A. I thought I had better get away. Q. What was the trouble about your staying there? A. No other trouble about it. Q. Why had you better get away? A. Because the train was coming, and I thought I had better get out of there, maybe. Q. Why did you want to be getting out of there? A. I thought it was right to ride away from the train; to get away from there. Q. What did you want to get away from the train for? The train would not hurt you if you stayed down there by Sue's. A. Only thing people like to get out from where they are if a train comes along, if you are traveling along close to where they come. I have seen lots of people drive out a good piece from where it is. Q. From where what is,—the train? A. Yes, sir; ride out and turn their horse around, or something to get out of the way. Q. You were afraid of this mule,—is that what you mean? A. Yes, sir. I was not afraid of him much. Q. You were afraid he would run off with you? A. No, sir. Q. Didn't you say you were a while ago? A. Of course, a body feels afraid a little,—afraid

of horses scaring at the train, maybe. Q. That was the reason you wanted to get out of there? A. Yes, sir; I think so. Q. The truth is that you wanted to get away from there because you thought the mule might run off, and do some harm? A. Yes, sir; lots of people do start to ride away. Q. You thought you would get away from the train because you thought your mule would run off? A. I didn't think nothing about that, sir. Q. What do you mean, then, now, about getting away from there? Did you think the mule would get beyond your control? A. No, sir. Q. Why didn't you get off and hold him? A. I didn't have no chance of getting off after he commenced bucking with me. Q. I am talking about right down there at Sue's gate. A. I could have had plenty of time to ride up there, and turned over south, if the mule had not run upon the track, and the train coming so fast. Q. Now, Mr. Prewitt, don't try to make any argument, please. Let me just ask the question, why didn't you get off the mule and hold it, out in front of Sue's house? A. Because I thought I could ride up there and ride clear off from the railroad, and turn off south when I got up there at the crossing. Q. Why didn't you stay on your mule right there in front of Sue's house? A. I didn't want to. Q. Why didn't you want to? A. Because there is lots of people that turn their horses clean around when a train is coming. Q. Because they are afraid their horses will be frightened at the train? A. Yes, sir. Q. Because they get scared at them? A. Yes, sir. Q. Maybe he would run off and get you hurt? A. Yes, sir. Q. It was because you wanted to avoid the risk or danger of the mule running off, you rode away? A. No, sir. Q. Then you simply went away? A. Because I was afraid, of course. I was riding away because I was afraid he might scare at the train. Q. Was he a young mule? A. He was three years old. Q. Was he a foolish young mule? A. No, sir. Q. Was he standing perfectly still all that time? A. No, sir. Q. Didn't you have to hold him pretty tight while you were talking? A. No, sir. Q. Were you not pulling on the bit to keep him steady? A. No, sir. Q. Perfectly still and quiet? A. Yes, sir. Q. When you heard the train coming down there before you got away from Sue's? A. No, sir. Q. He hadn't yet done anything? A. No, sir. Q. But you were afraid he might, by the time the train got there? A. Yes, sir. I don't know but what he might scare at the train, and that was the reason I was riding off. Q. Didn't you say that you would have to get out of that neck before the train came; you were afraid the mule would run off with you? A. Yes, sir." Other witnesses testified that when the train began to whistle below Sue Roberts' house the mule began bucking and jumping, and ran sidewise up the path onto the track, and that Prewitt seemed to be doing all that he could to hold him.

Upon this evidence defendant insists that under the ruling in the case of *Moore v. Railway Co.*, 126 Mo. 265, 29 S. W. 9, plaintiff was guilty of contributory negligence, and not entitled to recover. The facts in that case differed very widely from the facts in the case at bar. In that case Moore knew that his horses were afraid of the cars. They had been frightened by them a day or two before. They passed the locality in which he was every few minutes; yet he made no effort to get his team to a place of safety, but chose to remain so near the railroad track that the cars collided with his buggy in passing, and injured him. And it was held that one driving on a street along a railroad track with knowledge that a train is likely to pass, and that his horses are afraid of cars, cannot recover for injuries resulting from the frightening of his horses, he having had an opportunity to remove them to a safe distance, and neglected to do so. In the case in hand the evidence does not show that plaintiff knew the mule was afraid of the cars, but showed that when he saw and heard them coming he made every effort to get to a safe distance from them, but the mule became frightened at the short whistles made by the locomotive, commenced bucking and jumping, became ungovernable, and, in spite of plaintiff's effort to prevent it from doing so, it carried him up the path, and onto the railroad track a short distance in front of the train, where the collision occurred. Our conclusion is that the question whether, under the evidence, plaintiff was guilty of contributory negligence, was properly submitted to the jury, and, they having found that he was not, that their verdict should not be disturbed. The judgment is accordingly affirmed.

MACFARLANE, BARCLAY, and GANTT, JJ., concur. SHERWOOD and ROBINSON, JJ., dissent.

HURT v. FORD et al.
(Supreme Court of Missouri, Division No. 1.
June 30, 1896.)

NEGOTIABLE INSTRUMENTS — WHAT CONSTITUTES
DELIVERY — RATIFICATION — EVIDENCE
— STATUTE OF FRAUDS.

1. Where a note, complete in form, but incomplete in fact, because of the lack of a signature necessary thereto, was placed in the possession of the payee with a condition that the signature lacking should be added before the note should become valid, the payee could not afterwards, in default of the signature required, treat the note as delivered, and thereby fix the liability of the other signers.

2. The inference that a note was delivered, which arose from its possession by the payee, may be counteracted by proof that the delivery was based on some contingency that had not happened.

3. In an action upon a note, where the defendants pleaded an oral agreement releasing them from liability, the plaintiff, by failure to plead the statute of frauds in his reply, is estopped from resorting thereto to avoid the agreement.

4. In an action upon a note, where the defendants pleaded that there had been no delivery, it appeared that the note had been placed in the hands of a third party, to procure the signature of H. thereto, under the condition that it should not be delivered until such signature was obtained; that it had been turned over to plaintiff's agent with notice of the condition, and had been by such agent delivered to plaintiff without the required signature. There was some testimony that defendants had approved of the delivery. *Held*, that it was error to refuse to instruct the jury that if defendants, knowing that the note had not been signed by H., approved and adopted the act of the agent in making delivery thereof, they would be liable.

Appeal from circuit court, Jackson county; J. H. Slover, Judge.

Action by Julia G. Hurt against George Ford and J. R. Towers to recover a balance due on a promissory note. There was a judgment for plaintiff, and defendants appeal. Reversed.

The defendants appeal from an order which granted plaintiff a new trial after a verdict for defendants, and also sustained a motion for judgment for plaintiff notwithstanding the verdict. The answer on which the case was tried is as follows (omitting caption and signature):

"Defendants, for their second amended answer to plaintiff's amended petition, admit they signed the note as set forth in plaintiff's petition; admit the same was delivered to plaintiff by one R. L. Yeager, as hereinafter set forth; admit defendants made payments as set forth in petition; and for affirmative defenses to said note defendants aver: First. That said note was signed by defendants, solely for and on account and in renewal of a certain promissory note, in words and figures following, viz.: 'Kansas City, Mo., May 9th, 1883. No. 21,950. Six months after date we promise to pay E. K. Thornton, cashier, or order, at the Bank of Kansas City, eight thousand and five hundred dollars, for value received, with interest from maturity at the rate of ten per cent. per annum. \$8,500. M. R. Hightower. T. R. Towers. Geo. D. Ford.' Defendants further aver that the said promissory note last mentioned was given under and by virtue of the following agreement and arrangement, to wit: The said M. R. Hightower, principal in said last-mentioned note, made application to the plaintiff in the spring of 1883 for a loan of \$8,500 to enable him to purchase a herd of cattle. Plaintiff not then having the ready sum to make said loan, and being desirous to assist said Hightower, who was her brother-in-law, requested said Hightower to procure the defendants to sign a note, with said Hightower as principal, to the Bank of Kansas City, for \$8,500, and then and there requested, authorized, and empowered said Hightower to state to the defendants, in order to induce them to become signers on said note, that she would take up said note when it should become due, and save defendants harmless from its payment. Defendants

aver that, in pursuance thereof, said request and authority, said Hightower requested defendants to sign said note, stating to them that plaintiff had requested him to say, for her, that if they would sign said note, and thus enable him to get the money from the bank, she would take up said note when due, and they should be held harmless from its payment. Defendants further aver that, by reason of such statements and agreement, and relying on the same, they were induced to and did sign said note with said Hightower, and that plaintiff, in pursuance of said agreement above stated and communicated to the defendants, came into possession of said note, the same being turned over to her as an asset of the estate of her deceased husband, and became her property, and by her act in that behalf defendants became and were released from all liability on said note, and the same became as to them null and void, and plaintiff is now estopped from maintaining any action upon the note given in renewal thereof. Wherefore defendants aver that the note described in plaintiff's petition was and is wholly without consideration, and plaintiff ought not to have and maintain her action upon the same. For a second defense, defendants aver that the note described in plaintiff's petition was not only without consideration, as alleged in this answer, but that it is and was of no validity in law, in that it was placed in the hands of one R. L. Yeager, who was at the time the duly-authorized agent of the plaintiff, in escrow, with the direction that it was to be delivered by him to plaintiff, and have effect as a valid obligation, only upon condition that one M. R. Hightower, for whose benefit the instrument was signed, should be procured also to sign the same, and said Yeager received said note charged with such directions and conditions. And defendants further aver that said Hightower was never procured to sign, and never did sign, said note, but, without the knowledge of defendants, or either of them, the said Yeager delivered said note to the plaintiff; that at the time the note in suit was placed in the hands of said Yeager, said Yeager turned over to one Towers the note first above described, and said Towers turned the same over to the defendants; that the knowledge that said Hightower had not signed said note came to the defendants since the commencement of this suit, and the payments thereon were made without the knowledge that the note had been delivered to said plaintiff by said Yeager, contrary to said instructions given to him as aforesaid, and so defendants do herewith tender into court, for plaintiff, the promissory note first above described, and pray judgment. For a third defense, defendants aver that the note described in plaintiff's petition was and is, not only without consideration, as first alleged in this answer, but that it was and is of no validity in law, for it was understood and agreed, be-

tween defendants and one M. R. Hightower, that said Hightower, for whose benefit the said notes were given, should also sign the note in suit, and in pursuance of said understanding said note, after it had been signed by the defendants, was handed by them to their agent, one Maj. Towers, with instructions for him to obtain said Hightower's signature upon the same before delivery thereof, but the said agent, not being able to find said Hightower, took the said note to the said R. L. Yeager, who at that time was the attorney and duly-authorized agent of the plaintiff, and delivered the same to him, at the same time disclosing to said Yeager the instructions he had received from defendants as aforesaid, and the said Yeager, thus having notice of the instructions so given to defendants' agent, received said note charged with said notice, and, without further authority from the defendants, or either of them, delivered said note to plaintiff without obtaining the said Hightower to sign the same. And defendants aver that said Hightower was never procured to sign, and never did sign, said note. Defendants further aver that, at the time the note in suit was placed in the hands of said Yeager, said Yeager turned over to said Maj. Towers the note first described, and said Towers turned over the same to the defendants, who herewith tender into court, for plaintiff, the same. They further aver that the knowledge that said Hightower had not signed the note came to defendants since the commencement of this suit, and the payments thereon were made without the knowledge that said note had been delivered to plaintiff by said Yeager contrary to the notice and instructions given him as aforesaid."

Instructions: The eighth and tenth requests for instructions by plaintiff, denied by the court, are as follows: "(8) The jury are instructed that, although the witness Towers delivered the note in suit to witness Yeager in violation of the instruction of defendants, and although he communicated his instructions to witness Yeager at the time of such delivery, yet, if the jury find and believe, from the evidence, that after said delivery, and after having knowledge that Hightower had not signed said note, defendants approved and adopted as their own the act of said Towers in making said delivery to said Yeager, the verdict should be for the plaintiff." "(10) The court instructs the jury that if they find from the evidence, that the note in suit was delivered by W. A. Towers, as agent for the defendants, to R. L. Yeager, without imparting to him notice that he had been instructed by the defendants not to deliver the note to him until he had secured the name of Hightower thereon, then such delivery was valid and binding, and you must find for the plaintiff in the sum of \$3,500, with interest thereon at the rate of ten per cent. per annum from November 9, 1889; and this you must do, although you may believe

that defendants may have instructed him not to deliver said note until he had secured the name of Hightower on said note."

Beebe & Watson, for appellants. C. O. Tichenor, for respondent.

BARCLAY, J. This is an action upon a note for \$3,500 and interest. The plaintiff is Julia G. Hurt. The defendants are George D. Ford and J. R. Towers. The petition charges, in substance, that defendants made, executed, and delivered, November 9, 1887, to plaintiff, a promissory note, for that sum, payable on or before 12 months from said date, with interest from date at 10 per cent. per annum. It is alleged that defendants paid thereon \$850 for interest to November 9, 1888, and on the same day of 1889 paid the interest in full then accrued. Demand and nonpayment are alleged, and judgment is asked accordingly for the principal and interest. The second amended answer is the vital document for consideration on this appeal. As its effect is the subject of some controversy, we desire it to appear in full with the official report of the case. The plaintiff's reply denies the allegations of the answer. "except such as are set forth in the petition." The cause was tried with the aid of a jury, and a verdict for defendant resulted. At the trial two instructions asked by plaintiff were refused. In consequence of that ruling the court afterwards sustained a motion for new trial, filed by plaintiff. At the same time, the court sustained another motion by plaintiff, namely, for a judgment notwithstanding the verdict, and then a judgment was accordingly given to plaintiff for \$11,434.84, and costs. Defendants moved unsuccessfully to vacate that judgment as unauthorized and erroneous, and then appealed to the supreme court after the usual exceptions.

1. A number of minor points in regard to the procedure in the circuit court have been raised. We shall not touch upon them all, but discuss only those which seem to be finally material. As plaintiff had possession of the note and filed it, the burden of proof at the trial was upon defendants to establish some one of their defenses. Though the Code of Procedure makes no mention of such a motion as plaintiff's filed after verdict, yet it obviously may be resorted to on a proper occasion. If neither the defendants' evidence at the trial nor their pleadings disclosed any defense to the cause stated by plaintiff, it would not serve the ends of justice to grant a new trial, there being really nothing to try, according to the final opinion of the trial judge. In that event the court might properly give its view of the case on a motion such as that which plaintiff filed, waiving, now, the question whether or not it was made in due season. The filing occurred more than four days after the verdict, and the motion is attacked on that account.

But as we find it untenable on its merits, and have not, at present, ample time to investigate the proper classification of such a motion, we forbear ruling on the question of its timeliness. We also consider it immaterial on this appeal to decide whether a motion for judgment notwithstanding the verdict is available where a good affirmative defense appears in the answer, but is not supported by evidence tending to discharge the burden of proof as to that defense. We entertain no doubt that the testimony offered by defendants tended to prove at least one of the defenses set up in their answer. But, as the judgment should be reversed for a new trial of the cause, we prefer to refrain from any comment on the probative effect or weight of the evidence further than the general statement just made.

2. The important and decisive question in the case, raised by the answer, is whether its allegations avoid the prima facie showing of the petition. The gist of the plaintiff's contention is that the answer admits the delivery of the note, and that the facts alleged in connection therewith are legally insufficient to avoid the liability created by the delivery. The defendants repel that contention with vigor, and the discussion which that issue has elicited is both entertaining and very useful to the court. It will be noticed that the answer does not precisely admit an absolute delivery. It states that the note "was delivered to plaintiff by one R. L. Yeager, as hereinafter set forth." The answer then proceeds to set forth a conditional delivery to Mr. Yeager, and a failure of the condition, the facts of which are fully given. To simplify the case as now presented, we shall assume that the conditional delivery was made to plaintiff's agent, or, in effect, to plaintiff herself, though there is some question as to whether the facts should be so interpreted. We consider that view of them, however, most favorable to plaintiff, and we will endeavor to apply the rule of law which, we think, controls this branch of the case, upon that groundwork. Plaintiff's learned counsel argues that no condition could be connected with the delivery of the paper to plaintiff's attorney, asserting that a note cannot be conditionally delivered to the payee or to the payee's agent. The principles which govern that subject are by no means universally settled. On the contrary, we find not only conflicting opinions thereon in other states, but a want of harmony in the decisions in Missouri. The proposition contended for by plaintiff finds support in rulings, or, at least, remarks, in *Massman v. Holsher* (1871) 49 Mo. 87, in *Henshaw v. Dutton* (1875) 59 Mo. 139, and (1878) 67 Mo. 666, and in *Jones v. Shaw*, Id. 667; while in *Carter v. McClintock* (1860) 29 Mo. 464, it was distinctly held that mere manual delivery of a note to the payee created no liability where the intent to deliver was wanting. In that case the doctrine that a delivery of

such paper may be conditional is conceded and acted upon. That decision was cited without disapproval in *State v. Potter* (1876) 63 Mo. 212, a case which assumes the correctness of the proposition that delivery of a document may be conditional as between immediate parties, but asserts that the condition does not bind third persons who, without notice, acquire rights under the document delivered in violation of the condition in such circumstances as that case describes. The latter decision has been often approved, and is justly entitled to a place as a leading case on the topic which it treats. The analogy afforded by the Missouri rulings on conditional delivery of chattels, before the enactment of section 5180, Rev. St. 1889, tends to sustain the doctrine announced in *Carter v. McClintock* (1860) 29 Mo. 464, as to controversies between contiguous parties to notes. See *Dannefelter v. Weigel* (1858) 27 Mo. 45; *Little v. Page* (1869) 44 Mo. 412; *Oester v. Stiltington* (1893) 115 Mo. 247, 21 S. W. 820. The principle of the *Carter Case* was also recognized in *State v. Sandusky* (1870) 46 Mo. 377, followed by the Second division in *Gay v. Murphy* (1896; Mo. Sup.) 34 S. W. 1093.

Defendants' answer asserts that the note was to be signed by Mr. Hightower before final delivery, and that Mr. Yeager had full notice of that fact on receiving the paper as custodian. The true question in such cases is as to the intent of the parties touching the delivery. If the instrument, though complete in form, is incomplete in fact, for want of a further signature to be given it, and, in that state, pending the last signature, it is placed in possession of the payee, having full knowledge of its incompleteness, with the mutual understanding that the signature is to be added before the note is to be regarded as delivered, the payee cannot afterwards treat it as delivered, without more, even at law, and still less in equity. *Jordan v. Lofton* (1848) 13 Ala. 547. This proposition does not infringe upon the valuable and general rule that protects writings from change by oral evidence. It is not even an exception to that rule. Until delivery is complete, the writing does not become operative as a contract between the parties. *Rogers v. Carey* (1871) 47 Mo. 232. Bare possession of a document cannot be made a substitute for its delivery, which involves the expression, in some form, of an executed purpose to deliver. *Huey v. Huey* (1877) 65 Mo. 689; *Scott v. Scott* (1888) 95 Mo. 300, 8 S. W. 161. We are writing, now, only of a case in which the issue arises between the immediate parties to such a transaction. That is the case in hand, and we shall try to confine our comments within the field of legal view afforded by its record. Mere possession of a note by the payee may, unexplained, be competent evidence of its delivery. But the normal inference from such possession may be counteracted by proof that no delivery was intended in advance of some

event which has not happened. Proof of such a state of facts does not contradict the instrument. It only shows that the last act necessary to give it life as a contract has not taken place. The paper remains but a paper while the intent essential to put legal vigor into its form is wanting. It is not needful to inquire whether possession of a note by the payee, pending another signature, as alleged in the answer, constitutes a holding in escrow. The classification of the act is unimportant as compared with its legal substance. Whatever name the act may bear cannot change the principles regulating its effect. In our opinion, facts are stated in the answer which amount to a defense to the note in suit for want of a full and legal delivery of it. We forbear any further discussion of the subject, in view of the thorough treatment it has recently had in the supreme court of the United States in a learned judgment which we fully accept. *Burke v. Dulaney* (1894) 153 U. S. 234, 14 Sup. Ct. 816, since approved in *Michels v. Olmstead* (1895) 157 U. S. 198, 15 Sup. Ct. 580. In addition to the valuable precedents cited in the *Burke* decision, we refer to a few others having a tendency to support the result we announce: *Bell v. Ingestre* (1848) 12 Adol. & E. (N. S.) 317; *Sweet v. Stevens* (1863) 7 R. I. 375; *Michels v. Olmstead* (1882) 14 Fed. 219; *Westman v. Krumweide* (1883) 30 Minn. 313, 15 N. W. 255; *Bank v. Luckow* (1887) 37 Minn. 542, 35 N. W. 434; *Bank v. Borman* (1888) 124 Ill. 200, 16 N. E. 210. The ruling in *Burke v. Dulaney* is sustained by the following standard text-books, besides those cited in that case: 2 Am. & Eng. Enc. Law (1st Ed.) p. 343; *Browne, Parol Ev.* (1st Ed.) § 68; *Byles, Bills* (13th Ed.) p. 103; 1 *Greenl. Ev.* (15th Ed.) § 284; *Leake, Cont.* (1st Ed.) p. 187; *Story, Prom. Notes* (7th, Thorndike's, Ed.) p. 67, note; *Tayl. Ev.* (8th Ed.) § 1037; *Tied. Com. Paper* (1st Ed.) § 34d. Whatever is said to the contrary in the *Massman, Henshaw, and Jones Cases* should not be regarded as any longer authoritative.

3. Plaintiff insists that the first defense in the answer is insufficient because the statute of frauds defeats it. Whether that statute, if available to plaintiff, would have that effect, is a proposition we do not take up. It is involved in some doubt, as the discussion in a modern text-book indicates. *Reed, St. Frauds* (1st Ed.) § 144. But it plainly appears, from the answer in this case, that the agreement, on which the statute is supposed to bear, was oral, and the statute is not set up in the reply as a defense to it. Hence that statute cannot be resorted to as a barrier to prevent the enforcement of the promise. *Gardner v. Armstrong* (1862) 31 Mo. 535; *Gordon v. Madden* (1884) 82 Mo. 193.

4. But the order granting a new trial was plainly right. The plaintiff's eighth refused request for an instruction properly submitted the issue of a ratification of the alleged unauthorized delivery of the note in the form it

now has. We do not see that the refusal of that instruction was harmless, and are hence bound to assume that the trial court regarded it as prejudicial to plaintiff, since the verdict was set aside on that account. *Rev. St.* 1839, §§ 2100, 2240; *Bunyan v. Railway Co.* (1895) 127 Mo. 12, 29 S. W. 842. Notwithstanding the fact that the note may have been invalid between the first parties, for want of delivery without the signature of Hightower, it was competent for those who did sign it to make the delivery their own by duly ratifying it, as they might have made the delivery unconditional in the first place. *Leaf v. Gibbs* (1830) 4 Car. & P. 466; *Perry v. Patterson* (1844) 5 *Humph.* 133; *Robbins v. Phillips* (1878) 68 Mo. 100.

The judgment for plaintiff should be reversed, and the cause remanded for new trial. *MACFARLANE, J.*, concurs; but as *ROBINSON, J.*, dissents, and *BRACE, C. J.*, is absent, all of us present agree to transfer the cause to the court in banc.

STATE ex rel. WALKER, Atty. Gen., v.
FLITCRAFT, Circuit Judge.

(Supreme Court of Missouri, Division No. 2.
June 30, 1896.)

BUILDING AND LOAN ASSOCIATIONS—SUPERVISOR—
SUIT—DISMISSAL—REINSTATEMENT—ATTORNEY GENERAL—MANDAMUS.

1. Act March 22, 1895, § 1, created a bureau of building and loan supervision, and made the state treasurer ex officio supervisor of all such associations. Whenever it appeared that an association had violated its charter, or was conducting its business in an unsafe manner, after notice to the association, the supervisor was empowered, by section 7, to bring suit in the circuit court to enjoin the association, and for dissolution, and the settling and winding up of its affairs. Section 8 provided that "such proceedings shall be conducted by the attorney general of the state, and in the name of the state of Missouri as plaintiff at the relation of the supervisor." *Held*, that after the institution of such a suit the supervisor might have the cause dismissed or stricken from the docket without the knowledge or consent of the attorney general.

2. After the dismissal of such a suit by the supervisor against the wishes of the attorney general, where a second suit is brought, in another division of the court, at the relation of the supervisor, before a motion to reinstate the first suit has been filed by the attorney general, and in the meantime a receiver has been appointed in the second suit, and is rightfully in the possession of the property of the association, the first suit will not be reinstated.

3. The provision of section 8 is not mandatory; and where, for any reason, the attorney general has refused or failed to conduct the suit at the relation of the supervisor, it may be conducted by other counsel, and defendant cannot question the court's jurisdiction, since its rights are not thereby affected.

Gantt, P. J., dissenting.

Original proceedings in mandamus by R. F. Walker, attorney general, against P. R. Flitcraft, circuit judge, to compel respondent to reinstate a certain cause on the docket of the court over which he presides. Dismissed.

R. F. Walker, Atty. Gen., in pro. per. Alderson & McIntire and Draffen & Williams, for respondent.

BURGESS, J. This is an original proceeding by mandamus to compel the respondent, one of the judges of the circuit court of the city of St. Louis, to reinstate on the docket of division No. 2 of said court, over which he presides, a certain cause theretofore commenced in said court by the relator in the name of the state of Missouri at the relation, under the direction, and upon facts furnished by Lon V. Stephens, state treasurer, and ex officio supervisor of building and loan associations, under the provisions of an act of the general assembly of the state of Missouri approved March 22, 1895, which said cause has, upon the order of said supervisor, been stricken from the docket by respondent. To the alternative writ issued in accordance with the prayer of the petition filed herein, respondent made return as follows:

"(1) The respondent admits that the facts set forth in the alternative writ of mandamus are true, but alleges that the same are not all the facts attending the refusal of the respondent to reinstate the case instituted by the relator against the Western Building and Loan Association and the St. Louis Trust Company.

"(2) For his further return to the alternative writ of mandamus the respondent alleges that, said cause having been dismissed at the request and on the motion of the supervisor of building and loan associations on November 5, 1895, the relator, the attorney general, filed in division No. 2 of the circuit court of the city of St. Louis, over which the respondent presided, and now presides, on November 13, 1895, his said motion to reinstate said cause; that afterwards said motion was taken up for consideration, and the supervisor of building and loan associations did object to said cause being reinstated, and requested and urged upon the respondent, as such judge, that said motion of the attorney general be overruled and refused; and it was then shown and made to appear to the respondent that on November 9, 1895, the supervisor of building and loan associations had instituted an action in the circuit court of the city of St. Louis against the Western Building and Loan Association and the St. Louis Trust Company for the purpose of dissolving and winding up the affairs of said building and loan association, and to annul an alleged assignment by said building and loan association to said St. Louis Trust Company; that said cause was then pending in division No. 7 of said circuit court; that the said supervisor did apply in said division No. 7 of said court for a temporary receiver of the effects of said Western Building and Loan Association, and that said application had been granted, a temporary receiver had been appointed, who

had qualified, and taken possession of all the property and effects of said Western Building and Loan Association, and was holding and preserving the same in pursuance of an order of said division No. 7 of said circuit court so authorizing and directing; that the petition in said cause so instituted by the supervisor of building and loan associations was signed by him, the deputy supervisor, the circuit attorney of the city of St. Louis, and a member of the St. Louis bar, as special counsel for said supervisor, and was verified by said deputy supervisor.

"(3) And the respondent alleges and shows to the court that said motion of the attorney general was taken under advisement until the 9th day of December, 1895, when the same was by the division of said court over which the respondent presides overruled and refused; but prior to the overruling of said motion the said cause which had been instituted by said supervisor of building and loan associations, and which was assigned and was pending in division No. 7 of said circuit court, had been by all the parties thereto finally submitted to said division No. 7, had been fully heard, and said division No. 7 of said court, then having full, complete, and exclusive jurisdiction of said cause and of all the matters therein involved, had taken said cause under advisement, and this before the decision upon the said motion of the relator by division No. 2 of said court, and while the respondent had said motion of the relator under advisement, and thereafter said division No. 7 found all of the issues in favor of the plaintiff therein, ordered the dissolution of said Western Building and Loan Association, declared the assignment by it to said St. Louis Trust Company void, and appointed a permanent receiver of said Western Building and Loan Association for the purpose of settling and winding up its affairs; that said finding and judgment of said division No. 7 of said court were made and entered upon the records thereof on the 10th day of December, 1895; and a certified copy of said judgment and decree is hereto attached, and marked 'Exhibit A.'

"(4) The respondent further alleges that he has been informed and believes, and it appears by the affidavit of Honorable Lon V. Stephens, supervisor of building and loan associations, that while said cause was pending in said division No. 7 of said court the said supervisor of building and loan associations requested the attorney general of the state of Missouri to appear therein, and conduct the same, and that such request was by the attorney general refused, and the attorney general did not and would not appear and conduct said cause; that a certified copy of said affidavit filed in said cause in said division No. 7 of said court, showing such request and refusal, is hereto attached, and marked 'Exhibit B,' and the same is in words and figures as follows: 'State of Missouri, City of St. Louis—ss.: In the Circuit

Court of the City of St. Louis, Mo. October Term, 1895. State of Missouri ex rel. Lon V. Stephens, State Treasurer, and Ex Officio Supervisor of Building and Loan Associations, Plaintiff, vs. Western Building and Loan Association and St. Louis Trust Company, Defendants. No. 229. Room 7. Lon V. Stephens, being duly sworn, on oath states as follows: That he is the treasurer of the state of Missouri and ex officio supervisor of building and loan associations; that since the institution of the above-entitled cause he has made a personal request of Hon. R. F. Walker, attorney general of the state of Missouri, to appear and conduct this case; that said R. F. Walker refused, and still refuses, to so do. [Signed] Lon V. Stephens. Subscribed and sworn to before me this 3d day of December, 1895. [Signed] Thos. B. Rodgers, Clerk.'

"(5) The respondent alleges that at the time of the hearing of said motion of the attorney general to reinstate the case dismissed by the respondent on the motion and at the request of the supervisor of building and loan associations, it was made to appear that, though the supervisor had previously requested the attorney general to institute proceedings against said Western Building and Loan Association, on the very day the attorney general did institute said action, and prior to the institution of the same, the said supervisor, by and through his deputy, did withdraw such request, and did notify said attorney general not to institute such proceedings; that the supervisor of building and loan associations at all times objected to the reinstatement of said cause; and because of all the facts the respondent, as judge of division No. 7 of said circuit court, did overrule the said motion of the attorney general, and did refuse to reinstate said cause.

"(6) The respondent further alleges that under the provisions of an act entitled 'An act creating a bureau of supervision and inspection of building and loan associations; making the state treasurer ex officio supervisor; providing for the appointment of a deputy supervisor and special examiners; providing for the levying and collecting money from said associations, out of which the expenses of supervision shall be paid, and making an appropriation for the same,' approved March 22, 1895, the sole power and right to institute proceedings against building and loan associations is vested in the supervisor of building and loan associations, and that under the provisions of said act the said supervisor has the power and right to dismiss and abandon any proceeding instituted thereunder; that all that could be accomplished under the provisions of said act against said Western Building and Loan Association was being and had been accomplished by reason of said decree rendered by division No. 7 of said circuit court; that to have granted said motion at the request of the attorney general would have been in disregard of the positive wishes, ob-

jection, and direction of said supervisor, would have resulted in a conflict of jurisdiction between two divisions of said circuit court, would have been useless and needless, and would have embarrassed the enforcement of the provisions of said act against said Western Building and Loan Association.

"(7) The respondent further shows to the court that in pursuance of the decree of division No. 7 of said circuit court the affairs and business of said Western Building and Loan Association are being settled and wound up; that all that it would be possible to accomplish by way of enforcing the provisions of said act of the legislature is being accomplished; that all of the property and effects of said Western Building and Loan Association are the possession and under the control of said division No. 7 of said circuit court, and that to reinstate the cause instituted by the attorney general, which was dismissed by division No. 2 of said circuit court on motion of said supervisor, would be wholly useless and needless, and only result in complication and confusion, and endanger the rights of all persons interested in the speedy and economical settlement of the affairs of said association; that said division No. 2 of said court never took any action over said cause dismissed by it, except to issue an order on defendants to show cause. Wherefore the respondent submits and shows to the honorable court all the matters aforesaid as cause why he has not reinstated said cause instituted by the attorney general against the Western Building and Loan Association and the St. Louis Trust Company, and which was assigned to division No. 2 of said court; and, having so shown to the court, asks that he be discharged with costs."

To the return relator demurred for the following grounds of objection, to wit: Because said return admits all the facts upon which the application for the writ is based; because said return is insufficient in law; because the additional facts set up by respondent constitute no valid return to the alternative writ; because said return is not responsive to the writ; because said return sets up irrelevant and immaterial matter; because said return is evasive, and attempts to set up irrelevant matter on the "information and belief of respondent."

By section 1 of said act there is created a bureau of building and loan supervision in the office of the state treasurer. The state treasurer is made ex officio supervisor of all such associations, with power to appoint a deputy supervisor, who may perform the same duties as the supervisor. Section 7 of said act is as follows: "If it shall appear to the said supervisor from any report of any such association, whether heretofore or hereafter organized, or from any examination made by him, or by the person or persons appointed by him to make such examination, or from any knowledge or information in his possession, from whatever source obtained,

that any such association has committed a violation of its charter or of law, or that said association is conducting its business in an unsafe and unauthorized manner, or that the assets of any such association are insufficient to justify the continuance of business by such association, he shall communicate the fact to the officers or directors of such association. Such officers or directors shall be allowed sixty days within which to make the assets sufficient or to correct any illegal practices; and in case such assets are not made sufficient or the illegal practices corrected within the time herein provided, or whenever it shall appear to the said supervisor that it is unsafe or inexpedient for any such association to continue to transact business, said supervisor shall institute proceedings in the circuit court in the city or county in which such association has, or had, its principal office, to enjoin or restrain such association from the further prosecution of its business, either temporarily or perpetually, or for such injunction and the dissolution of such association and the settling and winding up of its affairs, or for any and all of said remedies combined, as the said supervisor may deem necessary." Section 8 provides that "such proceedings shall be conducted by the attorney general of the state, and in the name of the state of Missouri as plaintiff at the relation of the supervisor." In determining this controversy all material allegations in the return which are well pleaded must be taken as true, for such is the effect of the demurrer, and, when this is done, is relator entitled to have his peremptory writ? The question is not as to whether an action can be prosecuted under said act by the attorney general in the name of the state at the relation of the state treasurer, who is ex officio supervisor of building and loan associations, contrary to his wishes, and against his directions, but is as to whether an action commenced by his directions and upon information furnished by him, and dismissed or stricken from the docket by his directions, without the consent of the attorney general, shall be reinstated, and prosecuted in his name as relator, without his consent, and against his wishes and protest. It is insisted by the attorney general, the relator herein, that, as the suit affects the public interests, the state is the real party in interest; that respondent is merely a nominal party, and as, in such proceedings, it is made the relator's duty by the act to represent the state, that respondent had no authority to have the suit stricken from the docket; that the order to that effect was without authority, and that the case should be reinstated on the docket. This position is controverted by the respondent, who contends that the supervisor is not a mere nominal party having no interest or control of suits instituted by him, under said act, against building and loan associations, but

that it is for him to determine whether any such action shall be begun and when. Ordinarily, a person in whose name a suit is instituted has the right to dismiss it any time before its final submission, and, unless actions brought by the supervisor under said act against building and loan associations be an exception to this general rule, the demurrer to the return must be overruled and the peremptory writ denied.

By the provisions of said act it is made the duty of the supervisor in person or by one or more persons by him appointed for that purpose, to make a full and careful examination of the affairs of each building and loan association in this state at least once during each year, and if it shall appear to the supervisor from any report of any such association, or from any examination made by him, or by the person or persons appointed by him to make such examination, or from any knowledge or information in his possession, from whatever source obtained, that any such association has committed any violation of its charter or of law, or that said association is conducting its business in an unsafe and unauthorized manner, or that the assets of any such association are insufficient to justify the continuance of business by such association, to communicate the fact to the officers or directors of such association, and, unless the assets be made sufficient, or any illegal practices be corrected in 60 days, or if it shall appear to said supervisor that it is unsafe or inexpedient for any such association to continue to transact business, said supervisor is required to institute proceedings in the circuit court in the city or county in which such association has or had its principal office, to enjoin or restrain it from further prosecution of its business, and to wind up its affairs. No suit can be instituted under the act otherwise than at the relation of the supervisor, upon information furnished by him and at his request, and the fact that it is made the duty of the attorney general of the state to conduct such actions in the name of the state of Missouri as plaintiff at the relation of said supervisor, does not divest the latter of the right to dismiss such a suit, or to have it stricken from the docket without the consent of the attorney general. By the express terms of the act the supervisor is clothed with discretionary power to determine whether the suit shall be to enjoin the association from prosecuting its business temporarily or perpetually, or for injunction and its dissolution, and the settling and winding up of its affairs, or for any and all of said remedies combined, as he may deem necessary; and it seems to logically follow that if, after the institution of such a suit, he should become satisfied that it had been improvidently brought, or for any other cause that it should be dismissed or stricken from the docket, he might have it done, without the knowledge or consent of the attorney general. To the super-

visor belongs the power to investigate the affairs of building and loan associations under said act, and to institute actions against them for the purposes under the circumstances therein named; and, while the attorney general is required to conduct such actions in the name of the state as plaintiff at the relation of said supervisor, the manifest intention of the legislature was to furnish a lawyer of known ability to conduct such suits, but not to confer upon him the power to take charge of and manage the same to the exclusion of the supervisor, but rather subject to the right of the supervisor to have any such actions dismissed or stricken from the docket or disposed of as might seem to him to be expedient. We therefore conclude that the suit in question is not an exception to the general rule, and that the supervisor had the right to dismiss it in disregard to the wishes of the relator.

But we are not inclined to hold that the writ should go, for another and additional reason. It appears from the return that said cause was dismissed at the request of the supervisor on the 5th day of November, 1895; that the relator filed his motion to set aside the order of dismissal and to reinstate said cause on the docket on the 13th day of November, 1895; and that between those two dates, to wit, on the 9th day of November, 1895, the supervisor instituted an action in another division of the circuit court of the city of St. Louis against the Western Building & Loan Association and the St. Louis Trust Company for the purpose of dissolving and winding up the affairs and business of said loan association and to annul an alleged assignment by said building and loan association to said trust company, and that a receiver had been appointed in said cause, who had qualified and taken possession of all the property and effects of said building and loan association, and that said suit was then still pending; that said suit was not brought, nor was it being conducted, by the relator, who, although requested in writing by the supervisor to take charge of and conduct the same, refused to do so. Unless the suit last instituted by the supervisor and the proceedings thereunder are void because not brought and conducted by the attorney general, a good and sufficient reason is by reason thereof afforded for not granting the prayer of the relator in this proceeding, in which the court may, in the exercise of a wise judicial discretion, refuse to make the writ peremptory. The fifty-sixth section of the national bank act of June 3, 1864 (13 Stat. 116), provides that "all suits and proceedings, arising out of the provisions of this act, in which the United States, or its officers or agents shall be parties, shall be conducted by the district attorney of the several districts, under the direction and supervision of the solicitor of the treasury." The supreme court of the United States in *Kennedy v. Gibson*, 8 Wall. 498, in passing upon this provision,

says: "The receiver is the agent of the United States, and, according to the fifty-sixth section of the act, this suit should have been conducted by their attorney. But this provision is merely directory. The question which arises is between the United States and its officers. The rights of the defendants are in no wise concerned, and they cannot be heard to make the objection that this duty of the local law officer of the government has been devolved upon another. It is to be presumed there were sufficient reasons to warrant this departure from the letter of the law." There is great similarity in the provisions of the national bank act and the act of the legislature of this state for the winding up of insolvent building and loan associations, and if, as was held in the *Kennedy Case*, the question as to whether the case was brought or was being conducted by the person designated by the act of congress could not be raised in a suit against the stockholders of the bank, and constituted no defense as to them, it would seem for a like reason the court in which the last suit was instituted by the supervisor acquired jurisdiction over said building and loan association, and became possessed of the power and jurisdiction to appoint the receiver, who is, by reason of his appointment, rightfully in the possession of the property and effects of said association; and to require that the order striking the first suit from the docket be set aside, and the case redocketed, that another receiver might be appointed therein to take charge of the same property, would not subvert the ends of justice, and could but result in the complication of matters, without any seeming necessity, justification, or excuse therefor.

The premises considered, the demurrer to the return is overruled, and the proceedings dismissed.

SHERWOOD, J., concurs.

GANTT, P. J. (dissenting). The facts admitted are these: The state treasurer, who is ex officio supervisor of building and loan associations, reported to the attorney general that the Western Building & Loan Association was in an insolvent condition, and was violating its charter. Thereupon the attorney general prepared a petition looking to the dissolution of said association, and on the day he proposed to file it the deputy supervisor requested him not to file it, but the attorney general filed the suit, and within a few days the supervisor appeared before Judge Flitcraft in the absence of the attorney general, and without his consent or permission asked the suit to be dismissed, and the said judge dismissed it. Thereupon the attorney general moved its reinstatement, which was refused, and he prays mandamus requiring its reinstatement. While the act of March 22, 1895, presents some difficulty in its construction, owing to the fact that

section 7 of said act provides that, if the officers of any building and loan association shall fail to make good the assets of such association, or correct any illegal practices, within the 60 days allowed them, or whenever it shall appear to the said supervisor that it is unsafe or inexpedient for such association to continue to transact business, said supervisor shall institute proceedings in the circuit court in the city or county in which such association has or had its principal office, etc., and in the eighth section provides that "such proceedings shall be conducted by the attorney general of the state, and in the name of the state of Missouri at the relation of the supervisor," it seems to me, when the nature of the proceeding is considered, and the duties of the two officers, attorney general and state treasurer, are considered, as I think the legislature must have considered, I do not concur in the construction given by the majority of my brethren of their respective powers and duties under said act. The office of attorney general is created by the constitution. The incumbent is elected by the state at large, and his duties are such as may be prescribed by law. By section 630, Rev. St. 1889, he is "authorized and empowered in the name and in behalf of the state of Missouri to institute and prosecute all suits and other proceedings at law and in equity, requisite or necessary to protect the rights and interests of the state, and to enforce any and all rights, interests or claims of the state against any and all persons, bodies, politic or corporate." He is, in short, the law officer of the state. Hence it appears peculiarly appropriate that when any corporation is guilty of an abuse of the franchises granted it by the state, and the power of the state must be exerted, that so grave a proceeding should be conducted by the attorney general. It is the exercise of the right of visitation by the state for the violation of a legislative grant. The proceeding concerns the state, and is the exercise of a very high prerogative. It is this which distinguishes the case brought by the attorney general from those in which the relator is the real party in interest. Granting that in those cases he may control the action brought for his sole benefit, the analogy does not hold good when the action concerns the public, and he is a mere formal relator by virtue of the statute which commits the conduct and management of the suit to the attorney general. It is such a proceeding as the attorney general might inaugurate, conduct, and prosecute to its termination without the enabling section of this act; but when, in specific terms, it is made his duty to conduct the proceeding, I have no doubt in my own mind that it was the intention of the legislature not only to require that service at his hands, but to commit the proceedings in court to his judgment exclusively. This was the practice in England, whence we derive our conceptions of the duties of the attorney gen-

eral. In England the attorney general could file quo warranto and other informations at his discretion. No leave of court was required, and this is our practice. *State v. Stewart*, 32 Mo. 379. An information for the purpose of dissolving a corporation or seizing its franchises cannot be prosecuted save by the authority of the state, and the state must be a party, and, if a party, it is not only the duty, but the right, of the attorney general to represent the state, and the practice has been to require him to represent the state unless it appeared that he had refused to do so, and then even a private person might invoke the jurisdiction of the court when the subject-matter was one "*quod ad sanctum reipublicæ pertinet*." *Com. v. Union Fire & Marine Ins. Co.*, 5 Mass. 230; *People v. Tobacco Manuf'g Co.*, 42 How. Prac. 162; *People v. Utica Ins. Co.*, 15 Johns. 358. An examination of the whole act, I think, requires us to reconcile the duties of both officers, and, so doing, I think it imposes upon the supervisor the examination into the affairs of the corporation; and, if he discovers that its assets are impaired, or that it is engaged in illegal transactions in violation of the law of its organization, it is his duty to report those facts to the attorney general, who is required then to conduct the proceeding; that is to say, it becomes the duty of the attorney general to manage, direct, and carry on the litigation. The supervisor is not required to be a member of the bar; he is not; and every requirement of the act is subserved when he furnishes the information to the attorney general to bring the action. As an officer of the state the supervisor is not at liberty to withhold that information, and when he imparts it the duty is then devolved upon the law officer of the state to conduct the proceeding. When commenced, it is the state's action. It is not the supervisor's suit nor the attorney general's suit. It is the state coming into her own courts, demanding justice. Any other view, it seems to me, falls short of the aim and purpose of this legislation. The supervisor is henceforward merely a formal nominal relator, and the courts have no right to dismiss such actions without notice to or consent of the attorney general, upon the mere demand of the supervisor. Whether the supervisor could bring an action, and at his own expense employ private counsel to conduct it, and what effect such an action would have upon the rights of the offending corporation, it seems to me, are not involved in this case. Here the action was commenced by the attorney general in behalf of the state, and the circuit judge dismissed it without notice to or consent of the attorney general. Granting that the supervisor can refuse the use of his name to the state, certainly his right would extend no further than to have his name stricken out as relator. He would have no right to demand the dismissal of the suit, brought for the state, to enforce a pub-

lic right, by the attorney general, the law officer of the state; nor had the circuit court the right to dismiss the action of the state without notice to the attorney who brought it. This action of the circuit court in dismissing a proceeding of this high character brought in the name of the state by its chief law officer was, in my opinion, contrary to the established practice. Ordinary courtesy demanded that the counsel who had filed the suit should have been notified of the proposed action, and at most only the supervisor's name stricken out of the petition. There are other considerations which incline me to the opinion that it was the duty and privilege of the attorney general to maintain this action, and the manifest duty of the supervisor to have offered no objection to the use of his name as relator. It stands admitted that the circumstances were such, in the opinion of the supervisor, as demanded the action. He had so reported to the attorney general before the suit was commenced. Not only that, but it appears that immediately upon obtaining a dismissal he procured other counsel, and commenced the same proceeding, upon the same allegations, in another branch of the same court. If, as this conduct conclusively establishes, a suit was necessary, and the officer whom the law designated should conduct it had brought that suit, what purpose was to be achieved by dismissing it? No suggestion is made that the judge before whom it was pending was prejudiced against the state or in favor of the defendant corporation, or that he was wanting in any respect in jurisdiction to dispose of the case. This latter could not be, because immediately an action is commenced in another division of the same court, with the same powers. If a change of venue was deemed essential to the state's interest, it has not been pleaded as a reason. On the contrary, it appears to have been the arbitrary action of the supervisor alone. Again, the act provides, that the actual expenses of the attorney general shall be paid out of the "building and loan supervision fund" in carrying out the provisions of the law. It is evident, I think, that the state did not intend to pay private counsel for the service which it required of the attorney general, whose salary was fixed by law. I am confident that no authority exists in the supervisor to employ private counsel, and pay them out of this "building and loan fund," nor any other fund belonging to the state. The supervisor had no power to dismiss an action which he had not brought, nor the right to prevent the performance of the attorney general's duties, or deprive him of the perquisites of his office; and I therefore think the peremptory writ should issue.

I hold the demurrer was well taken to all that mass of immaterial matter detailing the subsequent conduct of the supervisor in Judge Russell's court. With this action Judge Flitcraft was not concerned, and, as it

was commenced without the authority of the attorney general, a proper regard for his official position very properly caused that officer to decline any and all connection therewith. The important question, I think, in this case is whether the attorney general has the right to institute and conduct for the state the litigation provided for in this act of March 22, 1895. I think most clearly he has, and is entitled to this writ.

STATE, to Use of VERNON COUNTY, v.
KING et al.

(Supreme Court of Missouri, Division No. 1.
June 30, 1896.)

COUNTY RECORDER—COMPENSATION—CLERK HIRE
—DUTY TO KEEP ACCOUNT OF FEES—SUP-
PRESSION OF EVIDENCE.

1. Under Const. art. 9, § 13, declaring that the fees of a county or municipal officer shall not exceed a specified sum "exclusive of the salaries actually paid to his necessary deputies"; and Rev. St. 1889, § 7450 (in force at the time the constitution was adopted), providing that all fees received by a county recorder over and above the amount fixed as his salary, after paying out such amounts for deputies and assistants "as the county court may deem necessary," shall be paid into the county treasury, etc.,—a recorder is entitled, as a matter of right, to retain out of the fees of his office an amount sufficient to pay reasonable compensation to necessary assistants, and the allowance of such reasonable compensation is not a matter of mere discretion with the court.

2. Pending suits against a county recorder for fees collected by him in excess of his salary for the years 1889 and 1890, an agreement was made whereby the attorneys for the county were to investigate defendant's books, and determine the amount due for fees collected from 1883 to 1890, inclusive; defendant promising to pay the amount so ascertained, less such clerk hire as should be allowed him. A total excess of \$5,402 was found, not including clerk hire, and on this defendant paid \$4,202; it being agreed by the attorneys that the balance should be allowed for clerk hire. The county court refused to allow the balance for clerk hire, and suit was then brought on defendant's official bond for the excess fees of 1890 alone. *Held*, that in this suit defendant should be credited with the amount paid, the agreement having been repudiated by the county.

3. The failure of a county recorder to keep a full and true account of all fees received by him, as required by Rev. St. 1889, § 7450, casts on him the burden of showing such amount, when sued for the excess over his salary; and, if he fails to make such proof, he may be charged with the amount he ought to have received.

4. If the amount which a recorder ought to have collected can be calculated from the office records, his failure to produce the account books in an action to recover any excess over his salary is not such suppression of evidence as to warrant the imposition of a penalty.

Barclay, J., dissenting.

Appeal from circuit court, Bates county.

Action by the state of Missouri, to use of Vernon county, against A. J. King and others, on an official bond. From a judgment for defendants, plaintiff appeals. Affirmed.

This is an action against defendant King, as ex-recorder of Vernon county, and the securities on his official bond, to recover

fees received by him officially, during the year 1890, in excess of what he was authorized to retain in payment of his own salary. The charge, in substance, is that during the year 1890 said defendant, as recorder, received fees amounting to \$5,519, out of which he was entitled to retain, as compensation for his services, the sum of \$4,000; and it was his duty to pay over the balance, \$1,519, to plaintiff, which he neglected to do. Judgment was asked for said sum of \$1,519 and interest. Defendant's answer was a general denial, and two special pleas. A change of venue was taken to Bates county. The case was referred to Thomas M. Casey, Esq., to take an account. The referee reported a balance due the county of \$1,232.96 and recommended a judgment for that amount. Defendant filed exceptions to the report of the referee. Considering the report and exceptions together, the court was of the opinion that the finding should have been for defendant, and judgment was entered accordingly. Plaintiff appealed.

G. S. Hoss and L. L. Scott, for appellant. Cole & Burnett, for respondents.

MACFARLANE, J. (after stating the facts). The evidence shows that defendant King held the office of recorder of Vernon county for two terms, commencing January 1, 1883, and ending January 1, 1891. After his term of office had expired, two suits were commenced against him for excess of fees collected by him for the years 1889 and 1890. Indictments were also found against him. Pending these suits and indictments, this agreement was entered into between him and the attorneys who were prosecuting these suits: "A. J. King has this day voluntarily and of his own motion come to the said parties of the second part, and stated that he desired to settle his account with and indebtedness to said county for fees due the county arising from the work done by said King during the eight years he acted as the recorder of said county; and said second party having consented, so far as they can, to settle the same, the following memorandum is agreed to as a basis of a settlement, to wit: That the said King and said attorneys will thoroughly investigate the books of the recorder's office, and all documents showing said King's indebtedness during said years. Accounts found to be due by them will be set down as the sum of his indebtedness, from which said attorneys agreed to subtract clerk's hire, and so forth. Said King agrees to leave the decision and determination of all matters between them absolutely to the said attorneys, and to abide by their decision. Said King agrees to begin and continue said investigation when called upon by said attorneys. The final sum found to be due by him to said county, or all fees received and earned by him while recorder, less such clerk hire as shall be allowed him, he agrees to pay to

the county, together with costs of suits pending. When the amount due by said King under the terms of this agreement shall be found, the same shall be reported to the county court for its approval; and this agreement is made subject to the approval of the county court of said county." Under the agreement, the attorneys made an investigation, and reported that King received, as fees of his office, for the year 1889 the sum of \$6,515, and for the year 1890 the sum of \$5,549, making an excess of \$4,064 over the amount of \$4,000 per year which was allowed him as salary, not including anything for clerk hire. For the years 1883 to 1888, inclusive, they found the excess of fees received amounted to \$1,338, not including clerk's hire, except for the year 1887. The total excess thus found was \$5,402. After this report was made, King agreed to pay, and did pay, \$4,202; and it was agreed by the attorneys that they would recommend the allowance of the balance, \$1,200, as clerk's hire. They made the recommendation, and the county court refused to make the allowance. The county retained the money paid, and the attorneys commenced this suit for the excess collected for the year 1890, in which they claim \$1,519 and interest, being the amount reported under the investigation.

Defendant, by answer, set up the foregoing facts, and claimed that he had fully accounted to the county for all claims against him. Defendant, for another defense, stated the same facts, and claimed that there was never in fact a default on his part, and that he owed the plaintiff nothing, and that plaintiff having repudiated the agreement, he was entitled to recover back the amount paid, and asked judgment accordingly. On motion of plaintiff, these pleas were stricken out, and defendant saved his exceptions. There was no controversy over the years 1884, 1885, and 1886, all investigations agreeing that there was no excess for these years. The referee found the fees earned on the remaining years as follows: 1883, \$3,841.20; 1886, \$3,735.97; 1888, \$3,959.54; 1889, \$4,954.54; 1890, \$5,232.95. This finding did not make any allowance for clerk's hire. The referee found also that defendant paid out for clerk's hire during the year 1890, \$1,160, and, during the years 1883, 1886, 1888, and 1889, the sum of \$4,120.75. The evidence tends to show that the payments for these years were as follows: 1883, \$906.75; 1886, \$740; 1888, \$770; 1889, \$1,650,—total, \$4,066.75. The evidence also tends to prove that the hire of assistants was necessary, and the amounts paid them was reasonable. The referee, in his report, confined his findings to the year 1890, rejected the evidence of the payment of \$4,202, made by defendant, and disregarded all payments made for clerk's hire. Defendant, in his annual report to the county court, did not make an itemized statement of the fees received, but gave monthly balances,

showing in the aggregate the amount collected for each month. He kept a cashbook in his office, in which the fees collected were entered. These were open to the inspection of any one desiring to examine them. He testified that he offered to file these books with his annual reports, but the court advised him that he need not do so. These books were not produced before the referee, and defendant disclaimed any knowledge of their whereabouts. There were a number of books in which miscellaneous instruments had been recorded, the fees for which could only be determined by absolute count of the words. Plaintiff charged defendant with having received a certain amount for them. The referee accepted, without proof, the amounts claimed by plaintiff for making these records, for the reason that defendant refused to produce his cashbooks. It seems that each party employed an expert to go through the books, and calculate the amount of fees received for the year 1890. The expert employed by plaintiff found them to amount to \$4,829, and that of defendant to amount to \$4,467. The referee "split the difference," and found the fees to be \$4,648. This amount he increased by the manner of his finding for miscellaneous instruments, so as to make the total \$5,232.95. In his calculation, he charged for all fees earned, and not for fees actually collected. Plaintiff testified that the total collected by him during the year 1890 was \$3,447.

Section 13, art. 9, of the constitution, declares: "The fees of no executive or ministerial officer of any county or municipality, exclusive of the salaries actually paid to his necessary deputies, shall exceed the sum of ten thousand dollars for any one year. Every such officer shall make return, quarterly, to the county court of all fees by him received, and of the salaries by him actually paid to his deputies or assistants, stating the same in detail, and verifying the same by his affidavit; and for any statement or omission in such return, contrary to truth, such officer shall be liable to the penalties of willful and corrupt perjury." The statute (Rev. St. 1889, § 7450) upon which a right of recovery is based is as follows: "Sec. 7450. Surplus Fees. The recorder of each county in which the offices of recorder of deeds and clerk of the circuit court are separate shall keep a full, true and faithful account of all fees of every kind received, and make a report thereof every year to the county court; and all the fees received by him, over and above the sum of four thousand dollars, for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury, to form a part of the jury fund of the county." The constitution, while placing a limit upon the amount of fees ministerial officers of a county are allowed to retain, makes

such amount "exclusive of the salaries actually paid to his necessary deputies." Section 13, art. 9. The statute which was in force when the constitution was adopted limits the fees a recorder is entitled to retain to \$4,000 per year, and provides that all fees received by him over and above that amount "for each year of his official term, after paying out of such fees and emoluments such amounts for deputies and assistants in his office as the county court may deem necessary, shall be paid into the county treasury."

Under these provisions, is a recorder entitled, as a matter of right, to retain out of the fees of his office an amount sufficient to pay reasonable compensation to necessary assistants, or is the allowance left entirely to the discretion of the county court? The constitution is positive in its terms, and contains no words from which a discretionary power can be implied. The statute cannot be given such construction as will cause a conflict with the constitution. The statute existing when the constitution was adopted would be repealed by such a construction. To give the statute effect, then, the word "may" cannot be given a meaning which could deprive the recorder of his right to an allowance for assistants if they were necessary to secure the proper and expeditious performance of the duties of the office. It is also a well-recognized rule of construction that the word "may" should be interpreted to mean "shall" when referring to a "power given to public officers, and concerns the public interest and the rights of third persons, who have a claim, by right, that the power shall be exercised in this manner." Such an interpretation is demanded "for the sake of justice and the public good." *Steines v. Franklin Co.*, 48 Mo. 178. There can be no doubt that the public interest demands that the work required of a recorder should be done promptly, carefully, and well. A public officer is, by right, entitled to compensation for the labor performed, and it should also be measured to some extent by the responsibilities assumed. The statute regulates the amount of the fees the recorder is entitled to collect, and the presumption is that he fairly earns what he is allowed to charge. Four thousand dollars was fixed as the amount the recorder was capable of earning at the established charges; and, when the fees for work required to be done exceeds that sum, it is a fair presumption that assistance would be necessary. If necessary, the constitution and statute clearly intend that assistants should be employed and paid. In construing a statute which provided that "when a county officer receiving a salary is compelled, by pressure of business to employ a deputy, the county court may make a reasonable allowance to such deputy," the court held that the county must pay a reasonable compensation for the necessary service rendered, and that payment was not discretionary with the county court. *Bradley v. Jefferson Co.*, 4 G. Greene, 300. See, also, *Washington Co. v. Jones*, 45 Iowa, 261.

We are of the opinion, therefore, that the allowance to the recorder of reasonable compensation for necessary hire of assistants was not a matter of mere discretion with the county court. In his settlement, the recorder was entitled to a credit for the amounts so paid; and, if such credit had been given, there would be, at most, but a small amount, if anything, due the county. From what has been said, it is clear that, in common justice and right, the judgment of the circuit court is correct; for the payment of \$4,002, made before the suit was commenced, was in excess of all demands the county could justly claim.

But it is insisted that, under the agreement between counsel for plaintiff and defendant King, the differences were fully adjusted and compromised, and defendant's agreement to pay the amount found due is conclusive as to his liability and that of his sureties. Without considering the circumstances under which the alleged settlement was made, or the one-sided character of the contract, we need only say that this suit is not for a breach of that agreement, or for a failure to pay the amount found to be due under the investigation made by the attorneys of plaintiff. The agreement having failed of its purpose, or having been repudiated by the county, common justice requires that defendant should have credit for the amount paid thereunder. According to the report of the referee, the fees of the office only exceeded \$4,000 for the years 1887, 1889, and 1890. For the year 1887 the county court allowed defendant all the surplus for the hire of assistants. For the year 1889, according to the report, which is not contested by plaintiff, defendant received \$954.54, and in the year 1890 he received \$648.60, over the amount he was entitled to retain for salary. This would make a total liability of \$1,603.14 for the entire term of office, without deducting the amounts actually paid during those years for necessary assistance. Allowing a credit for the \$4,000 paid, it is clear that defendant owes the county nothing. But assuming that the settlement was fairly made, and that the payment of \$4,000 was on account thereof, and that a balance of \$1,519 remained unpaid, yet the amount was subject to the credit of whatever necessary sum was actually paid for the hire of clerks and other assistants. The agreement in respect to the allowance of such credit should be given as broad a meaning as that given to the statute; that is, that defendant should have a credit for all amounts actually paid by him which were reasonable and necessary for the proper performance of the duties of the office. The referee finds that for the year 1890 defendant actually paid out for clerk's hire \$1,160, and for the previous seven years \$4,120. The evidence shows that for the year 1889 he paid \$1,650 of this amount. The evidence also establishes that the amounts paid were necessary for the proper discharge of the duties of the office. The amount thus actually paid during the years 1889 and 1890 for assistance

largely exceeded the balance received in excess of \$4,000 per year. In any view of the case, defendant is not indebted to the county.

But plaintiff says that inasmuch as defendant neglected his duty in respect to keeping a full, true, and faithful account of the fees of every kind received by him, and in making annual reports thereof to the county court, he should not be allowed reimbursement for what he may have paid out by way of clerk's hire. It was undoubtedly the duty of defendant to faithfully perform these duties, and, failing to do so, the burden rested upon him to show the amount of fees received. He stood in the character of a trustee for the county, and, as such, it was his duty to faithfully account for all fees received. By reason of the suppression of evidence, he might properly be charged with what he ought to have collected, but the referee enforced this rule strictly in taking the account. As the work done and the fees to which defendant was entitled can be correctly calculated from the records kept in the office, it does not seem just to charge him with more than he should have collected. The statute imposes no penalty for a failure to keep an account of the fees collected, and to make annual reports; and, when this evidence was before the referee, a failure to produce the account books was not such a suppression of evidence as should require the court to prescribe and impose a penalty. But defendant did keep an account of the fees collected, and did make annual reports to the county court. These reports, it is true, only showed the totals of the fees collected for each month. They were probably not such a detailed report as the statute contemplated should be made, but it does appear that they were satisfactory to the court. It also appeared that defendant offered to file with his reports the books containing an account of fees received for the year reported. This was regarded by the court to be unnecessary. Such books, therefore, should fairly be taken as part of the annual reports; and, being so taken, the reports fairly answer the requirements of the statute. It appears from the evidence that these account books, one of which was kept for each year, were kept in the office, and were at all times open to the inspection of the public, and defendant testified that they were left in the office when his term expired. We are of the opinion that the judgment of the circuit court was right, and it is therefore affirmed.

BRACE, C. J., absent. ROBINSON, J., concurs. BARCLAY, J., dissents.

We agree that the cause be transferred to court in banc, which is ordered.

LEONARD et al. v. BRASWELL et al.
(Court of Appeals of Kentucky. June 20, 1896.)

DESCENT AND DISTRIBUTION—ISSUE OF VOID MARRIAGE.

1. Gen. St. 1888, p. 716, § 3, providing that "the issue of an illegal or void marriage shall

nevertheless be legitimate," applies to marriages without as well as within the state, and entitles the issue of a marriage contracted in a state where it was void to inherit property in Kentucky from their parents and collateral kindred.

2. Such statute is in no way qualified or affected by section 4, providing that where the marriage is contracted in good faith, and with the belief of the parties that a former husband or wife then living was dead, the issue of the marriage born or begotten before notice of the mistake shall be legitimate issue of both parties.

Appeal from circuit court, Lyon county.

"To be officially reported."

Action by Thomas B. Leonard and others against Tilford Braswell and others. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

J. G. Husbands, Husbands & Husbands, W. H. Holt, and F. A. Wilson, for appellants. L. H. James, Ollie M. James, C. K. Wheeler, and T. J. Watkins, for appellees.

PRYOR, C. J. N. T. Braswell lived in the county of Lyon for many years. He died intestate, leaving no children surviving him, but several grandchildren, as well as a large estate. He had but two children, and both of them died before he did. One of his children, Ida, married Leonard, and her children, five in number, are the appellants in this case. His son, Charles Braswell, at his death, left children; and this controversy is between the children of Mrs. Leonard and the children of her brother, Charles, over the estate left by their grandfather, N. T. Braswell. The appellants, who are the children of Mrs. Leonard, claim that the children of Charles Braswell (the brother of their mother) are the offspring of a void marriage, and therefore not entitled to inherit from him, or take by descent any part of their grandfather's estate. The court below adjudged that the children of Ida and Charles Braswell stood in the shoes of their respective parents, and were entitled to inherit what their parents would have taken if living.

The origin of this litigation is based on the following state of facts: Charles Braswell, the father of the appellees, prior to the year 1863, having incurred the displeasure of his father, or for some other reason, left his home, which was in Lyon county, Ky., and took up his residence in Memphis, Tenn., under the assumed name of Charles Dobbins. About the year 1863, and when in Memphis, he married one Susan Deloate, and at the time of the marriage was going under the assumed name of Dobbins. In a short time he deserted his wife, and, after wandering from place to place, in the year 1866 he returned to Lyon county, to his father's home, and there succeeded in winning the affections of a young lady by the name of Josephine Dooms; and, under a promise of marriage, the two left their homes, in Lyon

county, and going to Cairo, Ill., were married at that place, in accordance with the law of the latter state. They immediately returned to their homes, in Lyon county, and there lived for many years, having had the two children who are the appellees in this case, and who, after their father's death, lived with their grandfather, the intestate, for some time; the latter dying, as the testimony conduces to show, without ever having known of his son's escapade in Memphis, or that he ever had but the one wife, the mother of the children who are the appellees in the present case.

It was argued upon the hearing in this court that Charles Braswell (alias Dobbins) never married Susan Deloate; but, as the testimony in the case upon this point is convincing, we have no doubt but that a marriage with the Memphis woman took place in the year 1863; and while his sending his second wife back to Memphis shortly after their marriage, and his having been arrested at the instance of her uncle for bigamy, and discharged, are facts tending to show that no lawful marriage had taken place, yet there were those who knew Charles Braswell well, and attended the wedding, which, connected with other facts and circumstances not necessary to detail, concludes this question. It seems to have been studiously concealed,—this Memphis marriage,—as the most intimate friends in Lyon county and the grandfather of these children were all kept in utter ignorance of the events that happened at Memphis in 1863, or that the father of these appellees ever had but the one wife. They lived in Lyon county, raised these children, and for 25 years, and until this suit was instituted, the Memphis marriage was kept concealed; and we are satisfied that the mother of the present appellees was not imbued with the belief that her husband had ever married the Memphis woman.

It is claimed by the appellants that the appellees are the offspring of a bigamous marriage, and have no right to inherit one-half or any part of their grandfather's estate, their father having died long before their grandfather. The law of the state of Illinois, where the last marriage took place, is pleaded, to the effect that the issue of such a marriage were and are illegitimate and without inheritable blood; and the contention is that the *lex loci contractus* governs not only as to the validity of the marriage, but determines once for all the legitimacy or illegitimacy of the children. It is conclusively shown that no statute was ever enacted in Illinois providing that the issue of marriages null or void in law shall, nevertheless, be legitimate, and it will be assumed that the issue of such marriages celebrated in that state are bastards, as at the common law; and, the better to understand the argument of able counsel, it is further

insisted that the law of the state where the marriage takes place must make the offspring legitimate, and, if the marriage was null and void by the law of Illinois, the children must be held to be illegitimate wherever they go. We shall not attempt to combat the proposition made by learned counsel that the *lex loci contractus* governs and determines the validity of the marriage, and, if valid where consummated, it must be held valid everywhere, and, if invalid, a like result follows. This doctrine cannot be controverted, and the rule must be considered to be that the law of the place of the marriage will generally govern as to the legitimacy or illegitimacy of the offspring. There is, then, no difference between the court and counsel as to this well-settled doctrine; but the appellees maintain they are made legitimate by the Kentucky statute, which reads: "The issue of an illegal or void marriage shall nevertheless be legitimate except the issue of an incestuous marriage; the marriage between a white person and a negro or mulatto shall not be legitimate." That every state has the power and the right to pass its own laws of descent counsel admit, but insist that this applies only where the marriages take place within the borders of the state passing such laws, and, if within its borders, can determine the status of the children or their right to inherit. It seems to us that the confusion in this case arises from the failure to distinguish between the validity of a marriage and the right of the offspring of that marriage to inherit from their parents or collateral kindred. The law of the state where the realty is located determines the mode of alienation or descent, and, as to personalty, it passes under the law of the domicile of the owner. The state of Kentucky, in the exercise of its sovereign power, has not attempted, by the statute making certain children legitimate, to validate marriages that were void when celebrated.

There can be no doubt of the power of the state to enact laws by which bastards may inherit from either father or mother, or from both; and this in no wise affects the validity of the marriage contract when entered into either in the state or out of it. Counsel have cited the case of *Smith v. Kelly's Heirs*, reported in 23 Miss. 167, and the case of *McDeed v. McDeed*, 67 Ill. 545, tending to establish the principle contended for,—and in fact the case of *Smith v. Kelly's Heirs* is exactly in accord with his views; but when we look to the history of the statute under which these appellees claim to be legitimate, with the right to inherit from their grandfather, and the decisions of this court upon the question, there is left but little room for controversy. The statute on which this claim rests is based on the Virginia statute of 1785, and was embodied in the statute of this state in the year 1796, and made a part of the

statute regulating the mode of descent and distribution. It then became a part of the Revised Statutes, and subsequently of the General Statutes, under the title of "Husband and Wife"; and there can be no doubt of its being a statute of descent and distribution, or creating such a status as to children within its provisions by which they may inherit not only from their parents, but from collateral kindred. The law of descent and distribution differs materially in many of the states of the Union, but this does not militate against the doctrine that a marriage valid where celebrated is valid everywhere, or, if void, must be so held. But such is not the question involved here. On the contrary, the only question is: Has Kentucky the right to regulate the law of descent or inheritance as to the property of its own citizens, when the property is within its own territory? In the case of *Ewing v. Sneed*, reported in 5 J. J. Marsh. 459, 460, it appears that Robert R. Moore lived in the state of Indiana at his death, dying in that state. He left a will that was admitted to probate. He devised a slave and a tract of land in Kentucky to Sneed. When the will was executed, Moore was childless; but, shortly before his death, his wife gave birth to a child, a daughter, and in 1823 this daughter married a man by the name of Ewing. Ewing and his wife claimed the land and slave as the heir at law of her father. Sneed's defense was that she was not legitimate. Mrs. Moore, it seems, when she married Moore, had a living husband. Moore's marriage to his wife took place in Kentucky. This court held that, under the Kentucky statute providing that "the issue in marriage deemed null in law shall nevertheless be legitimate," Mrs. Ewing was entitled to the land, its descent being controlled by the law of this state; but, as the slave was movable, the law of Indiana must control as to his value, that being the domicile of Moore at his death. The court in that case said, in discussing the effect of the statute: "It is a law of inheritance. It does not operate extraterritorially, so as to legitimate in another state a child who, by the law of that state, would be illegitimate there. This statute would have applied to the land even if the marriage had taken place in Indiana." And further: "The law of Kentucky which declared that issue in marriage deemed null in law should be legitimate can be applied only so far as the estate in Kentucky which descends according to her law may be concerned." The case of *Jackson v. Moore*, reported in 8 Dana, 170, involved a provision of this same statute (1796) by which antenuptial children were made legitimate by the subsequent marriage of the parents. This court held the statute to be one of inheritance, and a child made legitimate by its provisions was adjudged to inherit from the brother of her father, his brother dying without children. The word "legitimate," as defined by

Webster, means "born in lawful wedlock"; to put in position or state of a legitimate person before the law, by legal means; as to legitimate a bastard child." In *Harris v. Harris*, reported in 85 Ky. 49, 2 S. W. 549, a Miss Deacon married one Smith Ash, in the state of Ohio (Cincinnati), in August, 1860. In a short time after the marriage, she brought an action for a divorce, that for some reason was dismissed. While she was the wife of Ash, she intermarried with one Harris, the marriage to Harris taking place in Ohio also; but after this last marriage she obtained a divorce from her first husband. We have, then, both marriages taking place in the state of Ohio, and the testimony showing proceedings for a divorce from the first husband, and the birth of several children, the offspring of the second marriage. It was insisted in that case that, the marriage being void, the children could not inherit from the father. This court held the last marriage void from its inception, but the children were legitimate, and entitled to the father's estate, by reason of the statute of 1796, that had been embodied in both the Revised and General Statutes, and said: "When a marriage actually takes place,—that is, when it is solemnized according to the forms of law,—though void as between the parties, the offspring are made legitimate by the statute."

It is, however, contended that section 4 of the Kentucky Statutes, relative to void marriages, was intended to qualify something in the third section, and not to supply what they supposed had been omitted in the third section. The third section makes, in general terms, the issue of an illegal or void marriage legitimate; and section 4 provides: "Where the marriage is contracted in good faith, and with the belief of the parties that a former husband or wife then living was dead, the issue of the marriage born or begotten before notice of the mistake shall be the legitimate issue of both parties." Gen. St. 1888, p. 710. It is difficult to construe the fourth section as qualifying the third, unless it be said that in all void marriages, after notice of the mistake or the invalidity of the marriage, children begotten after this notice are illegitimate. Such could not have been the legislative meaning, and it is apparent that the framers of the statute were fearful that something had been omitted in the third clause that required to be supplied by the fourth; and it is certainly more in accordance with the legislative intent to place this construction on the statute than to make the notice of the mistake on the part of the parents determine the legitimacy or illegitimacy of the children; and as said in the case of *Sams v. Sams' Adm'r*, 85 Ky. 396, 3 S. W. 593, the statute should be construed according to its spirit and reason, and, viewed in this light, it forbids the conclusion reached by counsel. The fear of an indictment for bigamy would deter the parties from violating the law, and no harm can result from a

construction not only consistent with the object of the statute, but in furtherance of a sound public policy. Judgment affirmed.

McNEW et al. v. WILLIAMS et al.
(Court of Appeals of Kentucky. June 20, 1896.)

COURTS—JURISDICTION—CHANGE OF VENUE—APPEAL—PRESUMPTIONS—JUDICIAL SALES.

1. The fact that a new county is formed, and courts established therein, does not authorize the court of a county wherein actions are pending to transfer them to the new county, because the subject of the suit is situated in, or the parties thereto reside within, the territorial limits of the new county.

2. Where a sale of decedent's land is ordered, made, and confirmed by a court of competent jurisdiction, the purchaser acquires a valid title as against the heirs who were parties to the judgment of sale, though the deeds were made by another court, which had no jurisdiction.

3. Where the transcript shows that the record included a paper which might have contained matter that would sustain the judgment, the court will presume the judgment correct, unless such paper appears in the transcript.

4. Where the transcript in an action to recover land shows that an amended answer was filed, but does not contain the same, it will be presumed that such answer complied with Civ. Code Prac. § 125, relating the requirements of an answer in such suit.

Appeal from circuit court, Magoffin county.
"Not to be officially reported."

Four actions by James McNew and others against Thomas Williams and others for the recovery of land. By consent of parties, the cases were transferred to equity, and consolidated, and from a judgment for defendants plaintiffs appeal. Affirmed.

W. H. McGuire, Jas. Goble, and W. S. Harkins, for appellants. Jno. L. Scott & Son and D. D. Sublett, for appellees.

PAYNTER, J. The appellants brought four suits to recover certain boundaries of land particularly described in the petitions. The appellees were not all made defendants in either of the suits. By consent of the parties the suits were transferred from ordinary to equity, and consolidated. The plaintiffs claimed to be the heirs at law of William H. McNew, who died in Floyd county, in 1857. The land described in the petition was situated in Floyd county, and continued to be within the boundary of that county until 1860, when Magoffin was formed, whose boundary embraced the land in controversy. While separate answers were filed by some of the defendants, a joint answer was filed for most of them. The answer denied that the plaintiffs were the owners of the several tracts of land which were sought to be recovered. A number of defenses were interposed. In the fifth paragraph of the answer the death of William McNew in Floyd county, the appointment and qualification of his personal representatives, etc., is alleged, and, in addition thereto, in substance, that, the personal estate being insufficient to pay the debts

owing by the estate, the personal representative brought suit in the Floyd circuit, to which the plaintiffs in this action were made defendants, suggesting the insufficiency of the personal estate to pay its debts; that a settlement of the estate was asked, and a sale of enough of the real estate owned by the decedent at his death to pay the balance of the indebtedness of the estate, etc. It is further alleged "that the Floyd circuit court, by appropriate and proper orders, changed the venue of said case to the county of Magoffin, and transferred the suit aforesaid to the Magoffin circuit court, and such proceedings were had in the Floyd circuit court and the Magoffin circuit court as resulted in a judgment of sale, and a sale of all the lands claimed in these actions by the plaintiffs for the payment of the debts of their ancestor, W. H. McNew, which said sales were confirmed by the appropriate and proper orders of the courts, and deed made by the court's commissioners, which were examined and approved," etc. The answer states that a certified copy of the pleadings, exhibits, reports, orders, and judgments in the case is filed as part thereof. To the answers demurrers were sustained. An amended answer was filed by the defendants as appears by an order, as follows, to wit: "This day came defendants, and tendered and offered to file an amended answer, and plaintiffs objected, and cause submitted in said motion, and court, advised, sustains said motion, and permits said amended answer to be filed, to which plaintiffs except." The clerk certifies that this amended answer is not in the files of his office. A copy of it does not appear in the transcript of the record. The original answer is indefinite, uncertain, and unsatisfactory as to when the case was transferred to the Magoffin circuit court, and as to the court in which the orders, etc., were made. The fact that a new county is formed, and courts established in it, does not authorize the court of a county in which actions are pending to transfer them to the new county, because the subject of the litigation is situated in, or the parties to the action reside within, the territorial limits of such new county. *Drake v. Bedinger*, Sneed, 188; *Lindsey v. McCormick*, 2 A. K. Marsh. 230. The court can only be divested of jurisdiction by appropriate legislation. If the judgments of sale were entered in Floyd circuit court, sale made and confirmed by that court, although the deeds were made in the Magoffin circuit court, after the transfer of the case, then the purchaser would have acquired such title to the land as would be an available defense to this action, even if the orders in the Magoffin circuit court were void for want of jurisdiction in the court. The amended answer, which is not a part of the transcript, may have pleaded the state of facts we have indicated. When the transcript shows that the record contained a paper which may

have contained matter that would sustain the decision, the appellant must include such paper in the transcript, or this court will presume the decision appealed from to be correct. *Huffaker v. Bank*, 13 Bush, 644; *Bowman v. Holloway*, 14 Bush, 426. The answer may have alleged facts with reference to the action in question which showed that the sales to the defendants were valid. It is contended that the burden was on the defendants to show that the judgment was rendered ordering sale; that sales were made and approved by the court, and that they must be shown by an exhibition of the record. That the burden is on the defendants to show the judgments, sales, and confirmations is conceded, and that, if the record is in existence, it must be shown by it. We have presumed from the facts heretofore stated that the amended answer alleged facts which, if true, rendered the sales valid. It was incumbent on them to exhibit the record, or a certified copy of it, to sustain its allegations. The answer makes a certified copy of the record part of the answer. Unless the contrary is made to appear by an order of court or by a bill of exceptions, the presumption must be indulged that it was a part of the record, and considered by the court on the trial of the case. A copy of the record is not made part of the transcript, and for the reasons given with reference to the absence from the transcript of the amended answer, we must presume the certified copy of the record sustained the allegations of the amended answer. It is insisted that the defendants failed to exhibit the record from the following state of facts: On October 4, 1894, W. W. McGinis, one of the attorneys for plaintiffs, filed his affidavit, in which he says that this case was submitted for trial, and argued by counsel for two terms preceding this, and that the copy of the record in this case of *W. H. McNew's Adm'r v. W. H. McNew's Heirs*, etc., referred to in defendants' answer, was before the court on each occasion, and considered by the court, and that defendants' attorneys have possession of and refuse to produce same. Upon this a rule was awarded against the attorneys of defendants to produce the record in question. On the 5th day of October, 1894, the attorneys for the defendants filed responses to the rule, in which they denied having the record. Nothing further appears in the record in relation to the copy of the record. On the 6th of October, 1894, the court rendered a judgment dismissing the petitions. There was no order made to supply the copy, which did not appear to be in the record on the 5th of October, 1894, nor does the court state in its judgment that the copy was not used and considered on the trial of the case, and there is no bill of exceptions to show that fact. In view of these facts we must presume the court had before it and considered the copy of the record. We must also presume that

the amended answer complied with section 125, Civ. Code Prac., which presents the requirements of an answer in an action to recover land. The judgment is affirmed.

HYNES v. STEVENS.

Supreme Court of Arkansas. June 27, 1896.)

USURY—RETROACTIVE EFFECT ON CONTRACT.

Plaintiff, being indebted to defendant on two notes, each bearing interest at 10 per cent., deposited with defendant a bond for deed as security. Subsequently, when the two notes became due, they were extended on the execution of two additional notes for \$20 each. *Held*, that the usurious character of the \$20 notes did not relate back and taint with usury the original transaction rendering void the security given therefor.

Appeal from circuit court, Crawford county; Jephtha H. Evans, Judge.

Action by W. C. Stevens against Robert S. Hynes. There was judgment for plaintiff, and defendant appeals. Reversed.

Jesse Turner, for appellant.

BUNN, C. J. The facts in this case are that appellee had purchased the S. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ of section 34, township 10 N., range 32 W., from the Little Rock & Ft. Smith Railway Company for the sum of \$120, and given his note therefor, less \$30 cash, and taken bond for title, conditioned in the usual way. The \$90 were to be paid in three equal annual installments, and deed to be made when all the installments were paid. On December 17, 1888, plaintiff, Stevens, borrowed of defendant, Hynes, as cashier of the Crawford County Bank, \$100, and executed his promissory note to him for \$120, of that date, due November 1, 1889, and to secure the payment of same assigned said bond for title or contract of sale to him. On December 17, 1889, plaintiff, Stevens, paid off said note, and demanded his bond for title, and the same was refused by the defendant, acting for said bank, claiming that the bank owned a note (called the "Hays Note") of plaintiff for \$125, with accrued interest. After some negotiations it was finally agreed between them that defendant's bank should loan plaintiff \$100 for one year at 10 per cent. interest, plaintiff to pay the accrued interest on the \$125, and the land contract or title bond should remain as security for all the indebtedness of plaintiff to said bank, and an extension of one year to be given on the \$100 and the \$125. Defendant then paid over to plaintiff the \$100, less \$12.50, on the accrued interest on the \$125, took plaintiff's note for \$110.50, payable 15th of November, 1890, and dated December 2, 1889. (The \$100 and interest at 10 per cent. from date until maturity, and the interest on said interest for that time, made the \$110.50, the note to draw interest only from maturity.) Subsequently a further extension of one year was given on the two notes, and in consideration thereof

plaintiff gave defendant two notes, each for \$20. The \$110.50 note, the \$125 note, and the two \$20 notes all remained unpaid at the time of the institution of this suit. This was a bill in equity to compel defendant to surrender title bond, on the ground that the debts for which it was held were usurious. On bill and answer and testimony of plaintiff with exhibits the court found that there was no usury in the \$110.50 nor in the \$125 note, but that the deed, which in the meantime had been executed and delivered to defendant on the bond for title by the railroad company, was in fact a mortgage, and that some of the debts for which it was held for security were usurious, and therefore the same was void as a mortgage, and was only held in trust for plaintiff by defendant. Decree in behalf of defendant for the \$110.50 note and the \$125 note, and that defendant's lien be discharged; that the legal title vest in plaintiff, he having paid the full amount of the purchase money, and that defendant deliver up said deed to plaintiff. Defendant took exceptions, and appealed to this court.

The only question before us is whether or not the court below erred in holding the deed as a mortgage in the hands of defendant to secure the claims against plaintiff was usurious as to certain of the said secured debts, not mentioned in the decree, but presumably the two \$20 notes, and therefore void. The two \$20 notes are admitted to be usurious if they are to be taken with the other indebtedness, but no claim is made on their account, and it is contended that they were made long subsequent to the agreement by which the title bond, and, consequently, the deed, was agreed to be held as security for the indebtedness of plaintiff to defendant, and under the rule on that subject could not taint said indebtedness so secured with usury. The contention of defendant was correct, and the court erred in not so holding, and in decreeing the deed void as a security as aforesaid. The decree is therefore reversed, and the cause is remanded, with directions to foreclose the deed (properly held to be a mortgage), and out of the proceeds pay off the amount decreed in favor of the defendant and the costs, if same is not paid in a reasonable time.

LEWIS v. STATE.

(Supreme Court of Arkansas. June 27, 1896.)

CRIMINAL TRIAL—INSTRUCTIONS—HEARSAY EVIDENCE.

1. Where the usual instruction as to reasonable doubt is given, it is not reversible error to refuse a charge that, in order to convict, the evidence must exclude every other reasonable hypothesis than that of defendant's guilt.

2. Where the evidence as to the identity and ownership of the stolen property was conflicting, it was error to permit a witness, who had found the property on defendant's premises, to state that he could have identified the same by a description previously given by the alleged owner,

who was present at the trial, and testified as to his ownership and as to the description of the property.

Appeal from circuit court, White county; H. N. Hutton, Judge.

Eunie Lewis was convicted of petit larceny, and appeals. Reversed.

J. P. Roberts, for appellant. E. B. Kinsworthy, Atty. Gen., for the State.

BUNN, C. J. This is an indictment for grand larceny, tried in the White county circuit court. The trial resulted in a verdict for petit larceny, and defendant appeals. The grounds upon which the verdict and judgment are asked to be set aside are: (1) That the same is contrary to the evidence; (2) that the court erred in refusing to give instruction No. 5 asked by the defendant; (3) because the court admitted, over the objection of defendant, the testimony of Hamilton and Roberts, to the effect that the defendant did or could have identified the stolen property by the description thereof previously given them by the owner. There was evidence to sustain the verdict. How much, or how strong it was, it is improper for us now to say. There was no reversible error in refusing to give the instruction asked by defendant to the effect that, in order to convict, the evidence must exclude every other reasonable hypothesis than that of the defendant's guilt. It is true that this case is one of circumstantial evidence, and the rule sought to be invoked is applicable to and proper in such cases; yet this court has held, in effect, that the usual instruction on the subject of the reasonable doubt, covers the ground of the instruction refused in so far as to make its refusal not reversible error. *Green v. State*, 38 Ark. 304. The witnesses Hamilton and Roberts, who were in search of the stolen property, on the trial testified, in answer to a direct question of the prosecuting attorney, that they could have identified the meat they found in defendant's smoke house as the meat of the alleged owner by the description he (May) had previously given them of it. In view of the fact that the owner, May, was present, and testified as to his ownership of the meat, and as to its description, and especially in view of the fact that the testimony as to the identity and ownership of the meat was very conflicting, it was rather unfair to interject into the evidence what the owner said as to the identity of the meat in private conversation with the other witnesses, in the absence of defendant; or, rather, that witnesses identified the meat as that of the prosecuting witness as his own by the description he gave them of it. This was hearsay testimony, and had the tendency of bolstering up and giving undue weight to the testimony of the alleged owner, May. For the error the judgment is reversed, and the cause remanded, with instructions to grant a new trial, and to proceed not inconsistently herewith.

STATE v. BAILEY.

(Supreme Court of Arkansas. June 27, 1896.)

INDICTMENT—JOINDER OF COUNTS—ELECTION.

Where an indictment for carrying a pistol as a weapon is in two counts, the state should not be required to elect on which count it will proceed, because the first count states that the pistol was not, and the second count states that it was, such as is used in the army or navy of the United States; especially where the second is obnoxious to a demurrer filed, because it does not allege that the pistol was carried as a weapon.

Appeal from circuit court, Garland county; Alexander M. Duffie, Judge.

Pres Bailey was indicted for carrying a pistol as a weapon, and the state was required, on motion of defendant, to elect on which of the two counts of the indictment it would proceed. From a judgment for defendant on failure of the state to so elect, the state appeals. Reversed.

E. B. Kinsworthy, Atty. Gen., for the State.

BUNN, C. J. This is an indictment for carrying a pistol as a weapon, containing two counts. Motion by the defendant to compel the state to elect upon which count it would prosecute, and motion sustained. The state declined to elect, took exceptions. Judgment for defendant, and state appeals.

The indictment reads as follows: "The grand jury of Garland county, in the name and by the authority of the state of Arkansas, accuse Pres Bailey of the crime of carrying a pistol as a weapon, committed as follows: The said Pres Bailey, in the county and state aforesaid, on the 22d day of April, 1895, unlawfully did carry as a weapon such a pistol as is not used in the army or navy of the United States, against the peace and dignity of the state of Arkansas." Second count: "And the grand jury aforesaid, in the name and by the authority aforesaid, on their oath do further present that the said Pres Bailey, in the county and state aforesaid, on the 22d day of April, 1895, unlawfully did carry such a pistol as is used in the army or navy of the United States, said pistol not being then and there carried by the said Pres Bailey uncovered and in his hand [this being the same offense as that charged in the first count of the indictment], against the peace and dignity of the state of Arkansas." Notwithstanding the seeming inconsistency between the charge in the first count that the pistol was not such as is used in the army or navy of the United States, and that in the second count that the pistol was such as is used in the army or navy, the offenses in the two counts are one, and the same as stated in the second count, and for this reason the motion to elect should not have been sustained. *State v. Rapley*, 60 Ark. 13, 28 S. W. 508; *Howard v. State*, 34 Ark. 433. Besides, the second count of the indictment was of itself

demurrable, and should have been so held on the demurrer interposed, leaving only the first count valid, for the reason that the pistol was not alleged to have been carried as a weapon in this count. For the errors named the judgment is reversed, and the cause remanded for further proceedings not inconsistent herewith.

HART et al. v. BAYLISS.

(Supreme Court of Tennessee. June 16, 1896.)

ACTIVE TRUST—WHAT CONSTITUTES—POWERS OF TRUSTEE.

A deed to a trustee to hold the property for the sole use of the grantor's wife, free from dominion, debts, or liabilities of her present or any future husband, and providing that the "rents, profits, proceeds of, or sale or profits of, said property" shall be held under the same trusts, created an active trust; and a subsequent deed of trust of such property, executed by the husband and wife and the trustee to secure a debt of the husband, was void.

Appeal from chancery court, Shelby county; Sterling Pierson, Chancellor.

Bill by Kate Hart and others against Charles S. Bayliss to enjoin a sale under a deed of trust, and to remove the cloud on the title of complainant Kate Hart to the property conveyed by such deed. From the decree, both complainants and defendant appeal. Affirmed on defendant's appeal.

George Gillham, for complainants. Smith & Frezevant, for defendant.

ALLEN, Special Judge. This is a bill filed to enjoin the sale of certain real estate in the city of Memphis under a deed of trust executed by complainant and her husband to secure a debt for money loaned to her husband, and to set aside said deed of trust, etc. Prior to July 11, 1865, E. R. Hart was the owner in fee of a house and lot in Memphis, Tenn.; the same being lot 10 in the block, northwest corner of Shelby and Huling streets, 60 feet front on Shelby, by a depth on Huling street of 200 feet. On the 11th day of July, 1865, he conveyed said property, with some household goods, furniture, etc., to Ruel Hough, as trustee, in consideration of \$16,000; he to hold the same for the use and benefit of the complainant Kate Hart, as her sole and separate estate. The granting clause of the conveyance is as follows: "This conveyance is made to said R. Hough for the following uses and trusts: The said Hough, his heirs, executors, administrators, assigns, and successors, as trustees, are to hold the said property for the sole use and benefit of Kate Hart, wife of E. R. Hart, free from dominion, debts, or liabilities of her present or any future husband; and the rents, profits, proceeds of, or sale or profits of, said property, or any portion thereof, shall be held under the same trusts." This deed was properly acknowledged and recorded on July 12, 1865. Mrs. Hart at the time

accepted said settlement, and ever since then has had possession of the property, and has enjoyed its rent and profits. The trustee, Hough, some years later, moved from Tennessee to Massachusetts, and prior to April 10, 1890, had there died intestate; leaving surviving him his widow, Rebecca W. Hough, and his daughter, Annie H. Brigham, wife of Alfred W. Brigham, all residents of Boston, Mass. On March 28, 1890, Mrs. Kate Hart and her husband, E. R. Hart, filed in the probate court of Shelby county their petition to have a new trustee appointed, stating that the original trustee had many years ago moved from the state, and had since died intestate, a resident of Massachusetts, leaving surviving him a widow, and one child, Mrs. Annie H. Brigham, his sole heir at law; that they had caused said widow and daughter to acknowledge service of said petition,—and asked that a new trustee be appointed. In the petition it is stated that they had sent the same to the widow and heir of Hough, in Massachusetts, prior to that time, and that said widow and heir indorsed on the petition their acknowledgment of the same. These indorsements are as follows:

"We, Mrs. Rebecca W. Hough and Mrs. Annie H. Brigham, named in the foregoing petition, and do hereby acknowledge service of foregoing petition, and do agree that the same may be heard in the probate court of Shelby county, Tennessee, at the time and place when it may be convenient, and such decree rendered as the court may deem proper. Mrs. Rebecca W. Hough. Mrs. Annie H. Brigham. Witness: A. P. Burdett."

"I, Alfred W. Brigham, husband of the said Annie H. Brigham, join in the foregoing acknowledgment of service and agreement: Alfred W. Brigham. Witness: A. P. Burdett."

The decree was rendered March 28, 1890,—the same day the petition was verified and filed. By this decree, R. F. Patterson was appointed trustee in room and in stead of Hough, deceased, with the same duties and powers. In making this appointment, no process was issued, no publication was made; simply the sworn petition, with its exhibits, having upon it the written indorsements aforesaid of the widow of Hough, and also of the heir, with her husband (she being a married woman); and final decree entered the same day the petition was filed; there being no answer by the defendants, and no pro confesso against them. On April 10, 1890, Mrs. Kate Hart, with her husband, E. R. Hart, conveyed this lot, in trust, to John I. Dunn, trustee, to secure to the Lombard Investment Company a note for \$6,000 made that day by the grantors. The bill charges that this conveyance was to secure a debt due by her husband, of which defendants had knowledge; that she received none of the money, etc.; and that she signed it at the request of her husband. This deed was registered. Default having been made, the trust-

tee, Dunn, in November, 1895, advertised the property for sale under this conveyance. To enjoin this sale, and to remove the cloud upon her title, this bill was filed on December 24, 1895. Although Patterson had been appointed trustee in March, 1890, he did not join in the execution of the deed of April 10, 1890. On July 28, 1890, Mrs. Hart, her husband, and Patterson, as trustee, executed to the same party, and to secure the same debt, another trust conveyance, and in the same form. This deed was executed July 28, 1890, and was dated back to April 10, 1890. The sale, however, was advertised to be made under the first, not second, deed, in which the trustee was a grantor. Complainants, in their bill, insist: That Hart and wife alone could not convey the title, and that the attempted sale should be enjoined. Further, that the trust was active; that the second deed failed to convey the title, because of want of power to convey; that it was the duty of the trustee to hold the property, and see to it that Mrs. Hart received the rents and profits, and in case of sale the trustee had to hold the proceeds for her; and that it was a breach of trust to attempt to convey it to secure a debt of her husband. The bill further claims that the probate court had no jurisdiction over the defendants, and no jurisdiction to appoint Patterson trustee, and that said decree was void. The chancellor enjoined the sale, and on demurrer held that the deed to Dunn, trustee, was made in violation of the trust, and was void. He, however, held that the appointment of Patterson trustee was valid, and dismissed that feature of the bill. Each party appealed from so much of the decree as held against their respective contentions, and have assigned appropriate errors.

Under the deed from Hart to Hough, trustee, it was the duty of the trustee to hold the property for the benefit of Mrs. Hart; to hold the same free from the control of her present husband, or any future husband; to protect it from the debts and liabilities of her present husband, or future husband, and to hold the rents and profits for her sole use and benefit; and to hold the proceeds of sale, in the event of sale of any of the property under the same trust. This made the trust active. In *Cardwell v. Cheatham*, 2 Head, 17, 18 (opinion delivered by Judge Wright), language the same in substance as here employed was held to have created an active trust. There the language was: "That said Cheatham should hold the legal title of the lot for the sole and separate use and benefit of complainant, the same not to be liable to the control, or for any debt or responsibility to be contracted or incurred by, the said James W. Cardwell, and that the said Cheatham should permit her to use, occupy, rent out, or improve the lot as she may think proper; and, at her request in writing, to sell and convey the same, and to reinvest the proceeds as she, in writing,

might direct; and that the property acquired by the reinvestment should be held by the trustee in like manner as the original estate; and that said trustee should be responsible only for fraud, or gross neglect of duty, and not for any mismanagement of complainant in the premises." About the only difference in the terms used to create these respective trusts lies in the power given the wife, in the Cheatham Case, to collect the rents, improve and manage the property, direct its sale, and the reinvestment of its proceeds. In the present case no such powers are given the wife, but all is invested in the trustee, to hold it, and the rents and proceeds of sale, in the event of a sale for the wife, free from the debts and liabilities of her present, or any future, husband. In that case the court said: "It was the duty of the defendant, Cheatham, as the trustee of the complainant, upon her written request, personally—himself—to sell this lot, and to receive the proceeds, and reinvest it in other property under her written directions. A sale by the husband was totally unauthorized by the trust. The trustee could not legally pay the purchase money to him, or permit Davis (the purchaser) to do so, without a plain violation of the terms of the deed. To do so would be gross neglect of his duty, and, if allowed, would in effect annul the trust altogether." "We have no evidence, nor is it alleged, that the husband received this fund with the complainant's consent. But this could make no difference, for by the very terms of the deed he was to have no control over it." "Neither was she to have the fund produced by the sale of the lot. It was to be reinvested by the trustee in other property. She was to use, occupy, rent out, or improve the original or substituted property as she might think proper, and for any mismanagement on her part as to these things the trustee was not liable. But the body of the estate—the fund itself—was not to be consumed or destroyed, but the same was secured in the hands of the trustee against the power of the husband, and weakness of the wife." There the husband, as in the present case, had conveyed the lot to the trustee to hold for the wife free from the control, debts, responsibilities, contracted or incurred, of the husband; and it was made the duty of the trustee, upon her written request, to sell the lot, receive the proceeds, and to reinvest the proceeds in other property, in her direction. The court held it a palpable breach of trust for the trustee to sign the deed to carry out the sale made by her husband, in which the husband received the proceeds for his benefit, although the trustee was authorized by the wife, in accordance with said deed, to sign the conveyance, because it was made the duty of the trustee to receive the proceeds of the sale, and reinvest it, and hold it for the wife. That was so, although Cheatham, the trustee, had been made such trust-

tee in the deed from the husband, without his knowledge that he held such a trust. He having assumed to execute the deed to the lot in the capacity of trustee, he was treated as having accepted said trust, and as having full knowledge of the terms of the deed under which he held the lot in trust for the wife. The rule in this state is that "the trustee takes exactly that quantity of interest which the purposes of the trust require." *Ellis v. Fisher*, 3 Sneed, 234; *Murdock v. Johnson*, 7 Cold. 612; *Harding v. Insurance Co.*, 2 Tenn. Ch. 468; *Hooberry v. Harding*, 10 Lea, 397. In the last-mentioned case the court says: "Special active trusts were never within the province of the statute of uses. These are trusts which require some act to be done, or some duty to be performed, by the trustee, even if the act or duty be for the benefit of the cestui que trust. So, if the trustee is to exercise any discretion in the management of the estate, in the investment of the proceeds or the principal, or in the application of the increase, or if the purpose of the trust is to protect the estate for a given time, or until the death of some one, or until division." And the court says: "It is upon this ground that the trustee always takes the estate when the trust is in favor of a married woman, even if it be to permit her to receive the rents or use the property." 10 Lea, 398, citing *Perry, Trusts*, 305. In the case of *Jourolmon v. Massengill*, 86 Tenn. 97, 5 S. W. 719, Judge Lurton, delivering the opinion of this court, said: "The duty to protect the corpus of the estate from alienation, or either the corpus or income from subjection by creditors of the devisee, and the duty to see that the income was applied to the support of the son and widow during the lives of either, by necessary implications, rested upon the trustee. These were active duties, and, if not void because illegal, make the trust an active, and not a dry, one." "If any trust or duty be imposed upon the trustee, either expressly or by implication, then the trust will not be a dry one." *Jourolmon v. Massengill*, 86 Tenn. 93, 5 S. W. 719. This case approves the 10 Lea case, referred to, on the subject of what are active trusts, but overrules it on another question not here involved. Now, the deed from Hart to Hough, in the first instance, having imposed upon the latter an active trust, as heretofore defined, and if it be admitted that Patterson succeeded to said trust by proper appointment by probate court, the trustee was bound to execute said trust according to its letter and meaning, and he could not lawfully make any conveyance or perform any act with respect to said property that was not authorized by the instrument under which he assumed to act as trustee. *Cardwell v. Cheatham*, 2 Head, 14-16; *Campbell v. Fields*, 1 Cold. 416; *Hix v. Gos-*

ling, 1 Lea, 570; *Head v. Temple*, 4 Heisk. 34. The latest case in Tennessee on what is an active trust is the case of *Porter v. Lee*, 88 Tenn. 782, 14 S. W. 218,—the opinion was delivered by Judge Caldwell,—which is decisive of that question, when applied to the case at bar, and is in accord with this opinion. The trustee would not have had any right to have sold said property, and paid the entire proceeds over to the wife of said Hart, nor would he have been authorized in paying over to her more than the rents and profits for her support and maintenance; and even then, if, in the sound discretion of the trustee, it was not necessary to pay her over the total amount of the rents and profits for her support, he could only pay her over so much of the rents and profits as was actually necessary, in his discretion, for her support. Of course, this discretion must be properly and judiciously exercised, so as not to deprive Mrs. Hart of any part of the rents and the income she might need for her support and maintenance. This is the proper and only construction of said deed. In such a case this court have said: "A trust must be so created that no interest vests in the beneficiary, as where it is limited to the support and maintenance of the beneficiary, and he is prohibited from alienation or anticipation. So where the income is to be paid over only in the discretion of the trustee," etc. *Henson v. Wright*, 88 Tenn. 507, 12 S. W. 1035. "In all such cases the purposes of the trust would obviously be defeated if the beneficiary could assign or alienate." *Id.* The statute of 1869-70 does not apply in this case, because the trust is active, and the fee in the property is vested in the trustee. Mrs. Hart could not convey without the trustee joining in the conveyance. The trustee could not, without a palpable violation of the trust, convey said property to secure a debt of the husband; and the fact that Mrs. Hart joined in the conveyance, and consented thereto, could make no difference. That portion of the chancellor's decree which held that said deed of trust executed by Hart and wife, and joined in by Patterson, trustee, was made in violation of said trust, and is void, is affirmed.

It is not important for us to discuss in this opinion the assignment of error by complainant to that part of the decree holding that the probate court had jurisdiction to appoint Patterson trustee, except to say that the court deems it unnecessary to determine that question at this time. Cause remanded.

Since deciding this case, defendants filed a petition to rehear, which has been considered by the court; and said petition does not raise any new questions, nor call the attention of the court to any question of fact or of law that has not been fully considered, and the same is dismissed.

**SHELBY COUNTY et al. v. TENNESSEE
CENTENNIAL EXPOSITION
CO. et al.**

(Supreme Court of Tennessee. May 28, 1896.)

**COUNTIES—APPROPRIATION FOR COUNTY PURPOSES
—TENNESSEE CENTENNIAL EXPOSITION—
EFFECT OF POSTPONEMENT.**

1. Acts 1895, c. 25, authorizing the county courts in the several counties of the state to appropriate money to provide for an exhibit of their resources at the Tennessee Centennial Exposition of 1896, is an authorization to appropriate money for a county purpose, within Const. art. 2, § 29, declaring that the general assembly can authorize the several counties to impose taxes for county purposes.

2. The validity of the act, as applied to any particular county, is not affected by the fact that the exposition for which the appropriation was made is not to be held within the territorial limits of the county.

3. Nor is the authorization inoperative by an extension of the time of the exposition to 1897, such extension not being an abandonment, and it not being required that the exposition should be completed in 1896.

4. The public schools of a county are among the "resources" of the county, within Acts 1895, c. 25.

Appeal from circuit court, Shelby county; L. H. Estes, Judge.

Application by the Tennessee Centennial Exposition Company and others for a writ of mandamus against Shelby county and others. From a decree granting the writ, defendants appeal. Affirmed.

Turley & Wright and Malone & Malone, for appellants. James M. Greer, for appellees.

CALDWELL, J. On the 13th day of January, 1896, the county court of Shelby county, in regular quarterly session assembled, passed a resolution, in usual and proper form, appropriating \$25,000 of the county's revenue, then in the county treasury or to be thereafter collected in due course of law, "to provide for an exhibit of the resources of the county in the Tennessee Centennial and International Exposition, to be held in the city of Nashville during the current year 1896"; the fund so appropriated "to be administered" by the "County Court Centennial Committee," composed of George B. Fleece, J. M. Coleman, N. C. Taylor, J. M. Goodbar, R. C. Graves, and N. C. Perkins, citizens of Shelby county, "under such rules and regulations" as the court should "from time to time provide." On a later day of the same term, the court, by appropriate resolutions, "authorized" its chairman to issue warrants on the county trustee, "in payment of all orders for expenses incurred by the County Court Centennial Committee," such orders to be first approved by that committee's "executive committee." Some time thereafter the County Court Centennial Committee "was applied to by Miss Lida Thomas, superintendent of public schools for Shelby county, for an appropriation of \$50, to enable her to make an exhibit in behalf of the county schools at the approaching Centennial celebration"; and

"George B. Fleece, one of the committee, having incurred certain traveling expenses in and about the execution of his duties as a member of the said committee, amounting to \$25, applied for a sum sufficient to cover the said expenses." Both of these claims were properly approved, and the County Court Centennial Committee "applied to the chairman of the county court to issue his warrants for said sums, which he declined to do." Thereupon the present action was commenced, as an "agreed case"; the Tennessee Centennial Exposition Company and the several members of the Centennial Committee of the county court of Shelby county being plaintiffs, and Shelby county and John J. Barry, chairman of her county court, being defendants. The plaintiffs "insist that it was the duty of the chairman of said court to have issued warrants upon the application mentioned above," and seek to have him compelled by mandamus to issue them now; while the defendants insist that the chairman should not have issued said warrants, and that his refusal to issue them was right, under all the facts and circumstances of the case." The circuit judge "found the matter of law submitted to the court, upon the agreed statement of facts, in favor of the plaintiffs, and against the defendants," and thereupon ordered and adjudged that the chairman of the county court of Shelby county "issue his warrant for \$25, payable to George B. Fleece, and also issue his warrant for \$50, payable to Lida Thomas," and that such warrants, when issued, "be delivered to ———, the committee appointed by the county court, as set forth in the agreed case." The defendants have appealed in error.

There can be no reasonable doubt that the "expenses" for which the chairman was authorized to issue warrants were expected and intended to embrace all proper expenditures, whatever the form or nature, to be made by the committee in connection with the contemplated exhibit, and that the court designed that all outlays which the committee should have the right to make should come within, and be paid alone out of, the appropriation of \$25,000; hence, in considering the right of the committee to demand warrants for the matters or expenses involved in this case, it becomes necessary to determine, in the first place, whether or not the appropriation itself was validly made. If the appropriation was valid in the first instance, and nothing has since occurred to render it inoperative, the judgment of the court below is clearly right. County courts in this state are creatures of statute merely, possessed of statutory jurisdiction alone, and wholly wanting in common-law powers. All the powers emanate from the legislature, and, in granting these powers, the legislature itself must act within certain constitutional limitations. *Nashville & K. R. Co. v. Wilson Co.*, 89 Tenn. 597, 15 S. W. 446.

The appropriation in the present case was

made under and by virtue of a special enabling act, passed in February, 1895, which is as follows:

"An act to empower county courts to appropriate money for an exhibit at the Tennessee Centennial Exposition.

"Section 1. Be it enacted by the general assembly of the state of Tennessee, that the county courts of the respective counties of Tennessee are hereby authorized and empowered to make appropriations of money to provide for an exhibit of their resources at the Tennessee Exposition, to be held in the city of Nashville, state of Tennessee, in the year 1896; and to prescribe ways and means, rules and regulations governing the expenditure of any money so appropriated.

"Sec. 2. Be it further enacted, that this act take effect from and after its passage, the public welfare requiring it."

Acts 1895, c. 25.

If the exhibition of the counties' resources at the exposition mentioned is to be regarded as "county purposes," then this legislation is undoubtedly authorized by the first clause of section 29, art. 2, of the state constitution of 1870, which declares that "the general assembly shall have power to authorize the several counties and incorporated towns in this state, to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value, upon the principles established in regard to state taxation." Obviously, the legislature may authorize counties and incorporated towns to "appropriate money" for county and municipal purposes, respectively, if it has power to authorize them to impose taxes for such purposes. The power to do the latter, which is expressly stated, necessarily includes the power to do the former. It follows, therefore, that the legislature acted within its constitutional power in the passage of the act mentioned, if the appropriations therein authorized to be made shall be held to be for "county purposes," in the true sense; and in the latter event it follows, furthermore, that the said act, being complete in form and substance, and free from other constitutional objection, afforded ample authority to the county court of Shelby county for the making of the appropriation called in question in this case. There is no exact rule made by which the courts may always determine what is, and what is not, a "county purpose" or a "corporation purpose," within the meaning of the provision of the constitution just quoted. The question must be decided upon the particular facts of each case. This court has held the building of a railroad into a city to be a corporation purpose (*Nichol v. Mayor, etc.*, 9 Humph. 252); and likewise the building of a railroad near a city, when calculated to promote the interests of the city (*McCallie v. Mayor, etc.*, 3 Head, 318; *Adams v. Railroad Co.*, 2 Cold. 645). For the same reason, it

was also adjudged that the construction of a railroad through a county is a county purpose. *Louisville & N. R. Co. v. County Court of Davidson*, 1 Sneed, 637. In accord is the great weight of authority. See cases cited in note on page 479 of 14 Lawy. Rep. Ann. (*Daggett v. Colgan* [Cal.] 28 Pac. 51). Referring to legislative power to impose a burden of taxation for a public purpose, Judge Cooley says: "I do not understand that the word 'public,' when employed in reference to this power, is to be construed or applied in any narrow or illiberal sense, or in any sense which would preclude the legislature from taking broad views of state interest, necessity, or policy, or from giving those views effect by means of the public revenues. Necessity alone is not the test by which the state authority in this direction is to be defined, but a wise statesmanship must look beyond the expenditures which are absolutely necessary to the continued existence of the organized government, and embrace others which may tend to make that government subserve the general well-being of society, and advance the present and prospective happiness and prosperity of the people." *People v. Township Board of Salem*, 20 Mich. 452. To our minds it is entirely clear that an exhibition of the resources of Shelby county at the approaching State Centennial Exposition is a county purpose. In view of the fact that the event to be celebrated is one of no less note and importance than the birth of a great state into the American Union, and of the further fact that the exposition is reasonably expected to attract great and favorable attention throughout the country, and be participated in and largely attended by intelligent and enterprising citizens of numerous other states at least, it is beyond plausible debate that such an exhibition is well calculated to advance the material interests and promote the general welfare of the people of the county making it. It will excite industry, thrift, development, and worthy emulation in different avenues of commerce, agriculture, manufacture, art, and education within the county; thereby tending to the permanent betterment and prosperity of her whole people. In short, it will encourage progress, and progress will insure increased intelligence, wealth, and happiness for her people, individually and collectively. Undeniably, that which promotes such an object and facilitates such a result in any county is, to that county, a "county purpose" in the truest sense.

It is a vain impeachment of the purpose to say that the exhibition provided for is to be made beyond the territorial limits of the county, and at the capital of the state, some 200 miles away. That it should be made in the county is not essential. *Louisville & N. R. Co. v. County Court of Davidson*, 1 Sneed, 667; *McCallie v. Mayor, etc.*, 3 Head, 318; *Adams v. Railroad Co.*, 2 Cold. 645. Kindred questions have been similarly decided in oth-

er states. Recently, an appropriation of \$100,000 made by the legislature of Kentucky, to make an exhibit of the resources of that state at the World's Columbian Exposition, at Chicago, Ill., was adjudged to be for a "public purpose," within the contemplation of section 171 of the Kentucky constitution, which declares that "taxes shall be levied and collected for public purposes only." *Norman v. Board*, 93 Ky. 537, 20 S. W. 901. In 1891, the legislature of California passed an act appropriating \$300,000 "to meet the expenses of erecting buildings and maintaining an exhibit of the products" of that state at the World's Columbian Exposition, at Chicago. That appropriation was held to be for a "public use." *Daggett v. Colgan*, 92 Cal. 53, 28 Pac. 51. In the latter case, the court, after deciding the point just stated, said, additionally, that it has never been doubted that the state, unless restrained by its constitution, "could confer upon a city or town the authority to celebrate such important events in the history of the country as appeal to the patriotism or higher sentiments of the people, and to tax their citizens to pay the expenses thereof. Thus, it was held that the city of Philadelphia had power under its charter to provide for the entertainment of distinguished visitors upon the occasion of the celebration of the centennial anniversary of American independence. *Tatham v. City of Philadelphia*, 11 Phila. 276. So, also, in Massachusetts, by general statutes, the power has been conferred upon towns to celebrate the centennial anniversary of their incorporation (*Hill v. East Hampton*, 140 Mass. 381, 4 N. E. 811); and also to appropriate money for the celebration of holidays, and for other public purposes (*Hubbard v. Taunton*, 140 Mass. 467, 5 N. E. 157)." 92 Cal. 59, 28 Pac. 51.

But, passing the question of the original validity of the appropriation involved in the case at bar, plaintiffs in error insist that it has been rendered inoperative and null by what they say is a "postponement" of the exposition until 1897. The facts upon which this contention is based are disclosed in a resolution adopted by the stockholders of the Tennessee Centennial Exposition Company on the 7th of February, 1896, as follows: "Resolved: (1) The time for inauguration of the Tennessee Centennial Exposition of 1896, with all proper ceremonies, is hereby fixed, and the centennial year will be celebrated on the first day of June, 1896. (2) The period of preparation, embracing the completion of all buildings and the accumulation of all material exhibits, shall be extended to embrace the months of May, June, July, August, September, and October of the year of 1897, so as to allow such an extended period of preparation as will insure results satisfactory, in every detail, to the directors and to the public, and highly creditable to the state and to every contributor of the enterprise. (3) The construction of buildings, the accumulation of exhibits, and all

other preparations incident to the opening and holding of the exposition, shall be pushed to completion as rapidly as circumstances may permit; and the first day of May, 1897, will be the day when the exposition will be so far equipped in all its appointments as to justify an invitation, which is hereby extended, to the public to attend it, until the close, on the last day of October, 1897." It will be readily observed that this resolution does not work an entire and complete postponement, but rather an extension and prolongation. It is not an abandonment of the exposition first intended, and the substitution of another one in its stead. The inaugural ceremonies and the formal celebration of the great event to be commemorated will occur on the 1st day of June, 1896, as originally contemplated; but, for the enlargement of the enterprise and the greater success of the exposition, as such, the time for actual and finished display of exhibits from far and near, and for the general attendance of the public, is carried into the year 1897. Presumably, the increase in magnitude, and the larger success thus provided for and reasonably insured, will redound to the advantage of all exhibits, Shelby county among the number. The plan now is to extend the enterprise through two years, instead of one, as originally designed; the first, 1896, to be used in formal opening and preparation; and the second, 1897, for the great display, and its consummation. This change is not so radical as to annul appropriations previously made. The mention of only the one year, 1896, in the act of the legislature and in the resolution of the county court of Shelby county, does not, in a legal sense, limit and confine the appropriation made by the latter to an exhibition to be completed and terminated in that year. The time mentioned is not to be considered as absolutely controlling in all respects, nor should it be treated as of such importance and inflexibility as to override and defeat the whole enterprise, in case of such a change as has been made. The manifest purpose and intention of the legislature and of the county court were to have a great and creditable exposition at the capital of the state, in connection with the celebration of her one hundredth anniversary; and whether the whole of that should be accomplished in one year or in two was not of the essence of the legislation by the state, or of the resolution by the county court. The exposition designed by them is the same provided for in the resolutions of the stockholders, with only such changes as seem most favorable, if not indispensable, to its sure and perfect success. These changes facilitate, rather than impede or destroy, the paramount object of a State Centennial Exposition.

It has been well and truly said that the making of the appropriation by the county court created and established no contractual

relation between the county of Shelby and the Tennessee Centennial Exposition Company, and that said company cannot have and maintain a suit for any part of the fund appropriated. But that does not affect the validity of the appropriation as made. That company was joined in this suit for form's sake merely, and no judgment was sought or rendered in its favor. The real and only necessary plaintiffs were the members of the County Court Centennial Committee, appointed by the county court for the administration of the fund appropriated; and they brought the suit simply to compel a compliance on the part of the chairman with the court's direction to issue warrants in payment of all expenses incurred by the committee, as the representatives of the county in relation to its proposed exhibit. The suit was well brought, and the judgment rendered by the circuit judge is right. Both matters for which warrants were sought were legitimate matters of expense. The warrant for \$25 was sought to meet an outlay by a member of the committee while traveling in the interest of business devolved upon the committee by the county court. That for \$50 was sought to enable the committee, through the county superintendent of public instruction, to prepare an exhibit on behalf of the public schools of the county. In the broad and liberal sense, the public schools of a county may well be classed among her "resources." Obviously, the word "resources," as employed in the act of the legislature and in the resolutions of the county court, was intended to include products of farm, forest, manufacture, art, education, etc.

In conclusion, it should be remarked that the county court of Shelby county has never attempted or signified any desire to recall, annul, or withhold the appropriation made, but has simply directed the able county attorney to represent the county in the preparation, submission, and argument of this agreed case, to the end that this court, in due course of proceeding, might pass upon and finally decide the questions herein considered. Affirmed.

SUTTON v. STATE.

(Supreme Court of Tennessee. June 11, 1896.)
CONSTITUTIONAL LAW—LAW OF THE LAND—SPECIAL LAWS.

1. Acts 1895, c. 182, making it a misdemeanor, in counties having a certain population according to the census of 1890, for the owners of live stock to allow the same to run at large, in view of the fact that it does not apply equally to all counties now or hereafter having the same population, is not the "law of the land," within Const. art. 1, § 8, declaring that no man shall be deprived of his property but by the law of the land.

2. Acts 1895, c. 182, making it a misdemeanor, in counties having a certain population according to the census of 1890, for the owners of live stock to allow the same to run at large, and giving landowners in such coun-

ties a lien on trespassing live stock, is in violation of Const. art. 11, § 8, declaring that the legislature shall have no power to pass any law granting to any individuals special immunities.

3. Such act is unconstitutional as being "unnatural, arbitrary, and capricious."

Appeal from criminal court, Shelby county; L. P. Cooper, Judge.

Joe Sutton was convicted of unlawfully permitting his live stock to run at large, and appeals. Reversed.

James H. Malone and C. M. Bartran, for plaintiff. Morgan & McFarland and the Attorney General, for the State.

CALDWELL, J. Joe Sutton was indicted and convicted in the criminal court of Shelby county for unlawfully and knowingly permitting his live stock to run at large in violation of what is known popularly as the "No-Fence Law," the same being chapter 182 of the acts of 1895. He was fined \$25, and has appealed in error.

The indictment is in good form, and the proof is plenary; but the contention is made on behalf of the plaintiff in error that the statute is unconstitutional, and consequently that his motion to quash the indictment, and then his motion in arrest of judgment, should have been sustained. It is well to say preliminarily, in response to able arguments at the bar for and against the law, as a meritorious or undeserving measure, that the courts have nothing to do with the mere policy or impolicy of any legislation, and therefore it is not for us to determine whether the end designed to be accomplished by the act mentioned is good or bad. *Ballentine v. Mayor, etc.*, 15 Lea, 634; *Lynn v. Polk*, 8 Lea, 228; *Peck v. State*, 86 Tenn. 262, 6 S. W. 389; *Williams v. Nashville*, 89 Tenn. 488, 15 S. W. 364; *Manufacturing Co. v. Falls*, 90 Tenn. 481, 16 S. W. 1045. That was a question for the legislature, and its decision thereof is not subject to judicial review. Const. art. 11, § 2; *Cooley*, Const. Lim. 202. The act is as follows:

"An act to encourage economy in the use of timber in the state of Tennessee, and for the protection of growing crops.

"Section 1. Be it enacted by the general assembly of the state of Tennessee, that in all the counties of the state having a population of not less than 30,000, and not more than 34,000, and of 55,000 and over, according to the federal census of 1890, it shall be unlawful for any owner of any horse, cow, sheep, goat, hog or other livestock to knowingly permit the same to run at large within the limits of such counties of this state; provided however it shall not be unlawful to use unfenced lands of this state in such counties (the owners of such lands not objecting) for summer range, if the livestock shall be placed under the care of a herdsman.

"Sec. 2. Be it further enacted, that the owner of livestock mentioned in section 1 of this act shall be liable for all damage done to the property of other persons while running at large in said counties of this state.

"Sec. 3. Be it further enacted, that in addition to the owner's liability for damage done by the livestock mentioned in section 1 the party shall have a lien on the animal doing the damage, and recover the same by attachment.

"Sec. 4. Be it further enacted, that any person violating this act shall be guilty of a misdemeanor, and, on conviction, shall be fined not less than twenty-five (\$25) dollars nor more than one hundred (\$100) dollars.

"Sec. 5. Be it further enacted, that it shall be the duty of the judges of the circuit and criminal courts of this state, in such counties, to make special reference to this act to the grand juries.

"Sec. 6. Be it further enacted, that nothing in this act shall be so construed as to amend or repeal the railroad fence and stock law.

"Sec. 7. Be it further enacted, that the provisions of this act shall apply to all the counties in this state which have a population of thirty-five thousand one hundred and over, which adjoin any county or counties falling under the provisions and descriptions of the first section of this act. Any county in the state may come under the action of this law by submitting the question to a vote of the qualified voters of the county at an election to be ordered by the county court at a quarterly term; and if a majority of said votes shall be cast in favor of said law, then said law shall apply to said county, regardless of its population.

"Sec. 8. Be it further enacted, that this act take effect from and after the first day of January, 1896." Acts 1895, c. 182, pp. 380, 381.

It will be noticed at once that the first section of the act creates an offense, and makes it applicable to some counties, and not to others, and that the particular counties to which it applies are to be determined alone by their respective population, within certain specified limits, "according to the federal census of 1890," all other counties being excluded from its operation. That special census is expressly made the sole and ever-continuing criterion by which to ascertain what counties shall be, and what counties shall not be, subject to the law; and that, too, for all time to come, and without reference to changes of condition or population subsequently occurring. Those counties included by the figures found in the federal census of 1890 are included in the operation of the law forever, and likewise those counties excluded by the figures found in that census are excluded from the law's operation forever; the question of inclusion in or exclusion from the ameliorations and burdens of the law not being affected in the least by subsequent increase or decrease in population, however great, or whenever occurring. The law does not apply to all counties having a population within the prescribed limits in 1895, when it was passed, nor in any future year, when it may be violated; but it applies only to those

counties having such population in 1890, by the federal census of that year. As a consequence, the law may be applicable to some counties, and not to others having populations within the same limits when it was passed, or at some time thereafter, and it may also be applicable alike to some counties within, and to others without, those limits, at the time of its passage, or subsequently. The law, when attempted to be enforced, may, by reason of the controlling effect of a long-past census, be found to apply to some counties, and not to others then having the same population; and, for the same reason, it may also be found to apply alike to any number of counties at the time having different populations. Or, to state the same thing differently and more briefly, the law, as passed, includes some counties and excludes others of the same population at the time of the offense, and it also includes in the same class counties having different populations when the offense was committed. To illustrate: Each of the counties A. and B. now has a population within the limit of 30,000 to 34,000, but the law applies to A., and not to B., because A. had a population of 31,000, and B. of only 29,000, by the census of 1890; and each of the counties C. and D. now has a population within the same limit, yet the law applies to C., and not to D., because C. had 33,000, and D. 35,000, by that census. Thus it appears that the law does not apply to all counties now having the same limit of population. Only those within the limit by the census of 1890 are included. Those coming within the limit since that time, by change of population,—whether by increase, as in case of B., or by decrease, as in case of D.,—are excluded, with no possibility of ever being included. Next let us illustrate the fact that the law applies alike to counties now having different populations: M. now has 31,000, N. 29,000, O. 33,000, and P. 35,000; two of the four (N. and P.) being without, and two (M. and O.) being within, the limit of 30,000 to 34,000. Yet, notwithstanding the difference now existing, the law applies equally to all, because all were within that limit in 1890. Similar illustrations might be given in connection with the other limit of "55,000 and over," but we forbear. Such legislation is obviously partial, in the objectionable sense, and being so it is unconstitutional and void. It violates section 8 of article 1 of the constitution, which is as follows: "That no man shall be taken or imprisoned, or disseised of his freehold, liberties or privileges, or outlawed or exiled, or in any manner destroyed, or deprived of his life, liberty or property, but by the judgment of his peers or the law of the land." It deprives the citizen of his "property" by a fine and a lien (sections 3 and 4), and yet it is not "the law of the land," because it does not apply equally and alike to all counties now and hereafter having the same population, and does not extend

to and embrace all persons who are in, or who may come into, the same situation and circumstances. *Vanzant v. Waddel*, 2 Yerg. 260; *Wally's Heirs v. Kennedy*, Id. 555; *Bank v. Cooper*, Id. 600; *Jones v. Perry*, 10 Yerg. 71; *Sheppard v. Johnson*, 2 Humph. 296; *Budd v. State*, 3 Humph. 483; *Mayor, etc., v. Dearmon*, 2 Sneed, 103; *Brown v. Haywood*, 4 Helsk. 357; *State v. Burnett*, 4 Helsk. 186; *State v. Rauscher*, 1 Lea, 97; *Davis v. State*, 3 Lea, 379; *Maney v. State*, 6 Lea, 221; *Hatcher v. State*, 12 Lea, 371; *Woodard v. Brien*, 14 Lea, 523.

For a similar reason, the act is also in violation of the first clause of section 8 of article 11 of the constitution, which is as follows: "The legislature shall have no power to suspend any general law for the benefit of any particular individuals, nor to pass any laws for the benefit of any individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals rights, privileges, immunities or exemptions other than such as may be by the same law extended to any member of the community, who may be able to bring himself within the provisions of such law." It grants to landowners in some counties the protection of a penal statute, and the advantage of a lien on trespassing live stock, which protection and advantage cannot by the same law be extended to landowners in other counties that now have, or hereafter may have, the same population, that are, or may in the future be, in the like situation and circumstances. The act held to be unconstitutional in the case last cited, like this act of 1895, limited its application to counties having a certain population by a past census. In the opinion the court said: "But, by the express terms of the act in question, a judgment rendered against a citizen of any county having by the census of 1870 a population of 40,000, which, as before stated, can only mean a citizen of Davidson or Shelby county, shall not be a lien upon his land, affecting third persons, without actual notice, unless an abstract of the same is registered as prescribed by said act, thus giving an immunity from the operation of the general laws affecting the rights of property to citizens of those two counties that cannot be enjoyed by the citizens of any of the other counties of the state. And it is, by the very terms of the act, utterly impossible for them ever to bring themselves within its provisions, for its operation is restricted to those counties that had a population of not less than 40,000 by the census of 1870. Hence, although other counties of the state may have acquired since that census, and might now possess, that amount of population, or double that amount, they cannot come within its provisions, because they did not have that amount of population by the census of 1870." 14 Lea, 523, 524. Because of the infirmities so pointed out, the act was held to be obnoxious to the constitution, and void.

Id. 525. The cases of *City of Memphis v. Fisher*, 9 Baxt. 239, and *Burkholtz v. State*, 16 Lea, 71, were decided in part upon the same reasoning as that quoted above. The limits of the act before us are so fixed and circumscribed, with reference to population at a prescribed date in the past, that no included county can ever be excluded, and no excluded county can ever be included, though the natural changes of time, already elapsed and hereafter elapsing, may be such as would otherwise transfer given counties from the excluded to the included class or classes, and vice versa. The act violates section 8 of article 1 of the constitution, by imposing the burden of a fine and a lien upon citizens of some counties, and not upon like citizens in other counties that are, or may be, in the like situation and circumstances; and it violates the first clause of section 8 of article 11 of the constitution, by conferring the advantages of a penal law and a property lien upon citizens of some counties which cannot by the same law be extended to like citizens of other counties that are, or may be, in the like situation and circumstances.

Thus far the act has been considered, and criticism indulged, not with reference to the classes established, but only in respect of the inexorable and never-ceasing requirement that the figures defining those classes shall be taken alone, and always, from the census of 1890. Aside from and in addition to that fatal test for the application and nonapplication of the law to the different counties of the state, there is another ground upon which the act must be held to be invalid. By reading the first and seventh sections of the act together, it readily appears that the law was intended to embrace four different classes of counties, and to omit all others. The first section embraces those counties having a population (1) of not less than 30,000, nor more than 34,000, and (2) of 55,000 and over, by the federal census of 1890; and the seventh section embraces (3) those counties having a population of 35,100 and over, if adjoining some county of the first or second class, and (4) those counties which, upon a submission by their quarterly courts may cast a majority of their respective votes in favor of the law. What is the reason for these strange and peculiar classifications? No reason is given or appears in the act itself. None is discovered in the past history or present condition of the different counties included and excluded, nor in their local relations with each other. None is suggested by learned counsel, nor perceived by the court. Manifestly, they are not based upon any supposed difference in pursuit, in natural resources, or peculiar situation. Reading the first section, one naturally asks, why should the law, with its burdens and its advantages, be made to apply to counties having a population of 30,000, and not those having 29,900, 28,000, or 27,000? Why to those having 34,000, and not to those having

34,500, 35,000, or 36,000? Why to those having 55,000 and over, and not to those having 50,000, 52,000, or 54,000? Why to those within the narrow limit of 30,000 to 34,000, and not to any within the broader limit of 34,000 to 55,000? No rational answer is found for any of these questions. The strangeness and confusing features of the act are made greater, instead of less, by the seventh section. Upon that section the puzzling inquiries at once arise: Why should a county with 35,000 people be embraced in the law if it adjoins some county embraced by the first section, and excluded if it does not adjoin such county? How does the conjunction or disjunction afford a reason for the application or nonapplication of the law? Why should a county with 35,100 inhabitants and the conjunction indicated be embraced, and another county with such conjunction and 35,090 inhabitants be not embraced? Why the skip of 1,100 from 34,000 to 35,100? It is no answer to the strange peculiarity of the law in the respects mentioned to say that the excluded counties may become included by a vote of their people as provided in the latter part of the seventh section. That provision does not change or supersede the preceding classes, but introduces another one. The counties of those three classes are included absolutely, whether they will to be or not. Their position under the law is irrevocably fixed. Why this difference? Why should the operation of the law be conditional as to some counties, and unconditional as to others? Why should the law apply to some counties without the vote of the people, and to others only upon a vote? And, as to the latter, why should the right to an election be conditioned solely upon the discretionary order of the quarterly court? The classifications are unnatural, arbitrary, and capricious; and, being so, the statute is for that reason unconstitutional, null, and void. That such legislation is obnoxious to the constitution was recognized as an invariable and well-settled rule in *Demoville v. Davidson Co.*, 87 Tenn. 214, 10 S. W. 353; in *Railroad v. Crider*, 91 Tenn. 490, 19 S. W. 618; and in *State v. Alston*, 94 Tenn. 674, 30 S. W. 750, —although the different acts under consideration in those cases were found not to be subject to that objection. The rule was both recognized, and applied to the invalidation of the act involved, in the noted case of *Stratton Claimants v. Morris Claimants*, 89 Tenn. 500, 15 S. W. 87. It was well said by Special Judge Baxter, speaking for the court, in the last-named case: "We conclude, upon a review of the cases referred to above, that whether a statute be public or private, general or special, in form, if it attempts to create distinction and classifications between the citizens of this state, the basis of such classifications must be natural, and not be arbitrary. If the classification is made under article 1, § 8, of the constitution, for the purpose of conferring upon a class the bene-

fit of some special right, privilege, immunity, or exemption, there must be some good and valid reason why that particular class should alone be the recipient of the benefit. If the classification is made under article 1, § 8, of the constitution, for the purpose of subjecting a class to the burden of some special disability, duty, or obligation, there must be some good and valid reason why that particular class should be subjected to the burden." *Id.*, 89 Tenn. 534, 535, 15 S. W. 87. No such reason underlies the classifications made in the act before us, either in respect of the benefit conferred, or of the burden imposed. We do not mean to say that all legislation intended to affect a particular class, and not the public at large, is obnoxious to the constitution, and therefore invalid, but only that such legislation, to be constitutional and valid, must possess each of two indispensable qualities: First, it must be so formed as to extend to and embrace equally all persons who are or may be in the like situation and circumstances; and, secondly, the classifications must be natural and reasonable, not arbitrary and capricious. The present act possesses neither of those qualities.

The other objections urged against the act need not be considered. The motion to quash should have been sustained, and, that not having been done, the judgment should have been arrested. Reverse, and discharge the plaintiff in error.

GREEN v. STATE.

(Supreme Court of Tennessee. June 16, 1896.)

CRIMINAL LAW—ADMISSIONS—APPEAL—OBJECTIONS NOT RAISED BELOW.

1. The admission in evidence of a confession by defendant's accomplice, implicating defendant, and made in his presence, and of which he at the time made no denial, is not ground for reversal, because on cross-examination it was shown that defendant shortly thereafter denied its truth, where the court instructed the jury to disregard the confession.

2. A confession by defendant's accomplice, implicating defendant, and made in his presence, and which he did not deny, is admissible against defendant: especially where the court admonishes the jury to receive such evidence with great caution.

3. The fact that the court, on the mistaken belief that certain evidence properly admitted was testimony of an accomplice, instructed on the subject of accomplice, is not ground for reversal, where, on discovering its mistake, it clearly instructed the jury to disregard such instruction.

4. Prior statements of witnesses, made in the presence of accused, though denied at the time and at the trial by accused, are admissible to support the credibility of such witnesses.

5. Accused, for the first time on appeal, cannot object that the court granted a change of venue without his presence before the court, on application of the attorney appointed by the court to defend him, where such change was granted to prevent mob violence to accused.

Appeal from criminal court, Madison county; John M. Taylor, Judge.

Bart Green, alias Bard Green, was convicted of murder, and appeals. Affirmed.

W. G. Lynn and A. W. Storall, for appellant. The Attorney General and E. L. Bullock, for the State.

McALISTER, J. The plaintiff in error was convicted in the criminal court of Madison county of the murder of one Miles P. Mitchell, and, from the sentence of death pronounced upon him, has appealed to this court. The crime was committed in the county of Hardeman, but, on account of the popular excitement prevailing there, the venue was changed to Madison county, with the result already announced. The crime was one of peculiar atrocity, and, if the guilt of the prisoner has been established and his conviction secured in the manner prescribed by law, the judgment pronounced against him should be executed. The conviction was rested largely upon circumstantial evidence, fully set forth in a voluminous record, which has been very carefully examined by the court. But, before entering upon a discussion of the evidence, the theory of the state in respect of the crime will be briefly outlined.

It is claimed by the state that the crime was the result of a conspiracy entered into between the defendant, Bart Green, and another negro, one Moses Pirtle, to murder Miles Mitchell, and rob him of a large sum of money which it was thought he carried upon his person. Moses Pirtle was arrested as an accomplice in the crime, and, for protection from mob violence, he and the defendant, Bart Green, were lodged in jail at Nashville, where Moses Pirtle died prior to any trial. Miles Mitchell, the victim of the crime, was accustomed to carry upon his person large sums of money in a leather pocketbook, which he deposited in his inside vest or coat pocket. Moses Pirtle, the dead accomplice, had been employed, the year preceding the murder, upon Mitchell's farm, and had knowledge of the habit of Mitchell to carry large sums of money upon his person. It was also known to Pirtle that Mitchell was accustomed daily to go to his barn at a very early hour, for the purpose of feeding his stock. At the date of the homicide, Moses Pirtle lived with his father, Rube Pirtle, whose house was about 400 yards northeast of Mitchell's place. Bart Green, the prisoner at the bar, cultivated a small farm, known as the "Kinnie Place," situated about 2 miles north of the Mitchell farm, and about $1\frac{1}{2}$ or $1\frac{3}{4}$ miles northwest of where Moses Pirtle lived. The murder was committed on Monday morning, December 16, 1895, before daylight, while Mitchell was in his barn, in the act of feeding his stock; and the theory of the state is that the fatal shot was fired by the defendant, Bart Green, who robbed the body, and buried \$70 of the money near a stump in the imme-

diate vicinity, where it was subsequently found. It is not claimed by the state that Moses Pirtle was present when the homicide was committed, but it is claimed that he actively participated in planning the murder, and that, in pursuance of said plan, he loaded the gun, and set it outside his door, where it was found by Bart Green, and that Pirtle was to receive one-half of the money found upon the body. With this brief outline of the state's theory, we proceed to notice the more prominent facts and circumstances supporting that theory, and tending to incriminate the defendant.

The body of Miles Mitchell was discovered by his wife, about 7 o'clock in the morning, lying in a crib on the inside of a barn situated on the premises, about 100 yards from the house. The lantern which the deceased had used in the early morning was extinguished, and was hanging on the wall at the side of the crib, close to the door. The body was lying partially on its right side, with a large, lacerated gunshot wound in the left side of the head, tearing off a portion of the ear, lower jaw, and neck, severing the internal and external carotid artery, and producing, according to the medical experts, instant death. An examination of the wound showed that it had been inflicted at close range, with bird shot, delivered from a gun; the newspaper wadding and some of the shot being extracted by the surgeon. The vest of the deceased indicated that it had been unbuttoned from the top, the lower button being still fastened; and within the inside vest pocket bloody stains or splotches were plainly discernible, tending to show that a bloody hand had been introduced into this pocket. A splotch of blood was also observed on the facing of the crib door; that is to say, on the right-hand side as one would leave the crib, going from the inside to the outside, and about a foot and a half from the bottom. In the language of the witness, this blood looked like a splotch, and then a smear about like a hand would make, that had caught the facing. The barn in which this crib was built was divided by a passageway, and the crib where the body was found was on the left-hand side of the passageway, at the rear end. The rear end of this hall or passageway was inclosed by a lattice door, through which, the witnesses say, a man entering the barn with a lighted lantern could be plainly seen. An examination of the ground disclosed two tracks apparently of a man that stood very near this lattice door, at the rear of the barn, near the left-hand crib. Near this barn was a gate opening into an orchard, and through this orchard, across a ravine, and in the direction of Moses Pirtle's house, were distinctly outlined two sets of tracks, one set coming, and the other going, but plainly made by the same person. The witnesses describe these tracks as a little careened and run down to the outside on both feet. A comparison was made, on the day of the

killing, between these tracks and the tracks which Moses Pirtle was asked to make in some soft mud prepared for the purpose. Witnesses state that, while the track made by Moses Pirtle was of the same length, his track was perfectly straight, and not careened or twisted. It was, however, shown by witnesses who examined Bart Green's premises on the day of the killing that foot tracks precisely similar to those leading away from the scene of the homicide were found in his garden and also his corn field, where the defendant admits he was at work that morning. It was shown that, shortly before the trial below, the defendant, Bart Green, while confined in jail, had on a pair of shoes which careened on both sides after the manner of the tracks, and he admitted that he had on these shoes when he left Whiteville, which was the day of the murder. It was also shown in evidence that Bart Green was the owner of a gun, originally an army musket, but which had been bored for a shotgun; and that, on Friday preceding the murder, this gun was taken to the house of Moses Pirtle. Bart Green and Moses Pirtle were in conference on Saturday; and, by daylight Sunday morning, Green was again at Pirtle's house, and spent the entire day, leaving at a late hour in the evening. The theory of the state is that the murder was committed with this gun, and that, after the tragedy was enacted, Bart Green returned to the Pirtle place, and concealed the gun in the smokehouse. On this point the evidence showed that, about 1 o'clock on the day of the murder, bloodhounds were taken to the scene. They caught the trail at the orchard gate near the barn, and followed it along the peculiar tracks already described, out into an open field, in a northeasterly direction, running about 50 yards northwest of the Pirtle house, when suddenly they turned, and, coming back, crossed over to the Pirtle premises, stopped behind the smokehouse, and began to bark. This evidence was offered by the state in support of its theory, that, after the assassination of Mitchell, Bart Green returned to the Pirtle premises, and deposited the gun in the smokehouse. As further evidence of this fact, it was shown that on the morning of the killing, between 9 and 10 o'clock, Bart Green again returned to the Pirtle premises, repaired to the smokehouse, procured the gun, and, after making an ineffectual effort to hide it in the stovepipe, carried it to a thicket northeast of the garden, and there concealed it in some sassafras bushes. It was found by a searching party in that thicket, about 4 o'clock in the afternoon; and, upon examination, it was empty, as though recently discharged, with fresh powder burns on the tube and on the side of the barrel. There being some dirt in the muzzle, which prevented a proper inspection of the interior of the barrel, it was sawed in twain, and experts who examined it expressed the opinion that it had been recently fired.

When Bart Green was asked about the gun, he denied having seen it, or any knowledge of its whereabouts. While the party was searching for the gun, Bart Green was upon the premises, and suggested that a pond situated in an opposite direction from the thicket would be a good place to look for it. This was before the defendant concealed the gun in the thicket, and, when the party dispersed, Bart Green went off with the constable, ostensibly for the purpose of going to the Mitchell place, but instead of doing so, upon becoming separated from Constable Foote, Green immediately and hastily returned to the Pirtle place, removed the gun from the smokehouse, and concealed it in the thicket.

The evidence is indubitable that the gun in question was the property of Bart Green; that he concealed it in the thicket; and there can be no doubt that it is the weapon with which the deed was perpetrated. Another inculpatory circumstance is to be found in the fact that the defendant was the owner of a pair of buckskin gloves, which on Wednesday succeeding the murder were found in a tool box upon his premises, with every indication of having been stained with blood. The proof is that defendant was accustomed to wear these gloves, and had them on his hands on Saturday and Sunday preceding the murder, but, when seen Monday, he was without them. When discovered on Wednesday, the right glove presented the appearance of having been scraped on the inside of the palm and the inside of the finger. On the palm, across the fingers, and at the intersection of the thumb and forefinger, were stains which the witnesses testified were blood. It appears that two triangular pieces containing this discoloration were cut from the right-hand glove, and, having been saturated in a solution of chloride of sodium, were subjected to a microscopic examination by an expert in such matters, who pronounced it blood. This expert, however, did not undertake to state that it was human blood, saying that it is impossible to distinguish between the blood of a man and other mammals; as, for instance, the blood of a goat, dog, horse, or cow. He was very positive, however, that the stains were produced by blood. Such evidence, while not conclusive, was competent for the consideration of the jury, and, in connection with other facts and circumstances, may be cogent and convincing that the stains were from the blood of Miles Mitchell. There were other incriminating circumstances of minor importance, which we will not pause to consider, but pass to the examination of certain confessions made by Moses Pirtle, implicating the defendant, Bart Green, which it is alleged were illegal and incompetent.

The first confession was made on the Mitchell premises, the afternoon of the killing, while Moses Pirtle and Bart Green were in custody, and in the presence of reputable witnesses. The prisoners were standing

within six feet of each other, and the statement of Moses Pirtle was made in a tone of voice that all present could hear. One witness relates the confession, viz.: "Yes; I loaded the gun, and set it on the outside of the house; and Bart Green come and got the gun, and killed Mr. Mitchell. Bart was to bury my half of it, and I have told Mr. Montgomery and others, and have gone with them, and shown them where the money was." Montgomery, in accordance with the information furnished by Moses Pirtle, found \$70 in money buried in the ground, in a snuff bottle, in a woods lot about 126 yards northwest of Moses Pirtle's house. It is also shown that when this statement or confession was made by Moses Pirtle, within hearing of the defendant, Bart Green, the latter did not open his mouth or make any explanation. It was shown, however, that, within a few moments after the statement made by Moses Pirtle, Bart Green was taken into the barn by the witness Montgomery and one Henley, who tried to induce him to make a confession, but Green refused to confess, and also denied the statement made by Moses Pirtle. Counsel for defendant objected to the statements made by Moses Pirtle as incompetent, which objection was overruled, but thereafter the court sustained the objection, and instructed the jury in writing as follows: "The court has allowed testimony to go to the jury as to a statement or statements made by Moses Pirtle on the afternoon of the day of the death of Miles Mitchell, which statements were made in the Mitchell lot in the presence of the defendant, Bart Green. The evidence shows that Bart Green, shortly afterwards, in Mitchell's barn, denied the truthfulness of the statement. The court holds that, for the latter reason, this testimony is incompetent, and therefore excludes the testimony, as well as defendant's denial, from the jury, with instructions that it must not be considered for any purpose." Notwithstanding this evidence was withdrawn by the court, with the explicit instruction to the jury to disregard it, it is made the basis of an assignment of error in this court. It is insisted that the evidence is incompetent, and the effect of permitting it to go to the jury was irremediable. If it be conceded that the testimony was in fact incompetent, as ruled by the trial judge, it was only rendered incompetent by the denial of the defendant made subsequently, in the barn. This denial was brought out on cross-examination. The court cannot be expected to be endowed with any such preternatural prescience as to know what is coming on cross-examination. No denial of the statements of Moses Pirtle was made by defendant, Green, on the spot, but the denial was made afterwards, when he had separated from Pirtle, and was in the barn, and when there was time to reflect and to fabricate. Ordinarily, the value of such a denial is measured by the promptness with which

it is made, and from the fact, also, that it is made in the presence of the accuser. There is, at least, nothing in the action of the court of which defendant can now complain.

Exceptions were also taken to the proof of other confessions made by Moses Pirtle, and admitted, under the following circumstances: On the evening of the day the murder was committed, the prisoners were taken from Whiteville to the jail at Bolivar. On the way, another negro came up, and, addressing the prisoners, said, viz.: "Didn't you boys know you would get caught when you killed Mr. Mitchell?" Moses Pirtle replied: "I didn't do it. I loaded the gun, and set it outdoors, and Uncle Bart killed him." This statement was made voluntarily by Moses Pirtle, without constraint or suggestion from the officers who had the prisoners in custody, and was admitted in evidence because made in the presence and within the hearing of the defendant, Bart Green, and was not denied by him. Again, further along in the journey, Moses Pirtle became very weak, and, while the party stopped, one of the officers asked Moses Pirtle: "Why did you kill Mr. Mitchell?" He replied: "It's just like I said before. I set the gun out of the house, and Uncle Bart killed him, and put my money beside the stump." Bart Green was within 10 feet when this remark was made, could have heard it, and made no reply. The record shows that a general exception was interposed by counsel for defendant to both of these statements, and the exception was noted, but no ruling appears to have been made by the court at that time. The court, in its charge, held that the last two confessions were admissible in evidence, because made in the presence of Bart Green, and not denied by him. The rule on this subject is thus laid down in *Queener v. Morrow*, 1 Cold. 123, viz.: "The general rule is that an admission may be presumed, not only from the declaration of a party, but even from his acquiescence or silence. The force and effect of such an admission must, of course, depend upon the circumstances under which it is made. In some cases, if clearly proved, it will be evidence of the most convincing kind. In others, it may be of very little force, and perhaps entitled to no consideration. And it is always to be borne in mind that it is of the most dangerous kind of evidence. In order that a party may be affected by the statement of another on the ground of his implied admission of its truth by silent acquiescence, it must distinctly appear that he heard and fully understood such statement. The occasion must also have been such that the party sought to be affected was at liberty to interpose a denial of the statement, and must not only have had the opportunity to speak, but the statement must have been in respect to some matter directly affecting his rights, so as properly and naturally to demand a contradiction if untrue." On this subject the court

charged the jury as follows: "The court has permitted evidence of certain declarations or statements of Moses Pirtle made, as the state contends, in the presence and hearing of defendant, and implicating him in the crime, and to which the defendant made no denial. In the first place, it is incumbent on the state to show such statements were made, and made in the hearing and presence of defendant, and that he did not deny same. If this has been established by the state, then you will give such evidence such weight as it is fairly entitled to, under the following instructions: Such evidence should be carefully and cautiously scrutinized by the jury, as it is considered of a dangerous character; and, before any inference of an implied admission or acquiescence in the truthfulness of the statements can be drawn by the jury against the defendant, it must appear affirmatively that the defendant heard and fully understood the statements; that they were made under such circumstances as afforded the defendant an opportunity to speak or act; or if the circumstances did not naturally, properly, or reasonably call for a denial on his part, or the peculiar circumstances prevented a denial, you should not give any weight whatever to defendant's silence or failure to contradict the same; but if it appears any such statements are proven, and defendant heard and understood the same, and had the opportunity to act and speak, and the statements naturally and reasonably called for a denial on the part of defendant, and were such as reasonably permitted a denial, and he did not contradict or deny the same, then the jury may consider the same as proven for the purposes aforesaid, not as proof or evidence of the circumstances detailed in the statements, but to draw such inference as they think right. It is a rule of law that when a prisoner is accused of crime, and remains silent under the charge, such fact may go to the jury for such inference as it may reasonably warrant. But acquiescence in a statement, to have the effects of an admission, must exhibit some act of the mind, and amount to voluntary demeanor or conduct of the party. And, whether it is acquiescence in the conduct or language of others, it must plainly appear that such conduct was fully known, and that the language was fully understood by the party, before any inference can be drawn from his passiveness or silence. The circumstances, too, must not only be such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action in reply from men similarly situated; and you jurors should look to all the surroundings and circumstances confronting the prisoner, and his explanation of same." In view of the strong admonition delivered by the court to the jury in respect of the dangerous character of this evidence, and the very circumscribed limits within which they were permitted to consider it at all, we are un-

able to perceive any error in the admission of this testimony of which the prisoner can complain. Says Mr. Rice, in his work on Evidence (volume 3, p. 501), viz: "Where an individual is charged with an offense, or declarations are made in his presence and hearing touching or affecting his guilt or innocence of an alleged crime, and he remains silent, when it would be proper for him to speak, it is the province of the jury to interpret such silence, and determine whether his silence was, under the circumstances, excused or explained. At most, silence under such circumstances is but an implied acquiescence in truth of the statements made by others. Still, it is a familiar elementary principle that silence, when the accused is under no restraint, and at full liberty to speak, may sometimes be regarded as a tacit admission. At all events, all such matters are proper for the consideration of the jury,"—citing *Pierce v. Godsberry*, 35 Ind. 317; *Puett v. Beard*, 86 Ind. 104. Says Mr. Wharton on American Criminal Law (section 696), viz: "Where a man at full liberty to speak, and not in the course of judicial inquiry, is charged with a crime, and remains silent,—that is, makes no denial of the accusation by word or gesture,—his silence is a circumstance which may be left to the jury." See, also, *Rosc. Cr. Ev.* 18; *Greenfield v. People*, 85 N. Y. 85. The fact that a person charged with crime is under arrest does not render what he says and does inadmissible. *People v. Wentz*, 37 N. Y. 303; *People v. Montgomery*, 13 Abb. Prac. U. S. 209; *People v. Long*, 43 Cal. 444; *Com. v. Cuffee*, 108 Mass. 285; *Com. v. Crocker*, Id. 464. Mr. Rice, in commenting on the case of *Com. v. Kenney*, 12 Metc. (Mass.) 235, says: "That case does not conflict with the general principle, but suggests important limitations in its application, and in extent of its operation. If the statement is not heard by the accused, or if, being heard, he denied it, or if circumstances existed at the moment which prevented a reply or rendered a reply inexpedient or improper, the evidence certainly is of no value." It is admitted that such evidence should always be received with great caution. In some cases it may be equivocal, and of the lightest possible value. In others, it may be entitled to much weight. Its value, of necessity, must be estimated by the jury. If it is doubtful whether the defendant heard or understood the proposition to which his silent assent is claimed, the jury may determine it. *State v. Perkins*, 10 N. C. 377; *Berry v. State*, 10 Ga. 511; 2 Phil. Ev. 194, note. The degree of credit due to such tacit admissions is to be estimated by the jury under the circumstances of each case. 1 Greenl. Ev. § 215. We think the instructions of the court below were in accord with these authorities, and contain no reversible error.

The next assignment of error is based upon the following instructions submitted by the court to the jury, to wit: "The statements of

Moses Pirtle, as stated, have been permitted to go before you; and if he was, beyond a reasonable doubt, an accomplice with the defendant in the perpetration of the crime, you should receive his statements as heretofore charged, and the circumstances under which made." The court then proceeds to charge fully the law on the subject of an accomplice. It is conceded by the attorney general and the learned counsel representing the state, Mr. Bullock, that this instruction was erroneous, since Moses Pirtle did not testify in the case, but was dead at the date of the trial. The law, therefore, governing the testimony of an accomplice, had no place in the case. The court itself realized that this instruction was erroneous, and at the conclusion of the general charge, upon request of the counsel for the state, submitted, in lieu thereof, the following instructions, to wit: "The court, in its charge, has heretofore instructed the jury as to the evidence of an accomplice. Any statement of Moses Pirtle allowed to go to the jury in this case as being made in the presence of the defendant cannot be received as evidence of the truthfulness or correctness of such statements. They are permitted to go to the jury as evidence alone for the purpose of being considered whether they were made in the presence and hearing of the defendant, under such circumstances and surroundings as would, under the charge heretofore given you, fairly and reasonably warrant any inference of an implied admission or acquiescence of the defendant by his silence, if shown, in the truthfulness or correctness of such statements; and you are charged that this last instruction must prevail over any instruction heretofore given you by the court as to the evidence of an accomplice." We think the infirmity in the former instruction was cured by the charge subsequently given, which leaves no substantial basis for this assignment of error.

There was no error in admitting proof of statements made by the two women, Winnie Pirtle and Mattie Motley, in the presence of Bart Green, to the effect that he had hidden the gun. The two women were examined on the trial, and testified that defendant came to the Pirtle house on the morning the murder was committed, took the gun from the smokehouse, and hid it. There was no error in permitting other witnesses to state that these two witnesses had made similar statements on the afternoon of the killing, in their presence and that of the defendant. The fact that the defendant denied the statement at the time it was made would not render incompetent proof that these two women had made such statements, since such evidence would be proof of previous confirmatory statements tending to support the credibility of the witnesses. *Queener v. Morrow*, 1 Cold. 123.

It is also assigned as error that the venue was changed from Hardeman county, where the crime was committed, to Madison coun-

ty, upon the application of defendant's counsel; the defendant being absent, and not having joined in the application, or authorized it. The record shows that on account of public indignation aroused throughout the county of Hardeman, and the belief that the prisoner had some guilty complicity in the murder, it was necessary that he should be hastily removed from the county, to escape mob violence. There is little doubt from the record, although a sad commentary upon our institutions, that, had the prisoner been returned to Hardeman county, he would have expiated his crime at the hands of a mob. The trial judge appointed reputable counsel to represent the prisoner, who, seeing the emergency, applied for a change of venue. The action of the trial judge in promptly granting it is to be commended, since to have required the presence of the prisoner would have exposed him to summary vengeance. The petition for change of venue is signed and sworn to by J. H. Foster, attorney for defendant, and there is nothing to show that defendant did not authorize the petition to be filed. Since the application and change of venue were manifestly for the benefit of the prisoner, and probably saved his life, he cannot be heard now to complain of the action of the court. This is especially true since no objection was interposed in the court below, and the question is made for the first time in this court.

There is no merit in any of the assignments of error, and they all are overruled. The defendant was examined as a witness in his own behalf, and told a story which was incredible, and wholly disbelieved by the jury. The defense of an alibi, which he attempts to set up, we think, is entirely overthrown by the proof. The defendant is shown by his neighbors to be a man of bad character, and unworthy of belief. We think his guilt has been demonstrated upon this record beyond a reasonable doubt, and the judgment of the criminal court must be affirmed.

OPPENHEIMER et al. v. FARMERS' & MERCHANTS' BANK et al.

(Supreme Court of Tennessee. June 12, 1896.)

REVIEW ON APPEAL—NEGOTIABLE INSTRUMENTS—BONA FIDE HOLDERS—INADEQUATE PRICE—CONSTRUCTIVE NOTICE—NEGOTIABILITY—STIPULATION FOR ATTORNEY'S FEES—EXTENT OF RECOVERY BY INNOCENT PURCHASER.

1. On appeal by one party from a decree in chancery, the whole case is open for re-examination; and if the decree is found correct on any ground, though incorrect on the ground assigned, it will be affirmed.

2. Inadequacy of price paid for commercial paper means a price less than the actual market value of the instrument purchased,—not one lower than the face value.

3. A bank which purchases before maturity, at a discount of 20 per cent., the notes of a solvent person, of the aggregate face value of \$1,500, does not pay such an inadequate price

as to charge it with constructive notice of infirmities; it appearing that the bank was accustomed to discount notes at rates varying from 12 to 25 per cent., and that it had previously discounted at the same rate paper held by the same payees against other solvent parties.

4. A note otherwise negotiable is not rendered nonnegotiable by the insertion of a stipulation for the payment of reasonable attorney's fees by the maker in case of suit.

5. Where a note is fraudulent and without consideration between the original parties, a bona fide purchaser before maturity can recover only what he actually paid for the paper.

Appeal from chancery court, Gibson county; A. G. Hawkins, Chancellor, sitting by interchange with John S. Cooper.

Bill by L. Oppenheimer and others to enjoin the Farmers' & Merchants' Bank and others from prosecuting suits for the collection of certain notes. From a decree for complainants, defendant bank appeals. Reversed.

W. I. McFarland and Wm. M. McCall, for appellant. McDearmon & Killough, Cooper & Harwood, and Nell & Deason, for appellees.

McALISTER, J. Complainants filed this bill to enjoin the defendant bank from prosecuting three several suits before a justice of the peace for the collection of certain promissory notes. It is charged in the bill that said notes were procured by fraud, and are without consideration, and that the bank received the notes from the payees with actual or constructive notice of the fraud. It is further charged that said notes were not negotiable, for the reason that each contained a stipulation for the payment of reasonable attorney's fees, and that said bank is not protected in its title to said notes as an innocent holder for value in due course of trade. The chancellor, upon final hearing, was of the opinion that the defendant bank purchased said notes without actual or constructive knowledge of the fraud, but held that the stipulation in respect to attorney's fees destroyed the negotiability of said instruments, and thereby defeated the claim of said bank that it was an innocent holder for value, within the meaning of the law merchant. The court decreed that said notes had been procured by fraud, and were void in the hands of the defendant bank, and perpetually enjoined their collection. The bank appealed, and has assigned as error the action of the chancellor in adjudging said notes nonnegotiable on account of the stipulation in respect of attorney's fees.

The facts out of which the present controversy has arisen may be briefly stated: The record discloses that Curtiss Bros. were the proprietors of a patent churn which they were engaged in selling in Gibson county. Complainants purchased of Curtiss Bros. the exclusive right to sell the churn in the state of Louisiana and certain counties of Mississippi, for which they agreed to pay the sum of \$2,000, evidenced by four notes, each for the sum of \$500, and payable, respectively, in

seven, eight, nine, and ten months from date. The following is a specimen of the notes in controversy, viz.: "Trenton, Tenn., June 3rd, 1889. Nine months after date, we promise to pay to Curtiss Bros., or bearer, the sum of \$500, negotiable and payable at the Exchange Bank of Trenton, Tenn., for value received. The drawers and indorsers severally waive presentment for payment, protest, and notice of protest and nonpayment of this note, and, in case of suit, agree to pay all reasonable attorney's fees for collecting the same. \$500. Due February 3, 1890. L. Oppenheimer. C. T. Love. R. F. Ross. H. R. Camp." On the 27th and 28th of June, 1889, three of these notes were purchased by the defendant bank at a discount of 20 per cent.; that is to say, the bank paid \$1,200 for the three notes, of the aggregate face value of \$1,500. H. R. Camp, one of the signers of the notes, was in the employment of Curtiss Bros. in the capacity of salesman, and negotiated the sale to Oppenheimer of the exclusive right to sell this churn in Louisiana and Mississippi. It was agreed between the original parties, at the time the notes were executed, that they were not to be transferred, and were also payable out of the profits of the new business. Curtiss Bros. and Camp and Ames, soon after the execution of the notes, left the state clandestinely, and their whereabouts is unknown. The proof abundantly shows that Curtiss Bros. were in collusion with Camp, and that said notes were procured to be executed upon false and fraudulent representations, and, as between the original parties, there has been a total failure of consideration. The defendant bank, however, relies upon the plea of innocent purchaser for value before maturity, in due course of trade and without notice.

Defendant's counsel insist that, complainants not having appealed from the ruling of the chancellor that the bank had no actual or constructive notice of the fraudulent conduct of the payees in procuring the execution of the notes, this question cannot be reopened in this court; but this position is manifestly erroneous, since upon the appeal of the bank the whole case is open for re-examination, and if the decree in favor of the complainants is found correct upon any ground, although incorrect upon the ground assigned by the chancellor, we should affirm it.

The contention of learned counsel for complainants is that the purchase of the notes in suit from strangers, at a discount of 20 per cent., when the bank knew that Oppenheimer, one of the makers, was perfectly solvent, indicates knowledge of the fraud, or that the bank had such constructive notice as to put it upon inquiry. As said by this court: "When the indorser takes negotiable paper, before maturity, under circumstances which might reasonably create a suspicion that it was not good, as where he buys a note, on a

solvent man, having less than one year to run, for \$333.33, at \$125, with agreement to pay \$25 more if collected without suit, he takes it at his peril, and subject to the equities between the original parties." *Hunt v. Sandford*, 6 Yerg. 387; *Merritt v. Duncan*, 7 Helsk. 163. Says Mr. Tiedman in his work on Commercial Paper (section 291): "It is said that inadequacy of price paid for negotiable paper may be so gross as to justify the conclusion that the purchaser is charged with the notice of a fraudulent or defective title on the part of the vendor. And it has been held that there was constructive notice of fraud, or of some other equally effective defense to the paper, where the purchaser paid \$125 for a note of \$333.33, \$50 for a note of \$300, \$5 for a note of \$300. On the other hand, it has been held that the purchaser of a commercial instrument was a holder for value, and hence took it free from equitable defenses when he paid \$100 for a note of \$250, \$50 for a note of \$100, or \$12.50 for a note of \$25. It is certain that a purely nominal consideration would not make the purchaser a holder for value. And it may be stated, subject to an explanation of terms, that an inadequate price always puts the person upon inquiry, and may, certainly along with the other suspicious circumstances, charge him with notice of existing defenses. But every price is not inadequate which is less than the face value of the instrument purchased. Commercial paper of every kind has its commercial value, rising above or below par, according to the financial credit of the person liable on it. Only that price is inadequate which falls below the market value, and, if the disproportion between the price paid and the market value be very great, it is fair and just to presume that the purchaser had reasonable grounds for suspecting fraud, or some other defense to the instrument. Each case must therefore stand on its own merits. One-half of the face value may, under some circumstances, be a grossly inadequate price, while, under different circumstances, it may be greatly in excess of what the instrument is worth on the market. *Tied. Com. Paper*, § 291. We think the rule laid down by Mr. Tiedman is sound, and furnishes an intelligible basis for the determination of what constitutes inadequacy of price in the purchase of commercial paper. We cannot say, however, in view of this rule and the proof in the record, that there was any such gross disparity between the commercial value of the notes and the price actually paid as to awaken suspicion in the minds of the officers of the bank of any infirmity in the paper. The proof shows that this bank was accustomed, during this time, to discount paper at rates varying from 12 to 25 per cent. per annum, and that it had, prior to this time, discounted paper held by these payees on other solvent parties at such rates. It was also insisted in argument that H. R. Camp, one of the mak-

ers of the notes, negotiated the sale of this paper to the bank, and that this fact was sufficient to put the purchaser upon inquiry. Nothing can be predicated upon this position, for the reason that it does not distinctly appear from the record whether it was Ames or Camp who sold the notes to the bank. The officers of the bank who purchased the paper are unable to state which of these parties conducted the transaction, and there is no other proof in the record on the subject. We hold, however, this feature unimportant in this case. We find no facts or circumstances in the record fixing the bank with knowledge, actual or constructive, of the fraudulent character of the paper, and the holding of the chancellor in respect of this proposition is correct.

The next question is whether the stipulation in respect of payment of attorney's fees, written in the face of the note, destroys its negotiability, and thus dismantles the note, allowing proof of fraud in its execution. The question presented has given rise to much judicial controversy, and the decisions announced in different states and jurisdictions are by no means reconcilable; and, since the question is one of first impression in this state, we shall, after a review of the authorities, adopt that view which most commends itself to our reason and judgment. Mr. Tiedman, in the work already cited (*Commercial Paper*, § 28) says: "Bills and notes—particularly the latter—sometimes contain stipulations that, if not paid voluntarily, the drawer or maker will pay the attorney and collection fee. It has been much discussed what is the effect of such stipulation upon the legal character of the instruments to which they are added. A few authorities maintain that the stipulation is in the nature of a usurious charge, and avoids the whole transaction, under the laws prohibiting usury;" citing *State v. Taylor*, 10 Ohio, 378; *Shelton v. Gill*, 11 Ohio, 417; *Dow v. Updike*, 11 Neb. 95, 7 N. W. 857. It may be remarked, under this head, that in the case of *Parham v. Pulliam*, 5 Cold. 497, this court held that a stipulation in a note to pay attorney's commission for collecting is not usurious. "Other decisions hold the stipulation to be void, because it is in the nature of a penalty, and tends to the oppression of impecunious debtors. But the avoidance of the stipulation on such grounds enables the courts to treat the stipulation as mere surplusage, and hold the instrument to be negotiable, notwithstanding;" citing *Sweeney v. Thickstun*, 77 Pa. St. 131; *Woods v. North*, 84 Pa. St. 410; *Johnston v. Speer*, 92 Pa. St. 227; *Bank v. Bynum*, 84 N. C. 24; *Bank v. Gay*, 63 Mo. 33; *Samstag v. Conley*, 64 Mo. 477; *Bank v. Marlow*, 71 Mo. 618; *Storr v. Wakefield*, Id. 622; *Bank v. Gay*, Id. 627; *Morgan v. Edwards*, 53 Wis. 599, 11 N. W. 21; *Jones v. Radatz*, 27 Minn. 240, 6 N. W. 800; *Witherspoon v. Musselman*, 14 Bush, 214; *Myer v. Hart*, 40 Mich. 517; *Bullock v.*

Taylor, 39 Mich. 138; Gaar v. Banking Co., 11 Bush, 182. "In a large number of cases the stipulation is held to be valid, but, because it renders the gross sum to be recovered on the instrument uncertain, its insertion in a bill or note is declared to destroy its negotiability;" citing *Sweeney v. Thickstun*, 77 Pa. St. 131; *Woods v. North*, 84 Pa. St. 410; *Johnston v. Speer*, 92 Pa. St. 227; *Bank v. Bynum*, 84 N. C. 24; *Bank v. Gay*, 63 Mo. 33; *Samstag v. Conley*, 64 Mo. 477; *Bank v. Marlow*, 71 Mo. 618; *Storr v. Wakefield*, 71 Mo. 622; *Bank v. Gay*, 71 Mo. 627; *Morgan v. Edwards*, 53 Wis. 599, 11 N. W. 21; *Jones v. Radatz*, 27 Minn. 240, 6 N. W. 800. "There are also other cases which not only recognize the validity of the stipulation, but also the negotiability of the paper on which it appears;" citing *Dietrich v. Bayhl*, 23 La. Ann. 767; *Overton v. Matthews*, 35 Ark. 147; *Smith v. Bank*, 29 Ind. 159; *Bank v. Canatsey*, 34 Ind. 149; *Johnson v. Crossland*, Id. 334; *Smith v. Silvers*, 32 Ind. 321; *Wyant v. Pottorff*, 37 Ind. 512; *Hubbard v. Harrison*, 38 Ind. 325; *Walker v. Woollen*, 54 Ind. 164; *Sperry v. Horr*, 32 Iowa, 184; *Seaton v. Scovill*, 18 Kan. 435; *Howenstein v. Barnes*, 29 Am. Rep. 406, note; Id., 5 Dill. 452, Fed. Cas. No. 6,786; *Heard v. Bank*, 8 Neb. 10; *Bank v. Rasmussen*, 1 Dak. 60, 46 N. W. 574; *Machine Co. v. Moreno*, 29 Am. Rep. 406, note; Id., 7 Fed. 806, Fed. Cas. No. 17,853a; *Storneman v. Pyle*, 35 Ind. 103. Indiana now prohibits, by statute, such stipulations in notes, unless unconditional. 1 Rev. St. 1876, p. 149. Mr. Tiedman remarks that, "where the amount to be recovered as attorney's fees is explicitly stated in the instrument, it would seem that the sum of money to be recovered on the paper, with the attorney's fees added to the principal and interest, would be as certain as the principal and interest would be alone; for the interest continues to accumulate, if the paper is not honored at maturity. When the exact amount of the fee is not stated, only reasonable fees can be recovered, and there may be some ground for objecting to the negotiability of such an instrument; but it would seem that even such an instrument ought to be held negotiable, for the stipulation for reasonable attorney's fees renders the amount no more uncertain than the addition by the law merchant to the principal sum of the costs of the protest, and the taxed costs of the suit." Mr. Randolph, in his work on Commercial Paper (volume 1, § 205), in treating this subject, says: "The effect of a stipulation for attorney's fees, or costs of suit, contained in a note, has been a subject for much consideration, more especially in our Western states. As an agreement, irrespective of usury laws and other statutory prohibitions, such a stipulation is in itself valid;" citing *Meacham v. Pinson*, 60 Miss. 217; *Brown v. Barber*, 59 Ind. 533; *Bank v. Breese*, 39 Iowa, 640; *Garver v. Pontious*, 66 Ind. 191; *Mathews v. Norman*, 42 Ind. 176; *Sinker v. Fletcher*, 61

Ind. 276; *Smiley v. Meir*, 47 Ind. 559; *Maynard v. Mier*, 85 Ind. 317; *Miner v. Bank*, 53 Tex. 559. "And the fees so stipulated for may be recovered by the holder of the notes, although not the original payee;" citing *Johnson v. Crossland*, 34 Ind. 334. "And, when a stipulation of this sort is contained in a bill of exchange, it has been held to be embraced in the liability assumed by the acceptor. *Bank v. Ellis*, 2 Fed. 44; *Smith v. Bank*, 29 Ind. 158." "It may be said, in general," says the author, "that such a stipulation for fees does not affect the negotiability of the note containing it, even though the stipulation be restricted to the case of suit being brought in the instrument;" citing 1 Daniel, Neg. Inst. 66; 2 Pars. Notes & B. 147; *Dietrich v. Bayhl*, 23 La. Ann. 767; *Heard v. Bank*, 8 Neb. 10, 16; *Sperry v. Horr*, 32 Iowa, 184; *Seaton v. Scovill*, 18 Kan. 433; *Machine Co. v. Moreno*, 7 Fed. 806; *Adams v. Addington*, 16 Fed. 89; *Trader v. Chidester*, 41 Ark. 242; *Gaar v. Banking Co.*, 11 Bush, 180; *Nickerson v. Sheldon*, 33 Ill. 372; and citing, also, the Indiana cases. *Davidson v. Vorse*, 52 Iowa, 384, 3 N. W. 477; *McGill v. Griffin*, 32 Iowa, 445; 3 Rand. Com. Paper, §§ 1717, 1718; *Ohit. Bills*, 770. Says Mr. Daniel in his book on Negotiable Instruments (section 62a): "Such instruments should, we think, be upheld as negotiable. They are not like contracts to pay money and do some other thing. They are simply for the payment of a certain sum of money at a certain time, and the additional stipulation as to the attorney's fees can never go into effect if the terms of the note or bill are complied with. They are therefore incidental and ancillary to the main engagement,—intended to assure its performance, or to compensate for trouble and expense entailed by its breach. At maturity, negotiable paper ceases to be negotiable, in the full commercial sense of the term, as heretofore explained, though it still passes from hand to hand by the negotiable forms of transfer; and it seems paradoxical to hold that instruments evidently framed as bills and notes are not negotiable during their currency, because when they cease to be current they contain a stipulation to defray the expenses of collection. Such stipulations do not, we think, render such instruments usurious. The additional amounts are in consideration of additional trouble and expense inflicted on the holder, and not excessive interest for the loan or forbearance of money." The author states further: "That cases sustaining the negotiability of such instruments consider that the stipulation in respect of attorney's fees is valid because it is an indemnification assured by the maker against the consequence of his own act, for, unless in default, he will not have to pay the additional amount. That it is consonant with public policy, because it adds to the value of the paper, has a tendency to lower the rate of discount, not only because it promises less

expensive collection, but bears evidence of a greater degree of confidence on the part of the maker in his ability to pay without suit, and that it does not impair the negotiability of the instrument, for the reasons that the sum to be paid at maturity is certain; that commercial paper is expected to be paid promptly; that, if so paid, no element of uncertainty enters into the contract; that it ceases to be negotiable, in the full sense of the term, if not paid at maturity; and that the additional agreement relates rather to the remedy upon the note, if a legal remedy be pursued, than to the sum which the maker is bound to pay, etc." 2 Daniel, Neg. Inst. (3d Ed.) § 62. This doctrine has received the indorsement of such eminent jurists as Mr. Justice Brewer, now an associate justice of the United States supreme court, who said in the case of *Seaton v. Scovill*, 18 Kan. 433, viz.: "It seems to us, therefore, a just conclusion that paper otherwise negotiable is not rendered nonnegotiable by a stipulation for the payment of costs of collection, including attorney's fees, in case suit is brought thereon." Justice Brewer cited with approval the case of *Gaar v. Banking Co.*, 11 Bush, 180; s. c. 21 Am. Rep. 209,—in which it was said, viz.: "The reason for the rule that the amount to be paid must be fixed and certain is that the paper is to become a substitute for money, and this it cannot be unless it can be ascertained from it exactly how much money it represents. As long, therefore, as it remains a substitute for money, the amount which it entitles the holder to demand must be fixed and certain; but when it is part due it ceases to have that peculiar quality denominated 'negotiability,' or to perform the office of money, and hence anything which only renders its amount uncertain after it has ceased to be a substitute for money, but which in no wise affected it until it had performed its office, cannot prevent its becoming negotiable paper."

Upon a careful review of the authorities, we can perceive no reason why a note otherwise endowed with all the attributes of negotiability is rendered nonnegotiable by a stipulation which is entirely inoperative until after the maturity of the note, and its dishonor by the maker. The amount to be paid is certain during the currency of the note as a negotiable instrument, and it only becomes uncertain after it ceases to be negotiable by the default of the maker in its payment. It is eminently just that the creditor who has incurred an expense in the collection of the debt should be reimbursed by the debtor by whom the action was rendered necessary, and the expense entailed. So far from such a stipulation discounting the negotiability of the instrument, we think with Mr. Daniel, that it is an indemnification assured by the maker against the consequences of his own act; that it is consonant with public policy, because it adds to the value of the paper;

has a tendency to lower the rate of the discount, not only because it promises less expensive collection, but bears evidence of a greater degree of confidence on the part of the maker in his ability to pay without suit. We are therefore of opinion that the decree of the chancellor, adjudging said notes nonnegotiable, was erroneous. We hold, however, that these notes being fraudulent in their inception, and without consideration between the original parties, the bank will only be entitled to recover to the extent of the sum actually paid by it, to wit, the sum of \$1,200 and interest. In other words, we hold that there was a negotiation of the notes in due course of trade only to the extent of the amount actually paid. *Petty v. Hannum*, 2 Humph. 102; *Holeman v. Hobson*, 8 Humph. 127; *May v. Campbell*, 7 Humph. 450; *Green v. Stuart*, 7 Baxt. 422. The reason of this rule is thus stated by Mr. Daniel, viz.: "When the execution of a bill or note has been induced by fraud, a different rule applies. The bona fide holder of it for value and without notice is undoubtedly entitled to be protected against a loss which would befall him if the party defrauded were permitted to set up the defense of fraud on the part of the payee against him. But it does not therefore follow that he may recover of such party the whole amount, when he has paid a less sum. For his protection and security against loss, it is only necessary that he should be paid back the amount which he was induced to give for the instrument by its appearance of validity, and therefore such amount is the limit of the recovery against the drawer or maker who was defrauded into the execution of the instrument. The paper derives its vitality wholly from the circumstance that it has been obtained for value, without notice, by an innocent purchaser. For his protection, it is maintained in his hands as a legal obligation. The object of the law is to save him from loss, and, to do that, a recovery of the amount he may have advanced is all that can be required. To go beyond it would be inequitable, and unjust to the party after that equally entitled to be protected from loss." 1 Daniel, Neg. Inst. § 758; *Todd v. Shelbourne*, 8 Hun, 510.

NEW HAMPSHIRE INS. CO. v. KENNEDY et al.

(Supreme Court of Tennessee. June 11, 1896.)
FOREIGN CORPORATIONS — CONTRACTS — VALIDITY.

Acts 1891, c. 122, § 3, provides that it shall be unlawful for any foreign corporation to do or attempt to do "any business, or to own or acquire any property," in the state, without having complied with the act, and its violation shall subject the offender to a fine, etc. *Held*, that a note given to a foreign insurance company by its agents for uncollected premiums on policies issued by it after it was prohibited by such act from doing business was void; and this, though the contract of the agents, made before the act was passed, required them to be

responsible for all premiums on policies issued through them. *State v. O'Brien*, 28 S. W. 311, 94 Tenn. 79, distinguished.

Error to circuit court, Shelby county; J. S. Galloway, Judge.

Action by the New Hampshire Insurance Company against W. H. Kennedy and P. B. Jones on a note, commenced in justice's court, and taken on appeal by defendants to the circuit court. There was a judgment for defendants, and plaintiff appeals in the nature of a writ of error. Affirmed.

Finley & Finley, for plaintiff in error. F. P. Poston and W. W. Goodwin, for defendants in error.

ALLEN, Special Judge. This is an action by the New Hampshire Insurance Company against W. H. Kennedy and P. B. Jones, commenced before a justice of the peace, on a note executed by defendant Kennedy, June 21, 1894, made due and payable September 1, 1894, for \$234.42, indorsed by defendant Jones. The justice gave judgment for said company against defendants for the amount of said note, protest fees, and the cost, and defendants appealed from said judgment to the circuit court, where said suit was tried by the judge without a jury, which resulted in a judgment against said company for the cost of suit, the court holding that said note was based on an illegal consideration, and was void. Plaintiff in error appealed in the nature of a writ of error to this court, and has assigned errors to the holding of the circuit court. Plaintiff in error is a foreign corporation, and in 1891 began to do business in the city of Memphis, and established an agency there, and it constituted and appointed defendants to act as such agents; and through the defendants, as such agents, plaintiff in error did a large business in Memphis up to June 30, 1893, when plaintiff in error terminated said agency, and withdrew from this state, refusing to file a copy of its charter with the secretary of the state, and to have an abstract of its charter registered in Shelby county, as required by chapter 122 of the Acts of 1891. It was a part of the original contract of agency between plaintiff in error and defendants that defendants, as such agents, should be responsible for and pay to said company the premiums on all policies issued by them, and they were to settle every 60 days; and they, as such agents, had to be responsible for all uncollected premiums, and were required to account every 60 days for premiums on all policies issued, whether they had collected the same or not. On settlement with said company, after the termination of said agency, defendants were indebted to said company to the amount of \$1,248.42, and defendant Jones gave his note for \$1,000, and defendant Kennedy gave the note sued on, indorsed by said Jones. Both of said notes were given for uncollected premiums on policies issued by said company through said

agents in the city of Memphis, after said act of 1891 went into effect, and in violation of the provisions of said act. Section 3 of said act provides: "That it shall be unlawful for any foreign corporation to do or to attempt to do any business, or to own or to acquire any property in this state, without having complied with the provisions of this act, and a violation of this statute shall subject the offender to a fine," etc. Plaintiff in error being a foreign corporation after said act went into effect, and by its failure and refusal to comply with the requirements of said act, it was not authorized to do any business, or to own or acquire any property, in this state; and all business transacted by said company in Memphis, and all contracts made by said company, in the course of its business, in the city of Memphis, after said act went into effect, were illegal, and prohibited by said statute; and said company could not have sued the policy holders for any uncollected premiums on policies issued in violation of said statute, and recovered the same. *State v. Insurance Co.*, 92 Tenn. 420, 21 S. W. 893; *Lumber Co. v. Thomas*, 92 Tenn. 593, 22 S. W. 743; *Haworth v. Montgomery*, 91 Tenn. 16, 18 S. W. 399; *Stevenson v. Ewing*, 87 Tenn. 46, 9 S. W. 230. It is well settled in this state that all contracts which are prohibited by statute are void, and will not be enforced by the courts. *Isler v. Brunson* (Cooper's Ed.) 6 Humph. 277, and cases cited. The note here sued on being for uncollected premiums on policies issued by plaintiff in error when it was prohibited by said act of 1891 from doing any business in this state, the same is illegal and void, and cannot be collected. *Bates v. Watson*, 1 Sneed, 377; *Parker v. Cowan*, 1 Heisk. 520. The circuit court dismissed this suit, and the judgment is affirmed.

On Rehearing.

(June 11, 1896.)

Upon the petition to rehear it is earnestly insisted that, inasmuch as the agency contract was made with defendants prior to the passage of the act of 1891, by which they agreed to be responsible, and account for all premiums on policies issued through them as agents, this makes the note given for uncollected premiums legal and binding, notwithstanding it was for uncollected premiums on policies issued in violation of a statute issued after said contract was made, inasmuch as no fraud, accident, or mistake was alleged or proved. This is not a suit upon the contract of agency referred to, but upon the note given to cover uncollected premiums on policies issued in violation of said act passed after said contract of agency was made. Defendants had a right to assume that said company would, so long as said agency continued, comply with every legal requirement to authorize it to conduct its business legally in the city of Memphis; and the fact that the said company failed and refused to comply with the statute, and withdrew from the state, rather than com-

ply with the statute of the state, leaving policies outstanding, and policy holders unwilling to pay the premiums, because said company had refused to comply with the statute, and had withdrawn from the state, might have been grounds sufficient for defendants to have refused to stand responsible for uncollected premiums. If defendants had collected these premiums as the agents of said company, then they would be estopped to deny their liability. But the record shows these premiums for which this note was given were never collected, and the premiums were illegal, and could not be collected, on account of the failure of said company to comply with the statutory requirements of the state, without any fault or neglect on the part of these defendants. This is a different case from one where the agent actually collects the money of his principal and embezzles it, and undertakes to defend his action on the ground that the business from which the money was derived was unlawful, which was the case in *State v. O'Brien*, 94 Tenn. 79, 28 S. W. 311, which is relied on by plaintiff in error as authority in this case. In that case the agent had received the money of his principal and embezzled it. Judge Beard, delivering the opinion of this court, said: "Upon the plainest principles, having assumed to receive this money for his nonresident principal, he is concluded, both civilly and criminally, by this assumption." As stated, if the defendants had received the money of said company in the course of its business conducted in Memphis, and suit had been brought to recover of defendants the money so collected, defendants would be concluded and estopped by their assumption to defend such a suit on the ground that the business of the principal out of which they received the money, as agents of the principal, was prohibited by law. But such is not this case. Here the money was not received by the agents, and these contracts to pay premiums having been made illegal and void by reason of the principal's failure and refusal to comply with the statute, so that the premiums could not be collected, there was no moral or legal obligation resting on defendants as a reason why they should be held liable for said uncollected premiums. And although defendants gave their notes to cover the uncollected premiums, they are not concluded from making the defense that the consideration for said note was illegal. In the case of *Bates v. Watson*, 1 Sneed, 379, the court say: "We take it to be a principle of law too well established to be now called in question that no liability can be created by a subsequent promise, where no legal obligation ever existed previously, unless supported by a new and sufficient consideration. It is unquestionably true that a new contract may be created which, if wholly unconnected with the illegal transaction, and founded on a new consideration,

will be valid, although relating to a matter respecting which there may have been prior unlawful transactions between the parties. 11 Whart. 207. But if the promise, though it purports to be a new contract, grow immediately out of, or be connected with, the illegal transaction, it will be utterly void." These well-settled principles of law are applicable to this case, and they show conclusively that plaintiff in error is not entitled to invoke the aid of the courts to enable it to collect said note. The petition to rehear is dismissed.

ZANONE v. STATE.

(Supreme Court of Tennessee. June 16, 1896.)

JURY—IMPANELING—VALIDITY—WITNESS—CREDIBILITY.

1. Under Const. art. 1, § 9, guarantying to the accused "a speedy public trial by an impartial jury of the county," the action of the court in directing the sheriff to summon a special venire entirely from the country districts of the county is illegal, and entitles the accused to a new trial, if convicted, though no injury be shown.

2. A witness may be questioned on cross-examination as to recent specific acts of moral turpitude on his part, not involving a criminal offense, for the purpose of affecting his credibility.

Appeal from criminal court, Shelby county; L. P. Cooper, Judge.

Dominic Zanone was convicted of murder in the second degree, and appeals. Reversed.

Gantt, Peters & Norfleet, for appellant. The Attorney General and E. E. Wright, for the State.

ALLEN, Special Judge. The defendant was indicted for the murder of George Tait, and was tried and convicted of murder in the second degree, and his punishment fixed at 20 years in the penitentiary. The state's theory is that the killing was the result of malice growing out of the fact that in November, 1894, George Tait, the deceased, was summoned as a witness before the grand jury, and gave evidence which resulted in an indictment against A. Zanone, father of defendant, for selling liquor contrary to law. The defense is on the theory that the origin of the trouble which culminated in the killing of George Tait on January 24, 1895, by defendant, was much earlier in point of time, and that the deceased was wholly in fault, and that deceased brought about the difficulty with defendant in which he lost his life. Deceased, at the time of his death, was about 30 years of age, and was a street-car conductor; and defendant was about 19 or 20 years of age, and was engaged as clerk in his father's grocery, which was situated near the east end of the electric car line running from the customhouse, in the city of Memphis, to Montgomery Park (Race-Track Grounds) about $4\frac{1}{2}$ miles from the city.

Prior to November, 1894, the deceased usually stopped his car in front of Zanone's grocery, and had the other cars on that line to stop there, as a regular stopping place; but after that deceased quit stopping his car in front of Zanone's, and had his car and the other cars to stop in front of Slagle's grocery. There is proof in the record tending to establish the theory of the state, and also of the defendant; but we refrain from expressing any opinion on the facts, as the case must be reversed, and remanded for a new trial, on account of errors in the ruling of the court trying the case.

The first error assigned by defendant is as follows: "The court committed error in ordering the sheriff to summon the special venire to try the defendant entirely from the country, and not to summon any of them from the city of Memphis; and the sheriff accordingly summoned the venire entirely from the country districts, and every citizen of Memphis, where the majority of the population of Shelby county resided, was excluded from it." It does not appear in the order of the court, on the minutes, that the sheriff was ordered to summon the venire from the country, but it appears in the bill of exceptions, and in the opinion of the criminal court judge, delivered by him in overruling the motion for a new trial, that he instructed the sheriff and his deputies to summon the entire venire from the country, and not to summon any of the jurors from the city of Memphis; and, according to these instructions from the trial judge, a venire of 355 men were summoned by the sheriff and his deputies from the country, and none of them from the city of Memphis. The defendant on this account duly challenged the array, and moved to quash the venire, which motion was overruled by the court, and defendant duly excepted to this ruling of the court. The killing of George Tait by defendant occurred in the Fourteenth civil district of Shelby county, near the Race Track, about four miles from the city of Memphis. Memphis has a population of about 70,000, and the country districts in the county have a population of about 60,000. His honor, without designating the names of the jurors to be summoned, and without any application or any reasons assigned therefor, directed the sheriff to summon the entire venire from the country, to the exclusion of the resident citizens of Memphis who might qualify as jurors to try defendant. But after the verdict, on the motion for a new trial, his honor gave as a reason for directing the entire venire from the country that the case had been tried before, which resulted in a mistrial, and a full report of the testimony given in on that trial had been published in the city papers, and for this reason the court gave the instructions to obtain the venire from the country; also, in another case he had had trouble in securing a jury from the city of Memphis, and, from his ex-

perience, he thought it would be next to impossible to get a jury from the city of Memphis. It appears that on the first trial referred to by his honor the jury who sat upon the case then were all from the country, and no effort was made to get any of the jurors from the city of Memphis. It is here insisted by defendant's counsel that this action of the trial judge, and his reasons therefor, as subsequently given, are without legal sanction, and that the defendant did not have tendered to him, as his triors, a fair and impartial jury, drawn from the body of the county, as guaranteed to him by law. The constitution of Tennessee provides that the accused shall have "a speedy public trial by an impartial jury of the county." Article 1, § 9. At the early common law the jury came from the visne or neighborhood or hundred in which the offense occurred, because such a jury were supposed to be more intimately acquainted with the merits of the controversy, and therefore were better qualified to do justice in the premises, than mere strangers; but by statute, in England, it was subsequently provided that the jurors should be taken from the body of the county. *Thomp. & M. Jur.* §§ 1, 2; *Shaffer v. State*, 1 How. (Miss.) 243. A similar provision is found in all of the state constitutions, and the right of a trial by a jury of the county, or from the body of the county, is guaranteed. This right has, from the earliest times, been regarded as "one of the greatest securities of life, liberty, and property of the citizen." *Thomp. & M. Jur.* § 2.

Now, looking at the decisions of the courts in other states on this question: In *Pennsylvania*, in *Hartshorne v. Patton*, 2 Dall. 252, the court held that a jury could not be selected, by order of the court, from the country, to the exclusion of the city. The case had been repeatedly tried, with constant mistrials; and in order to obtain a jury whose minds were unbiased by reports, discussions, and conversations regarding the controversy, the court was requested to direct a panel from the country, exclusive of the city. The court said, "Can we direct the sheriff to take a jury from any particular part of the county? Surely not." In *New York*, in the case of *Gibbons v. Van Alstyne* (Sup.) 9 N. Y. Supp. 156, the parties were both farmers. The justice instructed the constable to summon all farmers, to get a farmers' jury, and not to summon any of the jury from the village. This was held unlawful, if it were shown that the constable summoned the jury according to this instruction. As this did not appear, the court held that it would let the presumption prevail that the constable did his duty, and did not follow this instruction, in summoning the jury. The court held that it was an improper instruction for the justice to give, and said, "The constable should have been left entirely free and independent to summon an impartial jury, without reference to

any particular class of men," and referred to *People v. Kelly*, 31 Hun, 225; *Mandeville v. Reynolds*, 68 N. Y. 528. A similar doctrine has been held in several of the other states. *Shaffer v. State*, 1 How. (Miss.) 243; *State v. Nash*, 46 La. Ann. 194, 14 South. 607; *People v. Hall*, 48 Mich. 432, 12 N. W. 665; *People v. Coughlin*, 87 Mich. 466, 35 N. W. 72; *Hewitt v. Circuit Judge*, 71 Mich. 291, 39 N. W. 56; *Babcock v. People*, 13 Colo. 515, 22 Pac. 817; *Wash. v. Com.*, 16 Grat. 531. For the judge, clerk, or other officer of the court to direct the sheriff to discriminate in the selection, in favor of or against any class of citizens eligible to jury duty, is held generally by the courts to be a grievous wrong, and that such practices are unlawful; and when the sheriff follows such orders and instructions, in summoning jurors, the panel should be quashed and discharged when the array is challenged. His honor, the criminal court judge, held that this question was determined by the case of *Ellis v. State*, 92 Tenn. 85, 20 S. W. 500, and, as conclusive, quotes this language of the court: "If the jury is made up of citizens of any part of the county who are otherwise qualified, the requirement of the constitution is complied with." This decision does not apply here. In that case an act of the legislature created a court with jurisdiction over certain districts in Roane county, providing that the jurors should be selected from these districts within its jurisdiction. The act was claimed to be unconstitutional because these jurors were not summoned from "the body of the county." This court held that a jury summoned from the portion of the county within the jurisdiction of the court was lawful, using the language above quoted. *Id.*, 92 Tenn. 97, 20 S. W. 500. In this state, in the case of *Mayor, etc., v. Sheperd*, 3 Baxt. 373, the court ordered a jury to consist of one-half white men and one-half colored men, and this court said: "We regard this as so fundamentally erroneous, and so likely to lead to mischievous consequences and pernicious results, that we feel constrained to reverse the judgment." And in the case of *Jackson v. Pool*, 91 Tenn. 453, 19 S. W. 324, the court ordered the sheriff to summon as jurors on a special venire citizens from the country, and not to summon any taxpayers or residents of the city of Jackson. This was held to be erroneous. Judge Lea, delivering the opinion of this court, said: "The law, in its provisions for a special jury, contemplates the selection of men with reference to their superior fitness to try or determine the particular issues involved in the case; but he cannot direct the sheriff, where all are equally competent, not to summon those whose residence is within the city limits, but to summon those only who reside beyond the city limits, any more than he can authorize him to summon those citizens only of German descent, and not to summon those of Irish descent, or to author-

ize him to summon negroes, and not to summon white men."

From the foregoing authorities, it is manifest that the action of his honor in instructing the sheriff and his deputies to summon the jury from the country entirely, whereby more than half of the citizens of Shelby county were excluded from the venire, and the jurors summoned on the venire came from a particular part of the county designated by the judge, was illegal, and the panel, being unlawful, should have been quashed and discharged when challenged by the defendant. The sheriff should have been left free and independent to summon an impartial jury from the county of Shelby, without reference to any particular class of men, and without reference to any particular part of the county. The trial judge would have as much right to have instructed the sheriff to summon the venire of 300 Italians, and not to summon men of German or Irish descent, or to summon on the venire only men from one particular district of the county, or from a particular ward in the city of Memphis, or to summon all white men, or half of them white and the other half colored men, which would have been unlawful. When a panel is thus selected, and there is a plain departure from, and violation of, the legal mode of summoning the panel, it is unnecessary to show injury to the defendant. The court will presume injury to him, to the extent that he has been deprived of his legal rights in the manner of selecting jurors; and the conviction will be void, and a new trial will be granted him.

The third assignment of error is as follows: "The court erred in its rulings excluding the questions propounded on cross-examination by defendant to the state's witnesses A. G. Slagle, Dessie Slagle, and Carrie Brown, and answers thereto," which questions are as follows: Mrs. Dessie Slagle was the first witness for the state. The record shows that the following questions were asked her on cross-examination, and were excluded by the court: "How many times have you been married?" "How many times have you been married to Mr. Slagle?" "How many living husbands have you?" "Did you not, while married to Cooper, cross over the Mississippi river, marry Slagle in Arkansas, immediately return to the city of Memphis, and reside there with two husbands, Cooper and Slagle?" "Did you not also at that time know that Slagle had a living wife?" "Did you not immediately thereafter, or soon thereafter, go back and live with Cooper, and have Alexander Slagle indicted in the criminal court of Shelby county because he had married you, being the wife of Cooper?" The indictment referred to, against Alexander Slagle for knowingly marrying Dessie Cooper, the wife of Archie Cooper, was tendered, and witness was asked, "If that is not the suit against her husband for marrying her, which she prosecuted." Again she was asked, "If she did not have Martin

Kensey, Archie Cooper, W. L. Smith, and A. G. Slagle, four husbands, all at the same time." "Did not your husband Alexander Slagle, in the city of Memphis, in your own room, shoot at a man because of his intimacy with you?" "Did not your husband Archie Cooper leave you, and leave the city of Memphis, because of your intimacy with other men?" "Have you been impeached as a witness in any court? Have you had, or not, witnesses to swear that they would not believe you on oath?" "Have you not recently torn the clothes or the shirt off of your husband A. G. Slagle, drawn a butcher knife on him, calling him a damn son of a bitch, and say you were going to kill him?" Upon being recalled she was tendered the record in the divorce case of Dessie Slagle v. A. G. Slagle, and was asked if she filed the bill and made the allegations it contained, and if there was not a cross bill, and if she did not file the answer thereto, as it appears in the case. Also the following: "Alexander Slagle is charged in the indictment with knowingly marrying Dessie Cooper, the wife of Archie Cooper. I wish to ask the witness if she is the Dessie Cooper therein mentioned." "And was not the verdict of not guilty entered in the case before the trial because she (the witness) had quit Cooper, and had got back and was then living with Slagle, and if that was not the reason the verdict of not guilty was entered?" The court was apprised that the answers would be such as to bring the witness into disrepute, and lower the standard of her moral character. The ruling excluding them was not based on the fact that the court was not aware of the nature and character of the answers the witness would give, but that it was not competent to assail the credit of a witness by such questions, and the answers thereto. The following questions were asked of A. G. Slagle, and excluded by the court, viz.: "Here is an indictment against you for an assault and battery on one Dessie Cooper. I want to ask you if Dessie Cooper at that time was not the lady who testified here this morning, and if she wasn't your wife, and if the charge against you wasn't that of beating your wife." "The witness was then asked if he had not been indicted for wife-beating in this court, or for assault and battery on his wife, and if Dessie Cooper was not then, and in 1888, his wife." After reading the indictment charging him with marrying Dessie Cooper, then the wife of Archie Cooper, the witness was asked: "Who is Dessie Cooper?" "If Dessie Cooper was not then the wife of A. W. Cooper, and isn't she the woman that is now living with you,—your wife?" "Was not Dessie Cooper, upon whom you are alleged at that time to have committed this assault and battery, then your wife, and if this was not after the marriage, or the alleged marriage, in Arkansas?" "Mr. Slagle, really, could you tell the jury how many wives you have at present?" "I want to know if you haven't one wife living in Memphis, and one in Wash-

ington City?" "And you have a divorce proceeding pending against you now, haven't you?" Also, the following questions were asked the witness Carrie Brown, colored, viz.: "How many times have you been on the rock pile?" And, after referring to bawdyhouses: "Were not the women who kept these houses arrested because they were charged with keeping you there when you were too young to be there?" "And, further, wasn't your business in these bawdyhouses that of playing the piano?"

The trial judge excluded all these questions to these several witnesses, and the answers sought to be elicited, upon the ground, as stated by his honor, that the Hill Case settled the law of Tennessee on the question; and his honor said: "I shall not let, on cross-examination, the domestic relations or domestic troubles, or anything of that sort, be brought out of any witness, or any particular facts that would tend to disgrace or reflect upon the witness." In the case of Hill v. State, 91 Tenn. 522, 19 S. W. 874, the defendant, when being cross-examined as a witness, was asked, and required to answer over objection, "if he had not been charged with stealing money from a negro in Huntingdon, and if he did not pay him back the money." Defendant answered that he had been charged with the offense, and had paid the party some money to keep his father from hearing of the charge against him, but there was no truth in the charge. This court held (Judge Caldwell delivering the opinion) that, "great as the latitude of cross-examination is. It does not warrant the investigation of mere personal imputations, which may be easily instigated and multiplied by unscrupulous persons, to the injury or destruction of any witness," and that the witness' denial of the truth of the charge was conclusive, and should have ended that matter, to all intents and purposes; that the trial judge erred in permitting the question to be asked, in the shape it was put, and in instructing the jury that they could look to it as affecting the credibility of the witness, after the truth of the charge had been denied by the witness. This was all that was settled in the Hill Case. The questions propounded to the witnesses on cross-examination in the case at bar are altogether different from the question propounded in the Hill Case. Here these witnesses were asked about specific acts, relating to their conduct, antecedents, and character, involving moral turpitude, for the purpose of affecting and injuring the credibility of the witnesses, and they were not inquiries about personal imputations or charges made against the witnesses. Our decisions hold: (1) That independent evidence introduced by the opposite party to impeach a witness must relate to general reputation, and that specific acts cannot be shown. *Ford v. Ford*, 7 Humph. 92; *Gilliam v. State*, 1 Head. 38; *Merriman v. State*, 3 Lea, 394. (2) But that on cross-examination of a witness, we think,

specific acts, including indictments involving moral turpitude, may be asked about, which disclose his conduct, antecedents, and character, and thereby tend to affect and injure his credibility, although they may reflect upon and disgrace the witness, and the answers of the witness to such collateral matters are conclusive, and not to be contradicted. *Franklin v. Franklin*, 90 Tenn. 49, 18 S. W. 557; *Rocco v. Parczyk*, 9 Lea, 331; *Hill v. State*, 91 Tenn. 521, 19 S. W. 674; *Boyd v. State*, 94 Tenn. 505, 29 S. W. 901; *Braswell v. State*, 3 Leg. Rep. (Tenn.) 283; *Clapp v. State*, 94 Tenn. 202, 30 S. W. 214; *Hoard v. State*, 15 Lea, 323; *Peck v. State*, 86 Tenn. 259, 6 S. W. 389. It was considered admissible to show by one witness that she was a lewd woman. *Hoard v. State*, 15 Lea, 323. And to ask a witness whether he had not committed forgeries, and was not addicted to the excessive use of morphine and whisky, was allowed. *Franklin v. Franklin*, 90 Tenn. 49, 18 S. W. 557. And so whether the witness had not been indicted for an infamous crime. *Hill v. State*, 91 Tenn. 523, 19 S. W. 674; *Braswell v. State*, 3 Leg. Rep. (Tenn.) 283. And so whether he had been arrested for theft, or in prison on other charges, approved. *Peck v. State*, 86 Tenn. 259, 6 S. W. 389. There is this qualification to the rule: If the witness is asked as to any crime, he may claim his privilege from self-incrimination, and protect himself from a criminal prosecution by refusing to answer. *Clapp v. State*, 94 Tenn. 202, 30 S. W. 214. Judge Snodgrass, in delivering the opinion of this court in the case of *Boyd v. State*, quotes approvingly from a New York decision the following language, to wit: "The better rule now is that, on cross-examination, questions as to specific acts tending to disgrace the witness, and not questions as to accusations or charges including indictments, may be asked on cross-examination, but the party asking them is bound by the answer of the witness." 94 Tenn. 511, 29 S. W. 901. But the rule has not been definitely settled in Tennessee as to what extent questions of this character are allowed, except that, as to questions relating to indictments for offenses involving moral turpitude, the cases permit them to be asked about. *Braswell v. State*, 3 Leg. Rep. (Tenn.) 283; *Hill v. State*, *supra*. The case at bar presents the question as to what scope should be allowed on the cross-examination of witnesses touching their character; and, after a careful consideration of the question, we think it clear, upon the authority of our own decisions in other states, and the best text writers, that the inquiry, on cross-examination, may go to the extent of asking about any specific acts of the witness involving moral turpitude, and the witness may be compelled to answer the questions, unless the questions involve a criminal offense for which the witness may be prosecuted; and in that case the witness is permitted to judge, for the most part, for himself, and to refuse to answer wherever it

would tend to subject the witness to criminal punishment or forfeiture. Here the court must see for itself, when the witness claims the privilege of not answering, that the answer will directly show his infamy or crime, before it will excuse him from testifying. If the offense inquired about is barred by the statute of limitations from criminal prosecution, then the witness could not claim the privilege of not answering. There is no good reason why a witness may not be asked on cross-examination questions touching his present situation, employment, and associates, if they are of his own choice; as, for example, in what house or family he resides, what is his ordinary occupation, and whether he is intimately acquainted and conversant with certain persons, and the like. However these may disgrace him, his position is one of his own selection. A witness, on cross-examination, may be asked any question throwing light on his or her moral character, provided they involve moral turpitude, whether they relate to domestic relations or other habits, if the tendency is to show that the witness is guilty of wanton, habitual violation and disregard of the most sacred marital relations, or of the law, or of the rules of decent society, involving the witness in moral turpitude; as, for example, if the witness has more than one living husband or more than one wife at the same time, or if the witness has been, or is then, employed in a house of ill fame. Mr. Greenleaf says: "The examination being general, and kept within bounds by the discretion of the judge, all inquiries into transactions of remote date will, of course, be suppressed; for the interests of justice do not require that errors of any man's life, long since repented of, and forgiven by the community, should be recalled to remembrance, and their memory be perpetuated in judicial documents, at the pleasure of any future litigant. The state has a deep interest in the inducements to reformation held out by the protecting veil which is thus cast over the past offenses of the penitent. But where the inquiry relates to transactions comparatively recent, bearing directly upon the present character and moral principles of the witness, and therefore essential to the due estimation of the testimony by the jury, learned judges have of late been disposed to allow it." 1 Greenl. Ev. (15th Ed.) § 459. It is obvious that the tendency of the above questions was to bring out specific facts from these witnesses, on their cross-examination, which, if true, would have tended to involve their moral characters, and to show them guilty of moral turpitude in their conduct and habits. And, while some of said questions related to transactions which are not of comparatively recent date, other questions of a similar import were put to the same witness, in the series of questions asked, tending to show a continuation of the immoral conduct of the witness to within comparatively recent dates, bearing directly upon the present character and moral

principles of the witness; and all of these acts and transactions inquired about were essential to the due estimation of the testimony of the witnesses Mrs. Dessie Slagle, A. G. Slagle, and Carrie Brown by the jury, and were admissible, no privilege of not answering having been claimed as to such questions as might have involved the witnesses in criminal prosecutions. For these errors the judgment is reversed, and the case is remanded for a new trial.

MEMPHIS NAT. BANK v. SNEED et al.
(Supreme Court of Tennessee. June 29, 1896.)
INDORSEMENT OF RENEWAL NOTE—INSANITY AS A DEFENSE—NOTICE TO BANK.

1. An accommodation indorser on a note given in renewal of a note on which he was also accommodation indorser, at its maturity, is not relieved of liability because of his insanity at time of signing it; the bank taking it in renewal having no notice of his insanity, and he having been sane when the prior note was executed.

2. A bank will not be charged with notice of the insanity of an accommodation indorser on a renewal note accepted by it, because at that time the president of the bank, who was a member of the discount committee which passed on the note, knew of such insanity; he not having been present with the committee when the new note was taken and the old note extinguished, and not having had knowledge of the transaction till the day after it was consummated.

Appeal from chancery court, Shelby county.

Suit by the Memphis National Bank against W. A. Sneed and others. From the decree for complainant, the executrix of W. M. Sneed, one of the defendants, appeals. Affirmed.

Myers & Banks, for appellant. Wm. M. Randolph & Sons, for appellee.

BEARD, J. The complainant in this cause, by its bill, sought to recover on two promissory notes, one for \$7,500, dated 3d of October, 1892, due at 90 days, and the other for \$3,000, dated 22d October, 1892, and due at four months, made by W. A. Sneed, to the order of and indorsed by W. M. Sneed. At maturity, the notes were presented for payment to the maker, and, this being refused, they were protested, of all which the indorsee had due and legal notice. No defense was made by the maker of this paper, but Mrs. Neely, the executrix of W. M. Sneed, resisted recovery upon the grounds that her testate was non compos mentis at the time he indorsed the same. Upon the trial, the chancellor rendered a decree, not only against the maker, but also against the estate of the indorser. From this decree, the executrix alone prosecuted an appeal to this court.

The notes sued on were renewal notes, the last of two series made and indorsed by the same parties, the originals of which were discounted for the maker by the complainant bank in 1890. On all these notes W. M. Sneed was an indorser for the accommoda-

tion of W. A. Sneed, without any interest whatever in the proceeds of the discount. So far as the facts are concerned on which rests the contention of the executrix that her testate was of unsound mind when he entered into these two contracts of indorsement, it is sufficient to say that he had been for more than 20 years an active and prosperous member of the Memphis bar, and at the same time was interested in, and for a considerable period controlled, large enterprises outside of his profession. He was a man of energy, integrity, and sound business judgment, as the result of which he succeeded in acquiring a high reputation in the commercial community, and in accumulating a large fortune. Unremitting attention to his various duties, according to the testimony of experts, finally brought on an attack of paresis, a disease which is described as attacking the organic brain structure, which, though slow in its progress, culminated on or about the 15th of October, 1892, in serious mental disturbance. Up to that time we think it is clear from this record, whatever may have been the course of the disease, that he was in possession of his mental faculties, and was fully able, at the time he indorsed, to bind himself by contract on the \$7,500 note, of date the 3d of October. After the 15th, up to and including the 22d, of that month, his mind was the subject of delirium; and while he continued his daily visits to his office, and his attention to his numerous business interests, yet we think the testimony in the case shows that on the 22d of October, 1892, when he indorsed the \$3,000 note, he was, to a considerable degree, non compos mentis. Of this fact, however, the bank had no notice when it canceled and delivered the old note, maturing that day, to the maker, and took from him this new note in its room and stead.

Upon the finding of the facts, there is only the question left for determination whether the estate of W. M. Sneed can escape liability in the indorsement on the ground that he was insane at the time of making it. It is admitted that, as a general rule, the contract of a lunatic may be avoided. To this, however, there is this well-recognized exception: That where a contract has been entered into in good faith, without fraud or imposition, for a fair consideration, without notice of the infirmity, and has been so far executed that the parties cannot be restored to their original positions, it will not be set aside by the court. 5 Laws. Rights, Rem. & Prac. § 2380; 2 Pom. Eq. Jur. § 946. It is said that such a contract is enforced against the party non compos mentis, not so much upon the idea that it possesses the legal essential of consent, but rather because, by means of an apparent contract, he has secured an advantage or benefit, which cannot be restored to the other party, and therefore it would be inequitable to permit him, or those in privity with him, to repu-

diate it. *Lincoln v. Buckmaster*, 32 Vt. 652; *Matthiessen v. McMahon's Adm'r*, 38 N. J. Law, 536. The reports are full of cases which seem to illustrate this exception to the general rule. A few only will be referred to. In England, *Moltron v. Camroux*, 2 Exch. 489, affirmed in 4 Exch. 17, is a leading case on this subject. In the opinion of the court reported in 2 Exch. 489, it is said: "We are not disposed to lay down so general a proposition as that all executed contracts, bona fide, must be taken as valid, though one of the parties be of an unsound mind. We think, however, that when a person of comparatively sound mind, and not known to be otherwise, enters into a contract for the purchase of property, which is fair and bona fide, and which is executed and completed, and the property, the subject-matter of the contract, has been paid for and fully enjoyed, and cannot be restored so as to put the parties in statu quo, such contract cannot be afterwards set aside, either by the alleged lunatic or those who represent him." This rule, or rather this exception to the general rule, is recognized and applied by chancery courts in a great variety of cases. In *Wilder v. Weakley*, 34 Ind. 181, an action was maintained against the estate of a lunatic on an account for whisky, etc., sold to him in good faith, and without knowledge of his lunacy. The court there said: "It is laid down by an elementary writer that 'if a party to a contract was at the time he entered into the engagement a lunatic or of unsound mind, and any imposition appears to have been practiced upon him, or any advantage taken of his infirmity, by the other contracting parties, the contract will be void, as having been procured by fraud. But if the contract is a fair and honest contract, and bears no symptoms of the infirmity of mind of the party sought to be charged thereon, the courts will enforce it like any other contract.' * * * An action for the price of goods sold and delivered, or of work done, or for the hire of horses, carriages, or servants, cannot be defeated by showing that the defendant had been found by inquisition to be a lunatic at the time he received the goods, or had the benefit of the work or the use of the horses, carriages, and servants." In *Beale v. See*, 10 Pa. St. 56, the plaintiff, as administrator of one Dom, sought to recover the value of certain goods purchased by Dom from the defendant, on the ground that his intestate was a lunatic at the time of the purchase. The testimony showed that the goods were unsold to the object for which they were bought; that the price agreed upon exceeded their market value; and that the plaintiff had tendered them back to the defendant. On these facts, the court found for the defendant, and, in its opinion, distinctly based its conclusions upon this exception to the general rule. *Bank v. Moore*, 78 Pa. St. 407, was a case where a bank in good faith, and without any

knowledge of his infirmity, discounted a note for a lunatic, and paid over the awards, and in it the same principle was applied.

While conceding that these cases were properly decided, and that the doctrine announced by them is sound within proper limitations, it is insisted by appellant that as all of them involve the purchase of property by, or the loan of money to, the lunatic,—transactions by which something was added to his estate,—they afford no authority for the contention of complainant in this case. As we understand these cases, their underlying principle is this: A lunatic or his privies will not be permitted to repudiate a contract from which he has received a clear benefit, where the other contracting party acted in good faith, without notice of the infirmity, and where, upon repudiation, the status quo of the parties cannot be restored. That this is a sound distinction, we entertain no doubt. The question, then, is: Did Mr. Sneed, the insane accommodation indorser of this note, receive any benefit from the transaction, and if so, in the event it is set aside, can the parties be placed back in their original positions? In reply to the first part of this question, we say that it is apparent to us that he did receive a benefit, which was a consideration to him for his indorsement. He was of sane mind when he put his name on the back of the original note and of all the intervening renewal notes, including that which matured on the 22d of October. By his indorsement he undertook that the paper would be honored by the maker when it fell due, and that, if dishonored, then, upon due presentment, nonpayment, and notice, the holder might proceed at once against him (the indorser). Tied. Com. Paper, § 259; 2 Rand. Com. Paper, § 742. This promise or undertaking, while conditional, was none the less a binding, legal obligation, maturing on the same day as did the positive obligation of the maker. Now, when the bank surrendered the note which fell due on the 22d, and took in its stead the one in controversy, the effect of which was to give a further indulgence of four months, it conferred a valuable benefit upon both maker and indorser so far as this record discloses. The benefit or advantage which accrued to the indorser was quite as great as that to the maker, because there is no suggestion here that the latter was either able or ready to meet the note that fell due that day. If he did not, then, upon proper steps being taken, it would have been the duty of the indorser at once to have discharged it. We think there can be no doubt, in the light of the authorities, if the indorser had gone to the bank on the 22d, and, by his solicitation, had obtained a renewal of this paper, in order that he might be saved from making good his obligation, which was likely to mature that day, and it had granted him indulgence without notice of his infirmity, that neither he nor his executrix would be heard to say that as he was insane that day, and received no benefit

in the way of goods purchased or money borrowed from the bank, there should be no recovery on his indorsement. And we can see no difference, as a matter of principle, between that case and the one presented at the bar, where the same result is accomplished for him by the maker. He placed his name on this paper, in order that it might be used to that end. Not only was there a benefit conferred upon the indorser in this matter, but it is evident that it is impossible for the original positions of the parties to be restored. The old note has been extinguished and surrendered. It cannot be revived, and, if it could be, the day for payment and protest is long since past. The result is that unless the bank can hold his estate upon this renewal paper, which he contributed to induce the bank to take, by indorsing it, and intrusting it to the maker, from which he derived the benefit already mentioned, then the bank must lose its claim against his estate. It acted in good faith, and in accord with sound business principles.

The diligence of counsel, supplemented by a careful search by the court, has been able to discover but one case that furnishes an analogy to the one at bar. That is the case of *Snyder v. Laubach*, tried in a common pleas court of Pennsylvania, and reported in a law periodical published in Philadelphia (7 Wkly. Notes Cas. 464). As that publication is not generally accessible to the profession, it is thought proper to state the facts of the case and the conclusion of the court with some fullness: "On June 9, 1873, J. H. Lilly borrowed from the Dime Savings Institution of Bethlehem the sum of \$1,500, on his promissory note, payable to the order of Robt. Yost, which was indorsed by Yost as an accommodation indorser. To secure Yost against his indorsement, Lilly, upon the same day, confessed judgment to Yost for the amount of the note, which was entered upon the next day. The note was renewed every three months, until sometime in February, 1875, when Lilly sold the store and lot of ground upon which the judgment was a lien, to William H. Buss, who, assuming Lilly's indebtedness, took up the old note, and gave the bank, in its place, his own note for \$1,500, to Yost's order, and with Yost's indorsement; the latter consenting to indorse for him. At the same time there was a written agreement between Lilly and Buss that the judgment given to secure the old note should remain a lien on the above real estate as collateral security for the future indorsement of the note, it being the same debt. Lilly, on his part, agreed to indemnify Yost against his indorsements for the note. Yost continued to indorse for Buss up to February 18, 1876, the date of the last renewal. Upon that day, when Buss took the note to Yost for his indorsement, although he noticed that there was some-

thing wrong with Yost, he did not from his conversation think him crazy. Buss took the note to the bank, which accepted it, and returned the old note canceled." The note was protested by the bank for nonpayment, and suit afterwards brought thereon, against the administrator of Yost. The administrator refused payment, on the ground that his testator was insane at the time of indorsement. The court found as a fact: "There was no evidence to charge the bank with notice of his lunacy." The opinion of the court is very brief, and is as follows: "However it might have been had the note in suit been an original note, indorsed by the alleged lunatic, for the accommodation of Buss, yet the case was different when it appeared that it was a renewal of a note for a similar amount, upon which he was also an accommodation indorser. There had been several renewals, at each of which, as well as the execution of the first note. Yost was unquestionably of sound mind. He had taken a bill in judgment against the original maker as collateral security for the note. Yost was clearly liable on the note of which the note in suit was a renewal. There was full consideration therefor, and the case is directly within the decision of this court in *Bank v. Moore*, 78 Pa. St. 407 [referred to supra]." But it is insisted that that case is not an authority in the one at bar, because the court there rested its conclusion in the fact that the indorser, Yost, had received, in the judgment lien, collateral security for his indorsement. It is true that the common pleas court, in its opinion, did emphasize this, and did speak of it as a consideration passing to the indorser. Subsequently, however, that case was referred to, and by clear implication approved, by the supreme court, in *Wireback v. Bank*, 97 Pa. St. 543; and that court ignored as a controlling element in the case the fact that Yost had received collateral security. It said: "*Snyder v. Laubach*, 7 Wkly. Notes Cas. 464, is where Yost's indorsement of the note was merely a renewal of an indorsement made when he was unquestionably of sound mind; and it was held that he was clearly liable on the note of which the note in suit was a renewal. There was full consideration, and the case was within the decision of *Bank v. Moore*, supra. The consideration was a debt for the amount of the renewal note." The case of *Van Patten v. Beals*, 46 Iowa, 62, relied upon by the testatrix, is altogether different from the present case. In that it was held that a lunatic signing a note as surety for an antecedent debt was not bound thereby, although the other contracting party was ignorant of his infirmity. This was evidently a case where a lunatic undertook to bind himself for a debt on which he was not antecedently bound, and the court there properly declined to hold him.

Upon a careful consideration of the case at bar, we are satisfied that it falls under the exception to the general rule, which has been heretofore stated, and that the chancellor properly held the estate of the indorser upon the note in question, unless it be true, as urged by the testatrix, that the bank had constructive knowledge of Mr. Sneed's condition when it accepted this renewal note. This contention rests upon the fact that Mr. Neely was the president of the bank, and a member of the discount committee which passed on this note, and that at that time he was advised of Sneed's insanity. That Mr. Neely did sustain these official relations to the bank, and was informed of the fact in question, when this new note was taken, is clear; but it is equally clear that he was not present with the committee when it was received, and the old note extinguished, and had no agency whatever in the transaction, and, in fact, only obtained knowledge of it the day after it was consummated. Under such conditions, his knowledge could not affect the bank. 1 Mor. Priv. Corp. p. 540c; Bank v. Campbell, 4 Humph. 393. It follows that the decree of the chancellor is in all things affirmed.

BANK OF COMMERCE v. STATE, to Use of CITY OF MEMPHIS.

SAME v. STATE, to Use of SHELBY COUNTY.

(Supreme Court of Tennessee. May 9, 1896.)

APPEAL—MODIFICATION OF JUDGMENT.

1. The supreme court may look to its prior opinion in the same case, in connection with the decree, to ascertain what was intended to be and was by the court decided.

2. The supreme court has no power to reverse, change, or modify its decree of a previous term in the same case, or to pass a decree inconsistent with its adjudication of such term, though the supreme court of the United States has decided in another case that such decree is erroneous. Caldwell and Allen, JJ., dissenting.

Separate bills by the state of Tennessee, for the use of the city of Memphis, against the Bank of Commerce, and by the state of Tennessee, for the use of the county of Shelby, against the same defendant, to recover certain taxes, in which a judgment of the supreme court reversing a decree for defendants (31 S. W. 993) was reversed by the supreme court of the United States (16 Sup. Ct. 456). On the same day the latter court, in an action in the federal courts by the Union & Planters' Bank against the county of Shelby, city of Memphis, and others, for an injunction, involving one of the same questions involved in the state's actions, reversed a decree for complainant (16 Sup. Ct. 558). On the opinions of the supreme court of the United States and the mandates in the state's cases, the city of Memphis and the county of Shelby move for a decree against the Bank of Commerce, for privilege taxes for the year 1889 and subse-

quent years, and for ad valorem taxes against its capital stock for the years 1887 to 1891, inclusive, without prejudice to taxes for subsequent years. Motions denied.

Morgan & McFarland, for plaintiff. Metcalf & Walker, for defendant.

GILHAM, Special Judge. At the last term of this court these cases were heard and decided, and are reported in 95 Tenn. 221, 31 S. W. 993, under the style of State v. Bank of Commerce. The bills were filed to collect taxes claimed to be due to the city of Memphis and the county of Shelby for several years subsequent to 1886, aggregating about \$100,000. It was then contended by the bank that under its charter it paid a commuted tax upon its shares of stock in lieu of all other taxes. For the county and city it was contended that either the shares of stock in the hands of the shareholders or the capital stock, one or the other, but not both, were subject to general taxation. By the decree then rendered, this court adjudged that the shares of the stock in the hands of the shareholder were subject to general taxation. In the decree no reference is made to the capital stock, nor does it in terms adjudicate that the capital stock is not subject to general or ad valorem taxation; but the opinion then delivered goes fully into this question, and the court undoubtedly then held that the capital stock was not subject to general taxation. State v. Bank of Commerce, 95 Tenn. 234, 31 S. W. 997. The cases went by writ of error to the supreme court of the United States, were advanced for hearing, and have been recently decided. The court reversed so much of the decree of this court as adjudged that the shares of stock in the hands of the shareholders were subject to general taxation. 16 Sup. Ct. 456. The charter of the Union & Planters' Bank is in substance the same as that of the Bank of Commerce. After the decision of the Bank of Commerce Case by this court, at the last term, in which it was held that the surplus and undivided profits of that bank were liable to ad valorem taxes imposed by the state, etc., notwithstanding the exemption of its capital stock from such taxation, the Union & Planters' Bank filed in the United States circuit court for the Western district of Tennessee its bill to enjoin the county of Shelby et al. from forcing payment from it of a tax upon its surplus and undivided profits. That court held the tax to be illegal, and enjoined its collection. Upon appeal by the county of Shelby, the case went to the supreme court of the United States, was likewise advanced for hearing, and was heard with the Bank of Commerce Case and other cases from this court. In deciding the Bank of Commerce Case the court says: "We cannot, therefore, review the decision of the state court allowing the claim of exemption from general taxation of the capital stock of the bank, although the consequence is that in these cases both the capital stock and the

shares of stock thereof in the hands of the shareholders escape all taxation other than the charter tax." 16 Sup. Ct. 460. In the *Union & Planters' Bank Case* the court had the question before it, and upon a review of all the cases, state and federal, held that the capital stock of the *Union & Planters' Bank* was subject to general taxation. 16 Sup. Ct. 562. Upon these opinions, and the mandates in the *Bank of Commerce Case*, the city of Memphis and the county of Shelby now move this court to enter a decree against the *Bank of Commerce* for privilege taxes for the year 1889 and subsequent years here involved, and also for ad valorem taxes against the capital stock of said bank for the years 1887 to 1891, inclusive, and without prejudice to taxes for subsequent years. Upon these motions the contention of the city and county is that the decree of the last term should be treated as a unit, and should now be so modified as to conform to the opinion of the supreme court in the *Union & Planters' Bank Case*, by taxing the capital stock of the *Bank of Commerce*, and also by taxing the bank with the privilege taxes mentioned. The contention of the bank is that our decree of the last term is final, and that it cannot at this term be reversed, altered, or changed.

The principal questions now raised are: (1) Was the liability of the capital stock to general taxation by this court at the last term adjudicated? (2) If so, can we now readjudicate that question, and tax the capital stock? The decree is silent on the subject, but the opinion is full and clear. No one can read the opinion without understanding that this was one of the leading questions debated, considered, and by the court decided. In *Fowlkes v. State*, 82 Tenn. 19, this court, Judge Cooper delivering the opinion, has said: "And even if the presumption, as stated by the referees, was that the dismissal was on the merits, if the record leaves the matter in doubt, this court may look to the opinion of the court then delivered, which is also a record, to clear up the doubt." The supreme court of the United States in a recent case (*In re Sanford Fork & Tool Co.*, 160 U. S. 256, 16 Sup. Ct. 291) say that the opinion delivered by the court may be consulted to ascertain what was intended by its mandate. Upon authority we think it clear that we may look to the opinion, in connection with the decree, to ascertain what was intended to be and was by the court decided. These suits were instituted to obtain a construction of the bank's charter, and to settle the question whether the charter tax was on the capital stock or on the shares of stock in the hands of the shareholders, and to collect the general tax from the one or the other, as the court might construe its charter and locate the charter tax. The exemption of the capital stock from ad valorem taxation was therefore necessarily involved, and was a vital issue of the case. We understand it to

be well settled that all the issues which might have been raised and litigated are concluded, the same as if they had been directly adjudicated and included in the judgment or decree. *Lindsley v. Thompson*, 1 Tenn. Ch. 272; 21 Am. & Eng. Enc. Law, 216. We need not, however, rest our opinion on this doctrine, for, in the present case, the very question was litigated, both in the court below and in this court. We are of the opinion, and therefore hold, that the decree of the last term, construed in connection with the opinion, adjudged that the capital stock of the *Bank of Commerce* was not subject to general taxation.

This brings us to the second question, which is, whether we now have the power to reverse, change, or modify our decree of the last term, or to now pass a decree inconsistent with our adjudication of that term? It is settled and familiar law that no court can, upon a second writ of error or appeal, although in the same case and between the same parties, change or modify its rulings of a former term. *Supervisors v. Kennicott*, 94 U. S. 499; *Clark v. Keith*, 106 U. S. 464, 1 Sup. Ct. 568. It is also settled law that no court can in such case change or modify its judgment of a former term, except for clerical errors. *Elliot v. Cochran*, 1 Cold. 389; *Sibbald v. U. S.*, 12 Pet. 488. None of the cases which have been cited by counsel, and none which the court have been able to find, hold that this court has the power to reverse or change its adjudication of a former term. If the supreme court of the United States could not have directed this court by mandate to change its rulings and tax the stock, because it had not jurisdiction of the question, and if that court, upon a second writ of error, is concluded by its judgment of a former term, although in the same case and between the same parties, upon what principle can this court go behind its judgment of a former term, although in the same case and between the same parties? Had the supreme court of the United States jurisdiction of this question, and by its mandate had directed this court to reverse its decree, then there could be no question either as to our jurisdiction or our duty to enter such decree. We are of the opinion that this court has not the power to now pass a decree taxing the stock of the *Bank of Commerce* for the years here involved, nor to decree payment of the privilege taxes of said years. It follows that we have no power to dismiss the bills without prejudice. Both motions are disallowed. A decree will be entered, in pursuance of the mandates, reversing so much of the decree of the last term as is herein directed, and otherwise affirming it.

CALDWELL and ALLEN, JJ., do not concur in the conclusions here announced, being of the opinion that the court should now mold its decree to conform to the opinion of

the supreme court of the United States in the Union & Planters' Bank Case, and adjudge the Bank of Commerce liable for ad valorem and privilege taxes.

BEARD, J., being disqualified, did not sit in this case.

STATE, to Use of SHELBY COUNTY, v.
HERNANDO INS. CO. et al.

SAME v. BLUFF CITY INS. CO. et al.

(Supreme Court of Tennessee. June 16, 1896.)

CONSTITUTIONAL LAW—TAXATION—JUDGMENT OF
FEDERAL SUPREME COURT—CONCLUSIVE-
NESS ON STATE COURT.

1. The charter of an insurance company, providing that the company shall pay a state tax of a certain amount on each share of capital stock, which shall be in lieu of all other taxes, does not exempt from further taxation the capital stock.

2. The decision of the federal supreme court on the question of whether a state statute violates the federal constitution is binding on the state courts whichever way the question is decided.

3. The decision of the federal supreme court, determining that the decisions of a state court holding a state statute in regard to the taxation of a corporation a violation of the federal constitution have not become a rule of property, and that the statute is constitutional, is binding on the state courts.

Appeal from chancery court, Shelby county; W. D. Beard, Chancellor.

Actions by the state of Tennessee, to use, etc., against the Hernando and the Bluff City Insurance Companies. From a decree for defendants, plaintiff appeals. Reversed.

Metcalf & Walker and C. W. Weatherford, for appellant. Morgan & McFarland, for appellees.

GILLHAM, Special Judge. These cases involve the same questions and may be decided together. The first is a bill filed by the state of Tennessee and the county of Shelby against the Hernando Insurance Company et al. to collect the state and county taxes for the years 1887, 1888, 1889, 1890, and 1891, with interest, attorney's fees, etc., upon the capital stock of the defendant corporation, or, in the alternative, upon the shares of stock in the hands of shareholders. The second is a similar bill against the Bluff City Insurance Company, to collect the state and county taxes, with interest, attorney's fees, etc., for the same years, upon its capital stock, or, in the alternative, upon the shares of the stock in the hands of the shareholders. The bills aver: That the defendant corporations were duly chartered under the laws of this state prior to 1870, and that by the tenth section of each of said charters it is provided: "Said company shall pay to the state an annual tax of one-half of one per cent. on each share of capital stock subscribed, which shall be in lieu of all other taxes." That the state, by its revenue laws, had imposed such taxes, and that the same had been duly assessed

against said corporations and shareholders. The defendants in the court below moved to dismiss the suits on the ground that the bills upon their faces showed that, by the charter of the defendant company, both its capital stock and shares of stock were exempt from taxation other than that imposed by the charter, and that the laws of the state undertaking to impose such taxes were in conflict with section 10, art. 1, of the constitution of the United States. The motions were sustained, and the bills, on November 22, 1894, were dismissed. The state of Tennessee and county of Shelby have by writs of error brought the cases to this court, and have assigned appropriate errors; the errors assigned being that the capital stock of each of the defendant corporations was legally subject to the taxes imposed.

In dismissing these bills, the chancellor doubtless followed the law as announced by this court in *Memphis v. Hernando Ins. Co.*, 91 Tenn. 546, 19 S. W. 758, and the writs of error, we assume, are now prosecuted to get the supposed benefit of more recent decisions made upon the subject by the supreme court of the United States. In the year 1836 the charter of the Union Bank of Tennessee was brought before this court for construction. The eleventh section of that charter provides: "In consideration of the privileges granted by the charter, the bank agrees to pay annually the one-half of one per cent. on the amount of the capital stock paid in by the stockholders, other than the state." The court, Judge Turley delivering the opinion, held that exemption was of the capital stock, but that the shares of stock, so far as held by the resident owners, were taxable. *Union Bank of Tennessee v. State*, 9 Yerg. 490. In 1873 this court held, Judge Nicholson delivering the opinion, that the city of Memphis could not exact from the Hernando Insurance Company, one of the present defendants, a license tax, and upon the ground that, under its charter, the corporation was not subject to other or further taxation than the charter tax upon its capital stock,—citing and approving the case of *Union Bank of Tennessee v. State*, 9 Yerg. 490. *City of Memphis v. Hernando Ins. Co.*, 6 Baxt. 527. At the same time (1873), in the case of *De Soto Bank v. City of Memphis*, Judge Freeman delivering the opinion, where it was sought by the city to tax the real estate of the corporation, in which a part of its capital was invested, it was assumed that the exemption was of the capital stock, and that the shares of the stock in the hands of the shareholders were taxable. *De Soto Bank v. City of Memphis*, 6 Baxt. 415. In 1876, this court, Judge Freeman delivering the opinion, in *City of Memphis v. Farrington*, 8 Baxt. 539, construing the charter of the Union & Planters' Bank and others, held the capital stock not subject to general taxation, but that the shares of stock were taxable. This case went by writ of error to the supreme court of the United States, and was.

in 1877 decided, Justice Swayne delivering the opinion. 95 U. S. 679. That court held that the charter tax was upon the shares of stock, and, the same not being subject to other taxation than the charter tax, the decree of this court was reversed. In 1881, in *Bank of Commerce v. McGowan*, 6 Lea, 703, Judge Cooper delivering the opinion, where it was sought to tax the real estate, in which a part of the bank's capital was invested, it was held that the real estate, so far as used by the bank for a banking house was not taxable, and upon the ground that its capital stock was exempt from general taxation,—citing and approving *De Soto Bank v. City of Memphis*, 6 Baxt. 415. In this case the *Farrington Case*, 95 U. S. 679, was first cited by this court. Of that case, Judge Cooper, at page 705, says: "It was there held that the provision in the bank's charter, like the one before us, is a contract, and will protect the shares of the stockholders from additional taxation. We recognize the controlling authority of that court in such cases, and yield to its decisions. The provision in question will therefore protect the capital stock and the shares of the stockholders, from any taxation beyond that prescribed in the charter." Here the court construed the *Farrington Case* to exempt both shares of stock and capital stock. This case also went to the supreme court of the United States by writ of error, under style of *Bank v. Tennessee*, 104 U. S. 493, and was decided and affirmed in October, 1881, Mr. Justice Field delivering the opinion. Referring to the opinion of the supreme court of the United States in the latter case, Judge Caldwell, speaking for this court in *Memphis v. Hernando Ins. Co.*, 91 Tenn. 554, 555, 19 S. W. 758, truly said: "It is technically true, as contended by complainant, that the writ of error in the last case took up only so much of the controversy as this court had decided against the bank, and that therefore the supreme court of the United States cannot properly be said to have decided that even a part of the bank's buildings was exempt under its charter. Nevertheless, the reasoning of the court shows that such was its opinion. Indeed, that decision, as well as the decision of this court, was based upon the idea (1) that the capital stock was exempt from all taxation except that prescribed in its charter, and (2) that, such being the case, a building in which part of its capital stock has been invested must be exempt, so far as used by the bank for its legitimate corporate purposes, but no further." In 1884, in *State v. Butler*, 13 Lea, 400, Judge Cooke delivering the opinion, it was assumed that the *Farrington Case* held that both the capital stock and the shares of stock were exempt from other taxation than that of the charter tax.

Later, in 1888, in *State v. Butler*, 86 Tenn. 614, 8 S. W. 586, Judge Folkes delivering the opinion, where it was again sought to tax the real estate of the Bank of Commerce, it was assumed by the court that the capital

stock of that bank was exempt from general taxation. Still later, the city of Memphis filed bills in the chancery court of Memphis seeking to recover ad valorem taxes for the years 1887 to 1891, inclusive, from the Union & Planters' Bank, the Hernando Insurance Company, and the Bluff City Insurance Company, the two last being the present defendants, upon their capital stock, or, in the alternative, to recover from the stockholders the same amount as taxes on the shares of stock held by them, respectively, during said years. Upon demurrer, the bills were in the court below dismissed, and upon appeal were heard and decided by this court in 1892, Justice Caldwell delivering the opinion. 91 Tenn. 546, 19 S. W. 758. These cases, therefore, involved city taxes for the same years for which it is here sought to recover state and county taxes. This court, construing the *Farrington Case* in the light of all federal decisions bearing thereon, and especially *Tennessee v. Whitworth*, 22 Fed. 80, Id., 117 U. S. 136, 6 Sup. Ct. 645, and *Bank v. Tennessee*, 104 U. S. 493, and following the construction given that case by this court in *Bank of Commerce v. McGowan*, 6 Lea, 705, *State v. Butler*, 13 Lea, 406, and Id., 86 Tenn. 633, 8 S. W. 586, held that the charter tax upon the shares of stock was in lieu of all other taxes, whether against the shares of stock in the hands of the shareholders or the capital stock; the court at the same time taking occasion to say that it is so held only by reason of the authority of the cases of *Farrington v. Tennessee*, 95 U. S. 679, and *Bank v. Tennessee*, 104 U. S. 493, construed together, but that, as an original proposition, they would then still have held the shares subject to ad valorem taxation. In *City of Memphis v. Home Ins. Co.*, 91 Tenn. 558, 19 S. W. 1042, decided at the same term (1892), the opinion being delivered by the same judge, it was held that under the charter of that company the charter tax was upon the capital stock, and that the shares were taxable. The charter there under consideration differs from that involved in the *Farrington Case*. Its exemption clause is there cited, being, "There shall be a state tax of one-half of one per cent. upon the amount of the capital actually paid in." The court says this charter is, in legal import, the same as that of the Union Bank, construed in 9 Yerg. 490; our court thus distinguishing this class of charters from those construed in the *Farrington Case*. The same was again held at the same term, the opinion being delivered by the same judge, in case of *City of Memphis v. Memphis City Bank*, 91 Tenn. 574, 19 S. W. 1045; the construction there being of the charter of the Memphis City Bank, which does not materially differ from that of the Home Insurance Company. At the last term, in *State v. Bank of Commerce*, 95 Tenn. 221, 31 S. W. 992, Gillham, Special Judge, delivering the opinion, the exemption clause of the charter of the Bank of Commerce was again

construed, and, upon consideration, as we held, for the first time, of the full charter, we again decided that the exemption applied to the capital stock, and that the shares in the hands of the shareholders were taxable. In 1893 after the 91 Tenn. cases were decided, the state of Tennessee and Shelby county filed bills in the circuit court of the United States for the Western district of Tennessee against the Union & Planters' Bank and the Bank of Commerce to recover state and county taxes for the years 1887 to 1891. These suits were, however, by the supreme court of the United States, dismissed for want of jurisdiction. *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654. After the decision of the Bank of Commerce Case and other cases by this court at the last term (31 S. W. 993), the Union & Planters' Bank filed in the circuit court of the United States for the Western district of Tennessee, at Memphis, a bill against the county of Shelby and others to enjoin the collection of taxes upon its surplus and undivided profits. That court sustained the bill, Judge Hammond delivering the opinion, and enjoined the collection of taxes. The case was by the defendants appealed to the supreme court of the United States, was advanced for hearing, and decided in March, 1896. 161 U. S. 149, 16 Sup. Ct. 558. The Bank of Commerce Case and other cases decided by this court at the last term were by the defendants by writ of error also taken to that court, were heard at the same time, and were decided with the Union & Planters' Bank Case, Justice Peckham delivering the opinion, and are reported in 161 U. S. and 16 Sup. Ct. *Bank of Commerce v. Tennessee*, 161 U. S. 134, 16 Sup. Ct. 456; *Mercantile Bank v. Tennessee*, 161 U. S. 161, 16 Sup. Ct. 461; *Planters' Fire & Marine Ins. Co. v. Tennessee*, 161 U. S. 193, 16 Sup. Ct. 466; *Memphis City Bank v. Tennessee*, 161 U. S. 193, 16 Sup. Ct. 468; *Home Insurance & Trust Co. v. Tennessee*, 161 U. S. 198, 16 Sup. Ct. 476. The court reversed so much of our decree in the Bank of Commerce Case as held the shares subject to taxation, and, on rehearing, so much only as held the \$200,000 of stock issued prior to 1870 taxable. In the Union & Planters' Bank Case it was held that, under the charter of that bank and its exemption clause, its capital stock was subject to general taxation. The Farrington Case is there construed, and the court say that, properly understood, that case does not hold that both the shares and the capital stock are exempt from taxation. The charter of the defendant companies does not materially differ from that of the Union & Planters' Bank.

It is insisted by the complainants that this decision by the supreme court of the United States should by this court be treated as finally settling this vexed question, and that we should follow that decision, and apply the principles there announced to the present

cases. Upon the other hand, defendants insist that this court should adhere to its convictions and rulings, as repeatedly expressed from 1836 to 1895, a period of nearly 60 years, except where, under its construction of the Farrington Case, this court has in some of its cases held that both the capital and the shares of the stock were exempt. They invoke the doctrine of stare decisis. It is to be regretted that the opinion of the supreme court of the United States in the Farrington Case was so worded as to have brought about the declaration by Justice Cooper, speaking for this court, in *Bank of Commerce v. McGowan*, 6 Lea, 703, that it established an exemption of both shares of stock and capital stock from all taxation, except the one-half of 1 per cent. prescribed by the charter. Of the opinion in the Farrington Case, Mr. Justice Peckham, in the Union & Planters' Bank Case, says: "There are undoubtedly some expressions in the opinion of Mr. Justice Swayne which lend color to the idea that in his belief not only were the shares in the hands of the shareholders exempt from further taxation than that imposed by the charter, but that the property of the corporation was itself exempt from any taxation other than that provided for in that section." It is further to be regretted that the supreme court of the United States, in reviewing the opinion of this court in *Bank of Commerce v. McGowan*, supra,—an opinion that was founded upon what Judge Cooper declared to be the construction by this court of the meaning and result of the Farrington Case,—did not at that time correct what it now decides to be an erroneous reading of its opinion in the Farrington Case. It is undoubtedly true that in said case of *Bank of Commerce v. McGowan* the question of the exemption of both the shares of the capital stock was not before the court for decision, and it is further true that the supreme court of the United States, in reviewing that opinion and declaration, had no power to reverse the judgment of this court in so far as it was in favor of the bank. But this court, finding in the case of *Bank of Commerce v. McGowan* an explicit declaration of the supposed effect of the opinion in the Farrington Case, and finding that judgment reviewed by the supreme court of the United States in an opinion accepting or seeming to accept, without question or comment, the declaration made by Judge Cooper that the exemption was of both the shares of the stock and the capital stock, was induced when it came to decide the case of *Memphis v. Hernando Ins. Co.*, 91 Tenn. 546, 19 S. W. 758, to believe, and felt itself constrained against its own judgment, and solely by the force of the effect attributed to these opinions of the supreme court of the United States, to hold, that both shares of stock and capital stock were exempt. The history of the litigation over this and like charters shows at every point a purpose on the part

of this court to follow, in this character of question, the opinions of the United States supreme court, and strikingly illustrates the importance of confining the judicial opinions to the exact questions to be decided.

We cannot entertain the argument, so ably pressed upon us, that this court may in this case, for itself, and independent of the opinion of the United States supreme court, determine the issue presented. The question whether a statute of Tennessee which imposes upon the defendant taxes violates the object of their contract being a federal question, it is such whether we hold the statute to be valid or void. By the judiciary act of 1789, c. 20, § 25, proceedings in error are provided for only where the state court affirms the validity of the statute. Why a writ of error should have been allowed to one party and denied the other is a marvel in American jurisprudence. The greater wonder is that it should have been allowed to grow hoary with age. This provision has, possibly for the first time, done its perfect work, reduced conclusions to their last results in the case of *State v. Bank of Commerce*, decided by us at the last term (31 S. W. 993), and by the supreme court of the United States (16 Sup. Ct. 456, 1113) and again by this court at the present term (36 S. W. 719). At the last term we held that the exemption was of the capital stock, but that the shares were taxable. The supreme court of the United States held the shares not taxable, and reversed so much of the decree of this court as so adjudged. That court in that case did not decide that the capital stock was taxable, for, as the state did not and could not sue out a writ of error, there was no jurisdiction; but in the *Union & Planters' Bank Case*, which had gone up from the federal court, it decided that the capital stock was taxable. After this, complainants moved this court to change its decree and tax the capital stock, upon which motion we held that we had no power over the decree of the last term. The result is that both courts stand in a state of paralysis, neither being able to effectually decree its opinion, and the bank thus escaped all ad valorem taxation, both of \$200,000 of its capital stock and its shares of stock, while the *Union & Planters' Bank*, under same form of contract, must pay upon its capital stock.

It is true that, should we here decide that the capital stock of the defendant corporations was not subject to taxation, our decisions would not be subject to review. But would this course meet the full measure of responsibility which rests upon us? We think not in such a case as this. It has long been settled that in our government the supreme court of the United States is the final arbiter of all such federal constitutional questions. That court must at last decide whether a law of one of the states, when drawn in question, violates the obligation of a contract.

Story, Const. §§ 375-396, and notes; *Cohens v. Virginia*, 6 Wheat. 264-384. We should follow the spirit, not alone the letter, of that provision of the constitution, and, knowing the opinion of the supreme court of the United States, follow it, although our decision be not, under the present judiciary act, subject to review. In the *Union & Planters' Bank Case*, 161 U. S. 149, 16 Sup. Ct. 558, the supreme court of the United States holds that our state decisions on the subject have not been so long and firmly established as to constitute a rule of property. The result, if not the reasoning of that court, on this point is also conclusive upon us, and must be treated as settling this question. Entertaining these views, to put the court in accord, and to finally set this question at rest, we are constrained to hold that the capital stock of both the defendant companies enjoys no exemption from taxation, and to overrule to this extent our state cases, herein cited, which hold to the contrary. The decree of the chancellor in each case is reversed, and the causes remanded to the chancery court for further appropriate proceedings. The defendants will pay the cost of the appeal.

BEARD, J., being disqualified, did not sit on these cases.

FIRST NAT. BANK v. MEACHEM et al.
(Court of Chancery Appeals of Tennessee. Jan. 13, 1896.)

HOMESTEAD—CONVEYANCE BY HUSBAND—EFFECT
—RIGHT OF SELECTION—SEPARATE TRACTS—
DECREE IN EQUITY—RELIEF NOT PRAYED FOR.

1. Prior to the homestead act of 1879, when actual occupancy of a designated tract was essential to the existence of the homestead right, a conveyance by the husband alone, contrary to the provisions of the statute, and of Const. art. 11, § 11, was void, not only as to the wife, but, so far as it affected the homestead right, as to the husband also.

2. The same rule obtains since the passage of Act 1879, c. 171, which only modified the previous statutes so far as to make possession without occupancy sufficient, and to give to the head of a family the privilege of selecting where the homestead shall be located.

3. In Act 1879, c. 171 (exempting from sale under legal process real estate in possession of the head of a family to the value of \$1,000, and giving him the right to elect "where the homestead or said exemption shall be set apart, whether living on the same or not"), the words "set apart," and the accompanying right of selection, regardless of actual residence, apply only to proceedings in invitum, not to private sales and mortgages; and the fact that the head of a family, who owns several tracts, resides with his family on one of them, worth at least \$1,000, is notice to all persons taking conveyances from him that it has been adopted as a homestead, and that he may convey the other tracts free from the homestead right.

4. The head of a family may have a homestead in so much of a tract of land lying apart from the one on which he resides, but used in connection therewith, as is necessary, together with the residence lot, to make up the value of \$1,000.

5. On foreclosure of a trust deed, a sale on time, and without redemption, in accordance

with the terms of the instrument, may be decreed, though not specially prayed for in the bill.

Appeal from chancery court, Montgomery county; C. W. Tyler, Chancellor.

Bill by the First National Bank against J. H. Meachem and others to enforce a deed of trust. From the decree, complainant and defendant Meachem both appeal, the other defendants having suffered an order pro confesso. Modified.

Leech & Savage, for complainant. W. M. Daniel, for defendants.

NEIL, J. On the 24th day of February, 1891, the defendant J. H. Meachem, for the purpose of securing to Herndon and Major a note of \$5,000, executed to them a deed of trust on two tracts of land in Montgomery county; one tract containing 60 acres, and the other 109 acres. There was also some other indebtedness secured, but this does not affect the rights asserted in the present case; and, indeed, there is nothing to show that such other indebtedness is still outstanding, and it need not be further noticed. The said deed of trust contains the following language at its close: "If the said bills, drafts, etc., to the Northern Bank, shall be paid in full as above provided for, then this mortgage is not to be foreclosed until the expiration of the two years; and then, if the said note of five thousand dollars remains unpaid, the said Herndon and Major may proceed to take possession of said land and buildings, appurtenances, etc., and sell same for cash, and pay said note, with interest, etc., and any balance shall be paid to me. I expressly waive the right of homestead in and to all the land above mentioned, I being possessed of ample land and homestead right outside of this land herein conveyed. I also waive the right of redemption to the land in case the same shall be sold under this mortgage." The complainant, being the holder of the said \$5,000, as collateral security for an indebtedness of Herndon and Major to it for the sum of \$2,391.97, on the 21st of September, 1894, filed its bill in the chancery court of Montgomery against defendant Meachem and Herndon and Major for the purpose of enforcing said deed of trust by sale of the property for the payment of the said \$5,000 note, alleging that the trustees, Herndon and Major, refused to execute the trust out of court. Herndon and Major suffered an order pro confesso. Meachem answered. Among other things not necessary to mention, because wholly unsustained by proof or any attempt at proof, the answer contained the following: "Respondent further says that he is entitled to a homestead in the said mortgaged property, and to have the same set apart and allowed him in any event, and this he claims, he being head of a family, with wife and children, and owning no other real-

ty, and living on this as his home." The wife of Meachem is not made a party to the cause.

The proof shows that, at the date of the trust deed sought to be enforced herein, defendant Meachem owned, besides the lands conveyed in the trust deed, about 200 acres of land, which he sold to one Shepherd in 1894, for \$2,500. His wife did not join in the deed to Shepherd, nor did she join in the trust deed under consideration in the present case. The two tracts conveyed in the trust deed do not join, being one-fourth of a mile apart. Defendant testifies, however, that they are used as one farm by him. The proof shows that the two tracts are of the aggregate value of \$1,500. There is nothing in the record to show the value of the respective tracts separately. The defendant now owns no real estate other than the two tracts included in the trust deed. He is now, and was at the execution of the trust deed, the head of a family, having a wife and three daughters. It does not clearly appear upon which one of the two tracts described in the trust deed (60 acres and 109 acres) defendant Meachem lives. The chief proof upon this subject is embraced in the following questions and answers: "How much land have you where you live? How long have you lived there? Ans. I have lived on the place as my home for nearly 20 years. There is 169 acres. It is in two tracts,—one of sixty acres, and one of one hundred and nine. They do not join, one being perhaps a quarter of a mile [distant from the other], but they are used as one farm by me." It appears, however, that the dwelling house is on the 60 acres, and it may be fairly inferred that he inhabits said dwelling house. It is perhaps proper to state that, in addition to all the lands above mentioned, the defendant had, at the execution of the trust deed, a tract of about 50 acres in the following situation: He held it by an unrecorded title bond from one "Hambough & Goodlett," but had paid for it. Some ten years prior to October 22, 1895, he placed one Caroland in possession of this land, under agreement to sell the same to him, and Caroland remained in possession from that time forward, and some time during the year 1894 he made Caroland a deed to this land, for which Caroland agreed to give him between five hundred and six hundred dollars, on one, two, and three years' time, for which he executed his notes to the defendant. The wife did not join in this deed. The chancellor decreed that the defendant was entitled to homestead in the 60-acre tract, and directed that to be sold subject to the homestead right. He decreed that defendant was not entitled to homestead in the 109 acres, and directed that to be sold free of the homestead right. The decree further proceeds: "Should the first or homestead tract not be worth \$1,000, defendants Meachem and wife

must look for the remainder of the exemption to the third tract, which was last alienated by the husband, it being worth more than one thousand dollars." From other parts of the decree, it is apparent that by the expression "the third tract" the chancellor had reference to the tract that had been sold to Shepherd. The sales were ordered for the enforcement of the deed of trust, and on 6, 12, 18, and 24 months, barring the equity of redemption. Both sides appealed from the decree.

The chief question suggested by complainant, and debated at the bar, was this: "Whether or not a married man can convey his home place without his wife joining in the conveyance, if land of more than \$1,000 in value, exclusive of the home place conveyed, is owned by the head of the family at the time of the conveyance of the home place." The complainant insists that inasmuch as the defendant, at the date of the trust deed, owned other lands, of more than the value of one thousand dollars, available for homestead occupancy, he had the right to convey the two tracts in the trust deed free from the homestead claims, although the defendant subsequently sold these lands, and his wife joined in none of the conveyances. The defendant controverts the position. The defendant also raises the following questions on his appeal: (1) That the chancellor erred in directing the land to be sold; (2) that the chancellor erred in directing that, if the 60-acre tract should not be worth \$1,000, Meachem should resort to the land sold to Shepherd; and it is urged in this connection "that what is called the 'two tracts' in the mortgage has always been used and held as one place, and it is the homestead in fact, although separated a few hundred yards."

We will now proceed to consider these questions as far as they are raised by the pleadings and proof. But, before going into the discussion, we must premise that we can only consider the record as it is actually presented. We have been urged in one of the briefs to treat the case as if the wife were before the court, to save expense to the parties. We cannot do this. She is not before the court in fact, and the case must be treated in that way, with the husband only before the court. Whatever the rights of the wife are, they must remain unaffected by the decree that may be pronounced herein, except in so far as the husband is a trustee for her and her family in the exercise of his rights under the homestead law, and also in so far as a declaration of general principles governing a particular subject affects the rights of all parties falling under it.

We take up first the two homestead questions, and will consider them together. Prior to the homestead act of 1879, these questions could not arise. Before that act, it was

held by the supreme court that actual occupancy was essential to the existence of the homestead right. *Roach v. Hacker*, 2 Lea, 633; *Henry v. Wilson*, 9 Lea, 176; *Howell v. Jones*, 91 Tenn. 403, 19 S. W. 757. The law of the subject remained in this condition until the passage of the act of 1879. The new features introduced by that act (Acts 1879, c. 171) were that possession without occupancy was sufficient, and that the situs of the homestead should be at the selection of the head of the family; this latter under circumstances hereinafter more specifically referred to. Prior to that act, the homestead being designated, and in a sense created, so to speak, as to a particular tract by the actual occupancy thereof, certain important results followed; among others, the following: If the husband should undertake to sell the place so occupied—the actual homestead as the law then stood—without the concurrence of the wife, the sale was void as to her, under that clause of the constitution which provides that the homestead shall not be alienated without the joint consent of husband and wife where that relation exists. Const. art. 11, § 11. So, if the husband removed the wife from the land, she could return and claim it. So the deed, so far as it affected the homestead right, was held void as to the husband himself signing it without the concurrence of the wife. *Mash v. Russell*, 1 Lea, 543, and cases cited. All these rulings, however, followed from the fact that there was a designated spot to which the right could be referred, and about which contests could arise and could be considered and settled. How far are these rulings applicable under the act of 1879? In the case of *Rhea v. Rhea*, 15 Lea, 527, 528, it is said: "The act of 1879 exempts \$1,000 of real estate belonging to the head of a family, whether living upon it or not. The husband is the head of the family, and it is exempt for his use, and the use of the wife and children. He cannot alienate it without her consent, nor can he deprive her of her right to its use by his wrongful act. His conveyance is operative against himself alone, and does not affect the wife's rights. Since the act of 1879, the wife may assert her claim to homestead to any land to which the right attaches under that act, unless she has divested herself of the right by joining him in the conveyance of it in the mode prescribed by the statute. This she has not done, and the want of knowledge by Davidson and wife that the wife had such claim or right cannot protect them against the consequences which the law attaches to their failure to obtain her consent to the sale."

Can there be any estoppel as to the homestead right against the husband, during coverture, short of a deed, as prescribed by statute, in conjunction with the wife, or the subsequent acquisition of another homestead? In the case of *Mash v. Russell*, 1 Lea, 543,

which was decided prior to the act of 1879, and at a time when actual occupancy was essential to the existence of the homestead right, it was said, at pages 544, 545, speaking of conveyances made by the husband alone: "The land being in the actual occupancy of the husband and wife as a homestead at the date of the conveyances to Russell and Hilton, those conveyances did not carry the homestead right secured by the constitution of 1870 (article 11, § 11), and the act of the legislature passed to carry the provisions of that section into effect (Act 1870, 2d Sess. c. 80, § 1; Code, § 2114a). That right could only be alienated, under such circumstances, by the joint consent of husband and wife, 'evidenced by conveyance duly executed as required by law for married women'; that is, by privy examination of the feme. It is well settled that the wife may in such cases protect the homestead right by bill quia timet (*Williams v. Williams*, 1 Tenn. Leg. R. 316; *Carter v. Hattan*, Id. 326); or recover possession after removal and the husband's death (*Neam v. Campbell*, 1 Tenn. Leg. R. 38). And the right of the wife will prevail upon reoccupation, even where the conveyance was made by the husband when not in actual occupancy of the premises. *Hooper v. Hooper*, 1 Memphis Law J. 183; *Dickinson v. Mayer*, 11 Helsk. 515. By the terms of the constitution and the statute, the conveyance is equally invalid to carry the homestead right as against the husband. There can be no estoppel where the conveyance is expressly forbidden except in the prescribed mode, the husband being the trustee, to the extent of that right, for his wife and children. *Kennedy v. Stacey*, 1 Bart. 220; *Pratt v. Burr*, 5 Biss. 38, Fed. Cas. No. 11,372; *Hoge v. Hollister*, 2 Tenn. Ch. 612; *Connor v. McMurray*, 2 Allen, 202; *Doyle v. Coburn*, 6 Allen, 72; *Thomp. Homest. & Ex.* § 474. But the husband's deed would be good to convey his interest in the land subject to the homestead right or estate. *Moore v. Hervey*, 1 Tenn. Leg. R. 22." The principle of this case is still the law. As to property subject to the homestead right, there can be no deed good against the homestead right, either against the husband or wife, unless executed by both in the manner prescribed by law. But what is property subject to the homestead right? What shall be the effect of that provision of the statute which declares that the "head of a family owning real estate shall have the right to elect where the homestead or said exemption shall be set apart, whether living on the same or not?" In the case of *Flatt v. Stadler*, 16 Lea, at page 376, speaking of the act of 1879, it is said: "The purpose of the legislature was to give the head of the family the privilege to take as his homestead that which he actually occupied, to which section 2110a confined him, or, at his election, to take other lands on which he did not live; and the true construction of said section 1 is that the

head of the family may elect where the homestead or said exemption may be set apart, upon any real estate he owns." And in *Case Co. v. Joyce*, 89 Tenn. 340, 16 S. W. 147, it is said: "The act added nothing to the old law but an exemption of possession of a thousand dollars' worth of land owned by the debtor, but which he did not actually occupy, and gave him the right to select the part of his land upon which the homestead should be located and thereafter exist. *Flatt v. Stadler*, 16 Lea, 371-379. This case goes over the whole subject, and concludes as follows: "The whole of the acts upon this subject should be construed together as one act, and, if there is any seeming conflict, it should be so construed as to give effect to the will of the lawmaking power. But we think there is no real conflict in the object and design of the several statutes, nor any purpose by the act of 1879 to alter the then-existing law, further than to give the owner of the land the power to locate his homestead upon any part of it." This opinion was at the April term, 1876, and has ever since been followed. That is, by said act two new features were added to the homestead law: (1) It was no longer necessary that there should be actual occupation in order to secure or preserve the homestead right. (2) When it should become necessary to "set apart" the homestead, the right to designate its location was given to the head of the family. But we may add: (3) There remained in the wife, under judicial decisions which had become interwoven with the statutes, a reserved power to file her bill for the protection of the homestead right in default of the husband taking proper steps to that end. But what significance should be attached to the words "set apart"? In our opinion, these words and the accompanying special selection guaranteed in the statute apply only to a case where the interposition of a court or of judicial commissioners is necessary to set apart the homestead, and it should be construed in connection with section 3. There is no occasion to set apart the homestead unless the land of the head of the family has been levied on by execution or attachment, or is sought in some other way to be subjected to sale by judicial process, or, upon the death of the husband, to designate what the widow and children shall take as homestead. Under the construction, then, which we have given the words "set apart," and the right of special election, they have no application to cases where the question of homestead arises in connection with the execution of private sales and mortgages between citizens in their personal and contractual relations with each other. As to those matters, in our opinion the question stands precisely as it did before the passage of the act, with the exception that the homestead right is applicable to all lands owned by the head of the family, subject, however, to the qual-

ification that the head of the family, by adopting a particular piece of land, of the value of at least \$1,000, as his homestead, by living on it, may release the other lands from the homestead claim as between him (as representing the homestead right of himself, his wife and family) and the person with whom he deals, in the matter of sales and mortgages and the like. In short, we hold that where the head of the family owns several tracts of land, and resides with his family upon one of them, worth as much as \$1,000, this, as between him (both as to himself and as trustee for his family) and those who take conveyances from him, is an adoption of the residence place as the homestead, and satisfies the law, and he may convey the other tracts free of the homestead right. The rule is the same where he is the owner of a single tract of greater value than \$1,000, upon which he resides, and sells off portions of it, but leaving unsold as much as \$1,000 worth. This is the principle underlying *Rayburn v. Norton*, 85 Tenn. 351, 3 S. W. 645; *Enochs v. Wilson*, 11 Lea, 223, and *Hilderbrand v. Taylor*, 6 Lea, 659. It necessarily follows that where the husband is so residing with his family upon a particular piece of real estate, worth as much as \$1,000, or where it is all the land he owns, this is notice to all persons taking conveyances from him that it has been adopted as a homestead, and that this homestead right cannot be barred except by an instrument executed in conformity with the statute.

In proceedings *in invitum*, as we have seen, a different rule obtains under the statute. In such cases the fact of residence upon a particular parcel of land is not controlling. The creditor has notice that the debtor may elect where his homestead shall be set apart, whether living on the same or not. We think the distinction is clear between the two classes of cases, and the underlying reasons cogent and convincing, not to speak of the public policy to be subserved by this distinction. There can be no public inconvenience if it be clearly understood that, as against a levy, a debtor may claim his homestead in any lands that he owns. The levy is made; the homestead is claimed and designated; and this is all done in one transaction, and closes the matter. Whereas, if, in private transactions, sales, mortgages, and the like, it be the law that the homestead rests upon all the lands of the head of the family, regardless of actual residence upon any of them, transfers of real estate are much embarrassed, requiring the signature of the wife in all such transactions, besides ignoring a most obvious and reasonable estoppel, based upon the conduct of the parties most interested, and in harmony with the benign purposes of the homestead law itself. Nor is it any impeachment of the soundness of this rule that the location of the homestead by residence gives the power of designation, where there is more than one

piece of land, to the husband as head of the family. This has always been true since the creation of the homestead law. Once located, the wife acquired rights of which she could not be deprived without her consent, manifested in the way designated by law; but in the location itself, she has never had any voice, where the husband himself undertook to exercise the right.

Before applying the foregoing principles directly to the case in hand, there is one other question to consider. It is this: Can the head of a family have homestead in two separate tracts of land, where he resides on one, but uses the other in connection with the residence lot for homestead purposes, where it requires both to make up the \$1,000 value? This question is settled in the affirmative by the case of *Smith v. Carter*, 16 Lea, 528-530, decided in 1886. In that case it appeared that J. L. Smith owned a lot in the town of Falcon, on which he lived with his family, and held a title bond to another lot across a street, on which there was a lien for unpaid purchase money. The defendants *Carter Bros. & Co.* filed a bill against Smith and his vendor, to reach Smith's interest in the lot last mentioned, to satisfy a debt due from him to them. Such proceedings were had in the cause, to which Smith made no defense, that a decree was rendered in favor of complainants in that case against Smith for their debt, and the land was ordered to be sold in satisfaction of the balance of the purchase money, and then of complainants' judgment. Therefore a bill was filed by Smith and wife, averring that the two lots were the only real estate in which the husband had any interest, that both lots did not exceed in value \$1,000, and that they were entitled to a homestead right in the lot ordered to be sold. The defendants to that bill answered, and filed a cross bill, for the purpose, in the event the court should find that Smith and wife were entitled to homestead in the lot in controversy, to sell the husband's remainder interest in both lots. Upon final hearing, the chancellor found, and so decreed, that Smith and wife were entitled to homestead in the lot, and dismissed the cross bill. The court of referees held that the decree should be reversed, and the original bill dismissed, because complainants had failed to prove that the two lots were together of less value than \$1,000, and the complainants excepted. Upon remanding the cause for further proof upon this point, the supreme court said: "The complainants in the case before us have a clear right to homestead in the lot in controversy if the two lots are worth less than \$1,000; for although the husband has not set up the defense of homestead in the original suit, as he might have done, yet the homestead right of the husband and wife, when the relation exists, cannot be lost except by their joint deeds, or by legal proceedings to which they are both parties. *Mash v. Russell*, 1 Lea, 543; *Nichol v. County of*

Davidson, 3 Tenn. Ch. 547, 553; Joyce v. Fowler, MS. opinion at Jackson, 1884. The failure to make proof as to the value of the lots, we can plainly see from the record, was from neglect not culpable, and the case comes within the statute."

Applying the foregoing principles to the case under consideration, we hold as follows: (1) That the deed of trust, having been executed by the husband and without joining the wife therein, was not binding even as to the husband against the homestead right. (2) That residence upon the 60 acres was, as against the trust deed, an adoption thereof as the homestead, to the extent of \$1,000, if worth \$1,000 or more. (3) That, in case the 60 acres is worth less than \$1,000, the defendant will be entitled to make up the deficiency out of the 100 acres, the defendant having elected, in his answer, to take homestead out of these two tracts; and this additional amount should be laid off on such part of the 100 acres as shall be chosen by defendant. (4) It appearing that the two tracts together have been used by the defendant for homestead purposes continuously for many years, although separated by a few hundred yards, and that their joint value does not exceed \$1,500, but it not appearing what is the value of each, we are of opinion that the cause should be remanded to the chancery court of Montgomery county, to the end that the value of the 60 acres already in occupation shall be ascertained, and, in case that shall be found to be less than \$1,000, that a sufficiency of the 100 acres shall be, by commissioners appointed by the court, laid off to the defendant as homestead, to make up the \$1,000 value with the 60 acres; the same to be laid off upon such part of the 100 acres as shall be designated or selected by the defendant. (5) That, after the homestead shall be thus ascertained, the residue of the land, together with the reversion in the homestead, shall be sold, for the satisfaction of complainant's debt.

One other question remains. It is insisted by the defendant that the chancellor erred in decreeing a sale on time and without redemption, this not being specially prayed for in the bill. This was not error, inasmuch as the deed of trust provided that the property should be sold without redemption, and either on time or for cash. The trustees, under this direction, would have had the right to sell either on time or for cash, at their discretion, and in either event without redemption. The chancellor had the same right and discretion to direct the terms of the sale on enforcement of the deed of trust through the chancery court. The decree in this regard simply enforced the terms of the instrument, and rightly. *Clark v. Jones*, 93 Tenn. 639, 643, 27 S. W. 1009; *Knox v. McCain*, 13 Lea, 197, 199.

Let a decree be entered in accordance with this opinion. The costs of this court will be paid equally by the complainant and de-

fendant. The costs of the court below will be paid as may be hereafter directed by the chancellor.

BARTON, J., concurs.

Affirmed orally by supreme court, March 6, 1896.

JONES et al. v. GREEN.

(Court of Chancery Appeals of Tennessee. Dec. 14, 1895.)

CHARITABLE BEQUEST—INDEFINITENESS.

A gift by will of property in trust for a certain unincorporated church, for the support of the ministry, repairs of the church, or "other benevolent objects as may be designated from time to time by the said Union Church" in its regular action as a church of the Missionary Baptist persuasion, is invalid for indefiniteness in the objects of the trust.

Appeal from chancery court of Wilson county; J. S. Gribble, Chancellor.

Bill by M. E. Jones and others against Meredith Green, agent, etc. From a decree overruling a demurrer to the complaint, defendant appeals. Affirmed.

Tarver & Golladay and J. M. Horn, for appellant. R. E. Thompson and R. Cantrell, for appellees.

NEIL, J. March 3, 1896, William Bennett made and published his last will and testament. The clauses necessary to refer and quote for the purposes of the present controversy are as follows: "Fifthly. I desire that the funds arising under the second clause of this will, and the fund arising from the sale of the property, real and personal, given to my wife for life in the third clause, be a perpetual fund directed to the purposes and objects designated below. My reason for doing so is this: My property is too small, and, having no children, after the death of my wife my heirs would be too numerous, for a division of my estate among them to do them much good; and, besides, I feel it a duty to support the ministry and the cause of education. Therefore I direct that the fund donated in this clause be kept a perpetual fund, be loaned out at interest,—notes with approved security being taken, in that case, for the safety of the fund,—or be invested in the bonds of the state of Tennessee, or in the bonds of the United States. The interest annually accruing if the fund is loaned out, or on the bond if the fund is invested in state bonds, will be paid out from time to time, as the same is paid in, to the furtherance of such benevolent objects, such as the support of the ministry, repairs of the church edifice, or other benevolent objects as may be designated from time to time by the said Union Church in its regular action as a church of the Missionary Baptist persuasion, so long as said Union Baptist Church shall continue to exist as a church. Said

church is situated in the 20th civil district of Wilson county. The money will be paid to the deacons of said church, and by them will be applied to the furtherance of said benevolent objects. Should said Union Church cease in the course of time to exist as a church, then and in that case I desire that said interest in said fund, as it annually accrues, should be paid to the support of a school at Sugar Grove Schoolhouse, which is situated in the county, near the Cowsville road, between R. Foster and G. Thompson. A majority of the patrons of the school taught at said schoolhouse from time to time may designate the objects for which said annually accruing interest shall be expended; it being for the tuition of indigent pupils, the repairs of the house, or the salary of competent teachers. Should said Sugar Grove Schoolhouse cease to exist entirely as a house for school purposes, I desire that one-half of the fund (the perpetual) go to my next of kin, and the other half to my wife's next of kin." The sixth item appoints executors. "Seventh. After the sale of property given above to my wife, and the collection of the money, should my executors both qualify as such, or my administrator with the will annexed, should there be one, cease to act, by resignation or death or removal, my desire, in that case, that the probate court of Wilson county, state of Tennessee, will from time to time, when it is necessary, appoint a trustee to take charge of and manage said fund according to the foregoing provisions of this will, so long as either of the said Union Church or Sugar Grove Schoolhouse shall be in a condition to receive the bounty above provided for them. While the Union Church is the recipient of the bounty, said court is requested to select some suitable person, designated by the majority of the deacons of the said church; and when said church has ceased to receive said bounty, by ceasing to exist, then let a majority of the patrons of Sugar Grove Schoolhouse designate the person to be appointed. The trustee appointed as provided above shall hold the legal title to the said fund; the interest to be paid out by him from time to time, as the same may be collected, in accordance with the foregoing part of this will. He will be required every two years to renew his bond as trustee before said court, and the bond shall be condition[ed] for the faithful performance of his duties as such according to the preceding provisions of this will. He shall make biennial settlements with the clerk of said court, who will be custodian of his bond. Said settlements will be made on the same principle on which guardian settlements are made, and they shall be open to inspection of deacons of said church, as long as it exists, and then of the patrons of said schoolhouse. Said trustee may invest said fund in state securities, advising first, however, with those who are interested in the payment of said bounty." We should also quote a portion of the fourth

item of the will. In that item, after directing so much of "said interest" to be paid to his wife "as she may really need from time to time during her life," that item of the will proceeds: "The remainder of said interest, should there be any, pay annually or semiannually, as the same may be collected, in furtherance of such benevolent objects as may be designated from time to time by the Mission Baptist (Missionary) Church, of which I am a member, in its action as a church." This is the church referred to in items 5 and 7 of the will, already quoted.

The bill was filed by M. E. Jones, Robert Foster, John Foster, Samuel Foster, and John West Bennett, as the next of kin of the testator and his wife, against Meredith Green, "agent or trustee of Union Baptist Church." After charging the contents of the will, and exhibiting a copy of the will; the death of the widow; that one J. W. Edwards had qualified as executor of testator, and had squandered all the estate that came to his hands, and had died; and that there was now nothing left except the tract of land mentioned in the second item of the will, which was there given to the widow for life, and then directed to be sold in support of the trusts declared in items 5 and 7 of the will; and that the said schoolhouse had long ceased to exist,—the bill then proceeds to attack the said trusts on the following grounds: "First, because the language of the said will creates a perpetuity; secondly, because said church and schoolhouse were unincorporated, had no legal existence, and were incapable of taking under said will; thirdly, because the title to the property was not vested, by the language of the will, in any one in existence at the time, capable of taking and holding for said church." The prayer of the bill is for certain special relief, not necessary here to mention, for construction of the will, for protection of their rights, and for general relief. The defendant demurred as follows: "First, the provisions of said will do not create a perpetuity, in the sense of the inhibition of the constitution in the state of Tennessee, or the laws thereof; second, the trust created by the said will of William Bennett, deceased, being definite, and beneficiaries and purposes of the bounties given, are to be administered by administrators and trustees, and are good under the laws of the state." Counsel for complainants stated upon the argument that he did not rely upon the objection as to perpetuity made in the bill. So the contest is narrowed to the second ground of demurrer. The bill, in substance, attacks the trusts declared in the will in favor of Union Church, for want of a definite trustee, and for want of definiteness in the trust. These were the questions argued.

The second item of the will directed the executor to sell the tract of land in question at the death of the widow. This fund is to be lent out, under the fifth and seventh items of the will, or invested in bonds, and the interest to be paid out from time to time "to the

furtherance of such benevolent objects, such as the support of the ministry, repairs of the church edifice, or other benevolent objects, as may be designated from time to time by the said Union Church in its regular action as a church of the Missionary Baptist persuasion." Again, it is said, in the same item of the will, "The money will be paid to the deacons of said church, and by them will be applied to the furtherance of said benevolent objects." Those are the objects and purposes of the trust, as stated in the will, so far as concerns Union Church. It is unnecessary to advert to the objects connected with the schoolhouse, inasmuch as the bill charges that the schoolhouse has long since passed out of existence. As to the trustee, it is manifest from the seventh clause of the will that the trust was devolved on the executor; and in case of resignation, removal, or death, the succession was provided for as follows: The probate court of Wilson county was requested to appoint a trustee in his stead,—some such person as should be selected by a majority of the deacons of the church. In *Johnson v. Johnson*, 92 Tenn. 559, 565, 23 S. W. 114, it is said: "There is a broad distinction between a gift direct to a charity or charitable institution already established, and a gift to a trustee to be by him applied to a charity. In the first case the court has only to give the fund to the charitable institution, which is merely a ministerial or prerogative act; but in the latter case the court has jurisdiction of the trustee, as it has over all trustees, to see that he does not commit a breach of his trust, or apply the funds, in bad faith, to purposes foreign to the charity. 2 Perry, Trusts, § 719. Hence there must be either (1) a trustee capable of taking, and a definite, legal purpose declared; (2) a trust so definite and well defined that it can be enforced and executed, if necessary, by a court of chancery." In the case of *Rhodes v. Rhodes*, 88 Tenn. 637, 643, 13 S. W. 590, it is said, speaking of a somewhat similar state of facts, as to the nature of the trust itself: "This is not such a definite trust as could be executed by and through the chancery court. Such a trust would fail if the executor had been expressly appointed and named as trustee, for the reason that the direction as to the application and use of the income is too vague and indefinite. The executor would discharge his duty when he paid over the interest to the officers or members of this church. No direction is given by which we may see to the application and administration. Whether it should be applied to charity, to the employment of a minister, to the erection or maintenance of the church building, or be distributed among the members of the church, would depend upon the will of the church members, when received. Having no corporate capacity, there would be no responsibility, and there could be no supervision of the use of the charity by the trustee, or by the chancery court. Capacity in the church to take and administer the annual interest upon this bequest would

imply capacity to take and hold and administer the principal itself. When the charity is so indefinite, and the beneficiary is incapable of taking, the bequest must fail, although the fund be given to a trustee." This authority is in exact point. Under this trust the annual interest is to be by the trustee paid over to the deacons of the church, and to be by them applied to such benevolent objects, "such as the support of the ministry, repairs of the church edifice, or other benevolent objects, as may be designated from time to time by the said Union Church in its regular action as a church of the Missionary Baptist persuasion." The court of chancery could not take any control of such a trust, or give any directions concerning it, or in any wise direct the appropriation of the fund, or control or prevent any abuses that might arise. The administration of the trust is left entirely to the members of the church. They are to direct to what purposes the money shall be applied,—whether to minister's salary, to repairs upon the church building, or to other purposes. The trustee has no control over the expenditure of the money. We are constrained to the conclusion, therefore, that the objects of the trust are too indefinite. We regret that so worthy a purpose should fail because of a defect in its form, but, however much we regret it, we can only declare the law as we find it. Premitting the question of whether there was a definite trustee, and assuming, for the purposes of the present discussion, that there was, we hold that the purposes of the trust are too indefinite. The result, therefore, is that the decree of the chancellor overruling the demurrer is affirmed, and the cause is remanded to the chancery court of Wilson county for further proceedings. The costs of the appeal will be paid by the defendant.

WILSON and BARTON, JJ., concur.

Affirmed orally by supreme court, March 11, 1896.

MADDOX et al. v. SHACKLETT et al.

(Court of Chancery Appeals of Tennessee.
Dec. 23, 1895.)

TOWNSHIP TRUSTEES — BONDS — VALIDITY — CONSTRUCTION — LIABILITY OF SURETIES —
DEFAULT — APPORTIONMENT.

1. As Code, § 599, contemplates the execution of annual bonds by tax collectors, and is referred to in Acts 1875, c. 91, wherein the duties of tax collectors were devolved upon the county trustees, bonds conditioned for the payment of county and school taxes, to be collected by the trustee during his term of office (two years), are not valid statutory bonds, but may be good as common-law bonds.

2. Where a county trustee, whose term of office is two years, at the commencement of his term executed bonds conditioned for the payment of county and school taxes to be collected during his term of office, instead of making annual bonds as required by statute, and at the expiration of the first year executed other bonds with the same conditions, the sureties on the first bonds will be equally liable with the sureties on the second bonds for defaults occurring

during the trustee's term of office. The second bonds are merely cumulative upon the first, and both sets of sureties are equally liable.

3. School-tax bonds being special under the statute, the amount of the default for school revenues should be settled pro rata between the solvent sureties on the school-tax bonds, in proportion to the penalties of the respective bonds, where two such bonds were executed during the trustee's term of office, with penalties of different amounts. And so of the amount of default under county-revenue bonds similarly executed.

Appeal from chancery court, Cannon county; W. S. Bearden, Chancellor.

Bill by N. G. Maddox and others against John Shacklett and others. From the decree rendered, complainants appeal. Modified and affirmed.

W. G. Crowley and B. M. Webb, for appellants. James A. Jones, for appellees.

NEIL, J. The bill in this case was filed October 16, 1886, by N. G. Maddox, C. Y. Gunter, and John H. Thrower against J. L. Shacklett, G. W. Lorange, E. M. Patterson, L. W. Jarnigan, Isalah Cooper, S. A. Swoop, J. P. Willard, Amos Campbell, A. D. Campbell (administrator of Thomas Campbell, deceased), N. A. Mitchell, W. W. Wood, J. L. Cawthorn, John Bynum, A. J. Jarnigan, J. J. Bynum, L. G. Tolbert, and W. O. Burger. The bill charged that on the 3d day of August, 1882, one E. J. Lorange was elected trustee of Cannon county for two years, and that on the 4th day of September, 1882, he was qualified as such trustee before the county court of Cannon county, and executed two bonds, one in the penal sum of \$11,000, and the other of \$8,000; that the former bond was executed for the faithful performance of his duties as such trustee for the term of his office, and bound him for the faithful collection and paying over, within the manner and time prescribed by law, of all the school taxes collected, or that should be collected, during his said term of office; that the latter bond contained the same obligation, but was for the collection of and paying over the county taxes collected by him; that both of these bonds were signed by the defendants J. L. Shacklett, G. W. Lorange, E. M. Patterson, L. W. Jarnigan, Isalah Cooper, S. A. Swoop, J. P. Willard, Amos Campbell, N. A. Mitchell, J. L. Cawthorn, John Bynum, A. J. Jarnigan, J. J. Bynum, W. W. Wood, and L. G. Tolbert, and were acknowledged and approved by the court; that on the 1st day of October, 1883, the trustee entered into two additional bonds, one for \$12,000, and the other for \$10,000, conditioned for the faithful collection and paying over the school fund and county taxes in the manner prescribed by law; that these bonds were signed by complainants and by the defendants J. P. Willard, Thomas Campbell, G. N. Lorange, J. L. Shacklett, E. M. Patterson, J. M. Scisson, S. A. Swoop, W. O. Burger, and J. L. Cawthorn; and that said bonds were acknowledged by the parties, and approved by the court. The bill further charged that these last-mentioned

bonds only bound the sureties for any breaches that might occur from the 1st of October, 1883, and that the complainants were not liable for any defaults that might have been committed prior to the execution thereof; that in the year 1883 a judgment by motion was rendered in favor of J. B. Hawkins, chairman of Cannon county court, against the said E. J. Lorange, as trustee, and against the complainants and the other sureties on the bonds executed October 1, 1883, for \$2,902 and costs of suit, for county taxes and school funds that said E. J. Lorange had collected and failed to pay over; that nearly all of this was for the school fund; that defendants Scissons and Swoop are insolvent, and have not paid, and are unable to pay, their ratable share of said recovery; and that complainants have paid off their part of the same chargeable to the solvent sureties. The bill further charges that E. J. Lorange made a settlement in 1883 which showed that he was in arrears to the school fund for 1882 in the sum of \$108.98; that the vouchers produced by him on said settlement, from No. 130 to No. 175, inclusive, all amounting to near \$1,300, were paid in 1883, and credited on the indebtedness of 1882; that he discharged his liabilities for 1882 with the taxes collected in 1883 to the amount of about \$1,400; that the default was committed before complainants had executed any bond. And the complainants insist that the sureties on the first bonds are liable for this default, and that they are jointly liable to the second set of sureties for one-half of the remainder or default that occurred after the execution of the bonds of October 1, 1883. The prayer is for an adjustment of the equities between the sureties, and for general relief.

Defendant W. W. Wood filed a plea of non est factum, and also files an accompanying answer, in which he denies that the taxes of 1883 were applied to the liabilities of 1882. Amos Campbell filed an answer in which he made a like denial, but admitted that he was surety on the bonds of 1882. He also denies that he is liable for any default made after the trustee's settlement in 1882. December 14, 1886, an answer was filed by the defendants John L. Shacklett, L. W. Jarnigan, Isalah Cooper, A. D. Campbell (administrator of Thomas Campbell), W. A. Mitchell, John Bynum, A. J. Jarnigan, J. J. Bynum, J. L. Cawthorn, and L. G. Tolbert. They admit that E. J. Lorange was elected trustee of Cannon county, as stated in the bill, "and that he executed bonds, with the penalties prescribed by law, about the time stated; that respondents, except Thomas Campbell, were all "on the bond"; that respondent John L. Shacklett was on "both bonds," and that he, in connection with the complainants, paid off the judgment referred to; that respondent A. D. Campbell understands that Thomas Campbell was on the bonds with complainants, and that judgment was taken against him as adminis-

trator of the said Thomas Campbell, deceased, and that he will pay his part of the same as soon as sufficient assets come to his hands, but denies that he is liable to complainants for any sum in any event. The answer then proceeds: "It is admitted that about the 1st day of October, 1883, said trustee entered into additional bonds, as charged in the bill, with complainants and J. P. Willard, Thomas Campbell, G. W. Lorraine, J. L. Shacklett, E. M. Patterson, J. W. Schisson, S. A. Swoop, W. O. Burger, and J. L. Cawthorn sureties on the same, as charged. As to the liability of the parties, and when it began, is a question of law, for the decision of the court. It is admitted that a judgment was rendered in the circuit court against complainants and the other sureties, in connection with their principal, E. J. Lorraine, trustee, on the bonds executed about 1st of October, 1883, for about the amount of \$2,903, charged in the bill, together with costs of suit. It is further admitted that the greater portion of said judgment was for school funds which the said trustee E. J. Lorraine had collected, and failed to pay over as required by law. Respondents suppose that complainants have paid their pro rata part of said judgment as charged. Respondents admit that E. J. Lorraine made a settlement prior to October 1, 1883, which was approved by the court, showing that he had on hand about the sum of \$103.98 of school funds, but deny that the report and settlement show that he was a defaulter, because he reports the money on hand at the time he made the settlement. Respondents admit that a considerable number of the vouchers filed in said settlement were paid off in 1883, but deny that he discharged his liabilities due on his tax books of 1882 by appropriating the tax collected on the book of 1883, as charged in the bill. They deny that the default was committed before complainants signed any bond, as charged. Respondents L. W. Jarnigan, Isaiah Cooper, N. A. Mitchell, John Bynum, A. J. Jarnigan, J. L. Cawthorn, J. J. Bynum, and L. G. Tolbert deny that they are liable to complainants for one cent, in any shape, and demand the proof. Respondents Shacklett and Campbell have already answered, and shown that they are jointly liable with complainants on the second bond or bonds, for 1883, and that judgment was recorded against them, jointly with complainants, for the \$2,902, and consequently complainants have no cause of action against them, as their liability has already been fixed. Respondents in the first bond deny that they are liable to complainants for any default that occurred after the second bonds were executed by reason of the fact that they were on the first bond. Respondents on the first bond might have been held liable to the state in the event the sureties on the second bonds had been insolvent, but deny that they are liable to complainant for any default after the second bonds were executed." W. O. Burger and L. M. Patterson were, upon their own

motion, and without objection, transferred to the complainants' side of the record, and adopted the charges and allegations of the bill.

The school-tax bond executed September 4, 1882, was in the penalty of \$11,000, and is conditioned as follows: "Now, therefore, should the above-bound E. J. Lorraine truly and faithfully perform the duties of county trustee for the term of his office, and shall faithfully collect and pay over, in the time and manner prescribed by law, to the proper officers designated by the laws of Tennessee to receive the same, all school taxes received by him, collected, or that ought to be collected, during his said term of office, then this obligation to be void, otherwise to remain in full force and effect." The bond recites that E. J. Lorraine had been elected for two years. The county revenue bond was executed on the 3d day of September, 1882, in the penalty of \$8,000, and is conditioned as follows: "The condition of the above obligation is such that whereas, the above-bound E. J. Lorraine was on the 3d day of August, A. D. 1882, elected trustee of Cannon county for the legal and constitutional term of two years, and until his successor shall be elected and qualified; and whereas, the said E. J. Lorraine, as county trustee aforesaid, has appeared in open court, and taken an oath to support the constitution of the United States and of the state of Tennessee, and an oath of office as prescribed by law: Now, therefore, should the above-bound E. J. Lorraine truly and faithfully perform the duties of the office of county trustee for the term of his office, and shall faithfully collect and pay over, within the time and in the manner prescribed by law, to the proper officer designated by law of Tennessee to receive the same, all county taxes by him collected, or that ought to be collected, during his said term of office, then this obligation to be void, otherwise to remain in full force and effect." The school-tax bond executed October 1, 1883, is in the penalty of \$12,000. The condition is precisely like the one just copied, down to and including the words, "within the time and in the manner prescribed by law." Then it continues: "To the treasurer of the school fund of Cannon county, or to the proper person designated by the laws of Tennessee to receive all taxes by him collected, or that ought to be collected, during his said term of office, then this obligation to be void, otherwise to remain in full force and effect." The county-tax bond executed October 1, 1883, is in the penalty of \$10,000, and, in its terms and conditions, is substantially the same as the county-tax bond executed in September, 1882. All of said bonds are for the faithful performance of E. J. Lorraine's duty as trustee during the term of his office. The bonds of October, 1883, are not limited, as charged in the bill, to breaches that might occur after the 1st of October, 1883, nor are the bonds of 1882 limited to that year. Proof was taken tending to show that E. J. Lorraine was in arrears to

the school fund, on a settlement made by him in 1883, to the amount of \$108.98; also, proof tending to show that he had used taxes collected in 1883 to pay off liabilities for 1882; also, proof tending to show that a judgment had been rendered in favor of J. B. Hawkins, as chairman of the Cannon county court, for \$2,902, against the sureties on the bonds executed October 1, 1883, for county taxes and school funds that said E. J. Lorange had collected and failed to pay over, and that nearly all of this was for the school fund. There was also proof tending to show that this recovery, or the principal part of it, had been paid off by sundry of said sureties. In this state of the record, the chancellor decreed as follows: "(1) That all the parties to the respective bonds on file in this cause as sureties of E. J. Lorange, trustee of Cannon county, are equally liable, as such sureties, for the default of said Lorange as said trustee. (2) This cause is referred to the clerk and master to report the number of names and solvency of each of said sureties on said bonds. (3) He will report the amount paid by each surety, and when paid. (4) He will report how the indebtedness stands, as between said sureties, as to the amount paid by each, making a settlement between them." From this decree the defendants N. A. Mitchell, John Bynum, Leroy Tolbert, Isalah Cooper, L. W. Jarnigan, A. J. Jarnigan, and the administrator of J. I. Bynum, deceased, prayed and prosecuted an appeal. Those appellants were sureties on the bonds executed in 1882, but not on those executed in 1883. The chancellor allowed the appeal at this stage of the cause because his decree settled rights, and ordered a reference, leaving only the amounts to be ascertained.

It is proper to state that the record does not disclose the occasion or reason of executing the bonds of 1883. It does appear, however, that the trustee did not get possession of the tax books for 1883 until these bonds were executed. From this we may infer that any one of the statutory grounds set out in Mill. & V. Code, § 488 or 966, existed, but which one we cannot affirm. They do not appear to be renewal bonds. It is sufficient for the purposes of this present litigation to say that these bonds are treated upon both sides as proper and legal bonds, executed under competent authority, and we shall so treat them. Appellants' contention is that the sureties on the bonds of 1883 are liable before those upon the bond executed in 1882. This contention is based upon the theory that the trustee must give an annual bond, and hence the case is assimilated to the rule applicable to biennial guardian bonds. It seems to be true that the law contemplates the execution of annual bonds by tax collectors, as will be seen by a comparison of the statutes. This was the requirement under the Code of 1858, § 599, where the collector's term was only one year. Under the act of 1859-60, c. 9, although the term of office was extended to two years,

the provision of Code, § 599, as to the bond, were not only left in force, but specially referred to as governing the bond. Under chapter 91, §§ 1, 2, Acts 1875, wherein the duties of tax collectors were devolved upon the county trustee, again section 599 of the Code was referred to and adopted as giving the kind of bond to be given. This statute was in force during the period covered by the transactions we have under consideration. It is not necessary for us to consider whether there has been any subsequent modifications. It is clear, then, from the recitals hereinbefore contained, that none of the bonds were statutory. They were good, however, as common-law bonds. The same question arose under the Act of 1859-60, c. 9, in the case of McLean v. State, 8 Heisk. 22, and is discussed by Judge McFarland at pages 270 to 275. In that case the court says: "Another question is this: The bonds taken in 1868, the first year of the first term, in terms bind the collector and his sureties for the discharge of all duties, and the payment of all moneys collected, or that should be collected, during the entire term of office, and the bonds of 1870 are in the same terms; and the question is, are the sureties on the bonds of 1868 liable for the default occurring in 1869, with the sureties upon the bonds executed in the year 1866, or must the judgment for the default of the year 1869 be confined to the bonds of 1869? And the same question arises as to the bonds of 1870, in regard to default occurring in 1871. This we regard as a question of some difficulty. That the bonds in terms bind the obligors to the extent claimed for the plaintiff is not denied, but the argument for the defense is that the law required bonds to be given annually, and only regarded the first bond to cover the taxes for the first year; and if the bond of the first year, in its terms, should annex conditions not required by law, and bind the obligors for the taxes of the second year, that the sureties will only be bound to the extent the law required the bond to go, and not for those conditions not required by law, under the principle of the cases of Polk v. Plummer, 2 Humph. 500, and Banks v. McDowell, 1 Cold. 84." After discussing the question at some length, and reviewing the several statutes bearing on it, the court thus concludes: "When the collector, under the act of 1859-60, gave his bond, and was inducted into office, he was in the office for two years; and, although these laws evidently require his bonds to be renewed every year, still this duty might be omitted, and the law, to meet this possibility, might well require the first bond to cover the entire term, and the terms of the section of the act of 1859-60 we have quoted will bear this construction; and, in this connection, section 761 of the Code requires the bonds to cover the entire term of the office, unless otherwise directed. See, also, Code, §§ 771, 772. We hold that the bonds of 1868, covering, as they

do, in express terms, the taxes for the entire term of two years, constituted a lawful obligation, to that extent, upon the makers thereof. Had Mr. McLean held the office for two years, without giving any bonds for the second year, as he might possibly have done, there could be no doubt that the first bonds, to the extent of their penalty, would be held to cover any default occurring in the second year. This being so, the execution of bonds in the latter year cannot be held to discharge that obligation, but only be regarded as cumulative. Even upon the principle of *Boughton v. State*, 7 Humph. 193, these bonds, as to the second year's default, are good at common law, and we hold that the distinction between statutory and common-law bonds is, in this respect, now immaterial. As the makers of both these sets of bonds are liable for the default of the second year, we can make no distinction as to the order of their liability, but hold simply that the plaintiffs are entitled to judgments upon both sets of bonds. The rule applicable to guardian bonds furnishes no analogy, as the order of their liability was fixed by statute. *Jamison v. Cosby*, 11 Humph. 273. The same rule also applies to the bonds of 1870 and 1871." See, also, *Prince v. Britt*, 8 Heisk. 290, and *Allison v. State*, 8 Heisk. 312. These authorities seem to cover the contention advanced, and we might well pause at this point. But we may add, touching the analogy sought to be drawn between this case and the case of guardian bonds, that even in the latter class of cases the rule of inverse liability does not apply when the two bonds are given during the same term, and covering the same time. In the case of *McGlothlin v. Wyatt*, 1 Lea, 717, 719, it is said: "It is next insisted that the opinion at the present term, in *Hospital v. Fuqua*, 1 Lea, 608, decides that the sureties on the last bond are first liable. It will be found, however, that the opinion in that case decides the rule contended for in reference to the biennial renewal bonds of the guardian, upon the theory that each renewal under these provisions is a recommittal of the estate to the guardian for a new term of two years; but this would not apply to two bonds given during the same term, and covering the same time, especially when the last is given because the sureties on the first are not solvent. This is the same, in effect, as if the last sureties had signed as additional sureties on the first bond. The terms and conditions of the two bonds are the same. It is for the performance of the same duty, and they are merely cumulative. The reasons upon which the sureties on the regular biennial renewal bond are held to be liable before the sureties on a former bond do not apply in a case of this sort." Without deciding what the rule would be in event the statutory bonds had been given,—a case not before us, on this record,—we hold that the bonds in this case are merely common-law

bonds, covering the same term and the same duties; that those of 1883 are merely cumulative upon those of 1882; and that the two sets of sureties are equally liable.

A distinction, however, must be taken between the bonds for school taxes and those for general county taxes (*State v. Starnes*, 5 Lea, 545; *Jernegan v. Gray*, 14 Lea, 550), the school-tax bond being special under the statute. The amount of the default for school revenues should be ascertained and settled pro rata between the solvent sureties on the school-tax bonds for said years 1882 and 1883, in proportion to the penalties of the respective bonds; and so of the amount of default under the county revenue bonds for 1882 and 1883. With this modification, the decree of the chancellor is affirmed, and the cause is remanded for further proceedings in accordance herewith. The costs of this court will be paid by the appellants, in accord herewith, and the costs of the court below will be paid as may be decreed by the chancellor.

WILSON and BARTON, JJ., concur.

Affirmed orally by supreme court, March 9, 1896.

HILL et al. v. PAGE.

(Court of Chancery Appeals of Tennessee. Dec. 17, 1895.)

WILLS—CONSTRUCTION—PRECATORY WORDS.

1. Testator, who derived all his property from his wife, through marital rights and gifts from her, declared: "All the remainder of my estate * * * I give to my beloved wife, * * * believing she will do justice between her relatives and mine at her death." Held, that this vested absolute title in the wife, with unrestricted power of disposition; the concluding words being merely precatory, and not equivalent to a command.

2. To create a trust and make precatory words operative in a will, it must appear that the estate vested in the first taker is not absolute, nor disposition thereof unrestricted; that the subject of the devise and the devisees therein are certain, and the trust definite; and that the language, as gathered from the whole context, is intended to be imperative, and not a mere matter of discretion.

Appeal from chancery court, Wilson county; T. J. Fisher, Chancellor.

Bill by R. S. Hill and others against William H. Page, administrator of William G. Page, deceased, to establish alleged rights in decedent's property, and for the construction of a will. A demurrer to the bill was sustained, and complainants appeal. Affirmed.

R. E. Thompson and R. Cantrell, for appellants. R. P. McClain and E. E. Beard, for appellee.

BARTON, J. On bill and demurrer. The demurrer was sustained by the chancellor, and the bill dismissed. The complainants appealed, and assign errors here. The ques-

tion for determination involves the construction of the will of W. G. Page, deceased. The bill alleges that, in 1884, W. G. Page, now deceased, made and published a will, a copy of which is filed, and the fifth and residuary clause of which is as follows: "All the remainder of my estate, real, personal, and mixed. I give to my beloved wife, Hattie H. Page, believing she will do justice between her relatives and mine at her death." The bill further alleges that, shortly after the execution of this will, the said W. G. Page became hopelessly insane, and was put in the asylum, where he died; that he was in this condition long prior to the death of his wife, Hattie, who died before the testator; that they had had and left no children; that complainants are the nephews and nieces of the wife of the testator, William Page; that William Page left considerable property, not otherwise specifically devised, which would pass under the fifth clause of the will (the property is described); that he obtained all of his property from and through his wife, through his marital rights and gifts from her; asks to have said will construed; and insists that the effect of the fifth clause was to vest the property of the testator in complainants equally with the heirs and next of kin of the testator, and that any other construction would be inequitable and unjust, and place the testator in the unenviable attitude of taking the property from the family which produced it, and giving it to one which had no claim upon it; asks to have their rights in the property set up and established, and for general relief. As stated, the bill was dismissed on demurrer.

The insistence of complainants is that the words of the fifth clause following the devise by the testator to his wife, which are "believing she will do justice between her relatives and mine," are imperative, and constitute a devise on the death of the wife to her and his next of kin equally. The defendant's contention is that the wife would have taken under this clause an absolute estate, and, she dying before the testator, the legacy lapsed as to all of the property that would have passed under this clause; the testator died intestate; that the property descended to his heirs and next of kin; and complainants have no interest therein. While we appreciate the kindly admonition of the venerable and distinguished counsel for complainants in this case, and can unite in thorough sympathy with the spirit of his appeal to this court, to disregard as far as possible the intricate technicalities and the more rigid rules of the common law, to the end that exact justice and impartial equity may be administered in each case so far as possible, yet there are certain rules and limitations within which we are compelled to work in order that the symmetry and certainty of the law, without which there can be no impartiality and no liberty, may be enforced and maintained. Courts cannot prevent thought-

less and improvident conduct of people, nor always save them from the unfortunate results of such acts; and, though a court of equity, we have to administer the law as we find it. So, in this case, we cannot look to the apparently inequitable results that may eventuate from the fact that Mrs. Page, a woman of property, married a man without means, and that, as a result of the operation of law through his marital rights, and from the gifts from her, induced by whatever means, the property which had been hers, and came entirely from her family, passed, through the husband, to his family. After the property became his, under the law, by whatever means it was acquired, he had the sole right of disposition; and, on his failure to dispose of it, it passed under the rules prescribed by law, and this court is clothed with no power to make what might seem to it an equitable distribution, looking to the sources from which it came, unless such distribution is one directed by the testator, or provided for by law. We can therefore look at the charges in the bill, to the effect that this property came from and through the wife, no further than as a circumstance which should have weighed on the mind of the testator, and which should indicate his probable intention, and, in the light of that, so read and construe his will. To this extent, we think we look to these allegations, and to this extent only.

Turning to the authorities on this question, the text-books and reports, we find the following: In Pritchard on Wills (section 12) it is stated: "That any language which shows the intention to have an instrument operate to control the title after the death of the testator is sufficient. The ordinary and appropriate language is 'I devise' or 'I will and devise' when applied to real estate; 'I bequeath' or 'I give and bequeath' when applied to personalty; but 'I wish,' 'I desire,' 'it is my request,' and the like, will be allowed to operate as a valid disposition." In section 253, same authority, it is said: "Even where words are precatory, expressing hope, desire, or request, if the object of the hope, desire, or request be certain and definite, the words are construed imperative, and are allowed by the courts to create a trust for the purposes indicated." In the same authority (section 455) it is said: "The expression of a wish or desire on the part of the testator, accompanying the devise or bequest, that a particular application shall be made of the property, is prima facie considered obligatory, and creates a trust, unless an intention appear to the contrary. Thus, if a testator gives one thousand dollars to A. B., desiring, wishing, recommending, hoping, entreating, or believing that A. B. will, at his death, give the same, or some certain part of it, to C. D., it is considered that C. D. is the object of the testator's bounty, and A. B. a trustee for him. But in order that words of recommendation, entreaty, or wish, when

used in a will, shall be held to create a trust, it is necessary—First, that the words be so used that, upon the whole, they ought to be construed as imperative; secondly, that the subject of the recommendation, entreaty, or wish be certain; and, thirdly, that the objects or persons intended to have the benefit of it be also certain. Where there is sufficient certainty of subject and object, the real question in every case is whether an expression of the wish or recommendation by the testator was meant to control the conduct of the person to whom it is addressed, or was merely intended to indicate what he supposed would be a reasonable exercise of the discretion of such person, without intending to control it."

Turning to our own reported cases, as far as we have been able to find them, that throw light on this subject, as intending to support the complainants' view, we find the following cases: In *Henderson v. Vaulx*, 10 Yerg. 30, the will was as follows: "I give to my beloved wife all my estate, both real and personal, * * * to her, her heirs or assigns, during her natural life. At her death, it is my will and desire that she shall have the will and disposal of one-half the property to whomsoever she thinks proper; the other half of my property to be divided among my brothers and sisters. It is likewise my desire that my estate, both real and personal, remain unsold by my executrix, hereinafter named. It is likewise my will and desire that my brother Logan Henderson and Sam'l Henderson should counsel, assist, and help my wife, and that she should not act contrary to their consent." The testator's wife is then appointed his executrix. Held, that the wife had only a life estate in all the property, with a power of disposition at her death of the moiety. In the case of *Downing v. Johnson*, 5 Cold. 229, the will was: "I will and bequeathe to my beloved wife, Sallie Johnson, the whole of my estate, both real and personal, for and during her natural life, to be by her freely possessed and enjoyed. The balance of my property, money, or other effects that may be on hand at the death of my wife, I dispose of in the following manner: * * *." Held that, under this will, the widow is entitled to the possession of all the property belonging to her husband at his death; and if her support and maintenance, in her opinion, requires it, she may consume the corpus of the entire estate, except the land, and whatever balance remains at her death will, under the law, pass to her remainder-man. In the case of *Word v. Morgan*, 5 Cold. 407, the will was: "I give and bequeathe to my beloved wife, Roberta A. Johnson, all my estate, both real and personal, to dispose of and divide among my children as she may think best." Held, that the will did not vest in the widow an absolute interest in the estate of the testator, but only a qualified interest in the same, with power of appoint-

ment, in the exercise of a sound discretion, to the children; and, second, that the exercise of this power of appointment is a condition precedent to the actual enjoyment of the estate, in whole or in part, by the children, and that no beneficial interest in them can be enjoyed until the power is exercised. The case of *Anderson v. McCullough*, 3 Head, 614, appears to be the strongest case in this state upon this subject in favor of the complainants' contention. The language of the will in this case was: "I, Robert Wallace, do hereby give and bequeathe to my dear wife, Margaretta, all my real estate, personal and mixed estate, believing that she will make an equitable distribution of the property at her death among our children, as she knows better than any other person what each of them has already received. She is getting old and infirm, and, when I am gone, this power to give will make them dutiful and affectionate to her, as I hereby give her the power to reward those who are the most dutiful to her. Any part that may be given to my son John's children I request may be laid out in their education, as he has proven so unsteady. No part of my estate is to be given to him in any way or at any time, unless secured to his children, so sure am I that he would waste it." The court said: "We are of opinion that, under the law, the widow took a life estate in the property, with a power of appointment, coupled with a trust. The gift is to her, 'believing that she will make an equitable distribution of the property at her death among our children, as she knows better than any one else what each of them has already received.' The intention of the testator that the widow, at her death, should distribute the property equitably among the children, is clearly manifested. According to the current authorities, these words must be construed to be a limitation, and not conferring merely a naked power, which the party might or might not exercise, in her discretion. The rule for the distribution of the property is prescribed. It is to be an equitable,—that is, an equal distribution,—subject to the qualification, not that she may appoint to such of the persons named in the will as she may think proper, but simply that she may bestow a reward upon such of them as are most dutiful. In other words, she may make a reasonable discrimination in the division of the property, based upon the good or ill conduct of the children towards her after the testator's death; but still the language of the will demands a real and substantial allotment to each one in the distribution." In this case the rule is enunciated that, in order that words of recommendation, entreaty, or wish shall be held to create a trust, it is necessary—First, that the words are so used that, upon the whole, they are to be construed as imperative; secondly, that the subject of recommendation or wish be certain; and, thirdly, that the

objects or persons intended to have the benefit of the recommendation or wish be also certain. The latest case we have found on this subject in our state is the case of *Anderson v. Hammond*, 2 Lea, 281, which is hardly direct in point, but reflects some light on the question. By his will, John Randolph made his wife, Statira, his residuary legatee, and also directed certain funds to be invested in a plantation for her sole use, for life, and, at her death, to be sold, one-half of the proceeds to go to the heirs of his sister Sarah Lyell, and the other half to be at the disposal of his wife, and it is added: "It is further my will and desire that my beloved wife, Statira, shall pay \$200, commencing the 1st of January, 1861, to my nephew John Lyell, for the purpose of educating him; said sum of \$200 to be paid annually until said Lyell is of age." It was held that this legacy in favor of John Lyell was valid, and a personal charge on the wife, but ceased on the death of the legatee. The court say: "It is always a question as to the intention of the testator whether the words used are meant to govern the conduct of the party to whom they are addressed." They further say that the words "it is my will and desire that my wife shall pay" admit of no doubt of the meaning of the testator, and that it would have been difficult for him to have used language more expressive of positive intent on his part to govern the conduct of the party to whom it is addressed. In the case of *Ballentine v. Spear*, 2 Baxt. 269, the will was: "I give and bequeathe to my beloved mother, Isabella Spear, for and during her natural life, all the residue of my property, of every kind and description, both real and personal [describing the real estate, and certain negroes, household and kitchen furniture, "my notes, accounts, and demands"]; to have and to hold, and to use the same for her comfortable support, during her natural life, and for the comfortable support of my beloved sister Isabella, if she remains single and with my mother. At the death of my mother, I desire and direct my executor to sell and dispose of all of said property, both real and personal, which may remain, at private or public sale, as may be best, and collect and divide the whole of the proceeds thereof into three equal shares; * * * one share to sister Isabella, one share to the children of my deceased sister Margaretta, one share to the children of my deceased sister Mary Ann." The daughter Isabella claimed that the personal property had been insufficient to support the mother, and that she and her mother had advanced means for their support out of other individual resources, and she preferred a claim against the estate to be paid out of this. It was held that, as to the real estate, the mother had only a life estate, and that nothing short of an absolute power of disposition would defeat the remainder over, and that

in this case the mother's estate was clearly limited to a life estate in the realty.

These are the only cases we find in this state that would seem in any manner to favor the view insisted upon by the complainants' counsel. As sustaining the other view, we have the following cases: In the case of *Isaac v. Farnsworth*, 3 Head, 275, it is said: "That it is true that in the will a life estate only is expressly given to Mrs. De Witt, but she is vested with a general and unqualified power to sell. This, by all the authorities, makes her estate absolute." In the case of *Davis v. Richardson*, 10 Yerg. 290, the will was: "I give my dearly beloved wife all my property." A subsequent clause of the will directed that at her death or marriage, if there should be any property left, it should be disposed of among certain devisees. Held, that the absolute property in the goods and personal estate was vested in the testator's wife. In the case of *Booker v. Booker*, 5 Humph. 505, there was this limitation: "Should any of my children die without issue either before or after coming of age, or should leave issue, which issue should die before coming of age, in either of these events such portion of my estate so bequeathed to such child or children is to be equally divided among my surviving children." But in regard to Albert Booker, one of the children, there were provisions that certain property was to be given him on coming of age, and certain other property not to be disposed of until he was 25 years of age, except by consent of his executor. It was held that an absolute estate vested in said Albert Booker. In the case of *Williams v. Jones*, 2 Swan, 620, the will was: "I loan to my beloved wife, Martha Williams, the following property, to wit [describing it], during her natural life, and all my other property after paying debts. The condition of the above loan is such that if the said Martha Williams shall think proper to marry or dispose of this property in any manner whatever, so that Thos. Jones, Margaretta Jones, Rebecca Andrews, Elizabeth Jones, or either of them, nor their heirs, shall never enjoy any of the property above named, nor have anything to do with it in any manner whatever, then the above loan is to be void, or else stand in full force and effect. It is my desire that no misconception be held on this, my last will and testament, so as to deprive my wife, Martha Williams, to a bona fide title to the above-named property, and the increase thereof, forever, provided she would manage it in such a manner that neither of the above-named persons, nor neither of my heirs, shall never inherit any part of my estate. But, if she should not dispose of said property so as to deprive said persons nor their heirs, this loan to take effect." Held that, under this will, the widow took an absolute estate, which she might dispose of by will or by deed, to the excluded persons or others, at pleasure. In the case of *Sevier v. Brown*, 2

Swan, 112, the will was: "I give to my wife all my household furniture and farming tools, of every description; one-half of all my stock; of every description, not disposed of; and I give her the following negroes [describing them]; and after her death, if not disposed of by her, after her death to go to the children of Mary Caroline Sevier; and the use and benefit of my man Handy during her life, with the use and benefit of my land and ferry her lifetime, and Arch and wife." Held, that an unlimited power of disposal is conferred upon Mrs. Brown by this clause, and that a remainder created to depend upon the nondisposition of an estate by the first taker, who has an unlimited power of disposition, is void. In the case of *Troup v. Hart*, 7 Baxt. 188, the will was: "As to all the rest of my estate, residue and remainder, whatever it may be, the tract of land I now live on, my negro girl Ann, my mules, etc., all and everything belonging to the place, of every kind and description, whatever it may be, I will and bequeath to my beloved wife, Margaret Galbreath, to have and to hold during life, and to make what disposition she may see proper at her death." Held, that the widow took an absolute title to the property. In the case of *Bean v. Myers*, 1 Cold. 227, the will was: "I will and bequeath to my wife, Catharine Bean, all my household and kitchen furniture, my stock of all kinds, my plantation, and all its appurtenances, and all the grain and forage, together with all I possess, during her natural life, with full privilege to sell and use the same, and to pay any debts that may be owing, or for her support, and all other legal purposes. I have heretofore given all my children what I allowed them, unless there should something remain after my wife's death, which I allow to be divided among my children." Held, that the widow took an absolute estate, and that she had an unlimited power of disposal. In the case of *David v. Bridgman*, 2 Yerg. 558, the will was: "It is my will that my beloved wife, Martha David, have all my estate, both real and personal, during her life, except a debt due me from Jas. Chandon of about \$3,000, which I will and bequeath to the grandchildren of my mother, Mary David. Second. It is my will that my wife, Martha David, at her death, may have full power and authority to dispose of all my personal property in any manner she sees proper." Held, that the wife took an absolute estate, which, upon her death without a will, vested in her distributees. In the case of *Thompson v. McKisick*, 3 Humph. 631, the will was: "I give and bequeath to my daughter Susanna McKisick the following negroes [describing them]. It is my will that she shall have the benefit of said negroes, either by keeping them in specie, or by selling them, and having the proceeds of such sale; and the said negroes and their increase, or said money to arise from the sale of them, to be hers forever,

to be disposed of as she may think proper, amongst her children or grandchildren, by will or otherwise." Held, that the power of disposition was unlimited, and that the wife took an absolute estate. One of the first cases in this state on this subject was the case of *Smith v. Bell*, Mart. & Y. 102. In this case the devise was in these words: "I give to my wife all personal estate whatsoever, and wheresoever, and what nature, quality, or kind soever, after paying my debts, legacies, and funeral expenses, which personal estate I give and bequeath to my wife to and for her own use and benefit and disposition absolutely; the remainder of my estate after her decease to be for the use of my son Jesse." Held, that the absolute interest in the property passed to the wife, and that the remainder over to the son was repugnant and void. In the case of *Vaughn v. Cator*, 85 Tenn. 302, 2 S. W. 262, there was a devise to Basil Smith, and a codicil added in these words: "For the purpose of making a change in the bequest to Basil Smith, in the event Basil Smith dies without lawful issue, then the property therein bequeathed shall revert to my estate, and be equally divided among the other named heirs in said will, or which this is a codicil." Held, there was no limitation given to the estate of Basil Smith, nothing in the will to prevent him or his guardian from taking control and exercising unqualified power of disposition of the estate, and, the title having thus vested, it could not be divested or qualified by a subsequent event. The testator has not provided for a limitation, restriction, or continued defeasance, and the courts cannot.

Such are the authorities in this state as far as we have been able to find them. It will be seen from the above that, in arriving at a correct solution of this question, the operation of two somewhat distinct rules and principles have to be considered: First. The character of the first devise or estate passing under the will, whether an absolute estate, with unlimited power of disposition or not; for, although the intent to create a second estate or devise may be apparent, yet if, by the terms of the will, the first estate is absolute, and there is an unrestricted power of disposition, the limitation or devise over, though apparent, is held void, as the above-cited cases clearly show. Second. The operation and effect of precatory words, and when they are to be held sufficient to create a trust and work a limitation or restriction. While these rules and principles seem in many of the cases to merge, yet they are somewhat distinct, and in some of the cases we see the operation of the one rule, while the other is not in any wise apparent or applied.

Turning from our own text writers and decisions, we find the following statements of the law applicable to this subject. In 1 Jarm. Wills (5th Am. Ed.) p. 680, it is said: "It has been long settled that words of recommenda-

tion, request, entreaty, wish, or expectation, addressed to a legatee or devisee, will make him a trustee for the person or persons in whose favor such expressions are used; provided the testator has pointed out with sufficient clearness and certainty both the subject-matter and the object or objects of the intended trusts." A similar statement is given by 2 Story, Eq. Jur. § 1068; Hill, Trustees, 73; Williams' Ex'rs, 143; Perry, Trusts, § 112; 2 Redf. Wills, 415. When we resort to the reported cases on this subject in this country and England, we find ourselves in a wilderness of decisions, from which it is difficult to extricate ourselves with any very well defined views, or to reach a standpoint from which we can discern a path that it is clearly safe to follow; not that there is not a reasonable uniformity in the opinions as to the declaration of the general doctrines applicable, but the application made of these doctrines in the many reported cases is, to say the least, confusing. In fact, under the predominating rule for the construction of wills, that the intent of the testator is always, where possible, to be ascertained and enforced, it is essentially and necessarily difficult to get exactly analogous cases. Each case has its own peculiar coloring, to be gathered from the whole will, and all the various words and clauses, from the character, history, condition, disposition, and situation of both devisees and deviser, the nature of the property, etc.; and, when to these considerations be added the personal integer of the possible bent and bearing of the members of the court having the matter under consideration, it becomes apparent why there is a seeming great diversity in the application of the rules generally announced, and the greatest difficulty in obtaining from these cases a hard and fast rule of easy application to all cases. It will be unnecessary, under the circumstances, as we have an able court of last resort, to which this case should go, for us to attempt to enter into a full discussion of these cases, though we refer below to many of them; but, after as thorough a study of them as the limited time we have felt at liberty to give this case will allow, we have found what we think to be the established rules that should govern the decisions of this case.

On page 680, Jarm. Wills, in marginal note, the subject is discussed at length, with quotations from many cases, and this statement is made: "But the expressions are not always imperative. They are deemed to be flexible in character, and must yield if the imputed interpretation be against the rules of law, or so inconsistent with other provisions in the will that both cannot stand together, or if it appears from the whole will and the character of the property that the testator meant to depend on the justice and gratitude of the donee, or reposed in him a power to execute or not, at his discretion." In the same book (page 686) it is said: "Where the words of the

gift expressly point to an absolute enjoyment by the donee himself, the natural construction of subsequent precatory words is that they express the testator's belief or wish, without imposing a trust." In same book (page 68) it is said: "In *Johnston v. Rowlands*, 2 De Gex. & S. 356, the gift was to the testator's wife, to be disposed of by her will in such way as she shall think proper; but he recommended her to dispose of one moiety among her own relations, and the other among such of his own as she should think proper. Sir J. K. Bruce, V. C., said: "That the word 'recommend' may amount to a command in a particular instrument, and may create a binding trust, is certain. It is equally certain that the word is susceptible of a different interpretation consistent with the legal and equitable power of the person recommended to depart from the recommendation." He thought no trust was created. And see further discussion and cases cited along this line, same book, pp. 688, 689. Mr. Story, in 2 Eq. Jur. p. 453, § 1069, says: "The doctrine of thus construing expressions of recommendation, confidence, hope, wish, and desire into positive and peremptory commands is not a little difficult to be maintained, upon sound principles of interpretation of the actual intention of a testator. It can scarcely be presumed that every testator should not clearly understand the difference between such expressions and words of positive direction and command, and that, in using the one and omitting the other, he should not have a determinate end in view. It will be agreed on all sides that where the intention of the testator is to leave the whole subject, as a pure matter of discretion, to the good will and pleasure of the party enjoying his confidence and favor, and where his expressions of desire are intended as mere moral suggestions, to excite and aid that discretion, but not absolutely to control and govern it, there the language cannot and ought not to be held to create a trust. Now, words of recommendation and other words precatory in their nature imply that very discretion, as contradistinguished from peremptory orders, and therefore ought to be so construed, unless a different sense is irresistibly forced upon them by the context. Accordingly, in modern times, a strong disposition has been indicated not to extend this doctrine of recommendatory trusts, but, as far as the authorities will allow, to give to the words of wills their natural and ordinary sense."

There is a very full discussion of the cases and doctrine on this subject in the following cases and notes: *Knox v. Knox* (Wis.) 48 Am. Rep. 487, and note, pages 494-499; s. c., 8 N. W. 155; *Bills v. Bills* (Iowa) 20 Am. St. Rep. 418, and note; s. c., 45 N. W. 748; *Harrisons v. Harrison's Adm'r*, 44 Am. Dec. 365, and full note, pages 372-379. Here there is a full citation and discussion of the cases, English and American, and it is stat-

ed, and clearly shown, that the later English and a majority of the American cases have departed from the doctrine of the early cases, and have inclined to the doctrine of giving precatory words and expressions only their natural force; and Vice Chancellor Hart, in *Sale v. Moore*, 1 Sim. 534, is quoted as saying: "The first case that construed words of recommendation into a command made a will for the testator, for every one knows the distinction between them. The courts, of late years, have been against converting the legatee into a trustee," citing many cases. Other leading cases on this subject are *Howard v. Carusi*, 109 U. S. 725, 3 Sup. Ct. 575; *Lucas v. Lockhart*, 48 Am. Dec. 766; *Ellis v. Ellis*, 50 Am. Dec. 132; *Noe v. Kern* (Mo. Sup.) 3 Am. St. Rep. 544, 6 S. W. 239; *Phillips v. Phillips* (N. Y. App.) 8 Am. St. Rep. 737, 19 N. E. 411; *Williams v. Worthington*, 33 Am. Rep. 286; *Foose v. Whitmore*, 37 Am. Rep. 572; *McIntyre v. McIntyre* (Pa. Sup.) 10 Am. St. Rep. 529, 16 Atl. 783; *Randall v. Randall* (Ill. Sup.) 25 Am. St. Rep. 373, 25 N. E. 780; *Elliott v. Elliott* (Ind. Sup.) 10 Am. St. Rep. 54, 20 N. E. 264; *Combs v. Combs* (Md.) 1 Am. St. Rep. 359, 8 Atl. 757; *McKenzie's Appeal*, 19 Am. Rep. 525; *Henderson v. Blackburn*, 44 Am. Rep. 780; *Bryan v. Milby* (Del. Ch.) 13 Lawy. Rep. Ann. 563, 24 Atl. 333; *Barnes v. Boardman* (Mass.) 8 Lawy. Rep. Ann. 785, 21 N. E. 308; *Sulder v. Baer* (Pa. Sup.) 13 Lawy. Rep. Ann. 359, 22 Atl. 897; *McCullough v. Henderson* (Ky.) 7 Lawy. Rep. Ann. 836, 13 S. W. 353; and other cases cited in these cases, and notes thereto.

Without further discussion of them, it is sufficient to say these principles are clearly established, viz.: To create a trust and make precatory words operative in a will, it must be clear—First, that the estate vested in the first taker is not absolute, nor disposition thereof unrestricted; second, that the subject of the bequest or devise is certain, the trust certain and definite; and, third, the objects of the bounty certain and clear; and, further, that the language used, as gathered from the whole context, is intended to be imperative and controlling, and not a mere matter of discretion. Tested in the light of these principles, and authorities in our own state and elsewhere, there can, we think, be little doubt left as to how this case must be decided, especially in the light of the allegations of the bill. The great weight of the cases decided by our own supreme court is in favor of holding in such cases the estate of the first taker absolute, and the devise over, even when apparent, void. As will be seen above, in many of our cases the language indicating a life estate was very strong, and yet the estate, by reason of an unlimited power of disposition, was held to be absolute. In this case there is no hint of any limitation or restriction on her use and disposition of any part or the whole of the estate, except what may be inferred from the testator's expressed belief as to what she "will

do at her death." We think, clearly, an absolute estate would have gone to her under the will had she survived; and, construed especially in the light of the allegations of the bill, why should it not? It all, as alleged, came from her; in morals and equity, was hers. If the testator were moved by sentiments of affection or gratitude, or even the confidence he expresses, it certainly was his intention that she should have the unlimited right to the property. And these considerations impress us that he did not intend his words to be imperative, but, in the language of Mr. Story and the later cases, to have their ordinary meaning, leaving the matter, with a mere suggestion, absolutely to the wife's discretion. Again, under the rules declared by all the text writers and in the cases, that the object and the trust must be clear, definite, and certain, could a trust be here declared? We cannot say so. "Believing she will do justice between her relatives and mine." In some cases, it is true, the word "relatives" has been held to mean "next of kin," but it is not clear that it does so in this case. It clearly means the relatives by consanguinity, it is true; but we cannot see that the testator must have had in his mind only those who would have taken as his heirs or distributees under the law. A distant blood relation, to whom he was greatly indebted, or who was dependent on him, might have had much stronger demands, and been the much more appropriate object of his bounty, than a nearer relation, to whom he was antagonistic, and who had no need of his bounty. But, if to next of kin, how,—in what proportion? And what is the rule indicated in the will,—the measure of "justice between her relatives and mine"? There is no indication. If his next of kin were rich and prosperous, and especially if they had been made so, as indicated by argument of complainants' counsel, out of property which came from the wife, and had been given away in his lifetime by her husband, and her heirs were poor, dependent, and needy, and had formerly contributed to her wealth, natural justice and gratitude would indicate that his relatives should be cut off with the traditional shilling, and hers be provided for; or, if the situation be reversed, the scales would turn the other way; and, at last, it would be left for the courts to make the will which the testator had not. And then the subject of the bequest; there is no certainty about that. What part of the estate is to go "to her relatives and mine"? The will does not say "believing she will divide at her death what I leave, justly between her relatives and mine"; nor "what may be left that she has not used"; simply, that she "will do justice." There is nothing that we can see that should prevent a disposition by her to others as well as to relatives of either. This might well be done, and yet full justice be accomplished. Words precatory, devising what is left at the death of the devisee, have been held void for the uncertainty of the property bequeathed. 2

Story, Eq. Jur. § 1073. Tried by these tests, it is very clear to our minds that in all respects so much uncertainty here exists that an attempt to enforce a trust in this case would be a mere guess at the wishes of the testator, and would, as we have said, virtually result in the court's making the will which the testator had left unmade. A moment's reflection will demonstrate to all that the seeming hardship urged as a consideration for a different holding results, not from following the established rules of law, but the previous improvident acts of the wife. Suppose the testator had died before the wife, and the legacy to her had taken effect, and she had died intestate, or had willed the property substantially to her relatives; then the rule complainants now contend for would have worked the injustice of which they complain under the construction now established by us,—the taking of the property or half of it out of the family which produced it, and giving it to his family which had not. It will be difficult for our legislature, and impossible for our courts, to establish definite and fixed rules that will preserve from their own improvidence the estates of maiden ladies who give their hearts, hands, and property to the knights of their choice. We can, in any event, only declare the law as we find it. The decree of the chancellor is correct, and it will be affirmed, with costs.

WILSON and NEIL, JJ., concur.

Affirmed orally by supreme court, Jan. 10, 1896.

HANCOCK et al. v. DODD et al.

(Court of Chancery Appeals of Tennessee. Jan. 13, 1896.)

DEED—ALTERATION BY GRANTOR—REFORMATION IN EQUITY.

1. After a deed has been delivered and recorded, the grantor has no right to alter it, and nothing that he could do or assent to could change the effect of the deed.

2. A deed of gift was executed by a grantor to his grandchildren, but without conveying any interest to their husbands. After the deed had been recorded, commissioners selected to partition the land among said grandchildren informed the grantor that the insertion of the word "and" between the names of his granddaughters and their husbands would give the latter a life estate in their wives' shares. The grantor assented to the change, which was thereupon made by said commissioners. Afterwards, deeds of partition were prepared by a certain surveyor, pursuant to the agreement to partition the land, and a certain tract was conveyed to one of said husbands and his wife forever. The deeds were signed by the parties without having been read over, but were then and afterwards understood by all to convey to said husbands only life estates in the land. Thereafter said husband and wife died, and the land so conveyed to them was claimed by defendants as heirs of said husband. *Held*, that the partition deed should be reformed so as to meet the intention of the grantor and the understanding of all the parties at the time it was made.

Appeal from chancery court, Cannon county; W. S. Bearden, Chancellor.

Bill by A. L. Hancock and others against William Dodd and others to reform certain deeds, and for other relief. The bill was dismissed, and plaintiffs appeal. Reversed.

St. John & Cummings, for appellants. James A. Jones, for appellees.

BARTON, J. This is a bill filed to reform two deeds and recover a tract of land. The facts on which the relief is sought are practically undisputed, and are as follows: On the 3d day of November, 1890, complainant Alford L. Hancock made a deed of gift conveying a tract of land unto his grandchildren, who were the children and heirs at law of R. M. Hancock, deceased, to wit: S. F. Dodd, wife of H. L. Dodd, and Pleny Dodd and Minnie Dodd, children and heirs at law of Eliza Dodd, deceased, who was formerly Eliza Hancock, and daughter of said R. M. Hancock, and J. T. Hancock, R. T. Hancock, and A. M. Hancock, sons of R. M. Hancock. When the deed was first written and entered of record, the language used was: "I, Alford L. Hancock, have this day executed a deed of gift to R. M. Hancock, deceased, to his heirs, to wit, J. T. Hancock and R. T. Hancock and Eliza Dodd, now dead, and her two children, and Joseph Dodd, her husband, and S. F. Hancock, wife of H. L. W. Dodd, and A. M. Hancock (the consideration is \$2,000.00), containing 235 acres,"—describing the land, with the usual habendum clause, and covenants. R. M. Hancock, at the time of his death, lived upon the land, and after his death his children continued to occupy the premises, until November 3, 1890, when complainant Alford L. Hancock, the owner of the land, made the deed above mentioned. The heirs of said R. M. Hancock continued in possession of the land until May, 1892, when, by agreement, they selected commissioners to partition the land among themselves. The commissioners met and read the deed made by complainant Alford L. Hancock to the children and heirs of R. M. Hancock, and discussed the question as to what interest White Dodd, the husband of S. F. Dodd, and J. J. Dodd, the husband of Eliza Dodd, had in the land. Seeing, from the face of the deed, they had none, and a question having arisen how the minor children of J. J. Dodd could be represented, and having requested their father to represent them as guardian, and he declining to do so, and saying he would move off the land if he had no interest in it, they called on complainant Alford L. Hancock to know if it was his intention to entirely cut off the interest of the said two Dodds, sons-in-law of decedent R. M. Hancock, in the land. The commissioners at the time told complainant A. L. Hancock that, by adding the word "and" between the name of the Dodds and their wives in the deed, it would give them a life estate in the land, which he was willing to do. And, upon this suggestion, in order

to create a life estate in the lands, the word "and" or mark "&" was added, it being represented to and understood by him that this would give the two Dodds life estates in their wives' shares in said land. This addition made the deed read as follows: "I, Alford L. Hancock, have this day executed a deed of gift to R. M. Hancock, deceased, to his heirs, to wit, J. T. Hancock and R. T. Hancock and Eliza Dodd, now dead, and her two children, and Joseph Dodd, her husband, and S. F. Hancock, wife of and H. L. W. Dodd, and A. M. Hancock." A. L. Hancock consented that the change be made with this understanding, and it was made by one of the commissioners or the surveyor, but not by him, nor in his presence, nor did he ever after sign or acknowledge the deed so changed. After this was done the land was divided by the commissioners, and partition deeds were executed by the parties. On the 18th day of May, 1892, J. J. Dodd, R. T. Hancock, Mamie Hancock, J. T. Hancock, S. J. Hancock, and A. M. Hancock executed a deed reciting that, "whereas, A. L. Hancock having made a deed of gift to the heirs of Monroe Hancock, we, the undersigned, have agreed to divide said tract of land by the assistance of five commissioners, to wit, L. L. Melton, J. B. Collins, J. C. Spurlock, Wm. Grizzle, and E. T. Haley. We hereby convey unto H. L. W. Dodd, and wife, Sarah F. Dodd, formerly Fannie Hancock, forever, for the consideration of other lands deeded to us this day, a certain tract or parcel of land lying and being in the state of Tennessee, Cannon county [setting out the boundaries], to have and to hold the above described land unto the said White Dodd and wife, Fannie Dodd, and heirs, forever, as their share in said lands as divided." This was done in pursuance of the partition agreed on. The partition deeds were drawn by the surveyor, at the direction of the parties, and were signed up by them without being read over, and were understood by all to convey to each their respective rights and interests in the land, and to the two Dodds only life estates in the land. There is, we think, no question about this, and, after the deeds were made, it is made perfectly clear by the proof that H. L. W. Dodd thought and understood that he had only a life estate in the land. Sarah Dodd, wife of H. L. W. Dodd, died in March, and he died in April, 1894. They had had and left no children. Complainants J. T., A. M., and R. T. Hancock were the heirs at law of Sarah Dodd, being her brothers, and the defendants were the heirs at law of H. L. W. Dodd, and William Dodd was his administrator. The insolvency of the estate of H. L. W. Dodd was suggested by the administrator, though the administrator files a statement showing personal assets amounting to \$308.47, and claims filed amounting to \$330.49. He shows, on cross-examination, that among the claims filed is one for \$60, probably barred by the statute of limitations. This

would reduce the debt that much, and leave the personal assets probably sufficient to pay off claims. But it is shown that it is not known whether all claims are filed, and that the claims now filed are entitled to some addition for interest. The expenses of administration are not shown, and it would seem probable that there would be some excess of claims and expenses over personal assets on hand, which may render it necessary to resort to the real assets of H. L. W. Dodd's estate for the payment of such balance. And while it does not clearly appear, as stated, it is inferable that there is no other real property belonging to his estate, except that in litigation.

The bill in this cause was filed on the 24th of May, 1894, about two months after the death of said H. L. W. Dodd, and immediately after complainants found there would be a claim on behalf of the Dodd estate to the land, and the prayer is that the deeds be reformed, and the title to the land claimed by defendants as heirs of H. L. W. Dodd, to be vested in the heirs of R. M. Hancock. The theory of the bill seems to be that the insertion of the word "and" in the original deed made by A. L. Hancock conferred a life estate on H. L. W. Dodd, and that this and the partition deed were all made under a mistake and misunderstanding, contrary to the wishes, intents, and purposes of the parties. The bill is filed by Alford M. Hancock, the maker of the first deed, and by J. T., A. M., and R. T. Hancock, who joined in the partition deed of May 18, 1892; and the relief sought is to have said deeds reformed, and to recover the interest which is supposed to have gone to H. L. W. Dodd and his estate, on the ground of a mistake made in the deed. The defendants are the heirs of H. L. W. Dodd, and claim the land as such, and William Dodd is his administrator, and claims the right to have the land sold as such to pay debts. The complainants R. T. Hancock, A. M. Hancock, and J. T. Hancock are brothers of and heirs at law of Mrs. Sarah Dodd, who was the wife of H. L. W. Dodd. The two children of Eliza Dodd, who are not made parties to the cause, are also heirs at law of Sarah Dodd. It is not clearly stated in the bill in what capacity the complainants sue, but the facts all appear as above stated from the bill and the record; and the prayer is that the deeds be reformed, and the title to this land vested in the heirs of R. M. Hancock, and for general relief; and the question is, under these facts as here given, are the complainants entitled to any relief? Chancellor Bearden held they were not, and dismissed complainants' bill, holding that the deed of A. L. Hancock conveyed no interest to the Dodds, and that the insertion of the character "&" in the deed and register's record had no such effect, and therefore said deed needed no reformation; and, second, that the mistake in the partition deed to H. L. W. Dodd and wife is not one of fact but one of law, has caused no loss to the bargainors, and

is not remediable in equity. Complainants appealed, and assign errors. Are they entitled to any relief?

1. As to the first deed made by A. L. Hancock, and the alterations made in it with his consent, and the effect of such alteration: It seems clear that the deed of A. L. Hancock was originally made, in exact accordance with the grantor's intention, to his grandchildren, the children and heirs at law of R. M. Hancock, deceased. It had been delivered and registered. All title and interest he had in the land had passed out of him, and he had no further interest to convey, and no more right to change or alter it than a stranger, and nothing that he could do, direct, or assent to could change the effect of his original deed. There was nothing left in him to convey. *Gates v. Card*, 93 Tenn. 339, 340, 24 S. W. 486. And see 5 Am. & Eng. Enc. Law, pp. 424, 425, and authorities there cited.

2. As to the partition deed: The parties had had the first deed under discussion, and the surveyor, after the grandfather had made or consented to the alteration, the supposed effect of which was to give H. L. W. Dodd a life estate, was directed to draw deeds setting apart in severalty the several interests according to the division agreed on, and the respective rights and interests of the parties. This appears clearly from the oral proof, which is also supplemented by the situation of the parties and the recitals of the deeds, and it was clearly understood by all parties that the Dodds would only take a life estate in the lands. It was so understood and accepted by the Dodds. The surveyor drew the deeds, and they were signed up without being read, and were delivered to the respective parties. All understood, and H. L. W. Dodd died believing and understanding, he had only a life estate in the land, and that, after his death, it would go back to the Hancock heirs. It is unquestionably true, as a general rule, that a mere mistake of law cannot be relieved against, and it takes but slight reflection to convince us of the importance of this rule, and the dangers to be incurred by any extensive relaxation of it or infringement upon it. It would be difficult to aid parties, or have any settled titles, if parties, with full knowledge of the language and terms of written instruments, deliberately, purposely, and willingly entered into by them, could be allowed to subsequently come forward and allege they did not understand, or misunderstood, the legal effects of their acts and language, and seek to have such changed. It would open the door for mental reservation, frauds of all characters, and it would become extremely difficult to procure absolutely binding contracts. The very purposes for which written instruments are largely designed and required would in a large measure be destroyed by any considerable relaxation of this rule. But there are exceptions to this, as to most other rules of law, and especially in cases where there occur other elements besides a mere misapprehension of

the legal effect or meaning of words and terms used, as mixtures of mistake of fact as well as law, of fraud, surprise, imposition, misrepresentation, undue influence, misplaced or undue confidence, ignorance, mental imbecility, etc. A review of the authorities will enable us to some extent to ascertain whether this is a proper case for relief, or within the exceptions to be allowed.

One of the earliest cases in our state reports on this subject is the case of *Drew v. Clarke, Cooke*, 374. In this case it is stated and held: "If a man is clearly under a mistake in point of law, which mistake is produced by the representation of the other party, he can be relieved as well as if the mistake were as to a matter of fact." In the case of *Lewis v. Cooper, Cooke*, 467, it was held that if a compromise is made, by means of which one party agrees to pay more than the law would have compelled him, there being no fraud, he cannot be relieved in a court of equity. In the case of *Dickins v. Jones*, 6 Yerg. 484, it was held that money paid to a sheriff under a mistake of law could not be recovered back, the sheriff having paid the money over into the county treasury. *Hubbard v. Martin*, 8 Yerg. 498, was to like effect. See, also, the case of *Friedman v. Mathes*, 8 Heisk. 488, these being cases of voluntary payments. In the case of *Perry v. Pearson*, 1 Humph. 431, the court refused to reform a contract on the ground of fraud or mistake, holding that the case was not made out; the mistake relied on being one of law, one of the parties claiming to have been imposed upon by the other, who claimed to be "a part of a lawyer." The court, in its decision, seems to have recognized the doctrine that a reformation could have been had if the proof had made out a proper case. The case of *Helm v. Wright*, 2 Humph. 75, was a suit brought to reform a bond executed by the complainant for the delivery of property which had been levied on by a constable, on the ground of mistake in the recitations of the bond; the bond having recited that another party than the complainant was the owner of the property in question, and the recital of the bond being that "W. W. Wright, a constable, had levied on the following described property of the said James Helm." The property was claimed by Thomas Helm, who signed the bond. Judge Green, delivering the opinion of the court, said: "A court of equity would be of but little value if it could suppress only positive frauds, and leave mutual mistakes, innocently made, to work intolerable mischiefs, contrary to the intention of parties. It would be to allow an act, originating in innocence, to operate ultimately as a fraud, by enabling the party who receives the benefit of the mistake to resist the claims of justice. There is no question, therefore, but that a court of equity will relieve against a mistake of fact, when the words employed in an agreement do not

express the intention of the parties. But it is insisted by the defendants in this case that here there is no mistake of fact, but that the mistake, if any, is one of law; that the complainant conveyed in the bond the idea he intended to convey, but that, if mistaken at all, it was as to the legal consequence, and not as to a fact stated. If this proposition be true, the complainant cannot be relieved. For it is certainly true that, if the party intended to use the words in the sense which they really do convey, and if the thought they express was the idea he intended to communicate, there is no mistake of fact, but a mistake of the legal consequence of the act, as, if the party release a joint obligor, although he may not intend thereby to release the co-obligor, and may be mistaken as to the legal consequence of the act, yet there is no mistake as to the fact." Judge Green further says: "The case of Ball v. Storie, 1 Sim. & S. 210, is analogous to this. By the memorandum inserted in the agreement, the defendant intended to become personally responsible for the £200 only, but it was so worded as to make him liable in addition for the £4,000. The vice chancellor said: 'This is a common case of an instrument to be reformed in equity, because the drawer has, by mistake, miscarried in the expression of the agreement of the parties.' In that case there was no question but that the defendant read the instrument, and knew what it contained. But he inadvertently overlooked the import of the words. Knowing he had agreed to be bound for the £200, he supposed the agreement expressed his understanding. But he was mistaken, and, although himself a lawyer, he was relieved. In this case the object of the contract was to deliver the property. The agreement to do so was the matter to which the complainant's attention was directed. The recitations were deemed of but little importance, and very naturally were not scrutinized. The oversight in the statement, inadvertently inserted in the bond by the draftsman, that it was the property of James Helm, would naturally occur, and we think, upon reason and authority, ought to be relieved in this court." The case of Bell v. Steel, 2 Humph. 148, presented a case where a release, understandingly and deliberately entered into by the complainant, of one Collier, for the purpose of making him a witness in a case, had the effect of releasing his co-obligor, whom the complainant was suing, which result was not intended by the complainant, and who executed his contract of release in ignorance of this principle of the law. It was held that he could not be relieved. In the case of Trigg v. Read, 5 Humph. 529, it was held that, where a compromise of controverted rights is entered into, if both parties are in equal ignorance of the true state of those rights, such compromise is valid, and this whether the doubt rests upon a matter of fact or of law.

It is stated in this case, however, that the court thinks the principle is settled in the United States to be that ignorance of the law, however plain and settled the principles may be, and a consequent mistake as to title founded upon such ignorance, furnishes no ground to rescind agreements, or to set aside solemn acts of the parties, when they have been made with a full understanding of the facts, unless they be tainted by imposition, misrepresentation, undue influence, misplaced confidence, or suspicion. There is a very thorough discussion of the law of this subject in this case, and it is also shown that a party's acting upon a misapprehension that he has no title to property at all may be a mistake of fact, or at least a mistake of mixed fact and law; but the point we have referred to is the one decided by the court. In the case of Sparks v. White, 7 Humph. 90, relief was granted on the ground that the complainant was ignorant, of weak mind, and very poor, and that the defendant was a man of sense, bold and determined in the prosecution of his rights, and reputed to be very wealthy, and that Legg, the agent of the defendant, who transacted the business, was a man of sense and business capacity, in whom the complainant had great confidence; and it was said that the complainant was overreached by Legg, and, in ignorance of the rights the law gave him, was induced to sign away his right of occupancy without reference to its real value. In the case of Farnsworth v. Dinsmore, 2 Swan, 42, the point decided in the holding of the court was practically the same as in Trigg v. Read, 5 Humph. 535, and was based upon that case. In the case of Talley v. Courtney, 1 Heisk. 718, relief was granted, and the contract reformed. In delivering the opinion of the court, Judge Sneed quotes the doctrine announced in the case of Hunt v. Rousmaniere's Adm'rs, 1 Pet. 1, in these words: "There are certain principles of equity applicable to this question, which, as general principles, we hold to be incontrovertible. The first is that when an instrument is drawn and executed which professes or is intended to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfill or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement,"—citing cases. Judge Sneed says: "The great difficulty in such cases arises upon the evidence. The 'proper proofs' referred to by Lord Hardwicke mean something more than cogent inference or strong probability generated by the evidence." "The case must be made out by proofs entirely satisfactory," says Mr. Justice Story. Now, in the case under discussion by Judge Sneed, the contract embraced the words "current bank notes," and it was

stated: "These words have been interpreted to mean that which circulates as money, and which, in the absence of proof to the contrary, is presumed to be of value equal to money. But it was legitimate to prove in this case, by parol, what meaning the parties themselves intended to fix upon those words, and to show that they contracted with special reference to the bank notes then the circulating medium of the country where the contract was made,"—quoting from the case of *Thorington v. Smith*, 8 Wall. 12. In the case of *Ottenheimer v. Cook*, 10 Heisk. 309, the court refused to reform a promissory note usurious on its face, although the same was drawn in ignorance of the law. But it was clear that it was drawn exactly in accordance with the intention of the parties. "In regard to indorsers of negotiable notes, who have been discharged by want of demand, protest, or notice, it is held, if an indorser, with full knowledge of his discharge, promise to pay, he shall be held responsible. But this will not be done if the promise be made under a mistake or misapprehension of the facts, or as to the law of his liability upon them. In other words, if an indorser believe facts to exist which charge him, but which do not exist, or if he believe that facts which do exist charge him, which do not charge him, and in a misapprehension as to the operation of the law upon his case, thus supposed, he promise to pay, he will not be held by his promise. *Williams v. Bank*, 9 Heisk. 443; *Bogart v. McClung*, 11 Heisk. 113; *Seay v. Ferguson*, 1 Tenn. Ch. 204; *Bank v. Rawlings*, 1 Leg. Rep. 227."

In the case of *Cromwell v. Winchester*, 2 Head, 390, relief was granted. The facts in that case were these: "In 1843, David Winchester, who is now dead, leaving the defendants, his widow and children, sold and conveyed to Cromwell in trust, 'for Mrs. Elizabeth Armour and children,' a lot in Memphis, for the consideration of \$300. This bill is filed to correct an alleged mistake in the deed, by the omission of the words of inheritance. The words used are, 'To the said John Cromwell, trustee of Elizabeth Armour, and her children forever.' The rigid and well-established rule of the common law, 4 Kent, Comm. 4, 5, etc., that the word 'heirs' is indispensable to convey an estate of inheritance, and without it only an estate for life is created in deeds, is recognized by this court in *Hunter v. Bryan*, 5 Humph. 47. This rule, though of feudal origin, has been too long established to be changed, except by the legislature. This has been done by several of the states, and recently by our own. But this deed was before our statute. This deed is not before us, however, for construction, but upon a bill to reform it, because of a mistake in not inserting words of inheritance, in conformity to the understanding of the parties at the time. That this power has been always exercised

in proper cases by courts of chancery there can be no doubt. 1 Story, Eq. Jur. § 152. If, by mistake, the writing contains less or more or something different from the intent of the parties, and this be clearly made out by proof entirely satisfactory, a court of equity will reform the contract, so as to make it conform to such intent. But, if the mistake is not made entirely plain, and put beyond all reasonable controversy, the court will not interpose. It is not easy to reconcile this doctrine to the common-law rule which excludes all parol evidence to vary or control written contracts, and that it is liable to abuse is obvious. But where terms and stipulations are inserted or omitted by fraud or mistake, greater frauds and injustice would be perpetrated by closing the door against any relief than the rule is designed to prevent. Let this be as it may, the jurisdiction of a court of equity on this subject is well settled. The presumption always is strong that a writing contains the whole contract, and sets it forth accurately; but, if it can be clearly and indisputably shown that by fraud or mistake it does not, the presumption falls, and it will be reformed." In the case of *Spurlock v. Brown*, 91 Tenn. 241, 18 S. W. 868, this question was discussed at some length by Special Judge Dickenson, and it is stated that a mistake in law, produced by the representations of the other party, or resulting from misplaced confidence, will be relieved against. In the case of *Wheeler v. Smith*, 9 How. 82, relief was granted by the supreme court of the United States, because the heir was influenced by the honest, though erroneous, opinions of one of the executors, who was a lawyer, in whom he had great confidence; and the court said: "The complainant, it seems, had studied law, but it is manifest from the facts before us that he was but little acquainted with business, was an inefficient and dependent man, easily misled, especially by those for whose abilities and character he entertained a profound respect. But in making the compromise the parties did not stand on equal ground. He did not act freely and with a proper understanding of his rights." In the case of *Snell v. Insurance Co.*, 98 U. S. 91, the supreme court of the United States reformed a contract made, in mistake of law, through a reliance upon the representation, honestly made by the company's agent, that the insurance in the form adopted would give the protection sought. The party relied upon the larger experience and greater knowledge of the agent. The court said: "In deciding, therefore, as we do, that the complainants are entitled to have the policy reformed in accordance with the original agreement, it is not perceived that we enlarge or depart in any just sense from the general and salutary rule that a mere mistake of law, stripped of all other circumstances, constitutes no ground for the reformation of written contracts." In the case

of *Warren v. Williamson*, 8 Baxt. 431, it is said by Judge McFarland, in delivering the opinion of the court, "that a mere mistake of law will not be relieved against, but where, accompanying the mistake, there is ignorance, weakness, or misplaced confidence upon the one side, or unconscionable advantage obtained, or some other element involved, relief may be granted." In the case of *Smith v. Jordan*, 13 Minn. 264 (Gil. 246), it is said: "A court of equity looks to the spirit and meaning, and not to the letter. It has power to reform a contract so as to make and conform, in substance and effect, to the agreement and intention of the parties. It would be a reproach to the system of equity jurisprudence to say that its power to rectify mistakes is limited to those cases where the language used is not in the very words intended, but does not reach those cases where, in consequence of a mistake of fact, the meaning and intention of the parties are not expressed by the words. Neither reason nor the adjudicated cases so far limit the jurisdiction of the court,"—citing *De Peyster v. Hasbrouck*, 11 N. Y. 587; *Wheeler v. Hall*, 3 Paige, 313; *Botsford v. McLean*, 45 Barb. 478; *Bradford v. Bank*, 13 How. 57; *Gillespie v. Moon*, 2 Johns. Ch. 586; and other authorities. It is further said: "Whether the error in the written contract is the result of the intentional or unintentional misstatement is immaterial, for a court of equity has power to correct as well in the former as in the latter case." In 16 Am. & Eng. Enc. Law, p. 654, it is said: "If an agreement is made to execute a certain kind of instrument, and the parties do execute what they think is the proper instrument to carry out their agreement, which falls on account of its being defective in law, such an agreement will be reformed so as to carry out the intention of the parties, and, when reformed, it takes effect from the time of its original execution." And see authorities there cited. "A court of equity will correct mistakes in conveyances which are clearly proved, whether in regard to the statutory or common-law requisites, or whether the parties failed to execute such an instrument as they intended, or mistook in reference to its operation." *Beardsley v. Knight*, 33 Am. Dec. 193; *Goodell v. Field*, 15 Vt. 448. In the case of *Page v. Higgins*, 5 Lawy. Rep. Ann. 152, 22 N. E. 63, from the supreme court of Massachusetts, it is held: "A written contract which does not express the actual contract of the parties will be reformed." This last case contains a valuable note giving a full discussion of the law on this subject, and, among other things, it is stated: "The power to rectify mistakes is not limited to those cases where the language used is not in the very words intended, but reaches those cases where, in consequence of a mistake of fact, the meaning and intention of the parties are not expressed by words." See numerous cases cited.

Without further citation or discussion of the cases in other courts than those of our own state, and without attempting to define a hard and fast rule which we think would apply to all cases, we may safely say, after a thorough study and review of all the cases to which we have had access in the English and American reports, we find few which refused relief in a case where it was clear and positive what the real intention and understanding of the parties were, and, through ignorance and mistake, whether of law or fact, that intention was not expressed, but an entirely contrary intention. The courts in all cases are disposed to carry out and enforce what is clearly proven to have been the real understanding and intent of all parties. Applying the doctrines stated in these cases to the case in hand, we feel that justice requires in this case that the relief sought be granted. There is absolutely no conflict in the testimony. It is beyond reasonable doubt—First, that it was never intended by Alford L. Hancock, at first, that the sons-in-law of his son should have any interest in the land; second, that, when he consented to make the supposed correction, it was thoroughly understood by him and all parties that this only gave them (the two Dodds) a life estate in the lands given to their wives; and, third, it is also perfectly clear that it was fully understood, and the intention of the parties when the partition was made, and the land set apart in severalty, that the Dodds and their wives should take the same character of interest in the lands so set apart that they had before, or were supposed to have, and that the partition deeds were executed with this purpose and with this understanding, and H. L. W. Dodd is proven beyond a doubt to have so understood the matter, and, as we have stated, died supposing he only owned a life estate. When the commissioners met to divide the land, assuming, as some of them did, to know the law, they construed the original deed, and directed how the alteration should be made. Hipp, the county surveyor, or who acted as surveyor in laying off the lands, was one of the men who went to old man Hancock to procure this adjustment of the matter, and who, under the direction of the parties, drew up the deeds which they signed. He did it under the direction that a life estate only was to go to H. L. W. Dodd. The proof shows that the deeds were not read over. It is doubtless true that it was the intention of Mr. Hipp to fully comply with the directions of the parties, and he doubtless supposed that he had, and the mistake arose through his ignorance and want of skill. It is inferable that, if the complainants had read the deeds over, they would have signed them, as they evidently relied on the skill and knowledge of Hipp and the other commissioners, who, it seems, had settled the law to their satisfaction; the complainants themselves being ignorant of the mean-

ing of legal terms, and not knowing how to draw proper deeds, but yielding to the supposed superior wisdom of Mr. Hipp, who had been for a long time county surveyor. But whether the deeds were read over or not is not, as we think, essentially material, for it is clear to our minds that neither the intent nor purpose of any of the parties was expressed in the conveyance, and therefore the case clearly comes within the doctrine of the case of *Helm v. Wright*, 2 Humph. 76, and the authorities there cited. The case clearly comes within the rule laid down in *Talley v. Courtney*, 1 Heisk. 715, and *Hunt v. Rousmaniere's Adm'rs*, that when an instrument is drawn and executed which professes or is intended to carry into execution an agreement, but which by mistake of the draftsman, either as to fact or law, does not fulfill, or which violates, the manifest intention of the parties, equity will correct the mistake so as to produce a conformity of the instrument to the agreement." It is covered by the principle declared in *Cromwell v. Winchester*, 2 Head, 389, that "if, by mistake, the writing contains less or more or something different from the intent of the parties," it will be reformed. In this last case there was no pretense that the exact words put in the deed were not known. The case was simply that the proof showed an intention to convey a fee-simple estate, but by inadvertence or ignorance the word "heirs," then necessary to create such an estate, was left out. The case is within the exception, laid down in nearly all of the cases, of undue or misplaced confidence in the draftsman or parties preparing or presenting the contracts, and within the exception spoken of by Judge McFarland in *Warren v. Williamson*, 8 Baxt. 427, of "ignorance and weakness." The clear and satisfactory proof required in all the decided cases exists in this case. The whole trouble originated through the ignorance and mistake of the commissioners, who, in the first place, assumed the change in A. L. Hancock's deed. The other results were based on and followed this, and the mistaken belief thereby occasioned. The other heirs simply thought they were setting apart to the two Dodds the interests they were entitled to hold for life. In fact, the proof is so clear and satisfactory of the mistake, and so utterly devoid of all shadow of doubt, that it would shock our sense of justice, and leave an impression of the practical uselessness and helplessness of our courts of chancery, if so gross and clear a mistake could not be relieved against, and the parties restored to the status all had intended and understood. Not to relieve in such cases would, we think, be to establish a rule that it would not be safe for parties to contract without the most thorough and competent advice and skill in all cases, lest by inadvertence or ignorance they should be placed, without hope of relief, in a position possibly disastrous and ruinous, and entirely

foreign to the intention, expectation, desire, and understanding of all parties. If the parties had, by the deeds, been placed in the position in this case desired, intended, and understood by all parties, on the death of Mrs. S. F. Dodd this land would have gone to her brothers and sisters, or their representatives, her heirs, who were also the heirs of her father, R. M. Hancock, deceased, subject to the life estate of H. L. W. Dodd, and on his death they would have been entitled to the possession of the land as tenants in common thereof; and the partition deed will be so reformed, in accordance with this understanding and intention, and the rights of the parties so declared. The complainant A. L. Hancock, so far as we can see, is entitled to no relief, and was an unnecessary party; but, as no additional costs were incurred by his being joined as a complainant, no decree is necessary as to him.

From what we have said, it will result that the two children of Mrs. Eliza Dodd and J. J. Dodd, who were minors, were not and could not be affected by the change in the deed of A. L. Hancock, nor were the partition deeds signed by any one authorized to represent them, nor could thereby in any way, and their interest in said tract remains unimpaired. Besides, they were not parties to this suit. A. M. and T. R. Hancock, and the heirs and representatives of J. T. Hancock, who died pending this suit, and in whose name it is revived, will be entitled to a decree of reformation, and adjudicating their rights, and for a recovery of their interest as hereinabove indicated. It may be well to add that, in our opinion, no antagonistic interests have become vested which will prevent the relief sought. There are no innocent purchasers, and no creditors have fixed any liens on the real estate which give them vested rights. While it is true the insolvency of the estate of H. L. Dodd has been suggested, it is really a matter of some doubt whether the personal assets may not pay his debts. At least, the balance left unpaid will evidently be but a trifle, and in any event there have been no proceedings to subject the real estate to the payment of debts. The decree of the chancellor will be reversed, with costs, and decree as above indicated.

WILSON and NEIL, JJ., concur.

Affirmed orally by supreme court, March 9, 1896.

VAUGHN v. TATE.

(Court of Chancery Appeals of Tennessee.
Feb. 8, 1896.)

MORTGAGE—FORECLOSURE—DELAY—PRODUCTION OF NOTE.

1. A decedent left a mortgage executed to him by his sister and her husband, who was insolvent, on their home, and, in his will, expressed the wish that it should not be foreclosed dur-

ing his sister's lifetime. The sister died 32 years after the execution of the mortgage, which was then found among her papers. *Held*, in an action by an administrator of the mortgagee to foreclose, that the circumstances and relationship of the parties, together with the testimony of the executor and the acknowledgments of the mortgagors, were sufficient to overcome the presumption of payment arising from lapse of time and possession of the mortgage.

2. Under such circumstances, no laches was shown.

3. A mortgage may be foreclosed without a production of the note secured, where no personal judgment is sought, and the absence of the note is accounted for.

Appeal from chancery court, Davidson county; Thomas H. Malone, Chancellor.

Action by Thomas A. Vaughn, administrator of John W. Akin, against Zachariah Tate. Decree for complainant, and defendant appeals. Affirmed.

W. D. Covington and Jos. W. Byrnes, for complainant. Nolen & Slemons and Hamilton Parks, for defendant.

NEIL, J. The bill in this cause was filed to enforce a mortgage executed on the 18th day of December, 1861, to John W. Akin by Thomas J. Tate, upon a lot of ground in the city of Nashville, to secure a debt of \$679.75, purporting upon the face of the mortgage to be due by note for that amount dated December 17, 1861. The complainant is the administrator of John W. Akin, and the defendant is the guardian of the heir at law of Thomas J. Tate. The defenses urged are payment, laches, and the statutes of limitation of seven years and ten years. The bill was filed April 11, 1894. The chancellor decreed in favor of the complainant, and the defendant has appealed and assigned errors.

The facts are as follows: The mortgage was executed, as above stated, to secure the said debt of \$679.75. Rebecca Tate, the wife of the maker of the mortgage, was the sister of the mortgagee. He (the mortgagee) died August 22, 1868. He left a will dated December 14, 1866. This will contained the following direction with regard to the foregoing mortgage and mortgage debt: "8th. I do not wish the mortgage that I hold on T. J. Tate and Rebecca Tate's land foreclosed until after the death of Rebecca Tate, unless there should be sooner a danger of losing the debt. After her death, I wish it foreclosed, with interest; and, when the money is realized from it, I direct it to be loaned and mortgaged on unincumbered real estate, the interest to be paid semiannually, and equally divided between my said children." Rebecca Tate died March 24, 1894. The present bill was filed within a month after her decease. She occupied said property continuously till her death, but not adversely to the mortgage in question. On the contrary, she repeatedly acknowledged that the mortgage was just, and the debt unpaid. She did this as late as 1888, under the following circumstances: The administrator, prior to this time (the exact date does not appear in the

proof; it is charged in the bill to have been October, 1886), filed a bill (we infer, as a precautionary measure) against Rebecca Tate and the present defendant, as stated in the deposition of counsel, "to set up" this mortgage. She did not answer, and the bill was taken for confessed. However, her deposition was taken in the cause. In this deposition she stated that she recognized the existence of the mortgage, and was holding the property subject to it, and "requested that it should not be foreclosed during her lifetime," and a promise to that effect was made to her. The papers in that cause were destroyed in the fire that destroyed the building known in Nashville as "Baxter Court," in December, 1888, and nothing further seems to have been done concerning the case. The present defendant did not go into possession of the property until after the death of his grandmother, March 24, 1894. The only difficulty in the case arises out of the fact that at the death of Rebecca Tate the original mortgage was found in her papers, along with the original deed to Thomas J. Tate, made by one Griffin in 1859. A short time before her death, Rebecca Tate gave these papers to Mrs. Matilda Tate, the mother of the present defendant. This witness says: Rebecca Tate "told me to put them away; they were mine now. She hoped everything would come right at last." She does not appear to have had the mortgage note. Nor is it explained how she came into possession of the mortgage itself. It was duly registered in the county register's office. The executor of the will of John W. Akin was his son-in-law, James Gennett. This witness testifies that the original mortgage came into his possession along with the note, and that he turned both instruments into the hands of the clerk and master in 1870, when he settled his accounts, and was permitted to resign, in the case of James Gennett, Executor, v. F. C. Akin et al., in the chancery court of Davidson county. When asked to account for the fact that the mortgage was found in Mrs. Rebecca Tate's hands at her death, he is unable to do so, but suggests that she must have procured it from the clerk and master's office. No note for \$679.75, the amount mentioned in the mortgage, was found in the clerk and master's office. But there seems to have been a note in that case made by Thomas J. Tate to John W. Akin for \$1,085.34, dated August 7, 1868; and the inventory filed by the executor shows such a note, and the clerk and master receipted to the executor for a note of like description, differing only a few dollars from the amount already stated,—the receipt stating the amount at \$1,080, and the inventory stating it at \$1,085.75. We have no doubt that both instruments refer to one and the same note. The note itself has not been produced. However, it is probable that the above-mentioned note of \$1,085.34 was a renewal of the original note, with interest counted at 8 to 10

per cent., and perhaps compounded. A calculation at 9 per cent. comes within a few dollars of the amount of that note. But it is useless to speculate upon this subject,—how the note became so large. No other transaction between John W. Akin and Thomas J. Tate is even remotely indicated, and, as the proof shows that Tate was insolvent, it is not likely that there was any other of this magnitude. Moreover, the mortgage note was presented by the executor, Gennett, to Thomas J. Tate for payment, and he said he was unable to pay it. It is not specifically stated that this particular note was the one so presented to Tate for payment as the mortgage note, but the circumstances indicate that it was; and, on the whole, we are of opinion that the said note of \$1,085.34 was a renewal of the original mortgage note.

Recurring to the difficulty arising out of the fact that the original mortgage was found in possession of Rebecca Tate, we are of opinion that, though this presents a real difficulty, it cannot override the oft-repeated statement of Rebecca Tate that the debt was unpaid and the mortgage subsisting, and especially her deposition upon the subject, before referred to, and the statement of the witness Gennett, the executor, who testified that he had called upon Thomas J. Tate for the debt, and that he said he was unable to pay it, and his testimony that it had never been paid to him, and the testimony of the administrator de bonis non, who testified, in substance, that it had never been paid to him, and the evidence showing that indulgence was granted because of the direction in the eighth item of the will of John W. Akin. Our conclusion is that the debt has never been paid. True, the transaction is very old, and goes far beyond the time wherein the presumption of payment arises. But "the presumption of payment may be rebutted by any evidence tending to satisfy the court or jury that the debt is still due. The relationship of the parties, the condition of the debtor as to solvency, the leniency or the reverse of the creditor, the recognition of the debt, or other circumstances, may repel the presumption. *Anderson v. Settle*, 5 Sneed, 202; *Yarnell v. Moore*, 3 Cold. 173. And the recognition of the debt need not be made directly to the creditor, nor to some person with intent that it should be communicated to him. *Fisher v. Phillips*, 4 Baxt. 243. * * * The presumption of payment from lapse of time is not the matter of a plea in bar. It is matter of evidence in support of the plea of payment, or, as Prof. Greenleaf puts it, 'mere argument, of which the major premise is not a rule of law.' 1 Greenl. Ev. § 44. It may be rebutted by any circumstances satisfactory to the mind, not only without a new promise to pay, but without even a recognition of the debt. *Lyon v. Guild*, 5 Heisk. 175." *Stanley v. McKinzer*, 7 Lea, 454, 457; *Elliot v. Williamson*, 11

Lea, 38, 44, 45. In the present case, we think, ample evidence has been introduced to rebut the presumption of payment, and we find as a fact that the mortgage debt is unpaid. The same evidence prevents any imputation of laches, and shows that there is no ground whatever upon which to base the defense of the statute of limitations.

There is only one other question. As before stated, the note itself has not been filed in the present record. The suit is based upon the mortgage itself, and the prayer is to enforce the amount there shown, with interest. No objection is made to this (the absence of the note) in the answer, nor upon the hearing. Thomas J. Tate's administrator is not before the court, and, indeed, it does not appear whether he ever had any. Therefore there is no effort to obtain a personal judgment, but only to enforce the mortgage by a sale of the property; and the note is accounted for as being in the clerk and master's office, or as having been filed there in the aforesaid case of *Gennett, Executor, v. F. C. Akin*, and is shown never to have been paid, and to be still the property of the estate of John W. Akin. The enforcement of the mortgage lien upon the land is all that the complainant can ever recover, and the amount of the debt can be ascertained from the recitals of the mortgage.—Indeed, more satisfactorily than from the note, in view of the renewal, and the adding in of or compounding interest, as before mentioned; and it is to the advantage of the defendant that the amount be taken from the mortgage. Besides, the transaction is very ancient, and there is no possible way in which the note could be used to the prejudice of the defendant. Under such circumstances, to insist upon its actual production would be to enforce a barren technicality. Indeed, it is said by an eminent author: "If no personal judgment is sought, the recitals in the mortgage, without producing the note, are sufficient to authorize a foreclosure of the mortgage simply, according to some authorities, though by others this is not sufficient unless the absence of the note is accounted for." 2 Jones, Mortg. § 1469. The present case falls within both classes of the authorities referred to, and we think the suit may be maintained in its present form. The complainant is entitled to enforce the mortgage by sale of the land for the amount set forth in the instrument, with interest from December 17, 1861. The result is that the decree of the chancellor is in all things affirmed.

WILSON and BARTON, JJ., concur.

MALLORY v. STATE. (No. 1,018.)

(Court of Criminal Appeals of Texas. June 17, 1896.)

CRIMINAL LAW—EVIDENCE—BILL OF EXCEPTIONS.

1. In a prosecution for forgery, a recital in a bill of exceptions, approved by the court, that

appellant objected to evidence of the uttering of other forged checks, "because" they were not part of the *res gestæ*, does not state as a fact that the evidence was not *res gestæ*.

2. In a prosecution for forgery, where the purpose sought to be obtained by defendant by the introduction in evidence of a letter written by him is not obvious of itself, to enable the appellate court to review its exclusion the purpose must be stated in the bill of exceptions.

Appeal from district court, Dallas county; Charles F. Clint, Judge.

John Mallory was convicted of forgery, and appeals. Affirmed.

Stillwell H. Russell, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of passing a forged instrument, and prosecutes this appeal.

1. Appellant reserved a bill of exceptions in the following language: "The state introduced the following evidence, to wit, certain alleged spurious checks, said checks being fraudulent, and purporting to be the act of one Danl. F. Sullivan, and made payable to one Michael Gorman or bearer, said checks being passed upon one J. R. Wisdom and one G. A. Eisenlohr, both of Dallas county, Texas; and said evidence was objected to by the defendant at the time it was offered, upon the following grounds, to wit, that said checks were no part of the *res gestæ*, said checks being a part of and attached to other indictments against defendant, then pending, and upon said checks the state depended for a conviction of defendant upon aforesaid indictments; that said checks were wholly incompetent, immaterial, and irrelevant." This bill of exceptions is not sufficiently definite in its statements to require consideration. The statement by appellant that he objected to the testimony because the checks were no part of the *res gestæ* does not sufficiently allege the fact that they were not a part of the *res gestæ*; nor are any facts stated showing they were not *res gestæ*; nor are any facts stated showing that said checks were inadmissible. If the checks offered are a part of a system of forgery, or the uttering of forged instruments, or introduced for the purpose of identity, or to show the intent, or to develop the *res gestæ* of the transaction, they were admissible; and the fact that the appellant objected to their admission in evidence because they were not *res gestæ* does not state any fact, and the signature of the judge approving the bill of exceptions does not verify the grounds of objection. See *Smith v. State*, 4 Tex. App. 626; *Hennessy v. State*, 23 Tex. App. 340, 5 S. W. 215; *Ezzell v. State*, 29 Tex. App. 521, 16 S. W. 782.

2. The second bill of exceptions was reserved to the action of the court in rejecting a letter alleged to be in the handwriting of the defendant, and addressed by him to his sister, residing at Memphis, Tenn.; said letter having been written and sent from Waco,

Tex., through the mail. The reason for offering this evidence is in the following language: "Said letter being competent evidence for the purpose heretofore stated, material and relevant to the issue." The bill does not state what purpose was sought to be attained by offering the letter. It is necessary, in reserving a bill of exceptions to the court's ruling rejecting testimony, for the defendant to state the object and purpose for which the testimony was offered, unless such purpose is obvious from a statement of the rejected evidence itself. It is not clear why this testimony was offered, or the purpose or object to be attained by offering it; and this court will not supply this omission in the bill of exceptions. For collated authorities, see *Willson's Cr. St.* §§ 2368, 2516.

3. Appellant requested an instruction submitting the law of alibi. This was refused by the court, and in this there was no error. The court had fully submitted this phase of the law to the jury, and in language as set out in approved forms. The court charged the jury with reference to how they should consider the evidence admitted of other checks passed by the defendant to other parties. Said testimony may have been considered by the jury legitimately for the purpose of establishing the identity of the transaction, to develop the *res gestæ*, to show the knowledge or intent, and also where a system in committing crime is pursued. The charge of the court limits this testimony to knowledge and intent. This was more restrictive than the facts of this case would authorize. The court instructed them to consider it only for the purpose of aiding them to determine with what intent the defendant may have passed the instrument which he is charged with uttering. The court further instructed the jury in this connection that in no event could they consider it, unless defendant is shown to have been the man or party who passed the instrument. While the charge is too restrictive, and is somewhat inartistically drawn, yet, in view of the facts of this case, we think the charge as given was favorable to the appellant. There was no exception reserved to the charge of the court.

As presented, we are of opinion that this judgment should be affirmed.

MALLORY v. STATE. (No. 1,015.)

(Court of Criminal Appeals of Texas. June 17, 1896.)

CRIMINAL LAW — EVIDENCE — PROOF OF HANDWRITING.

1. Testimony of the officer who arrested defendant that he did so from the description given him by the persons upon whom defendant was charged with passing the forged checks is inadmissible to identify defendant.

2. Where, in a prosecution for forgery, witnesses for the state testify to having seen defendant make the forged signature, his defense

being an alibi, defendant may put in evidence, for the purpose of comparing the handwriting of the person who executed the forgery with defendant's, a letter written by him some time before the accusation was brought against him.

3. The testimony of defendant alone that he had written the letter is sufficient to authenticate the letter, so as to render it admissible for the purpose of comparison.

Appeal from district court, Dallas county; Charles F. Clint, Judge.

John Mallory was convicted of a crime, and appeals. Reversed.

Stillwell H. Russell, for appellant. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of passing a forged instrument, and prosecutes this appeal. This is a companion case to cause No. 1,016, Mallory v. State (just decided) 36 S. W. 750. The record in this case is before us in quite a different shape from that in the former case.

1. The witness Durham, while testifying for the state, over the objection of the appellant, was permitted to state that he obtained from E. A. Yost, J. R. Wisdom, R. F. Eisenlohr, and M. Stamm a description of the man who had passed upon them certain checks on the night of November 30, 1895, being the checks admitted in evidence in this case, and that, after he got a description from the parties named, he arrested the defendant, and that it was upon the description given him by said parties that he afterwards arrested defendant. The defendant was not present when the conversations occurred between said parties and the witness Durham. It was objected that this testimony was hearsay, and calculated also to injure the rights of the defendant before the jury, and served to strengthen the state's testimony as to the identity of the defendant, as the party who passed or uttered the forged checks upon said parties. We think these objections are well taken. These parties who gave a description to Durham were witnesses in the case, and testified. Their testimony as to the description and identity of the defendant was not attacked by showing that they had made contradictory statements in regard to this matter, and it was not permissible to corroborate them as to their description of the defendant, by the evidence of the witness Durham, to the effect that they had given him a description of a party that led him to believe that defendant was the guilty party, and caused him to make the arrest. It is not necessary here to state how far an officer will be permitted to go in testifying in regard to his actions in making the arrest of a party suspected of crime, or to detail information he may have received that led him to make an arrest, or to perform any given act looking towards the arrest of a party or ferreting out crime. Suffice it to say that the testimony here detailed by the witness Durham was unauthorized upon that ground, for it was tantamount to a statement that

these witnesses were correct in their identity of the accused as the party who passed the checks. The evidence as given was clearly hearsay, and inadmissible.

2. The state was permitted to introduce in evidence two checks passed upon Wisdom, Yost, and Stamm, with the indorsement of the name of "Michael Gorman" placed thereon. This was objected to, because immaterial, irrelevant, and calculated to prejudice the defendant's rights in the premises. We think this testimony was admissible. See *Hennessy v. State*, 23 Tex. App. 340, 5 S. W. 215; *Burks v. State*, 24 Tex. App. 326, 6 S. W. 300; *Id.*, 23 Tex. App. 332, 6 S. W. 303.

3. The state was also permitted to prove by Yost, Eisenlohr, Stamm, and Wisdom that they saw the defendant indorse the name "Michael Gorman" on the various checks introduced in evidence. They testified that this was the first time they had ever seen the defendant. The defendant relied upon an alibi. In this connection the defendant himself testified, and denied writing the name "Michael Gorman" on the check, denied being present or having any connection whatever with the passing of the instrument, and, after identifying a letter he had written to his sister some six or eight months prior to the alleged passing of these instruments, he proposed to introduce that letter in evidence before the jury for the purpose of comparing the handwriting of the party who wrote the name "Michael Gorman" on the checks. In other words, he proposed, as one of the means of disproving his presence at the time and place of the passing of the checks, to show by this letter that his genuine handwriting was not the same as that of the indorsement on the check. We are of opinion that the letter, under all of the circumstances, was sufficiently identified as the handwriting of the defendant to authorize its introduction as a means of comparison between the handwriting on the check and that contained in the letter. The court seems to have excluded this letter, because it was not authenticated by any other testimony than that of the defendant himself. This did not go to the relevancy of the testimony, but to its weight before the jury. While the court may have believed the defendant was testifying falsely in regard to writing the letter, yet the jury may have thought differently; and he was entitled to whatever weight might be attached to it in comparing the handwriting of the letter with the indorsement on the check. The envelope in connection with this letter, which was produced by the defendant, bore the postmark, "Waco, May 9, 1895." The letter was addressed to the defendant's sister in Memphis, Tenn.; and the postmark on the back of the envelope showed that it was received at Memphis on the night of the following day. Presumably for the purposes of this trial, the defendant had procured said envelope and letter to be sent to him from Memphis. Now,

if the defendant's sister, to whom the letter was addressed, had been present, and had been placed upon the stand, which would have been permitted, she could have testified as to the receipt of the letter from her brother, and identified the same. It then would have been before the jury for their inspection and comparison in connection with the alleged indorsement by the defendant on the draft he was charged with uttering. In our opinion, equally the defendant would be permitted to show that he had written said letter to his sister before this accusation was brought against him, and that the same had been returned to him by mail, and identify the same before the jury for their comparison and inspection with the alleged indorsement on the check.

4. The charge of the court given in this case on the subject of other checks which were introduced in evidence is objected to by appellant. Without criticising said charge, we would suggest that, upon said testimony, the learned judge frame a charge in accordance with the decisions of this court on the subject of such extraneous testimony. See *Burks v. State*, 24 Tex. App. 326, 6 S. W. 300; *Id.*, 24 Tex. App. 332, 6 S. W. 313; *Hennessy v. State*, 23 Tex. App. 340, 5 S. W. 215; *Thornley v. State* (decided at Austin term, 1896) 35 S. W. 981.

For the admission of Durham's testimony, and for the rejection of the letter offered in evidence by the defendant, the judgment is reversed, and the cause remanded.

PHIPPS v. STATE.

(Court of Criminal Appeals of Texas. June 17, 1896.)

CRIMINAL LAW—HARMLESS ERROR—TRIAL—READING AUTHORITIES BEFORE JURY—STATUTES—REPEAL—REVISION OF STATUTES—COURTS—TERM TIME.

1. Where, to prevent a continuance on account of the absence of one of defendant's witnesses, the state admits the truth of the facts such witness would have testified to, the fact that it fails to admit a fact not controverted and amply proven otherwise, is not ground for reversal.

2. Where, in a homicide case, witnesses testify as to the threatening position and appearance of deceased when he entered defendant's store, and that they immediately ran, to escape expected danger, it is not reversible error to refuse to permit a witness to state that his apprehension of danger was due to the threatening attitude of deceased, etc.

3. To impeach a witness, testifying in regard to an alleged conversation with deceased at a place distant from the witness' home, evidence of statements by the witness that he was, two days before the alleged conversation, confined at home in bed, is admissible.

4. It appeared that deceased had been arrested at the instance of defendant for using abusive language: that on his release he went to defendant's store, and immediately began using abusive language towards defendant. *Held*, that it was not prejudicial to refuse to allow the officer by whom deceased had been arrested to state that his reason for following deceased to

the store was his apprehension of a difficulty between deceased and defendant.

5. It is within the discretion of the trial court to permit authorities to be read before the jury.

6. Rev. St. 1895, contains the act of 1887, regulating the time for holding court in the Forty-Third judicial district, instead of the act of 1892, which repealed the act of 1887. The final title of the Revised Statutes of 1895 (section 11) provides that the laws now in force, organizing the several judicial districts, and prescribing the time for holding the district courts therein, are continued in force. *Held*, that the adoption of the Code did not repeal the act of 1892.

Appeal from district court, Jack county; J. W. Patterson, Judge.

Tom Phipps was convicted of murder, and appeals. Affirmed.

Jones & Gilliland, Stark & Stark, and W. E. Taylor, for appellant. Mann Trice, for the State.

HENDERSON, J. Appellant was convicted of murder, and given five years in the penitentiary, and prosecutes this appeal.

1. Appellant made a motion for a continuance, based on the absence of one Ed Garrison, who was alleged to reside in Jack county, and who had been duly subpoenaed on the 9th of March, 1895. This case was tried on the 12th of March, 1896; and the application shows that the witness was present at the intervening terms, and that he only ascertained on Sunday, March 8, 1896, that said witness was at Bowle, Montague county, Tex., and that he immediately procured an attachment to said county for said witness. He further says that since making the affidavit for said attachment to said county he has learned from the brother of said Ed Garrison that said witness is not now in Bowle, Montague county, and that his present whereabouts are unknown. This is a second application for continuance, and contains the formal averment as such, and also what defendant expected to prove, as follows: "That defendant expects to prove by said witness that just a few minutes before Mark Luttrell was killed, Mark Luttrell came into the saloon on the south side of the square in Jacksboro, Texas, at which saloon said witness Ed Garrison was bartender at that time; that said Luttrell came into the saloon with L. L. Cope, constable; that after said L. L. Cope stepped out of the saloon said Mark Luttrell asked him, said witness, for his pistol; that witness told said Mark Luttrell that he did not have a pistol, whereupon said Luttrell went around the end of the counter, and searched for a pistol behind the counter, and when he failed to find a pistol the deceased, Luttrell, said: 'It is all right, by God; I will get me a bottle of beer, and I will go over and knock old man Phipps in the head with it, and I will beat the s—t out of Tom;' that all the time the deceased, Luttrell, was searching for the pistol he was cursing and abusing old man Phipps and Tom Phipps, and that he was very angry;

that after deceased, Luttrell, quit searching for a pistol, he immediately went behind the screen, which was about the middle of the saloon, and back of the bar; that within a few moments after he went behind the screen the deceased returned to the front of the saloon, and immediately went out of the saloon at the north door, and in a few moments after he left the saloon said witness heard the first shot fired, which, from the direction, was at or near the Phipps store; that in said saloon, behind the screen, there was a box of beer bottles, and that said box contained both pint and quart bottles, and filled with beer, and the next morning after said killing the coat of deceased, Luttrell, was on the box containing said beer; that on the night the said deceased was killed he was drinking, and considerably under the influence of whisky." In reply to said application the state filed an admission as to what said witness would testify, admitting the truth of said allegations, as follows: "And now comes the state of Texas, by her county attorney, and admits that if the witness Ed Garrison was present he would testify to, and that the same is true, as follows: 'I saw deceased on the evening of the killing on the south side of the public square in the town of Jacksboro, Texas. He was drinking. This was about dusk of said evening. I next saw him when he came into the saloon with L. L. Cope, a short time before he was killed. Just after Cope left the saloon deceased asked me for a pistol. I told him I had none. Deceased then went behind the counter and looked for one. Deceased stated to me at this time that he would stamp the shit out of old man Phipps, if he bothered him any more. Deceased then left the saloon, and within a few minutes I heard the shot fired that killed deceased. I was keeping the bar at the Leach saloon at this time. That while deceased was in the said saloon last mentioned he went to the back part of the saloon, and that there were bottles of beer back there of different sizes in a beer case, and deceased's coat was found on said beer case next morning after the killing.'" Appellant claims that this admission omits to state that the deceased, after failing to find the pistol behind the counter of the Garrison saloon, stated, "By God, I will get me a bottle of beer, and I will go over and knock old man Phipps in the head with it, and beat Tom Phipps." And he insists that this omission was a material portion of the absent witness' testimony, and that it was error on this account for the court to overrule his motion.

As to the diligence used, it will be noticed that the appellant does not state when said witness Garrison left Jack county. He states that he ascertained that he left on the 8th of March. Now, this witness may have been absent from said county for a considerable length of time, and by the use of diligence the defendant may have ascertained this fact.

The application does not show in this regard that the appellant used reasonable diligence to look after his witness, and know that he would be present. Concede, however, that the application is sufficient, still it does not occur to us that the absent testimony is material. The fact that deceased, shortly before he was killed by defendant, stated he was going to get a beer bottle, and was going to beat old man Phipps, or Tom Phipps with it, one or both, was not communicated to defendant; indeed, if this testimony had been communicated to him, it strikes us that it would have put the defendant in a worse attitude than the testimony in the case places him. If defendant had known that he was only going to be attacked with a beer bottle, his right of self-defense may have possibly been much more circumscribed than it was. Besides, several witnesses testify to the same effect as it is stated the absent witness would have testified upon this point; and, moreover, when deceased was found, after he was killed, he had a beer bottle, either in his pocket or it had fallen under his body. So that the absent testimony upon this point, besides being cumulative, was not a disputed question in the case. There was no controversy on the part of the state as to the fact that deceased made inquiry for a beer bottle on the night before the homicide and on the night thereof, and that he had a beer bottle at the time he was killed. While it is true that, in order to dispose of a motion for a continuance where diligence has been used to procure the absent testimony, the state must not only admit all of the material allegations alleged in the application that the absent witness would swear to, but must admit the truth of such statements, yet where it appears that the omitted statement is amply proved otherwise, and is not controverted by the state, and is not of a material character, its omission by the state, from the admitted statement as made, as to what the witness would swear, would not constitute reversible error.

2. There is nothing in appellant's bill of exceptions as to whether the ball struck the ninth rib and deflected forward and downward, and was not a fact which would tend to solve any particular question in the case.

3. On the trial of the case the state introduced one Thomas F. Horton as a witness, who testified that he was in the storehouse of the defendant, a few feet from the door, leaning against the counter on the north side of the store, when the deceased came to the door, and was ordered to get out of the door by the defendant, and that deceased stopped at the doorsill or just in the door. The witness remained in the store long enough to see that the deceased was not going to leave, and that he then walked out of the house, and ran north up the sidewalk. On cross-examination, counsel for appellant asked said witness "if it was because of the position and threatening attitude of the de-

ceased, and his appearance at the time, that caused the witness to think the fight was going to begin, and the witness to leave"; to which question said witness would have answered "that it was because of the position and attitude of the deceased and his appearance at the time, and from the action and conduct of the defendant, and, further, what I had just heard him say, and my knowledge of the parties and the feeling and trouble existing between them, that caused witness to think the fight was going to begin, and the witness to leave and run, to escape expected danger to himself." On objection this testimony was excluded by the court, and defendant reserved his bill of exceptions. The conduct of the parties and their attitude when deceased stepped in the door of the defendant's store was detailed by several witnesses. A number of persons were in the store at the time deceased stepped in the door, and the defendant got down off of the south counter of the store, and told deceased to get out; that he immediately got out of the store hurriedly, and after they got out some ran in one direction and some in another. All these witnesses were before the jury, and when the jury knew from the witnesses the position and attitude of the defendant, and also knew from the testimony of the witnesses that they immediately left the store and ran, what useful purpose it would serve for the witness or witnesses to tell the jury that they ran because of the position and threatening attitude of the deceased and defendant we fail to see. As facts, the position and attitude of both of said parties was before the jury. The exodus of the bystanders was also before them. There was no necessity for a shorthand rendering of the facts, or for the witnesses to state the impression of danger produced on their minds. This was already fully manifested by the testimony of the witnesses as to the immediate facts attending the meeting of the parties.

4. On the trial of the case appellant proved by A. T. Bigham, deputy sheriff of Jack county, that on the morning of the 26th of January, 1895, he arrested deceased on an affidavit made against him by M. V. Phipps on an accusation against defendant for using abusive language to said Phipps on the 25th of January. Defendant also proposed to prove by this witness all of the particulars of said arrest, including all that said deceased said at the time. The court excluded a great portion of this testimony, but in his explanation he shows that all of the testimony relating to the defendant, Tom Phipps, or his father, M. V. Phipps, and what was said by the deceased about them at the time of his arrest, was admitted in evidence. In our opinion, this was all that appellant was entitled to.

5. Nor did the court commit any error in permitting the witness Stevens, in impeachment of the defendant's witness Dearmin,

who testified as to a conversation between himself and deceased, had on the night of the killing, near Garrison's saloon, to state that said witness Dearmin had told him that two days prior to the difficulty he had been confined at home in bed.

6. There is nothing in the contention of the appellant with reference to the remarks of the district attorney.

7. Appellant showed by the witness D. F. Carnes, sheriff of Jack county, that deceased had been arrested on Saturday morning before the homicide, and brought to his office, and there gave bond for his appearance to answer an accusation for using abusive language in the presence of M. V. Phipps on the Friday morning before. As soon as deceased gave bond he got on his horse, and went immediately to the storehouse of the defendant and his father, M. V. Phipps; and that the witness, upon discovering where deceased was going, went at once to said store, and found the deceased there in a "racket" with M. V. Phipps. Defendant's counsel then asked witness Carnes why he went over to Phipps' store, where deceased had gone; and proposed to prove by him that he anticipated that deceased would raise a difficulty, and went over there to prevent it. This was excluded by the court, and the action of the court is assigned as error. The fact that deceased went over to the store of M. V. Phipps after his release on bond was before the jury, and also the fact that the sheriff followed him over there; and, furthermore, it was shown that when the deceased got to the store of M. V. Phipps he immediately began to curse and abuse him, and was about to make an assault on him, when the sheriff interfered, and took him away. Clearly, the jury could not have misunderstood the reason of the sheriff going over to the store of M. V. Phipps; nor, in the face of the facts transpiring there, could they have desired any further light upon the subject. All of the facts were before the jury, and this was sufficient.

8. As to the reading of authorities before the jury, or the refusal of the court to permit such reading, this is a matter within the sound discretion of the trial court; and, in the absence of a showing of the abuse of that discretion, it will not be the subject of revision by this court.

9. The salient issues in this case were as to whether the deceased, on the night of the homicide, went to the store of the appellant for the purpose of raising a difficulty with defendant or his father, and at the time he was shot had done some act or made some demonstration from which it reasonably appeared to the defendant that his life was in danger, or that he was in danger of serious bodily injury; or whether, at the time deceased was shot by the defendant, he had gone to said store, not for the purpose of engaging in a difficulty with the defendant or his father, or, if he had gone for that pur-

pose, at the time he was shot he was not then doing some act or making some demonstration from which it reasonably appeared to defendant that he was then in danger of losing his life or of suffering serious bodily injury. These issues were presented to the jury in an admirable charge by the court, which directly applied the law to the facts of the case. The jury could not have misunderstood the charge, nor were the special charges asked by appellant necessary to a clear understanding of the case. The jury evidently believed that the deceased either did not go to the store on that occasion with the purpose of provoking a difficulty with the defendant or his father, or, if he did go there for that purpose, that at the time he was killed he had done no act nor made any demonstration from which it reasonably appeared to the defendant that he was then making or about to make an assault upon him or his father; and that when he fired the shot it was not in his necessary self-defense; and so they convicted him. The facts were all before the jury, and the law applicable and pertinent to the case was given them in the charge of the court. They have returned a verdict of guilty, and we cannot say that the evidence is insufficient to sustain that verdict.

10. It appears that no action was taken in the court below during the trial of the case with reference to the defendant being tried at a term not authorized by law. The question was first presented in appellant's assignment of errors, which is in the following language: "The verdict, judgment, and sentence herein are illegal and void, because the said verdict, judgment, and sentence were returned, made, and entered at a time when no legal term of the district court was or could be held in Jack county." His contention is that the Revised Civil Statute of the state had gone into effect when this case was tried, and that the Forty-Third judicial district was constituted of the counties of Parker, Wise, and Jack, and that the district court was authorized to be holden in the county of Jack on the eighth Monday after the second Monday in May and November of each year, and may continue in session four weeks (see Rev. St. 1895, p. 31); and that the district court which tried this case convened on the second Monday in March, 1896, and that the same was not the eighth Monday after the second Monday in May or November. If this was the law regulating the district court in Jack county when this case was tried, then it is obvious that the contention of the appellant is correct. This involves the question whether or not the law of 1892, which was in force before the adoption of the Revised Code, was abrogated and annulled by the passage of the Revised Civil Code. It will be observed that in the Revised Civil Code the act of 1887, with regard to the Forty-Third judicial district, and regulating the time of hold-

ing the courts in the counties constituting the same, was brought forward by the codifiers; and the act of 1892, regulating the time of holding the courts in said Forty-Third judicial district, and which changed the term in Jack county from the eighth Monday after the second Mondays in May and November to the first Mondays in March and September for said county, was not brought forward. See Laws Called Sess. 22d Leg. p. 59. Evidently the law of 1892, which made this change, escaped the attention of those who revised our Civil Code. The authority for legislating a code is found in section 43, art. 3, of our state constitution, which article reads as follows: "The first session of the legislature under this constitution, shall provide for revising, digesting and publishing the laws, civil and criminal, and a like revision, digesting and publication may be made every ten years thereafter. Provided that in the adoption of and giving effect to any such digest or revision, the legislature shall not be limited by sections 35 and 36 of this article." It is apprehended that this proviso was to relieve the legislature of following formalities prescribed in articles 35 and 36, but was not to enlarge their power to present new laws for passage by the legislature; and this seems to have been the idea which prevailed with the legislature in authorizing the revision of our present code. Sections 2, 3, c. 49, p. 53, Acts 22d Leg., are as follows:

"Sec. 2. Said commissioners shall adopt such of the revised statutes civil and criminal, as have not been repealed or amended, together with their present arrangement of titles, chapters, articles, marginal references, and chapter head lines, and shall not change the words or punctuation thereof, except in cases of evident clerical or typographical errors provided the present numbering of the articles is not required to be preserved.

"Sec. 3. All statutes passed since the adoption of the Revised Statutes, including those passed at the regular and special sessions of the sixteenth legislature and those that may have been passed at the time said commissioners shall submit their report herein provided for, which statutes by their terms are amendatory of the Revised Statutes or are germane thereto, shall be incorporated in their proper places in such statutes; and all other of said statutes passed as aforesaid, which are general and permanent in their nature shall be collated and arranged into their appropriate titles, chapters and articles, and with marginal references and chapter head lines similar to those used in the present Revised Statutes; provided, that in revising the statutes referred to in this section, said commissioners shall, without making radical changes therein, so revise them as to render them concise, plain and intelligible; provided further that the Civil Statutes, the Penal Code and the Code of Crim-

inal Procedure, shall each be separately indexed and the index placed at the end of each of such subdivisions."

It will be noted that the authority here conferred upon the commissioners was merely to present in a codified form all statutes contained in the former Revised Statutes and those passed since the adoption of said statutes. In 1895, when the commissioners had finished their work, and the legislature passed the act which adopted the Revised Civil Statutes, the Penal Code, and the Code of Criminal Procedure, said legislature provided as follows:

"Sec. 3. Where any article in said Revised Statutes or Codes has been expressly repealed by the twenty-third and twenty-fourth legislatures said articles shall be omitted in said volume, and in lieu thereof there shall be inserted a statement to the effect that said article has been repealed; also the date of the act by which the same was repealed, and the page of the Session Acts containing said repealing statute.

"Sec. 4. Where any article in said Revised Statutes or Codes shall have been amended and re-enacted by either of said legislatures, said article shall be omitted, and the article as amended and re-enacted, shall be inserted in lieu thereof, with marginal notes or references showing the date of the statute by which said article was amended, and the page of the Session Acts in which said statute appears.

"Sec. 5. When any article, chapter or title of said Revised Statutes or Codes has been modified by an act of either of said legislatures, but the same is not amended and re-enacted, then said article, chapter or title shall be retained in said volume, and the act modifying the same shall be inserted immediately after such article, chapter or title, together with like marginal notes or references, as hereinbefore provided.

"Sec. 6. General acts of said legislatures on the same subject with any of the articles, chapters or titles of said Revised Statutes and Codes shall be inserted immediately after such articles, chapters or titles, with marginal notes or references as provided above, and general laws of said legislatures not on the same subject with any of said articles shall be inserted with reference to said articles, chapters and titles thereof as may be deemed most appropriate by the codifier to be appointed as hereinafter provided; but in no event shall the number of any article, chapter or title be changed by said codifier, but said number shall remain as in the act by which said statutes and codes were adopted and established."

See Acts 24th Leg. p. 110, §§ 3-6.

From the latter act it will be seen that, if any provision of the Revised Statutes or Codes had been expressly repealed by the twenty-third and twenty-fourth legislatures, the commissioners and legislature were authorized to omit the same from the Code,

and the omissions, it appears, are confined to the acts of the twenty-third and twenty-fourth legislatures, so that they were not authorized to omit any act of any preceding legislature enacted since the last code had gone into effect. As to all other laws, and even as to unrepealed acts of the twenty-third and twenty-fourth legislatures, they were simply authorized to bring them forward, and arrange them in their proper places. As to the acts of the twenty-second legislature, the duty of the commissioners was clearly to bring forward in the new code all of said acts. The act of 1892, with reference to the terms of court in the Twenty-Third judicial district, effectually repealed the act of 1887, and if this had been brought forward in its proper place, following the act of 1887, no question would arise.

The commissioners or the legislature seem to have perceived the difficulty attending the revision and codification of our laws, and apprehended, especially with reference to the judicial districts, the terms of which are being continually changed by laws, that some of the laws regulating the holding of courts in certain judicial districts might not be brought forward, and so, as a general saving clause, among the general provisions, we find, in the final title of the Revised Statutes of 1895 (section 11), as follows: "That the laws now in force organizing the several judicial districts and prescribing the times for holding the district courts therein, are continued in force." This evidently was intended to apply to just such errors and omissions as the present one, and, in the view we take of this question, it is not necessary for us to decide what the effect would have been—the law of 1892 not having been brought forward in the Revised Civil Statutes—if this saving statute had been omitted. We think that is controlling, and refers to and keeps alive the act of 1892, which repealed the act of 1887. The act of 1887 did not have the effect, under section 11, of said final title, to repeal and annul the law of 1892. Accordingly we hold that the district court of Jack county was legally convened on the first Monday in March, 1896, and that it was authorized to try the case against the defendant. The judgment and sentence of the lower court is affirmed.

HURT, P. J., absent.

KINGSLAND & DOUGLASS MANUF'G CO.
v. MITCHELL et al.

(Court of Civil Appeals of Texas. June 17, 1896.)

PARTNERSHIP—ACTION AGAINST PARTNERS—PRACTICE — MAKING INTERLOCUTORY JUDGMENT FINAL.

1. In the absence of statutory provision, a partnership cannot be sued as an entity, and an action against the partners may be dismissed as to one defendant without affecting it as against others.

'2. Under Sayles' Civ. St. art. 1283, providing that an interlocutory judgment may be entered against one of several defendants, who is in default, but only one final judgment shall be entered in the action, an interlocutory judgment against one of two partners, which the court has refused to set aside, should be made final on a dismissal as to the other defendant, without reference to pleadings filed after the interlocutory judgment was rendered.

Error from district court, Dallas county; Edward Gray, Judge.

Action by the Kingsland & Douglass Manufacturing Company against C. S. Mitchell and J. B. Scruggs. From a dismissal as to defendant Scruggs, plaintiff brings error. Reversed.

Dickson & Moroney, for plaintiff in error. Crawford & Crawford, for defendants in error.

FLY, J. Plaintiff in error sued C. S. Mitchell and J. B. Scruggs, composing the firm of Mitchell & Scruggs, to recover against them as guarantors the amount of six notes, aggregating the sum of \$1,807.60, the notes having been executed by Hardee Bros., who were nonresidents. The suit was filed on September 18, 1888. On October 10, 1888, C. S. Mitchell filed an answer for himself alone. On January 10, 1889, citation was personally served on J. B. Scruggs. On October 23, 1889, an interlocutory judgment by default was taken against Scruggs, which he moved to set aside on November 2, 1889. The motion was overruled. On March 10, 1890, a pleading styled "Defendants' 2nd amended answer" was filed by the partnership of Mitchell & Scruggs in lieu of their first amended answer, filed on October 29, 1889. On October 3, 1894, a motion was filed by plaintiff in error, which stated that on November 7, 1893, they had dismissed their suit as to C. S. Mitchell, and by oversight of the clerk the order of dismissal was not entered, and it was prayed that the order be entered nunc pro tunc. The motion was granted, and the order entered. On December 23, 1893, a motion was filed by the firm of Mitchell & Scruggs to set aside the order of dismissal as to C. S. Mitchell. On February 6, 1894, Scruggs filed a plea in abatement setting up the dismissal of the suit as to Mitchell, and asking that the suit be abated as to him. The order of dismissal as to Mitchell was set aside by the court, and plaintiff in error then dismissed as to Mitchell and as to Mitchell & Scruggs. J. B. Scruggs then moved the court to dismiss as to him, which was refused. He then filed an amended motion to dismiss as to him. Plaintiff in error filed a motion to have the interlocutory judgment against Scruggs made final. But this was refused by the court, and the cause was dismissed as to Scruggs. From that judgment a writ of error has been perfected by plaintiff in error.

It is provided in article 1283, Sayles' Civ. St., that: "Where there are several defendants, some of whom have answered and others have made default, an interlocutory judgment by default may be entered against those

who have not answered, and the cause may proceed against the others; but only one final judgment shall be given in the suit." The demand in this case was liquidated. In the absence of a statutory provision to that effect, a co-partnership cannot sue or be sued as an entity, as in the case of an individual or corporation, but the individuals composing the partnership must sue or be sued. *Frank v. Tatum* (Tex. Sup.) 25 S. W. 409. Appellant had authority, therefore, to dismiss as to one member of the partnership and to take a judgment against the other, even without dismissing as to the partnership, which was in court only by virtue of the members of the partnership being there. The interlocutory judgment by default should have been made final after dismissal of the other partner, the motion to set it aside having been overruled by the court. Any answer filed by J. B. Scruggs after the refusal of the court to set aside the judgment by default should not have been considered, and the judgment should have been made final without reference to such pleas. *Bateman v. Pool*, 84 Tex. 405, 19 S. W. 552. The judgment of dismissal as to J. B. Scruggs will be reversed, and judgment here rendered in favor of plaintiff in error against Scruggs for the amount of the debt.

CHISUM v. CHESNUTT et al.

(Court of Civil Appeals of Texas. April 11, 1896.)

ACTION FOR BREACH OF WARRANTY—FINDINGS—DESCRIPTION IN DEED—CONFLICTING EVIDENCE—SUBMISSION OF ISSUE TO JURY.

1. In an action for breach of warranty in a deed where the jury were instructed that certain defendants were liable if the land in suit was included in the deed to plaintiff, a finding that such defendants were not liable necessarily included a finding that the land was not so included.

2. In an action for breach of warranty in a deed where the description called for the south line of a designated survey, and also for certain corner stones, and there was evidence that such stones were some distance south of the south line of such survey, there was a conflict of evidence warranting the submission of the issue whether the deed included the land involved.

On Rehearing.

The repetition in two special instructions of a charge which had already been given in the general charge renders the instructions argumentative, and is ground for reversal.

Appeal from district court, Clay county; George E. Miller, Judge.

Action by W. H. Chisum against J. C. Chesnutt, administrator, and others, for breach of warranty. A judgment in favor of defendants was affirmed on plaintiff's appeal. Reversed on rehearing.

Templeton & Patton, for appellant. L. C. Barrett and Stine, Chesnutt & Hurt, for appellees.

TARLTON, C. J. On October 18, 1888, John Preston executed to W. H. Chisum a

general warranty deed conveying land thus described: "160 acres known as the 'John Preston Pre-emption Survey,' beginning at the southeast corner of a survey of 640 acres for T. & N. O. R. R. Co., and northeast corner of survey No. 6 for same company; thence north 800 varas, stone marked 'X'; thence east 273 varas, stone marked 'X,' in west boundary line of a survey in the name of S. C. Belden; thence south with the west boundary line of same at 1,402 varas, stone marked 'X,' and inner corner of said Belden survey; thence west with north boundary line of same 500 varas, and northwest corner of said Belden survey, stone marked 'X'; thence south with west boundary line of same 1,743 varas, stone marked 'X'; thence west 221 varas, stone marked 'X,' in south boundary line of another T. & N. O. R. R. Co. survey, and south boundary line of said No. 6; thence north 2,046 varas, a stone marked 'X,' and inner corner of said No. 6; thence east 448 varas; thence north 800 varas, to the place of beginning." This pre-emption survey was located on what was supposed to be a vacancy between the S. C. Belden survey referred to on the east and the T. & N. O. R. R. Co. surveys Nos. 6 and 7 on the west, the survey No. 6 lying north of the survey No. 7. It is contended by Chisum that the title to the land described in the deed by Preston to him has fallen to the extent of 23.2 acres, consisting of a strip the east and west lines of which are 600 varas in length and the north and south lines of which are 225 varas in width. This strip lies south of the south line of the T. & N. O. R. R. Co. survey No. 6, and is alleged to be in conflict with the T. & N. O. R. R. Co. survey No. 7, an older survey. Of the latter survey one W. B. Worsham is the admitted owner. It is also contended by Chisum that if the strip in question is not out of the survey No. 7, it is a part of the land covered by the deed from Preston to him, and that Worsham is in the unlawful possession thereof. Hence this suit is brought by the appellant, Chisum, against J. C. Chesnutt, as the administrator of the estate of John Preston, deceased, and against Margaret Smith, Joe Preston, Sam Preston, and Sarah Preston, heirs of John Preston, deceased. Its object is to recover of the defendants named, as for breach of warranty, the sum of \$220.56, besides interest, the value of the strip above referred to, alleged in the petition to be 27½ acres, measured by the price of \$8.25 per acre, charged to have been paid by Chisum to John Preston, the ancestor of the defendants named. By a second count in his petition, W. B. Worsham was sued as in trespass to try title for the recovery of the strip referred to. We find that the land in controversy is not included within the description contained in the deed executed by John Preston to Chisum. This finding rests upon the verdict of the jury. We also find, under the evidence, that the plaintiff was not entitled to recover from Worsham, be-

cause the land in controversy was, under the undisputed testimony, a part of the survey No. 7, and not of the John Preston pre-emption.

We dispose of the questions of law presented as follows:

1. As we have seen, the verdict of the jury indicates a finding of fact that no part of the land involved was described in the deed from Preston to the appellant. This finding is manifest from the fact that under the second special instruction granted at the request of the defendants' counsel the appellees other than Worsham were necessarily liable in some amount, provided the land in controversy was included within the description of the deed to Chisum. The finding of the absence of liability includes, therefore, the finding that the land involved was not conveyed by the deed from Preston to Chisum. Hence it follows that any view entertained by the court as to whether the liability should be measured by the price per acre, or by the price as upon a sale in gross, a misconception by the court in regard to which is asserted in the first, second, third, sixth, and eighth assignments of error, was rendered harmless. In the absence of all liability, a rule for the measurement of any special phase of liability became inapplicable and unnecessary.

2. The court properly submitted as an issue to be determined by the jury the question whether the deed from Preston to Chisum included the strip in controversy. The testimony as to what was conveyed by the deed was certainly not without conflict. The description of the land as given in the deed calls for the south line of a designated survey (T. & N. O. R. R. Co. No. 6). It also calls for certain stones marked "X" at the southeast and southwest corners, respectively, of the tract conveyed. The testimony of certain witnesses tended to show that these stones were 600 varas south of the south line of survey No. 6. A contradiction in the calls was thus clearly indicated, which required the submission of the issue as one of fact to the jury.

3. The court correctly instructed the jury to find in favor of the defendant Worsham on the issue between him and the plaintiff. The correctness of the court's action in this respect depends upon whether the undisputed testimony showed the land in controversy to be upon the T. & N. O. R. R. survey No. 7, of which Worsham was the admitted owner. That the land involved is upon the latter survey was, in effect, held by this court upon the former appeal of this case. *Worsham v. Chisum* (Tex. Civ. App.) 28 S. W. 905. As said on page 15 of appellant's brief: "On the issue as to whether or not the land in controversy was included within the boundaries of survey No. 7, owned by appellee Worsham, by consent of all parties appellees introduced in evidence the former statement of facts in this case in so far as the same related to the

question of boundary. * * * The field notes of survey No. 7 call for the west lines of the J. B. Redding and the S. C. Belden surveys as its east line, and on the former appeal in this case this court held that upon this testimony survey No. 7 would go to the west line of the Belden and Redding surveys. This makes survey No. 7 embrace within its boundaries the 23.2 acres of land in controversy."

4. In view of the record in this case, we decline to reverse the judgment because the court granted the special instructions 1 and 3. It is not pretended that the propositions in the instructions are incorrect, but it is urged that they were so repeated as to constitute a charge upon the weight of the evidence. One of the propositions included in the third instruction had not been before presented to the jury, and the remaining propositions were but a more explicit statement of the law as announced in the general charge. The practice is not approved of repeating upon request instructions already given in the general charge, and such a practice will frequently lead to a reversal; but we do not think that in this case we are called upon to visit such a consequence upon the giving of the special instructions, under the circumstances adverted to. The judgment is affirmed.

On Rehearing.
(July 3, 1896.)

A reconsideration of this record leads us to the conclusion that we erred in holding in the fourth paragraph of our former opinion that the action of the court in granting the special instructions 1 and 3 was not erroneous to the prejudice of the appellant. An analysis of the testimony bearing upon the issue as to whether the land included in the deed from Preston to Chisum covers the strip in controversy causes us now to think that the statement of the same proposition in these two instructions, following its announcement in the general charge, probably seriously influenced the jury in reaching their verdict. Hence the argumentative character of the instructions will require a reversal of the judgment. *Lee v. Yandell*, 69 Tex. 34, 6 S. W. 665; *Railway Co. v. Harriett*, 80 Tex. 73, 15 S. W. 556. Consequently we withdraw the conclusion of fact heretofore announced that the land in controversy is not included within the description contained in the deed referred to, as that finding was founded upon the verdict of the jury, which we must now disregard. Whether the deed be regarded as showing a sale by the acre or a sale in gross, the plaintiff's damages in case of recovery should be as indicated in *Doyle v. Hord*, 67 Tex. 623, 4 S. W. 241. The appellee Worsham properly prevailed in the controversy between himself and the appellant. We find no merit in appellees' cross assignments. The motion is granted, the judgment is reversed, and the cause remanded.

CITY OF SAN ANTONIO v. MACKEY.
(Court of Civil Appeals of Texas. June 17, 1896.)

MUNICIPAL CORPORATIONS—REMOVAL OF GARBAGE
—DAMAGE TO PRIVATE PROPERTY—
MEASURE—LIABILITY.

1. A city is liable to the owner of property where it caused refuse matter to be deposited on his ground, thereby injuring him, though the act may not amount to a nuisance.

2. Under such circumstances the city cannot deny its liability for the reason that it had not, by a formal act of its council, designated the property as a place of deposit.

3. Where the city has acted with others in creating or carrying on a nuisance or trespass, each tortfeasor is liable for the entire damage.

4. In an action for damages resulting from a city having used plaintiff's lands and those adjacent as a dumping ground, where the jury are confined to the determination of the damage resulting from the nuisance arising from the noisome odors, it should be assumed that such damage will not be permanent, since it may be abated by the removal of the deposits, or by the action of the elements; and the measure of damages is the loss of rental value up to the time of trial, and such other accrued special damage as may be shown.

Appeal from district court, Bexar county; S. G. Newton, Judge.

Action by N. Mackey against the city of San Antonio for damages to property. From a judgment in favor of plaintiff, defendant appeals. Reversed.

R. B. Minor, for appellant. Upson & Bergstrom and W. W. King, for appellee.

JAMES, C. J. Appellee, owner of several lots in the city limits, brought suit against the city for damages to his property, arising from the use for a number of years of certain of his lots and other lots as a dumping place for refuse matter. The petition alleged that on one of plaintiff's lots (No. 178), containing 24 acres, he had his residence, and that defendant had deposited on plaintiff's other lots, and on adjacent lots belonging to others, carcasses of dead animals, decayed animal and vegetable matter, night soil, garbage, filth, and refuse matter of every description, and suffered the same to remain, wherefrom noxious and unhealthy odors and stench arose, rendering said lot and other property in the neighborhood uninhabitable, which compelled plaintiff to move from the lot, and rendered the same unfit to reside upon. In respect to this lot plaintiff asked damages based on the rental value of such lot. In regard to one of his other lots (lot 185, of 24 acres) he alleged that defendant had deposited, and still continues to deposit, tin cans, scrap iron, broken bottles, glass, tin and leather clippings, and trash of every description, whereby the entire surface of the lot is covered several feet in depth, and rendered worthless, and for this he claimed damage in the value of the lot. That plaintiff's lots other than No. 178, the residence lot, had from said causes been greatly de-

preciated in value, and in respect to these he asked damages for diminution in value. The district court applied the rule which has been adopted by the supreme court in reference to special injury resulting to the citizen from the creation or maintenance by the city of a dumping place for refuse matter from which noxious odors emanate. A city, in the pursuit of its power to provide for the public health, is liable in the event of negligence of its officers and servants in exercising such power. The cases show that in arriving at this result due consideration was given to the distinction in this connection between acts of the city done in its strictly governmental capacity, and acts not of that class. *City of Ft. Worth v. Crawford*, 64 Tex. 202; *Id.*, 74 Tex. 404, 12 S. W. 52. This makes it unnecessary for us to discuss the question. We believe that the city's liability in such cases extends to any acts of wrong or trespass committed by authority or direction of the city, as well as to mere negligent acts of its servants. In other words, applying this to the facts of this case, we are of opinion that a city is liable to the owner of property where it causes refuse matter to be deposited on his ground, thereby injuring him, although the act may not amount to a nuisance. There was testimony in this case which went to show that the city had for years used this locality as a dumping place, and certainly there was sufficient evidence to warrant a finding that this was done by its authority and direction, even though there may have been no ordinance or resolution on the subject. It can hardly be maintained that in causing the refuse matter of the city to be removed during a number of years the city did not connect itself with, and become a party to, and authorize the act of, depositing the same in a particular place; and under such circumstances it should not be allowed to deny its liability for the reason that it had not designated this as a place of deposit by a formal act of its council.

There was testimony to show that individuals having no connection with the city government also used this as a dumping ground from time to time, and in this connection it seems to be contended that the city, if liable at all, should not be held except so far as it contributed to the injury. In our opinion, this fact would not diminish the liability of the city. If it acted with others in creating or carrying on the nuisance or trespass, we do not see how it would be practicable to enforce a rule separating the liability of the city from that of the others, but on principle each tortfeasor would be held for the entire damage.

The charge of the court indicates that certain items for damages were abandoned, or not insisted on by the plaintiff. These were damages for loss in respect to the sale of lots, and damages for the mere deposit of substances on plaintiff's lots. The charge

submitted the case on the issue of whether or not the defendant, its agents or servants, made the deposit, and did so negligently, causing the bad odors alleged. It will be seen that the damage which the charge confined the jury to was that which resulted from the nuisance arising from the noisome odors. Plaintiff asked no further submission of issues, and it must be assumed that he was satisfied with that submission of his case, and we take it that we need not discuss the measure of damages from any other standpoint. In reference to this we think the measure of damages adopted by the charge was not the correct one. The jury were instructed that they should find the rental value of the residence lot, and the diminution of the value of plaintiff's other lots, caused by the foul odors emanating from the deposits. The measure last stated is the one that applies in cases where the injury to the property is of a permanent character. It is impossible to give a reason why, under like conditions, one rule should be adopted in reference to the residence lot and a different one to the other lots. The question to determine is whether or not this belongs to the class of cases in which the injury can be taken as permanent in its nature, and we are of the opinion that it cannot. As stated in *Rosenthal v. Railway Co.*, 79 Tex. 325, 15 S. W. 268: "The controlling rule in actions for injuries resulting from nuisances would seem to be to adopt in each case that measure of damages which is calculated to ascertain in the most certain and satisfactory manner the compensation to which the party is entitled when the injury is liable to occur only at long intervals, or when the nuisance is likely to be removed by any agency, the damages which have accrued only up to the time of the action will be allowed; but, if the injury is permanent, and the injury constantly and regularly recurs, then the whole damage may be recovered at once. In such case the resulting depreciation in the value of the property is the safest measure of compensation." We regard this as a clear statement of the law on the subject, sustained by cases too numerous to require citation. In *Baugh v. Railroad Co.*, 80 Tex. 58, 15 S. W. 587, it is stated: "When a nuisance is created by the construction of works in their nature permanent, and which, as sometimes occurs in case of works for a public use, are not subject to be abated, the rule is that all damages resulting therefrom to property may be recovered in one action, and the proper measure of damages is the depreciation in the value of the property. *Rosenthal v. Railway Co.*, 79 Tex. 325, 15 S. W. 268; *Railway Co. v. Hall*, 78 Tex. 169, 14 S. W. 259. That rule also applies when the injury resulting from the nuisance is of a permanent character. But when the nuisances complained of are of a temporary character, such as may be voluntarily removed or avoided by the wrong-

doer, or such as the injured party may cause to be abated, only such damages as have accrued up to the institution of the suit or (under our system) to the trial of the action can be recovered. For such damages depreciation in the value of the property affected by the injury is not a measure, and in such a suit the amount of such depreciation cannot be recovered." This language is peculiarly applicable to the present case. The deposits, being within the corporate limits, may be removed by the city, and the cause of the nuisance abated, and plaintiff, at any time since the origin of the nuisance, might have had it abated, had he seen fit to do so. It is entirely reasonable to say that odors emanating from such deposits as were made in this instance are not permanent, and that they must abate by action of the elements. The contrary of this is not a reasonable or admissible proposition. The court, by adopting as the measure of damages the decreased value of the lots, virtually assumed that the presence of the odors constituted a permanent damage to the property. If the matter was fairly a question of fact, it should have been left to the jury, but, in our view of the nature of the case as shown by the testimony, the court should have assumed that the injury arising from the odors was not of a permanent nature, and should have confined the damages to the loss of rental value up to the time of trial, and other special damage shown, if any had accrued, leaving the plaintiff to collect his future damage, if any, by subsequent actions. All we mean to say in this connection is that, as the case was presented to the jury on the issue of damage proceeding from the noisome odors, the damage should not have been estimated on the theory of a permanent injury to the freehold. Plaintiff would not be limited in his recovery to the loss of rental value, if he could show wherein he had sustained other special injury, the natural and proximate result of the act. Had the deposits been made upon plaintiff's land only, it is clear that the measure of damages would have been the cost of removing the same, together with any injury accruing to the rental value of plaintiff's property occasioned thereby, and all his damages would have been capable of being redressed in one action. From the fact that the deposits which emitted the offensive odors extended to the property of others, over which plaintiff had no control and had no right to enter for the purpose of removing same, such measure would not afford him adequate reparation. But he certainly would be allowed to recover in this suit, in addition to the impaired rental value of his property, the necessary cost of removing the deposits from his own land.

The defendant objected to the testimony that was offered to show the decreased value of the land, and assigns its admission as error, and for the admission of such evidence and the erroneous charge touching the meas-

ure of damages we think the judgment must be reversed.

In reference to the seventeenth assignment of error, although a contrary rule from Wood on Nuisances (section 744) is quoted with approval in the case of *City of Ft. Worth v. Crawford*, 74 Tex. 408, 12 S. W. 52, yet it seems to us that a city is not liable in damages for the mere failure to exercise a corporate power, or to enforce its ordinances. *Dill Mun. Corp.* §§ 950, 951. The rule of liability governing this case is that the city is liable when it undertakes a public work, such as removing garbage, and does it in an improper manner, causing thereby some injury to the individual.

The court did not err in admitting the testimony complained of by the eleventh and thirteenth assignments. The testimony tended to show in connection with the other evidence that the use of this locality for a dump yard was the act of the city.

There was no error in admitting the testimony of plaintiff, Simmang, and Wallace referred to in the twelfth assignment. This testimony was, in substance, that Simmang and Wallace were engaged as individuals in the business of carrying night soil from the city, and used this ground as a place of deposit. It appears from the testimony that there was a city officer known as "Superintendent of Scavengers," who directed all deposits to be made at this place. This tends to connect the city with creating and maintaining the nuisance, and with the act of the private scavengers, and the evidence was proper. So, also, was the evidence mentioned in the fifteenth, sixteenth, eighteenth, and nineteenth assignments. It appears unnecessary to discuss the assignments further. Reversed and remanded.

SMITH v. PATRICK.

(Court of Civil Appeals of Texas. May 27, 1896.)

SETTING ASIDE JUDGMENT OF DISMISSAL—SHOWING OF DILIGENCE—PLEADING.

1. A plaintiff is entitled to have a judgment dismissing an action for want of prosecution set aside at a succeeding term where he shows a meritorious claim, and that he was diligent, but was prevented from prosecuting the action by the fact that he resided in another county, and was informed by both the clerk of the court and by the attorneys for the defendant that no more civil cases would be tried at the term at which the dismissal was taken, and did not know of the calling of the case until after the adjournment of the term.

2. A pleading is not demurrable because it fails to state whether the contract sued on is oral or in writing, where such fact is not essential to the cause of action.

On Rehearing.

Where one proposing to become a purchaser of land at a trustee's sale agreed to make deeds to carry out sales arranged by another, if on examination he found such sales would make the land purchased by him yield his debt and expenses, but it did not appear that

if he had made such deed the land could have been sold for the necessary amount, he was not liable to such other for commissions for such sales.

Appeal from district court, Bexar county; Robert B. Green, Judge.

Action by W. A. Patrick against Francis Smith. Judgment for plaintiff, and defendant appeals. Reversed.

H. P. Drought, for appellant. F. M. Boyles and Martin & Eddins, for appellee.

JAMES, C. J. The cause was dismissed for want of prosecution. At the next term a bill was filed asking that the case be reinstated on the docket, for reasons indicated in the first conclusion of fact and in the opinion. The prayer was granted, and the cause tried, resulting in a judgment for the plaintiff. Defendant appeals.

Conclusions of Fact.

(1) Testimony of the truth of plaintiff's averments, which were made with a view to having the judgment of dismissal set aside, and the cause restored to the docket for trial, was waived by defendant; hence it must be taken that the averments were sustained; and from these we conclude that the dismissal was not due to any fault or neglect on the part of plaintiff or his counsel, but was due to his being misled into believing and relying on the fact that the cause would not be called for trial during the term at which the dismissal was obtained, acts of defendant's counsel contributing and leading to that belief and reliance. (2) We conclude that there is testimony to sustain a finding that defendant engaged plaintiff to make the sales, and to pay him commissions, as claimed.

Conclusions of Law.

In proceedings to have a judgment opened, and another trial allowed at a subsequent term, the rule is that such relief will not be granted unless the party asking it can show that he was prevented from making a valid defense to the action in which judgment has been rendered against him (or prevented from prosecuting a meritorious action if it be dismissed for want of prosecution) by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his part. *Merrill v. Roberts*, 78 Tex. 30, 14 S. W. 254, and cases cited; *Johnson v. Templeton*, 60 Tex. 238. Applying this rule to the matters alleged in the petition in this case, of which proof was offered by plaintiff, and dispensed with by defendant, it must be taken that plaintiff was asserting an apparently meritorious claim, which was set forth by a copy of the original petition. The facts alleged are: That the suit was filed to the term at the latter part of which it was dismissed; and that plaintiff had prepared the case for trial at that term, which convened December 19, 1892. That he came from Marlin, in Falls county, to San Antonio, and was there on the

first day of the term, looking after the trial of his case. That on the 21st he had the cause placed on the jury docket. That, while at San Antonio, he was present at a meeting of the bar practicing in that court on the morning the court was to adjourn for the holidays, on which occasion the judge announced a recess until after the holidays, and stated that he did not think any civil cases could or would be tried during said term, but that the court might devote one week towards the close of the term to civil causes, in reliance on which action and announcement plaintiff returned to his home. That while at San Antonio, in attendance on the court, he was informed both by the clerk of the court and by defendant's attorney that the clerk of the court always set civil causes for trial in that court; that, on his return home, he wrote to the clerk that he understood the clerk set the cases, and to kindly inform him when the civil jury docket of the court would be taken up, and that he wanted to know when the case of Patrick v. Francis Smith & Co. would come up; and that he also about the same time wrote to B. L. Aycock, a friend and attorney at San Antonio, to let him know when the case would likely come up. The reply of the clerk, dated January 1, 1893, was that the criminal docket would be taken up the following week, and would continue for the balance of the term ending February 25, 1893; that the next term would begin March 6th, when civil cases would be set and tried for the first, second, and third week of the term. Aycock's reply was that he had seen defendant's attorney, who told him the clerk would set the case, as was the rule; that no civil causes would be set that term, as the court would be criminal after that week. That he was ready and anxious to try at that term, but, relying on what had happened and what had been told him, he and his counsel believed that there was no hope that the case would be taken up at that term. That on February 5th, he and his counsel being absent, under these circumstances the case was called for trial, and dismissed, for want of prosecution. That he did not learn of this until after the term had expired. From these facts it seems to us that the case comes within the rule declared in the cases cited. The plaintiff negatives any negligence or fault on his part; in fact, states a case of great diligence throughout. Statements of opposing counsel calculated to induce the conviction in the mind of plaintiff that the case would not be reached that term were made directly to him, and through another to him; hence it must be concluded that the failure of plaintiff to be present when the case was acted on was due in some degree to the act of defendant. The court did not err in redocketing and trying the case.

2. The third assignment is to the overruling of an exception to the petition, on the ground that it does not give the date of the contract sued on, that it does not state whether the contract was oral or in writing, and that de-

fendant is unable to plead with any certainty thereto. It was not essential to the cause of action that the agreement should have been in writing. The demurrer was evidently for the purpose of having the petition amended as to the date of the contract in order to let in another special demurrer, on the ground of limitations. Had the date of the contract been definitely given, it would not of itself have opened the petition to such a demurrer. The breach of the contract was alleged to have taken place after the first Tuesday in November, 1890, when defendant acquired the land at a foreclosure sale. As the first Tuesday in November, 1890, was the 4th, and the petition was filed November 3, 1892, the applicability of the two-years statute to the cause of action is clearly negatived by the allegation.

We do not consider it necessary to discuss the testimony. The finding of the jury as to plaintiff's employment is supported by testimony, as pointed out in appellee's brief. Affirmed.

On Rehearing.

(June 27, 1896.)

JAMES, C. J. Upon a reconsideration of the questions involved, we see no reason to change our opinion respecting the question of jurisdiction. Upon the other issue,—that as to the liability of defendant to appellee for commissions,—we conclude that the evidence will not warrant the judgment. We revise our second conclusion of fact, and restate same as follows: Prior to the 4th day of November, 1890, defendant Smith, or Francis Smith & Co., had not entered into any contract, express or implied, to pay plaintiff commissions on the sales he had arranged. On that day, by the conversations had with plaintiff, according to the testimony in this record, Smith did not agree unconditionally to make deeds to carry out the sales arranged by Patrick upon his (Smith's) becoming the purchaser of the land at the trustee's sale. On the contrary, Smith retained the right to not make the deeds, if, on returning to San Antonio, he found that the sales as negotiated were not such as would make the land purchased by him yield his debt and the expenses connected therewith. We also find that the evidence shows that, if he had made deeds in accordance with the sales arranged by plaintiff, the residue of the land would not have sold for enough to yield an amount necessary to make him whole in his debt and expenses. The transaction upon which appellee relies to hold appellant for the commissions claimed occurred on the day of the trustee's sale, at which appellant became the purchaser of the land. Appellee had arranged sales (to a certain extent at appellant's instance) prior to the day on which the trustee's sale occurred, but with the understanding and condition that the land had to bring the principal and interest of appellant's debt, taxes, and expenses. It seems not to be contended that the transactions between appellant and

appellee, as they stood prior to the date of the trustee's sale, were sufficient to bind appellant to pay commission for the work done by plaintiff. As to what took place on the day of the trustee's sale, plaintiff testified on direct examination that on the morning of that day, and before the trustee sold, he displayed to Mr. Smith a map showing the various tracts he had sold, and told him the number of acres each party had purchased, when Mr. Smith expressed himself perfectly satisfied with said sales, and said the trustee would sell the land early in the day, and that as soon as the sale was made, and he became the purchaser and owner, he was going from Marlin to San Antonio, and as soon as he got there he would ascertain what the land had to bring, and that he would send a surveyor, and have the land surveyed, and as soon as this was done, and he got the field notes, he would make deeds to the parties to whom plaintiff had sold; that he saw Mr. Smith no more until on the same day after the sale took place, when he again told plaintiff that, as soon as he could have the land surveyed and get field notes, he would make deeds. Upon cross-examination, plaintiff admitted he could not repeat the conversation he had with Smith on the day of the sale, but that he knew the latter seemed satisfied with everything plaintiff had done, and that he said that on his return to San Antonio he would have the land surveyed and ascertain the relative proportions of improved and unimproved land, and would figure out the amount due on the loan, and see what the land would have to bring. No one gave plaintiff the prices or terms on which to sell the land. All Francis Smith wanted was the amount of the loan, and plaintiff thought he could have gotten that, if the remainder of the land was sold as well as this he had contracted to sell. With the exception of the testimony of Harlan, a witness for plaintiff, the above is all that plaintiff offered to establish the fact that Smith adopted the sales made by him, and agreed to consummate them. The testimony of Harlan was that Smith told him at Marlin, on the day of the sale, that Patrick had already contracted portions of the land, deeds to be made after sale under the deed of trust if he (Smith) became the purchaser, and that Patrick had other sales pending, which, if carried out, would about make the debt due on the land. Inasmuch as the testimony of Patrick, in effect, discloses that there were no other sales pending, and states the precise transaction he had with Smith on that day, we think his testimony should alone be looked to in order to arrive at the real transaction. Plaintiff's own testimony as to Smith's expressions on that day precludes the idea or inference that Smith was satisfied at that time to accept the prices at which plaintiff had made the sales. His previous correspondence, and what he said on that day, show that his purpose was to get his loan and expenses out of the land, and that the sales must be such as

would enable him to do this, and that this was the basis of his dealing with Patrick. The very fact that when he returned to San Antonio he was to ascertain "what the land had to bring," "ascertain the relative proportions of improved and unimproved land, and figure out the amount due on the loan, and see what the land would have to bring," does not tend to show that he was then and there satisfied with the prices at which plaintiff had sold, but shows that he reserved the right to discard the sales if they were not such as would enable him to get his money out of the land. Plaintiff would be in a better position if he had proved that the sales he had effected were such as would have enabled Smith to get back out of the land his loan, interest, etc. On this subject Smith testified that he could not have sold the land at the prices Patrick mentioned, and have got the money advanced out of it. Patrick's testimony in this connection was that if the remainder of the land was sold, as well as that he had contracted to sell, he thought he could have got the amount of the loan. He does not undertake to say that after the sales he had contracted the balance would have sold for sufficient to satisfy the loan. The testimony of Smith is really the only testimony on this subject, and the burden of proof of every fact material to his case was upon the plaintiff. We conclude that plaintiff had not shown that his services were such as Smith had agreed to accept and pay for. Therefore the affirmance will be set aside, and the judgment reversed, and here rendered in favor of appellant.

GEORGE KNAPP & CO. v. CAMPBELL.

(Court of Civil Appeals of Texas. June 17, 1906.)

JUDGES—DISQUALIFICATION—LIBEL—WORDS ACTIONABLE PER SE—PRIVILEGED PUBLICATION—JUSTIFICATION—EVIDENCE—TRIAL.

1. A judge is not disqualified from hearing a case because his brother is attorney for the plaintiff, his fee being contingent upon a recovery.

2. A publication charging a person with having been several times indicted for maintaining a gambling house, which is a penal offense under the statute, is actionable per se.

3. The publication in a newspaper of a false accusation against a man, though based upon information giving reasonable ground for belief in its truth, is not justified by the fact that the man against whom the charge is made is an applicant for a federal office, to be filled by appointment by the president, and is not privileged.

4. In an action for libel, a plea of justification, to constitute a defense, must be as broad as the charge, and a plea and proof of the truth of one charge made in a publication, which required an innuendo to render it actionable, and which, for want of allegation of special damage in the petition, could not be made the basis of a recovery, is not a defense as to other charges, actionable per se.

5. Proof of the actual bad character of a plaintiff in an action for libel, in the direction of the charges made, is admissible in mitigation of damages.

6. A trial court should not permit counsel to read and comment on authorities in an argument to the jury, when objected to.

Appeal from district court, El Paso county; C. N. Buckler, Judge.

Action for libel by Robert F. Campbell against George Knapp & Co., a corporation. Judgment for plaintiff, and defendant appeals. Reversed.

J. M. Dean and Burges & Burges, for appellant. J. A. Buckler and Davis, Beall & Kemp, for appellee.

FLY, J. Appellant was sued as a corporation, the basis of the suit being a certain publication that appeared in the St. Louis Republic, a newspaper published daily in the city of St. Louis, Mo., owned and controlled by said corporation. Actual damages were prayed for in the sum of \$30,000, and exemplary damages in the sum of \$30,000. No special damages were alleged or proved. Appellant answered that the publication was a privileged one, warranted by the occasion, and that appellant was authorized, and it was its duty, to give the same to the public; that the same was not published with any malice or ill will to appellee; that the matter published was true; that appellee was a candidate for a public office; that the publication was made in good faith, was justified by the occasion, and was by appellant believed to be true, and that it had good reasons for such belief. The case was tried by a jury, and resulted in a verdict for appellee for \$3,000 actual and \$2,000 vindictive damages.

The first assignment claims that it was error in the district judge to hold that he was not disqualified to try a cause in which his brother was counsel for appellee, and whose fee was contingent upon the recovery of appellee. Upon the authority of *Winston v. Masterson* (Tex. Civ. App.) 27 S. W. 691, and *Id.*, 87 Tex. 200, 27 S. W. 768, we hold the assignment not well taken.

In the third, thirty-third, thirty-seventh, forty-first, and forty-third assignments it is contended that the language of which complaint was made not being libelous per se, and no special damage being alleged, no cause of action was stated in the petition, and that the jury should have been instructed to return a verdict for appellant. Language which necessarily in fact or by a presumption of evidence causes damage to a person about whom a libelous publication is made is denominated libelous per se. Publications of this class are actionable without proof of actual injury, for the reason that the natural and proximate result would be to cause injury to the person about whom they are written, and therefore it is presumed that they were injurious. Where the language used does not necessarily, but naturally and proximately cause damages, a prima facie right of action does not arise, but, in order

to recover, there must be proof of special damages arising from the libelous publication. Townsh. Sland. & L. §§ 146-148; Cooley, Torts, pp. 228, 229. While it has been supposed that in the earlier stages of actions for libel it was necessary in all cases to prove pecuniary loss in order to recover, still for a long while the distinction above drawn has been recognized, and is now recognized in courts everywhere in England and America, and they are in the habit of exercising the power of drawing the distinction for the jury. There is, however, some uncertainty as to a rule by which to distinguish the cases in which damage is necessarily implied from those in which, to give a right of action, special damage must be proved. Mr. Townshend, in his work on Slander and Libel, asks the question, "What language published in writing concerning an individual as such is actionable per se?" He then proceeds to answer by giving the language used in opinions of different courts as follows: "That language in writing is actionable per se which denies 'to a man the possession of some such worthy quality, as every man is, a priori, to be taken to possess,' or which 'tends to bring a party into public hatred or disgrace,' or 'to degrade him' in society, or expose him to 'hatred, contempt, or ridicule,' or 'which reflects upon his character' or 'imports something disgraceful to him,' or 'throws contumely' on him, or 'contumely and odium,' or 'tends to vilify him,' or 'injure his character or diminish his reputation,' or which is 'injurious to his character,' or 'to his social character,' or shows him to be 'immoral or ridiculous,' or 'induces an ill opinion of him,' or 'detracts from his character as a man of good morals,' or alters his 'situation in society for the worse,' or 'imputes to him a bad reputation,' or 'degradation of character,' or ingratitude, and all defamatory words injurious in their nature. But to sustain an action for libel the plaintiff must either show special damage, or 'the nature of the charge must be such that the court can legally presume he has been degraded in the estimation of his acquaintances or of the public, or has suffered some other loss, either in his property, character, or business, or in his domestic or social relations, in consequence of the publication.'" Section 176. It is said by Odgers: "Whenever the words clearly 'sound to the disreputation' of the plaintiff, there is no need of further proof. They are defamatory on the face of them, and actionable per se. The injury to the reputation is the gist of the action, and wherever that is clear there is no need to inquire whether there is any injury to the pocket as well. But where it is by no means clear from the words themselves that they must have injured the plaintiff's reputation, there the court requires proof of some special damage to show that as a matter of fact the words have in this case impaired the plaintiff's good name." Odgers, Sland. & L. p. 18.

On page 21 of the same work it is said: "Any written words are defamatory which impute to the plaintiff that he has been guilty of any crime, fraud, dishonesty, immorality, vice, or dishonorable conduct, or has been accused or suspected of any such misconduct." The general rule is thus stated by Judge Cooley: "Any false and malicious writing published of another is libelous per se, when its tendency is to render him contemptible or ridiculous in public estimation, or expose him to public hatred or contempt, or hinder virtuous men from associating with him." He then quotes from *Stone v. Cooper*, 2 Denio, 299, to the effect that "the nature of the charge must be such that the court can legally presume the plaintiff has been degraded in the estimation of his acquaintances or of the public, or has suffered some other loss, either in his property, character, or business, or in his domestic or social relations, in consequence of the publication." Cooley, Torts, p. 240 (206). If the publication charges an indictable offense, it is libelous per se. *Conroy v. Pittsburgh Times* (Pa. Sup.) 21 Atl. 154. The above authorities have been substantially followed in this state. *Zeliff v. Jennings*, 61 Tex. 458; *Publishing Co. v. Jones*, 83 Tex. 302, 18 S. W. 652; *Hirshfield v. Bank*, 83 Tex. 457, 18 S. W. 743; *Belo v. Fuller*, 84 Tex. 450, 19 S. W. 616; *Belo v. Wren*, 63 Tex. 686.

There has been some conflict of opinion as to the character of crime which is imputed to a person that will constitute matter that is actionable per se, but it was held in the case of *Zeliff v. Jennings*, above cited, that: "An accusation is actionable whenever an offense is charged which, if proved, would subject the accused person to a punishment, though not such as is known in the books, technically, as an 'ignominious punishment.' If the accusation be such as to bring disgrace on the person of whom the words are spoken." One of the definitions given of libel in the Penal Code (article 727, Rev. St. 1895) is to the effect that it must convey the idea: "(1) That the person to whom it refers has been guilty of some penal offense." It may be safely held, therefore, that the authorities in this state, by decision and statute, make it libel per se to charge a person with being guilty of a penal offense. The charge is as follows: "It is hinted here that 'Poker Bob' Campbell, a character of more or less notorious reputation in the Southwest, who was a candidate for the collectorship himself at the time Clark was appointed, and who has been indicted several times in El Paso county for maintaining a gambling house, is the active spirit behind the charges against Mr. Clark." Does the publication charge appellee with any violation of a penal statute of this state? We waive any discussion of the name attached to appellee, or the charge of notoriety, but take the words, "has been indicted several times in El Paso county for maintaining a gambling house," as the basis

of our opinion. It is provided in the Penal Code:

"Art. 389. If any person shall permit any game prohibited by the provisions of this chapter to be played in his house, or a house under his control, or upon his premises, or upon premises under his control, the said house being a public place, or the said premises being appurtenances to a public place, he shall be fined not less than twenty-five nor more than one hundred dollars.

"Art. 390. If any person shall rent to another a room or house for the purpose of being used as a place for playing, dealing or exhibiting any of the games prohibited by the provisions of this chapter, he shall be fined not less than twenty-five nor more than one hundred dollars."

If the language used in the publication was such as to induce readers of it to infer that appellee had been guilty of either of the above-defined offenses, it would be sufficient to constitute libel. In actions of this character it is not essential that there should be a technical charge of violation of a penal law, such as is required in an indictment. We are of the opinion that the words used would, in their common acceptance, convey the idea that appellee had been indicted for a violation of one or both of the articles of the Penal Code above quoted. Following the brief of appellant, we have treated the subject as though there had been a direct charge against the appellee of maintaining a gambling house, but there was no charge made. The charge was that he had been indicted for maintaining a gambling house. Will the accusation that a man has been indicted for violation of a penal statute stand on the same plane with a direct charge of a violation of the statute? Is such a charge actionable per se, or will it require proof or special damage to sustain the suit? We are of the opinion that such a charge is actionable per se." Odger, *Sland. & L.* pp. 57, 106. "It is not necessary that the words, to be actionable per se, should make the charge in express terms. They are actionable if they consist of a statement of facts which would naturally and presumably be understood by the hearers as a charge of crime." *Belo v. Fuller*, 84 Tex. 450, 19 S. W. 616. The words quoted were used in a case in which the libel was as follows: "Gregorio Narvalle and Joe Fuller, a hack driver, were arrested and lodged in jail to-day on a charge of theft." The words were held to be actionable per se. The words of the libel complained of in the case now before this court could convey but one meaning, and that was that appellee had been indicted for and was guilty of a violation of a penal statute of this state. The accusation is intensified by the charge that he had been so indicted several times. The language of the publication being libelous per se, it was proper for the court to so charge the jury. *Young v. Kuhn*, 71 Tex. 645, 9 S. W. 860; *Cotulla v.*

Kerr, 74 Tex. 90, 11 S. W. 1058. It follows that it was not necessary to allege special damage in the petition. When language that is actionable per se has been proved, the plaintiff has made out a prima facie case, which may be rebutted by proof of a legal defense. In this case it was pleaded in the answer of appellant that appellee, at the time of the publication of the matter alleged to be libelous, was seeking to have the incumbent of the office of collector of customs at El Paso, Tex., removed, and was a candidate for the place in case of the removal of the incumbent, and that the publication was a privileged one. The witness Clark swore, "He (Campbell) was one of the candidates at that time in 1891." He was referring to the time of the publication of the article that forms the basis of this suit. The witness Moore swore that he was informed by officials in the appointment division of the treasury department at Washington that Campbell and his friends were trying to oust Clark, and that Campbell was an applicant for the position in case of the removal of Clark. The court instructed the jury: "Under the facts of this case, you are instructed that said publication is not privileged, and was unauthorized." "A privileged communication is a fair comment by a public journal upon a matter of public interest." *Starkie, Sland. & L.* 332. "A communication made bona fide upon any subject-matter in which the party communicating has an interest or in reference to which he has a duty is privileged if made to a person having a corresponding interest or duty, although it contain criminating matter, which without this privilege would be slanderous and actionable; and this though the duty be not a legal one, but only a moral or social duty of imperfect obligation." *Byam v. Collins* (N. Y. App.) 19 N. E. 75. Privileged communications are usually divided into those absolutely privileged and those only conditionally so. By an absolutely privileged publication is meant one which, by reason of the occasion upon which it is made, no remedy is provided for the damages in a civil action for slander or libel. Such are the opinions of judges of superior courts, and the speeches of members of congress or legislatures. The other class of privileged publications, taking such a wide range, are not so easily defined. *Townshend* defines it as the privilege to "publish, by speech or writing, whatever he honestly believes is essential to the protection of his own rights, or to the rights of another, provided the publication be not unnecessarily made to others than to those persons whom the publisher honestly believes can assist him in the protection of his own rights, or to those whom he honestly believes will, by reason of a knowledge of the matter published, be better enabled to assert, or to protect from invasion, either their own rights, or the rights of others intrusted to their

guardianship." Townshend applies the same rule to publications about candidates for office as to communications about those seeking employment; his idea being that the rule applies to every kind of employment, "and office is only another name for employment." He says: "The right which one has to speak concerning a candidate for employment as a mechanic or domestic is neither more extensive nor more limited than the right one has to speak of a candidate for the office of a legislator or a judge. As respects a candidate for employment generally, so with respect to a candidate for office; the publication, to be privileged, must, with certain exceptions, be limited to the persons interested. A general publication, as well to those interested as to those not interested, would not be privileged." Section 247. The rule is generally accepted that when a person becomes a candidate for public office he will be considered as putting his character in issue so far as respects his qualification for the office. Anything pertaining to the qualification of the candidate for the office he is seeking is a proper subject for discussion, within certain limits. Such discussion must, however, be confined to the truth, and must be pertinent to the issue relating to the question of the fitness or unfitness of the candidate for the office. *Printing Co. v. Copeland*, 64 Tex. 354. In the same opinion it is said: "Then, if the matter published is true, and such as is justified by the occasion, there could be no recovery by the candidate against the publisher. If the matter is not justified by the occasion, then the fact that the person against whom it was directed was at the time a candidate for office would not exempt the publisher from liability, whether the matter was true or false. And although the matter published might be justified by the occasion, still, if it was false, a right of action would accrue against the publisher, to defeat which the burden would be upon him to show that the publication was made in good faith, in the honest belief of its truth, and, besides, that there were just and reasonable grounds for entertaining that belief." The doctrine is thus stated in *Behee v. Railway Co.*, 71 Tex. 424, 9 S. W. 449: "If a privileged communication, though false, is believed to be true by the publisher, and the language used to express the communication is not unnecessarily disparaging, and it is not shown by extraneous evidence to have been actuated by a malicious intent to injure, there can be no recovery." Or, in other words, the Texas rule is the same laid down by Judge Cooley, that: "There must be exemption from liability for any publication made in good faith, and in belief of its truth, the making of which, if true, would be justified by the occasion. There should, consequently, be freedom in discussing in good faith the character, the habits, and mental and moral qualifications of any per-

son presenting himself, or presented by his friends, as a candidate for a public office, either to the electors or to a board or officer having powers of appointment." Cooley, *Torts*, p. 256. The good faith and honest belief in the truth of the publication cannot be available as a justification when the accusation is false, unless four things concur: First, it must be about a candidate for public office; second, it must be justified by the occasion; third, it must be made in good faith, and in the honest belief of its truth; and, fourth, there must have been just and reasonable grounds for holding the belief. *Curtis v. Mussey*, 6 Gray, 261; *White v. Nichols*, 3 How. 266.

In *Whittemore v. Weiss*, 33 Mich. 353. Chief Justice Cooley said: "The judge charged the jury that 'malice is to be presumed from the publication and its falsity; that, to rebut this presumption, defendants must prove that they made the publication in good faith, believing it to be true in all its essential parts, and for a proper purpose,' is immaterial if they believed what they published, and made the publication in good faith. This might be so if the publication had been true; but good faith cannot protect a false publication; nor can one excuse himself for making a mistaken assault upon his neighbor's reputation by showing the absence of malice, when, even had his charge been true, there was no proper purpose in bringing the matter to public notice. If one makes an attack which the occasion does not justify, there is no injustice to him in requiring him to show its truth." In *Peoples v. Detroit P. & T. Co.*, 54 Mich. 462, 20 N. W. 528, it is said: "There can be no question, at this late day, but that the public newspaper has the right (whether it shall be regarded as its duty or not) to discuss those matters which relate to the life, habits, comfort, happiness, and welfare of the people. In doing so it may state facts, draw its own inferences, give its own views upon the facts. It may err in its deductions, and if they are false they are not actionable unless special damages are shown; but false assertions, when they impute the commission of a crime, are actionable, and, when not based upon any facts legally tending to prove the facts imputed, the publication cannot be said to be privileged." In the case of *Bronson v. Bruce*, 59 Mich. 467, 26 N. W. 671, it is said: "To hold that false charges of a defamatory character, made against a candidate, are privileged as matters of law, if made in good faith, and that the party making them is absolutely shielded against liability, it seems is a most pernicious doctrine." The charge that appellee had been indicted for maintaining a gambling house was not shown to be true, and in order for appellant to justify it, it became necessary to show that appellee was a candidate, that the occasion justified the accusation, that the charge was made in good faith, and with the honest belief in its

truth, and that back of the belief was the basis of reasonable ground for it. The evidence tended to show that appellee was a candidate for the collectorship at El Paso, and it was shown that the correspondent of the paper owned by appellant had received reliable information that appellee had been indicted for keeping a gambling house. It was also proved that he was known as "Poker Bob" Campbell. We are of the opinion, however, that the occasion did not justify the publication. Appellee was an applicant for a position in the gift of the president of the United States by and with the advice and consent of the senate. The specific charges against appellee were on file in the treasury department in Washington, and there was no occasion to send the accusation broadcast over the Union that appellee was guilty of maintaining a gambling house. Discussing the matter, it was said by the court of appeals of New York that: "If the defendant's opinion of the plaintiff's character and qualifications as an officer had been contained in a remonstrance against his appointment to the office for which the defendant asserted he was a candidate, and had been presented to the appointing power, without an unnecessary publication in a newspaper, as in this instance, of wide circulation, the point would have been well made. As it is, he had been assailed through the columns of a public journal as if he was a candidate for the suffrages of the people, and not an appointing power, consisting of a few persons. It was not, therefore, a privileged communication." *Hunt v. Bennett*, 19 N. Y. 173. We have seen no authority in conflict with the above decision, unless it be the text quoted herein from Judge Cooley and copied into the decision in the *Express-Copeland Case*. We do not think, however, that the language of Judge Cooley should be construed as announcing a contrary doctrine to that in the New York case, as that very case, with others that coincide with it, are cited by Judge Cooley in support of the text. The following authorities are in consonance with the *Hunt-Bennett Case*: *Odgers, Sland. & L. *234-242*, and authorities cited; *Townsh. Sland. & L. § 247*; *Lewis v. Few*, 5 Johns. 1. The facts failing to show that the publication was a privileged one, it was not error in the court to so instruct the jury.

It is argued by appellee that it was pleaded that appellant meant by "a notorious reputation" that he was a man of bad reputation as to honesty, and that, when appellant pleaded the truth of the publication, he pleaded its truth as fixed by the innuendo, and that he was compelled to so prove it in order to justify on the ground of its truth. The publication can be held to be libelous per se only when taken altogether, and as charging a crime, as hereinbefore indicated. It is not apparent on the face of the charge of "notorious reputation" that it was defamatory in its character, and an innuendo was essential to

make out a case of libel. The word "notorious" would become libelous in itself only when qualifying some other word. It may be properly used in an innocent, and even laudatory, sense, as being synonymous with distinguished; remarkable; conspicuous; noted; celebrated; famous; renowned. The word being capable of a harmless meaning as well as an injurious one, it would be a question for the jury to decide which meaning was intended. If the meaning pleaded by appellant was, however, admitted to be the one intended by the answer setting up the truth of it, still appellee could not have recovered on that part of the publication without pleading and proving special damages. *Odgers, Sland. & L. pp. 82-87, 308*. The appellee, in his petition, did not plead special damages, and could recover only on the ground that the publication was libelous per se, and consequently could not recover on that part of the publication that required innuendo to make it actionable. *Hirshfield v. Bank*, 83 Tex. 452, 18 S. W. 743. It follows from what has been said that proof of "notorious reputation" would not justify the publication; in other words, under the pleadings the charge as to notoriety was not divisible from the rest of the publication. "The justification must always be as broad as the charge, and of the very charge attempted to be justified." *Fidler v. Delavan*, 20 Wend. 57; *Fero v. Ruscoe*, 4 N. Y. 165; *Townsh. Sland. & L. § 331*. While not justifying the publication, however, testimony as to reputation as a gambler would be admissible in mitigation of the damages. Any testimony that tended to show that appellee was a gambler and permitted gambling in a house owned or controlled by him was admissible in mitigation of damages. The gist of the action was the injury done to the reputation of appellee, and if he had no reputation to be injured, in the line of the accusation, he would not be entitled to substantial damages. Especially would the testimony be permissible on the cross-examination of appellee. *Odgers, Sland. & L. p. 305*. Actual bad character in the direction of the charge, such as would be shown by proof of commission of other crimes of the same nature, may be shown in mitigation of damages. *Kimball v. Fernandez*, 41 Wis. 329; *Leader v. State*, 4 Tex. App. 162; *Larned v. Buffington*, 3 Mass. 546; *Bodwell v. Swan*, 3 Pick. 376; *Howe v. Perry*, 15 Pick. 506.

In the closing argument to the jury counsel for appellee read extracts from opinions of the supreme court in the case of *Belo v. Fuller*, 84 Tex. 450, 19 S. W. 616, and in *Publishing Co. v. Jones*, 83 Tex. 302, 18 S. W. 652, and commented on them very freely, to which action appellant objected. The courts of Texas have condemned the practice of reading authorities to juries, and commenting on them, and it should not have been permitted by the trial judge. Even in one of the cases from which counsel was reading it is

condemned. *Belo v. Fuller*, 84 Tex. 450, 19 S. W. 616. In the qualification of the bill of exceptions granted by the court it is said that the court was not asked to exclude the remarks, or to give special instructions relative thereto, which is followed by the declaration that the court did not do so of its own motion "because, in the judgment of the court, the remarks were not improper." Doubtless the court would have had the same opinion had the motion been made. When the objection was made, it called for a ruling, and the failure or refusal of the court to act on the objections was equivalent to an approval of the remarks, as the bill of exceptions indicates. *Railway Co. v. Wesch*, 85 Tex. 593, 22 S. W. 957. We do not wish to be understood as holding that reading and commenting on authorities would, standing alone, be sufficient to cause a reversal, in the absence of something that would indicate that the verdict was influenced by it. It is a practice, however, that is not to be commended in any instance.

The other errors assigned are not likely to occur on another trial, and need not be noticed. The judgment is reversed, and the cause remanded.

KIAM v. CUMMINGS et al.

(Court of Civil Appeals of Texas. March 19, 1896.)

PRINCIPAL AND SURETY — DISCHARGE OF SURETY.

The surrender of the debtor of property held as security for the whole debt will release the surety on a note given for a part of the debt.

Appeal from Harris county court; John G. Tod, Judge.

Action by Cummings & Son against Ed. Kiam on a note. Judgment for plaintiffs, and defendant appeals. Reversed.

Perryman, Gillaspie & Bullitt, for appellant. G. W. Tharp, for appellees.

WILLIAMS, J. Appellees contracted with C. F. Morse to print for him a pamphlet descriptive of the city of Houston, for which Morse was to pay them a specified sum. The contract provided that the plates and all undelivered copies of the book were to be the property of appellees until the whole amount had been paid for the books. For \$150 of the price, appellees demanded of Morse a cash payment or a secured note which they could use in the banks; and Morse procured the indorsement of the note sued on by appellant, Kiam, which was delivered to appellees, they accepting it with knowledge of the fact that Kiam indorsed it as surety for Morse's accommodation. Morse delivered to Kiam claims upon third parties as collateral to secure his indorsement. Subsequently, he obtained the claims from Kiam, and collected the money due upon them, and paid it over to appellees, who applied it to the satisfaction of that portion of the debt unsecured by the

note sued on, leaving that unpaid, and delivered to Morse the plates and most of the books, of value greater than the amount of the note. Morse obtained the claims from Kiam with the expressed purpose of paying the note with the money collected upon them, but did not notify appellees of such fact in paying the money over to them, nor did he instruct them to apply it to the note. When sued upon the note, Kiam set up payment of it in the manner just stated, and also pleaded that he was released as indorser by the surrender by appellees of the security held by them. In both the justice's and county court judgment was rendered against Kiam, and he prosecutes this appeal.

We are of the opinion that, by the surrender of other property belonging to Morse which they held as security for the debt also secured by Kiam's indorsement, appellees discharged Kiam. If it were true, as urged by counsel for appellees, that they held such other property as security for the balance of the account only, and not for the note, the surrender of such security would not affect the liability of the surety on the note; but we do not understand this to be the case. The contract stipulates that the property secures the whole debt, and the note was given for part of such debt. It is true, one of the appellees testified that they "accepted the note as so much cash," and they seek to treat it as payment of so much of the debt, leaving only the balance secured by the property held; but there was no understanding to that effect with Kiam, and the evidence even fails to show that there was with Morse, though the latter fact might perhaps be inferred. Kiam signed simply as surety, and of that fact appellees had knowledge, and were consequently bound to deal with him as such. A surety who pays the debt of his principal becomes entitled to the benefit of any security held by the creditor; and a surrender of such other security by the creditor to the principal debtor has the effect to discharge the surety. *Murrell v. Scott*, 51 Tex. 520; *Machine Works v. Templeton*, 82 Tex. 443, 18 S. W. 601. It is unnecessary to determine the other question presented, as to whether or not the money paid by Morse should be applied to the discharge of the note. The judgment against Kiam will be reversed, and judgment will be here rendered discharging him.

PIPHER et al. v. BISSONNET et al.

(Court of Civil Appeals of Texas. May 14, 1896.)

INJUNCTION—DAMAGES—PLEA IN RECONVENTION.

A plea in reconvention for damages for the wrongful suing out of an injunction is insufficient if it fails to aver facts showing how the issuance of the injunction caused the particular damages set out.

Appeal from district court, Harris county; S. H. Brashear, Judge.

Action by Andrew J. Pipher and others against George Bissonet and others to restrain defendants from cutting timber on certain land. A temporary injunction was granted, and defendants filed a plea in re-convention for the wrongful suing out of the injunction. From a judgment denying the relief sought, and in favor of defendants on their plea, plaintiffs appeal. Reversed.

Thompson & Carter, for appellants. Joe M. Sam, for appellees.

GARRETT, C. J. Appellees' motion to dismiss the appeal in this case having been met by the appellants with the tender of a new appeal bond, the bond tendered is accepted and approved, and the motion to dismiss overruled. The suit was brought by the appellants to enjoin the appellees from cutting timber from land which appellants had sold them on a credit, with reservation of vendor's lien. A temporary injunction was granted. Appellees pleaded in re-convention for damages growing out of the obtaining of the injunction. Upon trial, appellants were refused the relief prayed for, and judgment was rendered against them for damages on the plea in re-convention. Appellants' assignments of error are not sufficient to present the question as to whether or not the judgment of the court below refusing them an injunction was correct. There was fundamental error, however, in rendering judgment against the appellants for damages, because the plea in re-convention fails to set out facts that would show any liability therefor on the part of appellants. There are several items of damages stated in the answer which are alleged to have been caused by the wrongful suing out of the injunction, but how the suing out of the injunction caused the damages is not stated. Appellees alleged that they lost \$250 profit on wood, and \$50 by being compelled to forfeit their contract with the railroad. There was no averment of any facts to show how appellees had lost any profit on wood, or the nature of their contract with the railroad. The charge of the court confined the right to recover only as to profit on the railroad contract, but, as stated, the allegation as to this item did not aver any fact to show that appellants were liable for the loss. It will also be observed that the verdict of the jury is greatly in excess of the amount alleged to have been lost as profits on the railroad contract. For the error indicated, the judgment of the court below will be reversed, and the cause remanded.

SPOFFORD et al. v. MINOR.

(Court of Civil Appeals of Texas. May 14, 1896.)

EXECUTORS AND ADMINISTRATORS—RIGHT TO COMMISSIONS—PAYMENT TO FOREIGN EXECUTOR.

An administrator with the will annexed, appointed at the request of a foreign execu-

tor to administer the testator's estate in Texas, is not entitled, upon payment of the proceeds to such executor, to the statutory commission of 5 per cent.; such payment being in effect a payment to the heirs, within Rev. St. art. 2191, providing that a commission shall not be allowed for paying money to the heirs and legatees.

Appeal from district court, Galveston county; William H. Stewart, Judge.

Accounting by Lucian Minor, administrator with the will annexed of the estate of Susan Spofford, deceased. From an order allowing the administrator 5 per cent. commissions on moneys paid over by him, Joseph L. Spofford and others, executors, in New York, of the will of Susan Spofford, appeal. Reversed.

Mott & Armstrong, for appellants. Robt. G. Street, for appellee.

WILLIAMS, J. This appeal is from an order of the court below allowing the appellee, as administrator, in Texas, of the estate of Susan Spofford, deceased, 5 per cent. commissions on moneys paid over by him to appellants, who are the executors, in New York, of the will of Susan Spofford, and are also trustees appointed by the same will for legacies bequeathed by her. The legal title to a large quantity of lands in Texas was vested in the deceased; and appellee, at the request of appellants, took out letters of administration with the will annexed in this state, and has sold lands, collected the purchase money, paid expenses, and turned over to appellants the residue of such proceeds, deducting 5 per cent. of same as commissions. In a suit in New York between the representatives of the estate of Paul Spofford and those of the estate of Susan Spofford, the lands in Texas, of which the latter had held the legal title, were adjudged to belong to the estate of the former, and the executors and trustees of the will of Susan Spofford were directed to deliver to the representatives of the estate of Paul Spofford the proceeds of such lands, as they should be received from appellee; but it was agreed that appellee should deliver such proceeds to Mrs. Spofford's representatives.

By the statute, administrators are allowed, as commissions, 5 per cent. "on all sums they may actually receive in cash, and the same per cent. on all sums they may pay away in the course of their administration." Rev. St. 1879, art. 2190. But such commission is not allowed "for receiving any cash which was on hand at the time of the death of the testator or intestate, nor for paying out money to the heirs or legatees as such." Article 2191. The right to commissions is only given for receiving and "paying away" money in the "course of administration." It does not arise, in the first instance, from the mere receipt of the estate, nor, in the second, from delivering it to the heirs or legatees as such. The administration of the property, as intended in article 2190, takes place between

its receipt by the administrator and its delivery to those entitled ultimately to receive it from him. The words of the statute, "heirs or legatees as such," were intended by the statute to embrace all those who, when the administration is ended, are entitled to receive the residue of the estate, either by inheritance or through a will. Persons who are heirs or beneficiaries of a will may be entitled to receive money from the estate in other capacities, and the right of the administrator to commissions for paying to them is saved by the language used. Sometimes parties who are not technically legatees may be entitled to a residue of money remaining in the hands of the administrator at the close of the administration, as is the case when lands devised are sold to pay debts, the balance left of the proceeds going to the devisees. But there is no conceivable reason why the administrator would be allowed commissions in such case for delivering such balance, when he is not allowed it for delivering to a "legatee." The latter word is intended, in our opinion, to embrace any person who is entitled under the will of the decedent to receive money from the administrator or executor. The provisions regulating final settlement and partition are in line with this view. Articles 2135-2145. After all debts are paid, the executor or administrator is required to state and present to the court his account for final settlement, one of the requisites of which is a statement of the persons entitled to receive the estate, who are in article 2143 referred to as "the heirs, devisees and legatees" of the estate; and to these the residue of the estate is to be distributed and delivered. Provision is made requiring the executor or administrator, in certain contingencies, to pay money left for heirs, devisees, or legatees to the state treasurer, and for that purpose to collect debts and sell property; but express provision is also made that the court shall allow reasonable compensation for services. Articles 2146-2163. The payment in this case was made to executors and trustees, but they received it for the benefit of the persons entitled to receive it from them, and the case is the same as if the payment had been made to the beneficiaries of the will; or, if the payment be treated as having been made to the representatives of Paul Spofford, it is yet true that they are the persons entitled to receive it from appellant, either under his will or by inheritance from him. It was not money paid away in the course of administration. The judgment of the district court cannot be affirmed on the assumption that this was an allowance made to the administrator as reasonable compensation for his services. It was adjudged to him as his statutory commissions. The question whether or not he was entitled to an allowance apart from his commissions has not been passed on in the court below. Reversed and rendered.

LEAGUE v. TREPAGNIER.

(Court of Civil Appeals of Texas. May 14, 1896.)

TRESPASS TO TRY TITLE — EVIDENCE OF TITLE — SUFFICIENCY.

In trespass to try title both parties claimed title from the same person, plaintiff as a donee and defendant as a purchaser under a trust deed, and there was evidence that plaintiff was the son of the alleged donor; that such donor had originally taken title to the land, and executed the trust deed in the name "K. M. T.," and that such was also plaintiff's name; and such donor testified that his name was J. F. B. T., and that he bought the land for plaintiff's benefit, and such testimony was corroborated in part by plaintiff's mother. The evidence as to plaintiff's age did not, however, clearly show that he was alive at the time his father bought the land. Defendant's evidence showed that the alleged donor had been known as "F. M. T.," had borrowed in such name the money for which the trust deed was given, and had in such name drawn checks on a bank; that plaintiff had not claimed the land prior to the suit, which was 20 years after the execution of the deed to his father. *Held*, that a judgment for plaintiff was against the weight of the evidence.

Appeal from district court, Harris county; S. H. Brashear, Judge.

Action by F. M. Trepagnier against J. C. League. Judgment for plaintiff, and defendant appeals. Reversed.

E. P. Hamblen, for appellant. W. C. Oliver, for appellee.

PLEASANTS, J. On the 21st of August, 1893, appellee filed suit in the district court of Harris county to recover of appellant the property in controversy, a lot in the city of Houston. The action was in the form of trespass to try title. Defendant pleaded not guilty, and specially that he held the land under regular chain of title from F. M. Trepagnier; that he derails title to the premises sued for through sale thereof, made under a deed of trust executed by F. M. Trepagnier, the same man who bought the property and paid for it, and afterwards executed the deed of trust in the same name as the one in which he purchased the property; that the person who so purchased the property and who afterwards executed the said deed of trust was known as F. M. Trepagnier, and did business by that name, and was the owner of said property when he executed the deed of trust under and by virtue of which defendant, under regular chain of transfers, is now the owner of said premises; but that appellee claims the same, and is asserting title thereto, which claim is a cloud upon defendant's title; and by way of reconvention defendant prays for judgment against plaintiff, and for a decree establishing his title thereto. Upon trial of the cause by the judge of the court without the intervention of a jury, judgment was rendered for the plaintiff, and defendant has appealed to this court, and the question submitted under the assignments for our determination is, does the evidence authorize the judgment decreeing the land to the plain-

tiff? There are no conclusions of law or fact of the judge in the record. Both parties claim title from common source. And it is admitted that there is a regular chain of title from the trustee of the deed of trust executed in the name of F. M. Trepagnier to J. Waldo, in 1872, down to appellant, and that the considerations expressed in the several deeds constituting said chain of title were paid as declared in said deeds. In the year 1871, on March 10th, J. E. Foster sold the land in controversy for the consideration of \$158.25 to the man who testifies in this case that his name is now, and always has been, J. F. B. Trepagnier; that, in consideration of the payment of said sum, Foster on same day conveyed the land by deed to F. M. Trepagnier, and delivered same to the person buying the property and paying the consideration. On the 23d of December, 1872, this same man who had bought the land from Foster borrowed from the Railroad, Real-Estate, Building & Saving Institution \$100, giving his note therefor in the name of F. M. Trepagnier, and executing in the same name, at the time he borrowed the money, a deed of conveyance to said land to one J. Waldo, in trust to secure the payment of said money borrowed as aforesaid and with power of sale; that at the time he borrowed said money, and for some time prior thereto, this same man kept a bank account with the same institution from which he borrowed the money, and which account was kept in the name of F. M. Trepagnier. The deposits were made in that name, and checked out in that name; and the deed of trust was duly acknowledged by him. He negotiated the loan with the cashier of the bank, claiming to own the land. The officers of the bank all believed him to be the owner of the land, and did not know of the existence of the plaintiff. This man was a barber for several years in Houston before the purchase of the land, and he was called "Frank," and he was also called "Trip." Trip is a contraction of his surname. Frank, it is admitted, is a part of his Christian name. The land was repeatedly sold after the sale by Waldo in execution of the power given him, without objection or claim of title by any one. None of the purchasers ever heard of plaintiff's claim until the institution of this suit. The man who bought the land and received the deed from Foster claimed to be the owner of the land prior to the sale under the deed of trust given by him. He did not at the time of the purchase direct the conveyance to be made to the plaintiff, nor intimate to any one prior to the sale under the deed of trust that he purchased the land for the plaintiff. The plaintiff is the son of a woman who was the former slave and concubine of one John Iams, late of Houston, and now deceased, and his reputed father is the man who bought the land from Foster. The year in which plaintiff was born is not definitely shown by the evidence, nor is it shown when he was

christened Frank M. Trepagnier. His mother was living with Iams at the time of his birth. She could not say when plaintiff was born. She had four children by Iams, and two by the man who purchased the land in controversy of Foster. The plaintiff was one of these two. The reputed father could not tell when plaintiff was born, but thought, at the time of the trial, in the spring of 1895, that plaintiff was about 25 years old; knew that he was born at the time of the purchase of the land from Foster; he was then a small baby. This witness admits he borrowed the money from the bank, and executed the deed of trust in the name of F. M. Trepagnier, but denies that that was ever his name, and denies that he was known by that name, and avers that his name is J. F. B. Trepagnier; says that he thought he had the right to use the plaintiff's name in borrowing the money, and in executing the deed of trust; does not deny that he kept his bank account in the name of F. M. Trepagnier, but does not remember telling any one that he owned the land. There is some evidence in the record, besides his own testimony, that this witness' name is what he avers it to be. The mother of plaintiff testifies that the plaintiff's father's name is J. B. F. Trepagnier. Another witness, who was at one time a partner of plaintiff's reputed father, testifies that he did not know certainly what his name was; that he was sometimes called "Frank" and sometimes "Trip," but that in their partnership transactions he signed his name J. B. F. Trepagnier. The plaintiff, as did his mother, testified that his age could be shown by Iams' Bible, and the court requested the plaintiff to produce the Bible in court, but this request was not complied with, and, in explanation of the failure of plaintiff to produce the book, plaintiff, by his counsel, informed the court that, upon inspection of the Bible, it was discovered that the leaf containing the record of plaintiff's birth had been torn out, and was lost. We have, in the foregoing statement, recited every material fact which, in our judgment, is established indisputably by the evidence, and also every fact material put in evidence, whether so established or not; and we are of the opinion that the evidence does not warrant the judgment rendered for the plaintiff. To sustain his claim, the plaintiff must establish by a preponderance of the evidence this proposition: that the property in controversy was not purchased by plaintiff's father, and the conveyance made to the father in the father's name, but that the purchase was made by the father for the plaintiff, and with the intent and purpose to invest the title to the property, both legal and beneficial, in the plaintiff, and in pursuance of such purpose and intent the deed of conveyance from the vendor was executed to plaintiff. The evidence in support of this proposition furnished by the record consists solely of the testimony of the reputed father, uncorroborated save by the testimony

of the plaintiff's mother, to the effect "that plaintiff's father told her, when plaintiff was a baby, he was going to buy the property for the baby; but she did not know whether he did so or not." In support of defendant's title are these indisputable facts: That the father of plaintiff, before and at the time he executed the deed of trust under which defendant derails title, kept his bank account in the name of F. M. Trepagnier; that he borrowed money from the bank in that name, and in that name he executed the deed in trust, and acknowledged the same before the proper officer for registration, and there is not the slightest evidence in the record that the father was ever heard to declare that the land was bought by him for the plaintiff until he gave his testimony in this case, over 20 years after the purchase was made by him, and after the land had been sold again and again, the purchaser at each sale paying a valuable consideration, and without knowledge, or even suspicion, on the part of any of the purchasers, that the property was claimed by the plaintiff, or by any one for him. The attitude of this witness before the court is such that we do not think his testimony a sufficient basis for the judgment rendered for the appellee. If the witness, as he testified he did, purchased the property in controversy in 1871 from J. G. Foster, and had the same conveyed to the plaintiff with the intent to invest in him both the legal and beneficial title, then he perpetrated a deliberate fraud, when, in 1872, he executed the deed in trust to J. Waldo, to secure the payment of the money borrowed of the beneficiary of the deed in trust. Such testimony is unworthy of credence. This court is of the opinion that the weight of the evidence is against the proposition that the land was bought and paid for by plaintiff's reputed father, and the deed of conveyance taken in the name of plaintiff with the intent to invest him with absolute title, legal and beneficial, to the property. The fact that plaintiff's father went by the name of Frank, and that Frank, as he admits, was part of his name; that he kept his bank account in the name of F. M. Trepagnier, and that he executed his note to the bank in that name in December, 1872, for money borrowed and to secure the payment of which he executed the deed of trust, and acknowledged the same for registration, in the same name in which he purchased the property; and the failure by him, at the time of the purchase, or at any subsequent time, so far as the record discloses, to declare that the property was purchased for the plaintiff,—outweighs, in our judgment, the declaration made upon the witness stand over 20 years after the purchase that he was never known by the name of F. M. Trepagnier, and that the property was not purchased for himself, but for the plaintiff. While an appellate court will not reverse a judgment where there is evidence to support it unless it is clearly wrong, it is not only the province, but it is the imperative duty, of

such court to reverse a judgment which is manifestly against the weight of the evidence. *Vide Willis v. Lewos*, 28 Tex. 185; *Railway Co. v. Somers*, 78 Tex. 439, 14 S. W. 779. In a case like this—a contest over property—both parties claiming from the same party, the plaintiff as a donee and the defendant as an innocent purchaser, to authorize a divestiture of the title of the latter, the plaintiff must prove his title to be paramount by a preponderance of the evidence. The judgment, in our opinion, not being supported by the weight of the evidence, is reversed; and this court, proceeding to render the judgment which should have been rendered by the trial court, adjudges and decrees that the plaintiff take nothing by his suit, and that the defendant recover his costs, both in this court and in the lower court.

HENNESSEE et al. v. JOHNSON et al.
(Court of Civil Appeals of Texas. May 14, 1896.)

POWER OF ATTORNEY—REVOCABILITY—DEATH OF GRANTOR—INSTRUCTION.

1. Plaintiffs' ancestor executed a power of attorney authorizing B. "to receive my head-right certificate for one-third of a league of land to which I am or may be entitled, and to locate or sell the same for me in my name." For his services, B. was to receive one-half the proceeds, in land or cash, power being given to divide the land if location was made. He also executed a deed conveying to B. all right, title, and interest in one-half of a third of a league of land, or a certificate therefor, to which he might be entitled. *Held*, that the power granted to B., being coupled with an interest, was not revoked by the death of plaintiffs' ancestor before the issue of the certificate.

2. Under the power therein granted, B. was authorized only to sell the certificate, and not the land located thereunder; the power of sale being limited by the provisions relating to the division of located land.

3. A location of the land being complete only when all the steps necessary to entitle the parties to a patent had been taken, power to sell the certificate terminated only upon the completion of a survey of the land filed upon; and at any time prior thereto it was within the scope of B.'s authority to abandon the filing by sale of the certificate.

Error from district court, Calhoun county; S. F. Grimes, Judge.

Action by Thomas Hennessee and others against P. G. Johnson and others. There was a judgment for defendants, and plaintiffs bring error. Affirmed.

A. S. Thurmond, for plaintiffs in error. Proctors, for defendants in error.

WILLIAMS, J. Plaintiffs in error, heirs of Thomas Hennessee, deceased, sued to recover an undivided half of a tract of 1.315 acres patented to said Hennessee August 9, 1854, from defendants, who claimed such half under a conveyance of the certificate by virtue of which it was patented, made by John Henry Brown, as attorney in fact for said Hennessee. Judgment was rendered in

the court below for defendants, which is now before us for review. On the 1st day of August, 1851, Thomas Hennessee was entitled to a certificate from the state for one-third of a league of land, and executed to Brown an irrevocable power of attorney, stating the authority as follows: "To petition for, ask, and receive from the legislature of this state or other competent authority my headright certificate for one-third of a league of land to which I am or by special legislation may be entitled, in view of my emigration to this country in the year 1833, and, when he shall have obtained said certificate, to locate or sell the same for me in my name; and for Brown's services he shall receive in his own right one-half the proceeds, in land or cash, it being understood that he is to pay the expenses of locating," etc. "And I further empower said Brown to divide said land when located equally." Here follow directions to be observed in making the division. "And I do hereby waive all legal advantages which this instrument may leave open to him, and do hereby grant, sell, alien, and convey said half of my one-third of a league unto him, the said Brown, his heirs," etc.; "provided that, should said Brown be able to ascertain and establish the fact that I can hold a third of a league on the waters of Nueces river to which and [sic] supposed I had a headright claim before the year 1834, then the said Brown shall proceed with that tract as above described." At the same time, Hennessee executed a deed conveying to Brown "all right, title, interest, claim, and demand in and to one-half of a third of a league of land, or a certificate for the same, to which I am or may be entitled as a headright for emigrating to Texas in 1833," and giving directions as to partition, and making reference to the tract on Nueces river, as in the power of attorney. Hennessee died August 12, 1851. Brown procured the certificate, which issued February 18, 1852, through authority from the legislature. On the 15th day of March, 1852, Brown executed a deed conveying the certificate to Henry Beaumont, under whom defendants claim, for a consideration of \$177.12; reciting that he did so "for myself and as the agent and partner of Thos. Hennessee," and that the certificate, through deed and power of attorney, was the joint and legal property of said Hennessee and himself, and that it had been located on Powder Horn Bayou, and signing "John Henry Brown, for Self and Thomas Hennessee, Deceased." The original field notes on which the patent issued show that the land in controversy is situated on Powder Horn Bayou, but that it and the other tract on which the certificate was located were surveyed May 5, 1853. Brown testified that the certificate was located on the land in controversy, and there is nothing to indicate that there had ever been a location of it made and abandoned on other land than the two tracts for which the patent issued. We think the con-

clusion from these facts is that, at the date of the power of attorney, Brown had taken preliminary steps to have the lands surveyed by filing the certificate and application designating such lands, but that no survey had been made, and that it was to this the language in the instrument refers as a location on Powder Horn Bayou. Brown paid over to a party claiming to represent Hennessee's estate, but of whose authority there is no other evidence, one-half of the money received for the certificate. None of the heirs received any part of it, but the widow of Hennessee, one of the plaintiffs, knew of the sale to Beaumont as early as 1855.

Conclusions of Law.

1. The power of attorney and the deed together created and vested in Brown an interest in the right which Hennessee possessed to receive the certificate. That was a right which was the subject of contract and sale. *Johnson v. Newman*, 43 Tex. 639; *Robertson v. Du Bose*, 76 Tex. 8, 13 S. W. 300. The interest of Brown did not first arise as the product of the exercise of the power, but vested at once by operation of the deed. The consideration for the conveyance was Brown's undertaking to perform the services, and the case is not one in which the interest was to arise only upon performance of the services. Hence we think the power was one coupled with an interest, and was not revoked by Hennessee's death. It was a power to sell the whole of the certificate, and not merely Brown's half of it. The power accompanied the interest given to Brown, and was intended to make it effectual, by authorizing him to sell the certificate in order to get his share.

2. But we do not think the power was given to Brown to sell the land after that should be acquired. The option was given him to sell the certificate, which was indivisible, or to locate it, and acquire land which could be divided; and, if he chose the latter course, he was empowered only to make division. This plan runs through both instruments, as is evident from the provisions with reference to the division of the land on Nueces river, should it be secured. Nothing in either instrument manifests an intention that Brown should have power to convey land.

3. As Brown had power to sell the certificate, but not to convey land acquired by virtue of it, the question is, had his power to sell the certificate ceased when he made the deed to Beaumont? We think the power would have ended only when the right to the land was acquired, and that right arose only when all steps had been taken which entitled the parties to a patent. Until that had been done, Brown was at liberty to abandon any file made, or to permit such right as he may have acquired by the acts done to lapse, for noncompliance with the law regulating the subject. As he was intrusted with the discretion to decide whether he should

sell the certificate or locate it, this necessarily included the power to determine whether he would pursue the claim so as to perfect it into title, or to sell the certificate. The latter was not, in our opinion, merged into the land until the owner of it became entitled to the land from the state, and that result would not happen at any point short of a survey of the land. We find no case in which it has been held that the certificate was merged in the land before survey of it had been made. Until that has occurred, the right of the holder of the certificate is simply one to acquire the land designated by him, by following up his file, and doing the other things which must precede the accrual of his right to a patent. This view is, we think, in harmony with the purpose of the power. The certificate is to be "sold" or "located." What is meant by the latter term reasonably appears from the provisions concerning partition. There could be no partition without the acquisition of title, and, at any stage of the proceedings before title was acquired, Brown was necessarily the sole judge as to whether he should proceed and acquire it, or should stop and sell the certificate. We conclude that the conveyance of the certificate to Beaumont was authorized by the power, and the judgment of the lower court is affirmed.

GALVESTON, H & S. A. RY. CO. v. HARRIS et al.

(Court of Civil Appeals of Texas. May 28, 1896.)

DEATH BY WRONGFUL ACT—EARNINGS OF DECEASED—EVIDENCE—ORDINANCE—NECESSITY OF ENACTING CLAUSE—CHARGE ON STATUTE—PLEADING AND PROOF—ACCIDENT AT CROSSING—NEGLECT—PROVINCE OF JURY.

1. In an action for death by wrongful act, testimony that deceased expended his earnings upon a certain prostitute was admissible for the purpose of contradicting the testimony of deceased's mother that her son expended most of his wages in support of herself and his children.

2. In an action for death by wrongful act, testimony that deceased proposed to work for witness for a certain sum was admissible to rebut plaintiff's evidence that the earnings of deceased were greater than said sum.

3. In an action for causing death at a crossing, evidence to show the points on the track of defendant's railway at which signals were usually given was admissible where there was previous testimony that the usual signals were given before deceased was struck by the train.

4. An ordinance limiting the speed of railroad trains was void where it did not have the enacting clause, "Be it ordained by the city council of the city," as required by Rev. St. 1879, art. 488.

5. Where a statute requires that a railroad company shall give the usual signals "at least" at a certain distance from crossings, the company has the right to have the words "at least" inserted in an instruction as to the requirements of said statute.

6. Where, in an action for causing death at a crossing, it is alleged that defendant's negligence consisted in running its train at a rate of speed greater than that fixed by ordinance, and in permitting the crossing to be in an unsafe condition, and in failing to give the usual signals, it was error to submit to the jury the

issue of defendant's negligence in not discovering the presence of deceased on the track in time to avoid striking him.

7. A request to charge that if the jury found certain facts to exist such facts would, in law, be negligence, invaded the province of the jury, and denied to them the right to determine whether or not such facts constituted negligence, and was, therefore, properly denied.

Appeal from district court, Colorado county; T. H. Spooner, Judge.

Action by E. A. Harris and others against the Galveston, Harrisburg & San Antonio Railway Company for negligently causing the death of one Hattie Harris. There was a judgment for plaintiffs, and defendant appeals. Reversed.

Brown, Lane & Jackson, for appellant. J. W. Munson and Atkinson & Abernethy, for appellees.

PLEASANTS, J. Appellees sued appellant for alleged pecuniary damage resulting to them from the death of one Hattie Harris, who was killed by a passing train upon defendant's railway in the town of Eagle Lake, while deceased was attempting to cross the railway at a public crossing in said town, and whose death was caused, as appellees alleged, by the gross negligence of the employees of the appellant; the alleged negligence consisting (1) in running the defendant's cars at the dangerous and reckless rate of speed of 25 or 30 miles an hour, and in violation of the ordinance of the town of Eagle Lake, which prohibited a greater speed than 6 miles an hour; (2) in permitting the crossing over its track to be in an unsafe and dangerous condition; (3) that, as the train approached the crossing, no bell was rung nor whistle blown. The deceased was the father and son of the appellees, and the petition alleged that he was a kind and indulgent and affectionate son and parent, and that he was earning at the time of his death \$85 per month, and of which amount he contributed \$70 monthly to the support of appellees; and appellees alleged their damage to be \$50,000. Defendant company answered by general denial and by special plea charging contributory negligence by the deceased; and the plaintiffs, by replication, denied the averments of the defendant's special answer. Upon trial of the cause, verdict and judgment were rendered for plaintiffs for the sum of \$2,600, and, new trial being denied the defendant, it appealed to this court.

The first error assigned is that the court excluded the testimony of two witnesses offered by the defendant to prove that the deceased expended his earnings upon a certain prostitute. This testimony, in the opinion of a majority of the court, was admissible for the purpose of contradicting the testimony of the plaintiff Mrs. Harris that her son expended most of his wages in support of herself and his children. There was no error in excluding the testimony of the wit-

ness W. T. Eldridge, stated under the second assignment. The answer to the question propounded to the witness would have been but his opinion deduced from the facts to which he had testified, and the case is not one failing within any of the exceptions to the rule which excludes the opinion of a witness. But the court should have admitted the testimony of this witness to the effect that some time in the fall previous to his death the deceased had approached the witness, and proposed to work for him for \$35 per month. This evidence was admissible in rebuttal of the evidence on part of plaintiffs as to the monthly earnings of the deceased. The testimony of the witness Boedeker should have been admitted to show the points on the track of the railway at which signals were usually given by the engineer and fireman, evidence having been previously given that the usual signals were given before the deceased was struck by the train.

The sixth error assigned by appellant is that the court erred in admitting in evidence over its objections the ordinance of the town of Eagle Lake. The objection to this ordinance that it is without an enacting clause should have been sustained by the court. Article 488, Rev. St. 1879, provides that when a town ordinance is published in the form of a book or pamphlet, the enacting clause may be omitted. But the same article declares that the style of all ordinances shall be: "Be it ordained by the city council of the city." The witness Mansfield, who was city attorney of Eagle Lake at the time of the adoption of the ordinance, testified as follows: "I wrote the ordinances on paper, and then submitted them to the town council, and they adopted them, and they were then copied in the book." From this testimony we understand the ordinance offered in evidence to be a copy of what was adopted by the town council. While the statute allows the city council to omit the enacting clause of an ordinance when it prints or publishes the same, it is mandatory in its requirement that in adopting an ordinance the city council shall observe and follow the language prescribed for the enacting clause. The ordinance was, for this defect, we think, void. The other objections urged to the ordinance are not valid. The ordinance being void, the court erred in submitting to the jury the issue presented in the section of the charge complained of under the appellant's ninth assignment of error.

The appellant complains of the first paragraph of the court's charge, because it omits the words "at least" in the following sentence: "The law requires those in charge of and operating railway trains to provide a bell or steam whistle for each locomotive, and that the bell be rung or the whistle blown at a distance of eighty rods from the place the railway track crosses a street or public road, and that such bell be kept ring-

ing until the engine shall have crossed the street or public road." Whether such omission be an error for which a judgment should be reversed we do not decide, but we think it is the right of the appellant to have the law given to the jury as it is written. The omission to ring the bell or to sound the whistle within less than 80 rods from the crossing would be negligence per se; but whether it would be negligence to ring the bell or blow the whistle at a greater distance than 80 rods from the public crossing would be a question to be determined by the jury under all the facts bearing upon the issue.

The eighth assignment of error is well taken, and must be sustained. There was no averment in the pleadings which authorized the submission to the jury of the issue of negligence vel non on part of appellant's servants in not discovering the presence of the deceased on the track in time to avoid inflicting injury upon him. As we have seen, the petition charged negligence in three particulars only, no one of which authorized the issue submitted in the paragraph of the charge complained of under this assignment. Every issue submitted by the court to the jury must have for its basis both an averment and evidence relative and pertinent thereto. Authority need scarcely be cited for this requirement, but the case of *Railway Co. v. Younger* (Tex. Civ. App.) 29 S. W. 948, seems to be just in point.

We are of the opinion that the court did not err in refusing to give charge No. 2 requested by defendant. Whether or not the defendant may have been entitled to a charge touching the alleged drunkenness of the deceased, and its bearing upon the issue of contributory negligence, is a question which need not be decided; but the charge requested was properly refused, because it instructed the jury that, if they found certain facts to exist, such facts would, in law, be negligence, and thus invaded the province of the jury, and denied to them the right to determine whether or not such facts constituted negligence.

The appellant's complaint under the fourteenth assignment of error is well grounded, and the court should have given charge No. 5 requested by defendant.

Upon careful inspection of the record, we discover no other material errors than those pointed out in this opinion, and we shall not discuss the remaining assignments. The judgment is reversed, and the cause remanded.

HAYS et al. v. BYRD et al.

(Court of Civil Appeals of Texas. June 4, 1896.)

SHERIFF'S RETURN—SUFFICIENCY.

1. Rev. St. 1895, art. 1225, requiring that the return of the officer executing the writ shall

be signed by the officer officially, is complied with when the return is made over the official signature of the sheriff, either with or without the signature of the deputy by whom the sheriff executes the writ; and therefore the fact that the deputy who made the return simply writes the letter "C." for his own signature is immaterial.

2. A return made over the official signature of the officer executing the writ need not show where the writ was served, and therefore, the fact that the officer describes himself as "Sheriff of S. J. County" will not invalidate the return.

Error from district court, San Jacinto county; L. B. Hightower, Judge.

Action by G. B. Byrd and others against A. M. Hays and others. From a judgment by default, certain defendants appeal. Affirmed.

S. A. McCall, for appellants. Jas. E. Hill, for appellees.

PLEASANTS, J. This is an appeal by writ of error from a judgment by default against appellants and appellee L. W. Parkington. The only question presented for our decision is whether or not the officer's return of the citation is sufficient to authorize the judgment. The return was amended upon motion of the plaintiffs, and, as amended, the return is in these words: "Sheriff's Return. Came to hand 1st day of October, 1894, at 10 o'clock a. m., and executed 3d day of October, 1894, by delivering to L. W. Parkington, R. O. Hays, and A. M. Hays, the within-named defendants, in person, each of them, a true copy of this writ. W. Y. Robinson, Sheriff of S. J. County, Texas, by C., Deputy." It is submitted by counsel for appellants that this return is not such as is required by the rules announced in several cases by our supreme court, and that it is especially obnoxious to the rule laid down in the case of *Roberts v. Stockslager*, 4 Tex. 307, but we fail to discover that the return is in violation of any of the rules announced in the cases cited. The petition averred that the defendants were all residents of San Jacinto county, and prayed for the necessary process to cite them to answer the petition, and citation issued directed to the sheriff of San Jacinto county, or any constable thereof, commanding such officer to summon each defendant to appear, and answer the plaintiffs' petition, at the next regular term of the court; and, in addition, it contained the other requisites prescribed for such writ. Article 1225 of the Revised Statutes of 1895 requires that the return of the officer executing the writ shall be indorsed thereon or attached thereto, and that it shall show when the writ was served, and the manner of service, and shall be signed by the officer officially.

The first assignment of error is that the return does not show positively and affirmatively that any officer authorized to execute the writ did actually do so. As is to be seen by inspecting the return, it is signed: "W. Y. Robinson, Sheriff of S. J. County, Texas, by C., Deputy." It appears from the record that the return as originally made was considered

by the court, and by its order the return was amended, and the amended return is that which is in the transcript, and which is excepted to by appellants. Under such circumstances we are authorized to presume that W. Y. Robinson was the sheriff of San Jacinto county, and, further, that his signature to the return was affixed thereto by himself, or by a duly-appointed deputy of the sheriff. The law authorizes the sheriff to act by deputies, and, while the statute requires the return upon every writ to be signed officially by the officer executing the writ, there is no prescribed form of the official signature when the sheriff acts by deputy; and this requirement of the statute, we take it, is complied with when the return is made over the official signature of the sheriff, either with or without the signature of the deputy by whom the sheriff executes the writ. The words of the statute "that the return must be signed officially by the officer executing the writ" have reference to the officers to whom the writ of citation is directed, "the sheriff" or any "constable," and do not embrace the deputies of the sheriff. This being so, the fact that the deputy who made this return simply writes the letter "C" for his signature is immaterial. In reply to the objection that it does not appear from the return that the writ was executed in San Jacinto county it is sufficient to say that the statute does not require that the return shall show "where" the service was made. The law presumes, until the contrary appears, that its officers know their powers and duties, and hence there is no requirement of the statute that the officer executing a writ of citation shall show by his return that the writ was executed in his county. In the case of *Roberts v. Stockslager*, which seems to be chiefly relied on by appellants to sustain their contention, the return of the officer simply showed that the writ was executed by "leaving" a copy of the writ without showing with whom it was left. Manifestly, the decision in that case can have no bearing upon the question involved in this. There the return was fatally defective in not complying with an express provision of the statute. There is no provision of the statute, or other rule of law, that we are aware of, which requires the return of a sheriff, who executes a writ of citation by a deputy, to show the name of the deputy. What one does through another is as essentially his act as if done *propria persona*. The return, in our opinion, being in conformity with the requirements of the law, the judgment is affirmed.

WASHINGTON v. MISSOURI, K. & T. RY.
CO. OF TEXAS.

(Court of Civil Appeals of Texas. May 28, 1896.)

INJURIES TO PERSON ON TRACK—DIRECTING VERDICT—EVIDENCE—SUFFICIENCY—LICENSEE.

1. When the evidence is not sufficient in law to authorize a finding for plaintiff, the jury

should be peremptorily instructed to find for defendant.

2. In an action for negligently causing the death of plaintiff's husband, a verdict for defendant was properly directed on evidence that, shortly after deceased was seen walking upon defendant's right of way, he was killed in a wreck caused by the collision of two sections of a freight train, which had, in some unexplained manner, become separated, and that plaintiff's witnesses observed no brakemen nor their lanterns on either of the sections at the time of the collision; there being no evidence that the couplings were defective, nor that defendant was aware that the train had become broken into sections, until the collision occurred, nor that deceased's presence near the point of the wreck was discovered by those operating the train, nor that the collision could have been prevented had it been discovered that the train had parted before the wreck occurred.

3. Under the circumstances, it was unnecessary to determine whether deceased was a trespasser or a licensee.

Appeal from district court, Harris county; S. H. Brashear, Judge.

Action by Lizzie Washington against the Missouri, Kansas & Texas Railway Company of Texas to recover damages for the alleged wrongful killing of her husband. A verdict for defendant was directed, and plaintiff appeals. Affirmed.

O. T. Holt and J. D. Wolverton, for appellant. Baker, Botts, Baker & Lovett, for appellee.

WILLIAMS, J. This suit was instituted by appellant against appellee for the recovery of damages for the alleged wrongful killing of her husband, one Mose Washington, by appellee, through the negligence of its employes in the operation of a train of cars upon appellee's track in the city of Houston. Upon trial of the case, after hearing the evidence, the court instructed the jury to find for the defendant, which was done; and, upon the verdict, the court rendered judgment denying the right of plaintiff to recover against defendant, and, a new trial being overruled, plaintiff appealed to this court.

The question presented for our decision is: Did the court err in taking the case from the consideration of the jury, and adjudging the defendant not liable in damages to plaintiff? The solution of this question depends upon the answer to this further question: Would the law sanction a verdict had the jury rendered one for plaintiff, upon the evidence submitted to them? If not, then it was the duty of the court to instruct a verdict for defendant; and not, as seems to be the contention of the appellant, to permit the jury to return a verdict, and if, in the judgment of the court, the verdict was not warranted by the evidence, to set it aside, and grant a new trial. We take it that it is now settled by the weight of authority that, when the evidence is not sufficient in law to authorize a finding for the plaintiff by the jury, the court is not required to go further with the trial, but the jury should be peremptorily instructed to find for the defendant. *Railway Co. v. Faber*, 77 Tex.

153, 8 S. W. 64; *Pleasants v. Fant*, 22 Wall. 120. The doctrine as announced in the cases here cited, and in many others which might be cited, is now generally recognized and enforced by the courts, both of England and America, in the trial of jury cases; and the rule which was formerly observed in some courts, which required a submission of the cause to the jury if there were but a scintilla of evidence to support an issue of fact, is now generally repudiated.

The facts of this case, as we deduce them from the evidence, are substantially these: The deceased, Mose Washington, who was the husband of the plaintiff, left his home in the latter part of the afternoon of December 31, 1894, telling his wife he was going on a hunt, and when she next saw him, about 9 o'clock on the next day, he was dead. She did not know of his ever returning to their house after he left on the afternoon of the previous day, nor did she know anything of his movements or his whereabouts after he left the house. The deceased was seen between 6 and 7 o'clock p. m. on December 31, 1894, walking on the right of way of defendant company, and near to its track in the city of Houston. He was going east at the time he was seen on the right of way, and on this part of the right of way there is a footpath running by the side of the track of the railway, from the termination of Holly street to a bridge on said track, over a deep ravine. This bridge was built by defendant some two years before the trial, and it is so constructed as to admit of an easy passage by footmen; and both this pathway and the bridge had been much used by many people living in the First and Fifth wards of the city. Holly street is west from this bridge, and between this street and the bridge the track of the road passes through a cut of some seven or eight feet in depth. The distance from this cut to the bridge is not shown with certainty, the evidence leaving it in doubt whether the distance is 100, 200, or 300 feet. In this cut, about 7 o'clock p. m. of the 31st of December, 1894, a train moving east upon the railway track, and operated by the employes of defendant, was wrecked; and the next morning, from under the wreck, and lying within two or three feet of the track, the dead body of Mose Washington was found, his head having been severed from his body. There was a flat car in the derailed train, and upon it was an oil tank, and from under this tank the body was taken. Between the place of the accident and the bridge was a switch. But two witnesses testify about the derailment of the train. Both lived near the place. The train was in two sections. The fore section halted for the brakeman to set the switch, and, while this was being done, the rear section of the train collided with the front section, and caused the derailment. The train was a freight train, but how many cars composed it we are not informed by the evidence, nor does the evidence show the number of

cars in either section of the train. The train had come uncoupled at some point west of the place of accident, but at what point or at what distance from the point of derailment the evidence is silent. The grade of the track coming east is descending from a point several blocks west (but how many is not shown) from the place of the accident, and beyond that point, for some distance, the grade going east is ascending. The witnesses observed no brakeman on either the front or rear section of the parted train at the time of the collision and derailment. It was dark, but witnesses could have seen brakemen, or at least their lanterns, on the top of the train; but neither witness would testify affirmatively that there was no brakeman upon either section of the train. They observed neither lights nor men upon the tops of the cars. The evidence gives no explanation whatever of the uncoupling of the train. There is no evidence that the coupling was out of repair or otherwise defective. There is no evidence that those in charge of the train were aware of the fact that the train had broken into sections, until the collision occurred. The time between the halting of the front section and the collision is left in doubt, the witnesses estimating it at from three to six minutes. There is no evidence whatever tending to show that the presence of the deceased at or near the point of collision was discovered by any of those operating the train, or observed by either of the witnesses who saw the accident. There is nothing in the evidence tending to show that the collision could have been prevented by those operating the train had they discovered that the train had parted before the collision occurred.

This is the sum and substance of the evidence in this case, and a majority of this court are of the opinion that the jury could not have reasonably concluded that either the separation of the train into two sections, or the collision of the sections, and the consequent derailment of the train, was caused by any degree of negligence on the part of the defendant or its employees; and, without such conclusion, plaintiff could not recover, no matter whether the deceased was a trespasser on the right of way of defendant, or was there by the permission of the defendant. Under this view of the case, it is unnecessary for us to determine whether the deceased was a trespasser or licensee upon the property of the defendant. About the only evidence of negligence is the separation of the train, and the collision of the sections. Such facts, it seems to us, are but a scintilla of evidence; and, without further facts tending to establish some culpable act or omission on the part of the defendant or its servants, a verdict for plaintiff would have been contrary to the law, and the court rightfully instructed the jury to return a verdict for the defendant. Had there been a contractual relation between the defendant and the deceased, our conclusion would doubtless have been that the fact of the

separation of the train, and the collision and derailment, would have been something more than a "scintilla of evidence," and would have been sufficient to establish prima facie negligence on the part of the defendant's servants in the operation of the train. The judgment is affirmed.

GALVESTON, H. & S. A. R. CO. v. SPINKS.
(Court of Civil Appeals of Texas. May 28, 1896.)

RAILROAD COMPANIES—TREES ON RIGHT OF WAY
—INJURY TO ADJOINING LAND.

A railroad company is not bound to remove from its right of way a natural growth of trees which shade and injure the crops upon the land of an adjoining owner, and also sap such land of its fertility, it not appearing that the roots or branches of the trees penetrate or overhang said land.

Appeal from Colorado county court.

Action by S. H. Spinks against the Galveston, Harrisburg & San Antonio Railroad Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

Brown, Lane & Jackson, for appellant.
Foard, Thompson & Townsend, for appellee.

WILLIAMS, J. This case is submitted upon the facts found by the court below upon an assignment which questions the correctness of the conclusion of law based upon them. In brief, those facts are that appellant owns in fee a strip of land upon which its railroad is laid, and on each side of which lie cultivated lands owned by appellee. Upon the land owned by appellant there stands a natural growth of tall trees, which shade and injure the crops upon appellee's adjacent land, and also sap such land of its fertility. For this injury to crops and land the judgment appealed from was rendered. No act of defendant is shown beyond the construction and maintenance of its road and its omission to cut down its trees, it having removed only such portion of them as was necessary to permit the repair of its road and the operation of its trains. We know of no principle of law which authorizes the judgment. The land and the trees are the property of appellant, and it has the same right to them that appellee has to his land and crops. The exercise of one right is not an invasion of the other. If the presence of the trees impairs the productiveness of appellee's land, or if the cultivation of the latter should injure the trees, these results would constitute no wrong by one owner to the other, but would only be the incident of their ownership. No breach of any duty owed by appellant to appellee is shown. It is not stated that the roots or branches of the trees penetrate or overhang appellee's land. If they did, appellee had the right to remove such roots or branches as entered or overhung his land, or, if damage was caused by them, it may be true that he could main-

tain an action for such damage. Wood, Nuis. pp. 112, 113, 300. But no such case is made here, either in the statement of the cause of action or in the facts found by the court. It is not shown that appellee has not kept its right of way in proper condition for the safe and proper operation of its trains, but the contrary is inferable from the findings. Had it failed to do so, this might be a breach of the duty which it owed to those interested in the manner in which it conducted its road, but not of one due to appellee to protect his land and crops from such damage as that of which he complains. It is urged that, as there is no statement of facts, we should presume that enough was shown to sustain the judgment. But the conclusions of the trial judge show affirmatively the facts upon which the judgment is rendered, and the conclusion of law based upon those facts was excepted to by appellant in the court below and is erroneous. It is not a case where there is an omission to find some fact, but one in which a ruling erroneous in law is grounded upon facts found. Reversed and rendered.

GIMBEL et al. v. GOMPRECHT et al.

(Court of Civil Appeals of Texas. May 28, 1896.)

WRONGFUL ATTACHMENT—MALICE—OPINION EVIDENCE.

1. Probable cause for suing out an attachment may have existed though the attachment was unauthorized.

2. In an action for the malicious suing out of an attachment, it is error to instruct in terms that malice may be inferred from the want of probable cause.

3. Ratification by the principal of the act of his agent in suing out a writ of attachment does not ratify any malice in his act, unless the principal was aware thereof.

4. In an action for wrongful attachment, the statement of a third person to defendant's agent, by whom the writ was sued out, of facts on which the agent acted, is inadmissible.

5. A person cannot testify as to whether he acted with malice in suing out an attachment.

Appeal from district court, Smith county; Felix J. McCord, Judge.

Action by M. Gimbel & Son against J. Gomprecht & Co. There was a judgment for defendants, and plaintiffs appeal. Reversed.

For opinion on questions certified to the supreme court, see 35 S. W. 470.

H. C. & Cone Johnson, for appellants. Duncan & Jones, for appellees.

WILLIAMS, J. The decision of the supreme court in answer to certified questions necessitates a reversal of the judgment. The exceptions to the plea in reconvention and to the plea in abatement of the attachment should be sustained; and, if plaintiffs show themselves entitled to recover their debt, judgment should be rendered for the amount of their debt, and applying the money real-

ized from the sale of the attached property to its payment. In case defendants should put themselves in a position to have a further trial upon a plea in reconvention of which the county court has jurisdiction, it may be important to have a decision of such points presented by the assignments as may arise on such trial.

The court should have given special charge No. 1, asked by plaintiffs, stating the conditions upon which defendants could recover exemplary damages.

There was error in the charge wherein the jury were instructed that, "in case the defendants were not about to dispose of their goods with intent to defraud their creditors, the attachment would be wrongfully sued out, and without probable cause." There may have been in fact no ground for the attachment, and yet probable cause for suing it out may have existed. The language quoted was used in defining the right to recover actual damages, and by itself might not have been harmful; but in the instructions upon the subject of exemplary damages the phrase "without probable cause" was used, and the jury would naturally look to the clause in question as indicating its meaning.

The definition of malice was correct, but the court should not have instructed the jury that "malice may be implied in the want of probable cause." *Biering v. Bank*, 69 Tex. 599, 7 S. W. 90; *Willis v. McNeill*, 57 Tex. 476.

The special instruction No. 7, requested by appellants upon the subject of ratification by plaintiffs of a malicious suing out of the attachment by their agent, should have been given. There could be no such ratification of the malicious act of the agent, if such it was, without knowledge on plaintiffs' part of the existence of the malice, or of facts and circumstances from which it is to be inferred. The telegram from the sheriff to plaintiffs merely informed them that the attachment had been sued out by the agent, and levied, and asked if they ratified his act, to which plaintiffs replied, "We ratify action of Coldwell, who represents us." If they knew no facts which should have put them on notice that Coldwell's action was malicious, this telegram could not be held to be an adoption of his malicious conduct, or as making them responsible for it, and the court should have so charged at the request of plaintiffs.

Evidence that one Smith told Coldwell that, "from what he [Smith] had seen, he believed the defendants were about to fraudulently dispose of their property," was properly excluded. Smith stated to Coldwell what he had seen, and evidence was admitted of the statements thus made. The other was only an opinion of Smith, based upon those facts, and could not properly add to their weight in producing in Coldwell's mind a well-grounded belief that there was cause for the attachment. If Coldwell's opinion was not justified by those facts, no more was Smith's. It

was not competent for Coldwell to state that he was not actuated by malice in suing out the attachment. This involved a conclusion of law as to what would constitute malice. But it was competent for him to state that, in taking out the writ, he did not intend to injure or harass defendants, and that he was actuated only by an honest desire to collect the debt. In other words, a witness may testify as a fact that he did or did not entertain a particular intent, but he cannot state a conclusion of law, which may be based upon other circumstances besides the existence of the specific intent. *Hamburg v. Wood & Co.*, 66 Tex. 168, 18 S. W. 623; *Sweeney v. Conley*, 71 Tex. 543, 9 S. W. 548.

BURNETT v. CASTEEL et al.

(Court of Civil Appeals of Texas. June 4, 1896.)

AMENDMENT OF PLEADING—SALE OF LAND—COMMISSION—RELEASE.

1. Where the original complaint declares for commissions due absolutely for negotiating a sale of land for defendants, an amendment alleging that the commissions were not to become payable until the purchaser paid a certain portion of the purchase price, and that such portion was paid, does not set up a new cause of action.

2. The fact that in the sale of land the vendor and vendee agree that the latter shall pay the commissions agreed upon between the vendor and plaintiff for the services of the latter in negotiating the sale does not relieve the vendor of liability to plaintiff, in the absence of an agreement on plaintiff's part to release the vendor.

Appeal from district court, Galveston county; William H. Stewart, Judge.

Action by Casteel & Spears against J. H. Burnett. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

Jas. B. & Chas. J. Stubbs, for appellant. Edwin S. Easley, for appellees.

GARRETT, C. J. Appellees sued the appellant for the recovery of commissions upon the price of a tract of land which they were authorized by the appellant to sell. In the original petition, filed January 22, 1894, appellees alleged that on or about July 11, 1891, they procured purchasers for the land at the price and upon the terms agreed on, etc. On October 17, 1894, they filed an amended petition, alleging that under an oral contract between them and appellant it was agreed that no part of the commissions should become due and payable until appellant had received the sum of \$5,000 of the purchase price from the purchasers; and that subsequent to January 22, 1892, the purchasers had completed payments amounting to the sum of \$5,000. Appellant demurred to the amended petition that it set up a new cause of action different from that first declared on, which was barred by the statute of limitations of two years. The demurrer was overruled by the

court. Appellant pleaded, further, a general denial; limitation of two years; and that it was agreed between the appellees, himself, and the purchasers that the purchasers should pay the commission, and that appellees were to look to them only for it. The case was tried by jury, and resulted in a verdict and judgment in favor of appellees.

It was shown that the appellant employed the appellees to sell the land, and agreed to pay them a commission for doing so. Through the agency of appellees the appellant made a contract with one C. R. Munger to sell the land to him and his associates upon terms fully set forth in a written contract signed by Munger and the appellant. One thousand dollars was paid in cash, and the balance was to be paid in deferred installments. Pending the sale, appellees agreed to accept 2 per cent. of the purchase price as their commission, which appellant agreed to pay when he had received as much as \$5,000 of the purchase money. In the negotiations between Munger and the appellant it was agreed that Munger should pay the commission of appellees, and it was so expressed in the contract, which was reduced to writing by Casteel, one of the appellees, at the dictation of Burnett and Munger; but appellees never agreed to look to Munger for their commission. Subsequent to January 22, 1892, which was just two years prior to the time the original petition was filed, and prior to October 17, 1892, which was two years prior to the filing of the amended petition, Munger completed the payment of \$5,000 to appellant upon the purchase price of the land. Upon the contested facts the findings of the jury have been adopted, since they are supported by the evidence. The amended petition did not set up a new cause of action. As exhibited in the original petition, the cause of action was for a commission of 2 per cent. due absolutely on the date of the sale of the land, while in the amended petition the transaction out of which the liability grew is the same as set out in the original petition, only the date of payment being changed, and the payment made contingent upon the receipt of \$5,000 of the purchase money.

The sixth and eighth assignments of error are as follows: "Sixth. The court erred in that part of the charge which reads as follows: 'The mere fact that in the written agreement between Burnett and the purchaser, Munger, that Munger was to pay the two per cent. commission, would not release Burnett's liability to the plaintiffs for the commissions if the facts show liability on the part of Burnett to plaintiffs, and Burnett would have to look to Munger alone for any commissions that might be paid by the defendant to plaintiffs;' because it is distinctly a comment upon the evidence, and indicates the opinion of the court, and this particular part of the evidence should not have been singled out and eliminated from the

cause. The jury had the right to consider this fact in connection with the other evidence; and this portion of the charge was, in effect, upon the weight of the evidence, was partial and incomplete, and had a tendency to mislead the jury to defendant's prejudice." "Eighth. The court erred in refusing to give charge No. 2 asked by defendant, and which was in the following language: 'The jury are instructed that, in order to hold defendant liable, the evidence should show that he agreed to pay plaintiffs the commissions, and was not, through any conduct on the part of plaintiffs, or either of them, led by them to believe that they would look to Munger for their commissions, and not to him; and unless you believe that the minds of the plaintiffs and defendant met upon this question, and that it was understood that plaintiffs should look to Burnett, and not to Munger, then your verdict should be for defendant.' " The issues presented by the evidence in the case, in addition to time of payment, were whether or not Burnett had agreed to pay the appellees the commissions for the sale of the land, and; if so, had they released him, and agreed to look to Munger. So we think the court did not err in instructing the jury as to the effect of the written agreement between Burnett and Munger; and the instruction complained of, when taken in connection with the further instruction that, unless the jury believed from the evidence that it was mutually understood and agreed by and between appellees and appellant that he should pay the commission sued for, then their verdict should be for defendant, presented issues fairly and completely to the jury. There was no question of estoppel in the case. It was simply a question of fact whether or not appellees had agreed to release Burnett; and it would not have been proper for the court to have given the requested instruction No. 2. If there was any error in admitting the evidence of Munger, complained of, it is not shown to be material. Appellees produced a purchaser for the land, with whom the appellant contracted, so the court did not err in refusing to give the sixth special instruction requested by the appellant. Judgment affirmed.

THOMPSON et al. v. FORD.

(Court of Civil Appeals of Texas. June 4, 1896.)

PATENTS—RECORD OF FIELD NOTES—EFFECT.

The failure to record the field notes in the county where a portion of the land was situated will not invalidate the patent from the state, as against persons who settled upon that portion thereof, intending to acquire it as a homestead, but who never complied with the provisions of the statute regulating the subject.

Appeal from district court, Wharton county; T. S. Reese, Judge.

Action by Sophia Ford against Frank

Thompson and others to recover a certain section of land. Plaintiff had judgment, and defendants appeal. Affirmed.

Appellee sued appellants, Frank Thompson and Mrs. Louisa Sankbial and others, to recover section of land No. 24, which lies along the line of Jackson and Wharton counties. She recovered judgment against all of defendants, and two of them have appealed. This land was located as an alternate section for the school fund in 1874, by virtue of a certificate issued to the Washington County Railroad Company, and the field notes of the survey were filed in the general land office December 31, 1874, and before that date had been filed in the office of the county surveyor of Wharton county, but were never recorded in Jackson county. There is some uncertainty as to the location of the boundary line between Wharton and Jackson counties,—the maps in use in the land office, and recognized there, showing the line at one place; and a survey made by one Collingsworth, in 1861, under authority from the commissioners' court of Wharton county, showing it to be at a different place. According to the former map the section No. 24 is situated wholly in Wharton county, but according to the latter a portion of it is in Jackson county, and such portion is the land in dispute. On the 2d day of January, 1888, E. C. King made a contract with the state for the purchase of section 24; and, having complied with the law regulating such sales, a patent for it was issued to her January 29, 1895. Appellee has acquired her title. Appellant Sankbial claims a tract of 160 acres, known as the "J. B. Wallace Survey," which, according to the maps in the land office, dated 1865, lies wholly in Jackson county, but which, to the extent of 40 acres, conflicts with section 24. This is the subject of the controversy between Mrs. Sankbial and appellee. In 1861, J. B. Wallace settled upon this 160 acres of land, intending to acquire it as a homestead, but never complied with the provisions of the statute regulating the subject. He continued to reside on the land until 1878. In that year Mrs. Sankbial purchased his interest, and received a deed for the tract, which was duly recorded; and she has since lived upon the tract, and has regularly paid all of the taxes thereon, but she has never lived upon or occupied the part of the tract embraced in the lines of section 24 except that, at some time which is not shown, she has put a fence upon it. She has no other claim except such as was acquired through the deed from Wallace, and her occupancy. Appellant Thompson settled on the land claimed by him in 1891, and made application to acquire it as a homestead, but has not complied with the provisions of the statute, so as to entitle him to hold the same as a homestead. He has continued since 1891 to reside on the land, occupying the part in conflict with section 24. His field notes were returned to the land

office in February, 1896. Neither of the appellants, prior to the institution of the suit, had notice of any adverse claim, or that it was claimed that the land which they occupied lay in Wharton county. There is no statement of facts, the foregoing statement being based upon the trial judge's findings, and it is as full as can be made from such findings.

John O. Rowlett, Henry T. Chivers, J. D. Owen, and O. S. York, for appellants. Linn & Mitchell, for appellee.

WILLIAMS, J. (after stating the facts). It is claimed that the patent for section 24 is void as to that portion of the land which lies in Jackson county, because the field notes were never recorded in that county. It is not made to appear that the land in controversy is in Jackson county, and this would perhaps suffice to dispose of the case. But, if this fact were shown, the conclusion contended for would not follow. The validity of the patent when issued would not be affected by the mere failure of the county surveyor to have the field notes recorded in both counties. The patent itself passes the legal title of the state to the land which it embraces, and only the state or some person having acquired a right to the land prior to its issuance could attack it. If appellants had succeeded in showing that, before the issuance of the patent, they had acquired a better right to the land than that of the patentee, the patent would not preclude them from asserting it. But the finding of the court below is that neither of them had complied with the law, so as to give them the right to the land as homestead. They were not, therefore, in a position to contest the title acquired by appellee through her purchase from the state, by asserting that they had settled upon the land, and taken the steps essential to fix their rights to it as homestead, without notice of the prior location. Whether or not, under articles 3904, 3923, and 3965, Rev. St. 1879, the survey of the land, the record of the field notes in Wharton county, and the return of them to the land office, would be notice to subsequent locators on the part of it in Jackson county, if, indeed, any of it was located in that county, we need not decide. In the case of *Groesbeck v. Harris*, 82 Tex. 415, 19 S. W. 850, it is held, under a similar state of facts, that the field notes in the land office gave notice of the entire location. At any rate, the failure of the surveyor, making a survey of land lying partly in a county adjoining his own, to send the field notes to such other county for record, does not render the location void, for by the terms of article 3904 it is declared to be valid; and, as neither of appellants has shown a right to the land, they cannot claim to be innocent purchasers. The conclusion of the trial judge that Mrs. Sankbital failed to sustain her plea of limitations was correct. No objection was

taken in the court below to the joint judgment for costs against all of the defendants; nor was there any effort made to have the court apportion the costs. Affirmed.

SCHNEIDER v. HILDENBRAND et al.
(Court of Civil Appeals of Texas. June 11, 1896.)

**SPECIFIC PERFORMANCE—CONTRACT TO CONVEY—
—STIPULATION FOR ARBITRATION.**

A contract between lessor and lessee provided that, on the expiration of the lease, the lessor or his personal representative should convey to the lessee, if the latter so desired, the fee of the premises, and stipulated that, if the parties could not agree on the price, it should be determined by two arbitrators, mutually chosen, or by an umpire to be appointed by the arbitrators in case they disagreed. Held that, as the stipulation for determining the price was not essential to the validity of the contract, a court of equity should disregard it, and, in case the parties to the contract are unable to agree on the price, enforce specific performance against the lessor or his personal representative, on payment of a fair consideration, to be determined by the court.

Error from district court, Galveston county; William H. Stewart, Judge.

Action by C. Hildenbrand & Co. against Fred Schneider, administrator of C. F. Hildenbrand, deceased, to enforce specific performance of a contract between plaintiffs and intestate for the conveyance of land, and for the determination of the price through arbitrators. From a decree enforcing the contract in strict accordance with its terms, defendant brings error. Reversed.

Wheeler & Rhodes, for plaintiff in error. Jas. B. & Chas. J. Stubbs, for defendants in error.

PLEASANTS, J. This suit was instituted in the probate court of Galveston county, by the defendants in error against the plaintiff in error, upon a contract in writing made in September, 1883, between C. F. Hildenbrand, now deceased, and of whose estate the plaintiff in error is administrator, and the firm of C. Hildenbrand & Co., then composed of C. Hildenbrand and Pat Barry, the former of whom subsequently died, leaving the defendant in error Mrs. Elise Hildenbrand, his widow, his sole legatee and devisee. By the contract, C. F. Hildenbrand leased to C. Hildenbrand & Co., for the term of 10 years, certain real property situated in the city of Galveston, and which was fully described by reference to lots and blocks of the city; and the lessor agreed, in further consideration of the lease, upon the expiration thereof, should the lessees so desire, to convey to them, by deed of general warranty in fee, the entire property, with the stipulation that, if they (the lessor and lessees) should be unable to agree upon the price or value of said property, it should be determined by two arbitrators, one to be chosen by the lessor, and the other by the lessees, and, in case the arbi-

trators should not agree, they should refer the question of disagreement to an umpire to be chosen by them, and the price fixed by the arbitrators or the umpire should be the value of the property, and, upon the payment of which by the lessees, the lessor or his personal representative should make conveyance to them of the property; and said contract further stipulated that in case of the neglect or refusal of the lessor or his personal representative, upon demand made therefor by the lessees, to appoint an arbitrator in accordance with the terms of the contract, then the lessees should select an umpire, who alone should fix and determine the value of the property, and such valuation should be the purchase price. The object of the suit was to enforce specific performance of the contract, and the application averred that applicants, desiring to purchase the property in accordance with the terms of the contract, had demanded compliance therewith of the administrator of the estate of the said C. Hildenbrand, deceased, and they were unable to agree upon the price of the property, and that the administrator had declined, after appointing an arbitrator, to proceed to determine the value of the property in the manner provided in said contract, upon the ground that he was not authorized to carry out the agreement to arbitrate as provided in the contract, and that the probate court alone had jurisdiction of the matter; and the applicants prayed that the administrator be by the court authorized to carry out the provision of said contract, and to appoint an arbitrator, and to specifically execute said contract, and for general relief. To this application the administrator made answer: That the court was without jurisdiction to grant the application, and that he submitted himself to the jurisdiction of the court solely for the purpose of answering the application; that the death of his intestate had revoked the agreement to appoint arbitrators, and that specific performance of the contract could be obtained only in the mode prescribed by the statute. And the administrator further excepted to the application on the ground that applicants had not presented their claim in the manner provided by law, and he prayed that the application be refused, and that he recover costs against applicants. Upon hearing of the application, the county court made and entered the following decree: "No. 2,368. Estate of C. F. Hildenbrand, Deceased; Fred Schneider, Administrator. January 4th, 1894. This day came on to be heard the application of C. Hildenbrand & Co., a firm composed of Mrs. Elise Hildenbrand, widow of Christian Hildenbrand, deceased, and Pat Barry, praying that said administrator be required by this court to act under and in accordance with the provisions of an agreement made by and between C. F. Hildenbrand, in his lifetime, and Pat Barry and Christian Hildenbrand, and praying for specific performance. And it appearing to the court that the material averments of the

application are true, and that applicants are entitled to the orders and relief therein prayed, it is accordingly ordered, adjudged, and decreed that said Fred Schneider, administrator of C. F. Hildenbrand, deceased, be, and is hereby, authorized and ordered to appoint an arbitrator within 20 days from the date thereof, who shall act in connection with an arbitrator to be appointed by the said C. Hildenbrand & Co. (the parties hereto having failed to agree upon the value or price of the lots described in said application), which arbitrators shall appraise the value of the following described real estate, namely, lots 8, 9, 10, 11, 12, 13, and 14 in block No. 446, also lots Nos. 1, 2, 3, 4, and 5 in block No. 327, except that part of lot No. 1 occupied by the house thereon known as the butcher shop or house, and all of which property is situated in the city and county of Galveston, state of Texas, and is so numbered and described on the map or plan of said city; and, should said arbitrators fail to agree upon and fix the value and price of said lots, then they, said arbitrators, to be appointed, shall agree upon and appoint a third person or umpire to act with them, who shall fix the valuation or price of said lots; and the valuation or price that may be fixed in accordance with said agreement and this decree shall be the purchase price of said property, upon the payment of which by said applicants the said administrator shall execute a deed to said property to said applicants; and, in case such administrator shall refuse to appoint an arbitrator, then the arbitrator appointed by the said applicants shall have the right to fix the value of said property, which shall then be the purchase price thereof; and the administrator and the arbitrators and umpire that shall or may be appointed shall conform in their actions to the directions of this order and the terms of said agreement, a copy of which is annexed to the application. And said administrator is further ordered to make due report of his actions herein, and all the proceedings authorized and required by this decree, to this court, within 40 days from the date hereof, and also to make report of the action and proceedings of said arbitrators and umpire, should one be appointed, and the result thereof, within 40 days from this date. To all of which judgment and order the said administrator excepts, and in open court gives notice of appeal." From this judgment the administrator appealed to the district court, and in that court, in addition to the exceptions and defenses made in the probate court, the administrator, by amending his answer, objected to the application on the ground of failure of applicants to make the heirs of his intestate and the heirs of the deceased, C. Hildenbrand (one of the parties to the contract sued on), parties defendant. Defendant also urged the revocation of the agreement in the contract for arbitration, by reason of the death of said C. Hildenbrand; and he filed and made part of his answer a

formal revocation of power of attorney heretofore given by him, said administrator, to any one, to arbitrate for him, and on behalf of the estate of his intestate, the price or value of the property described in the contract sued on. Upon trial of the cause in the district court, that court overruled all the exceptions of the administrator, and rendered a decree requiring the administrator to carry out the contract in strict accordance with its terms, and ordering the administrator to make conveyance of the property when the purchase price determined by arbitration, as provided in the contract, should be paid him by appellees, and requiring and directing the administrator to make full report within a given time of his action in the premises to the probate court, and from that decree the administrator has appealed to this court.

The appellant's first proposition is that the death of C. F. Hildenbrand, the lessor and owner of the lots the subject of litigation, revoked and annulled the agreement in the contract, to determine the value of the property by arbitration in case of disagreement between the parties. And this seems to be the rule, unless the contingency of the death of the parties be provided for in the agreement to arbitrate, as seems to have been done in this instance; at least, in reference to the lessor, the appellant's intestate. 2 Pars. Cont. p. 712. But the solution of this proposition is unnecessary in the view we take of this case. As to the proper remedy to be pursued in cases like the one presented in this appeal, we find there has been much conflict of opinion in the courts. It has been held by a court of high authority that where a sale was provided for in a lease, at a price to be fixed by two persons to be mutually chosen, or by an umpire to be appointed by the arbitrators in case of disagreement, and where the appraisers failed to agree upon the price, or the person to be appointed umpire, a bill for specific performance of the contract would not lie, on the ground that the contract was incomplete and inoperative, until the price was determined according to the provisions of the lease. Vide *Milnes v. Gery*, 14 Ves. 400. And the principle involved in that decision has been followed in the case of *Greason v. Keteltas*, 17 N. Y. 491, and in *Hopkins v. Gilman*, 22 Wis. 476; these courts holding in the cases cited that, for the wrongful failure to complete an agreement for arbitration, the proper remedy was an action at law for damages. But the doctrine in these cases has been followed to a limited extent only by the American courts, and seems to be applicable only to contracts for arbitration in which the language of the stipulation makes the mode of determining the price by arbitration a condition to the validity of the agreement, and to cases in which parties can be easily placed in statu quo, or where an action in damages can be made to afford an adequate remedy. Vide *Coles v. Peck*, 96 Ind. 339. But

when the case is one in which the stipulation for determining the price of the property, by its language, will allow it to be treated as not essential to the validity of the contract, and itself as virtually an agreement to sell the property at a fair price, if the means specified for ascertaining the price fail for any reason the contract is not treated as void or inoperative, but a court of equity will, in a suit for specific performance, by some legitimate mode, ascertain the reasonable and fair price of the property. The contract sued on falls, we think, in the latter class of cases to which we have referred. But a court of equity will not decree a specific performance for the sale of property except upon the payment of a fair and adequate price by the vendee. Vide 2 Story, Eq. Jur. § 751; *Seymour v. Delancy*, 6 Johns. Ch. 222. And, the price not having been agreed upon in this case by the parties, the stipulation to determine the price by arbitration should have been treated as immaterial, and the trial court should, by appropriate judicial inquiry, have ascertained what was the fair and reasonable price of the property, before decreeing specific performance. This a court must do itself, and not relegate it to any one, before it decrees a specific performance, and compels the execution of a conveyance of the property in accordance with the terms of the contract. For the errors here pointed out, the judgment must be reversed, and the cause remanded for another trial in conformity to the rules of law herein announced. We discover no other error in the record, and the other assignments will not be discussed. The judgment is reversed.

WESTERN UNION TEL. CO. v. DRAKE.

(Court of Civil Appeals of Texas. May 30, 1896.)

TELEGRAPH COMPANIES — DUTY TO DELIVER MESSAGE—CONTRACT.

Defendant received a message, addressed to the sendee at P., a country post office, at which it had no telegraph station, notifying the sendee of the illness of his brother-in-law, and contracted to send the message from its nearest station to the sendee by special messenger, payment of the additional price for the messenger being guaranteed. The sendee lived four miles from P., and between it and the station to which the message was sent. Held, that defendant was required to deliver the message by special messenger, if the sendee, by reasonable efforts, could have been found.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

Action by C. A. Drake against the Western Union Telegraph Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Stanley & Spoonts, for appellant. Carter & Lewright, for appellee.

HUNTER, J. This suit was instituted by appellee to recover of appellant damages for

mental anguish for an alleged failure on the part of appellant to transmit a certain message delivered to it at Decatur, Tex., to be transmitted to Bowie, Tex., over its wires, and thence about 20 miles in the country by special messenger to C. A. Gifford, at Post Oak, in Jack county, a country post office. The message was as follows: "Decatur, Texas, January 25, 1892. To C. A. Gifford, Post Oak, Texas. (Mail.) Perry can't live. Can you come? Answer. [Signed] Mrs. P. W. Drake." C. A. Gifford was the sender's brother, and Perry was her husband. The evidence establishes sufficient facts to sustain the verdict of \$700, if the telegraph company is liable at all. In fact, no complaint is made against the amount of the verdict. The record shows that Gifford resided on a farm three miles from Post Oak, and near the main road leading from Bowie to Post Oak, but had no office or place of business at Post Oak; that he was not at Post Oak on the 25th day of January, nor did he go there until on the 28th day of January, when he received the message from the hands of the postmaster at about 12 o'clock noon of that day. It is about 40 miles from Decatur to Bowie by rail, and about 36 miles from Decatur to Post Oak. As soon as the message was received by Gifford, he immediately returned home, and thence went at once across the country in a buggy to Decatur, but when he arrived his brother-in-law had been buried; he having died on the morning of the 26th about 6 o'clock. If the message had been delivered to him at 11 or 12 o'clock of the 25th, which could have been done by special messenger from Bowie, he would and could have driven to Decatur that afternoon and night, and would have been with his sister and her husband during his last hours, and aided and comforted her in her deep sorrow and distress. The message was delivered to appellant's agent at Decatur at about 8 o'clock a. m. on the 25th by Rev. Mr. Leatherwood, whose undisputed testimony is that he explained to the agent the necessity of dispatch in delivering the message and the relationship in part of the parties, and that it would not do to mail the message at Bowie to Gifford at Post Oak; that he would not send it if it was to be mailed, but required it to be sent from Bowie to Gifford at Post Oak by special messenger, and offered to pay the price, which the agent said would be \$2.50 or \$3, when the agent said he did not know what amount to charge, but agreed to send by special messenger upon Mr. Leatherwood agreeing to guaranty the cost of so sending, which he did, and it was then delivered to be sent by special messenger from Bowie. The agent, however, sent the message to Bowie at once, but marked it to be mailed to Post Oak, and it was so mailed. The agent at Bowie received it between 8 and 9 o'clock the same morning, and put it in an envelope, and addressed it as follows: "C. A. Gifford, Post Oak, Texas. Important telegram. An-

swer at once,"—and placed it in the post office. The mail leaves Bowie for Post Oak at about 1 o'clock p. m. every day, and reaches Post Oak about 6 o'clock on the same day. It had been arranged between Gifford and Mrs. Drake, his sister, that she should send him a telegram if her husband's illness should take a fatal turn, and he agreed to go to her at once, and he was expecting a telegram from her at any time. The message, when written out and delivered to the appellant's agent at Decatur, did not have the word "mail" in it, but that was added or placed there by the company's agent without the consent or knowledge of the sender. C. A. Gifford was a farmer, and man of a family, and received all his mail at Post Oak; sometimes going there once or twice a week, sometimes three or four times a week. It does not appear how long he had lived in that vicinity, nor whether he owned his farm, nor to what extent he and his place of residence were known to the postmaster or other citizens of Post Oak; but the evidence shows that he resided at the time of the trial, in May, 1895, at the same place that he did when the telegram was sent, in January, 1892, and it does not appear that he or his place of residence was unknown to the postmaster and other inhabitants of Post Oak, or that he was a stranger in that neighborhood.

The appellant, to escape liability, pleaded general denial, and that Gifford lived 20 miles from Bowie, and beyond the free delivery limits as fixed in the printed blank upon which the message was written, and which formed part of the contract, and that appellee failed to pay or guaranty the costs of sending out the message to Gifford by special delivery. The court charged the jury as follows: "If you believe from the evidence that a message as alleged and set out in the plaintiff's petition was delivered by the plaintiff, or by W. M. Leatherwood, acting for and at the plaintiff's request, to the agent of the defendant at Decatur, on the morning of the 25th of January, 1892, with instructions to send the same at once, and to have the same carried by special messenger, and not by mail, from Bowie, Texas, to the home of C. A. Gifford, and that the extra charges for the delivery of said message in that manner, viz. by special messenger, were offered or guarantied at the time the same was delivered to the defendant's agent at Decatur; and if you believe from the evidence that the defendant's agent received the same upon the promise of the party delivering it to him to pay the extra charges for delivery or be responsible therefor, without requiring the said extra charge to be actually paid in advance, and without requesting any other or further guaranty or assurance of the payment of extra charges for the delivery of the same than was then made by W. M. Leatherwood; and if you believe from the evidence that the defendant's agents failed

to deliver the same by special messenger, but sent the same by mail; and if you believe that by reason of sending the same by mail the same did not reach C. A. Gifford until it was too late for him to reach Decatur in time to attend the last sickness or funeral of the plaintiff's husband; and if you believe from the evidence that C. A. Gifford would have been present had the same been delivered promptly by special messenger; and if you further believe from the evidence that the plaintiff sustained any mental suffering, as alleged, by reason of not having C. A. Gifford present,—then it will be your duty to find for the plaintiff; and unless you so find you will find for the defendant." The appellant requested the following charge, which was refused: "If you find from the evidence that the contract as made between the plaintiff, by her agent, and the defendant, by its agent, was to transmit the telegram in question to Bowie, Texas, and send the same by special messenger to Post Oak, Texas; and if you further find that the addressee of said telegram did not reside at Post Oak, and that the delivery of said telegram at Post Oak, in accordance with the terms of said contract, would not have accomplished the purpose for which said telegram was attempted to be sent, and would not have prevented the injuries claimed to have been suffered by plaintiff,—then you will find for the defendant." Appellant's assignments of error which complain of the giving of the charge first above set out and the refusal of the other asked by it are based upon two legal propositions, which it asserts as follows: First. "The defendant telegraph company was not required to do more than it contracted to do, and in this case its contract was to carry the message to C. A. Gifford at Post Oak, and there deliver it to him. It was not, under its contract, required to carry said message to any place except Post Oak, and its contract to transmit and deliver the message at Post Oak did not require it to carry the message to a point three or four miles in the country, but only to carry it to Post Oak and deliver it to Gifford, if he was there. If he was not there, and the message could not there be delivered to him, the company was not in duty bound to carry it and deliver it to him at some other place." Second. "There being no evidence to support that portion of the court's charge with reference to the agreement upon the part of the defendant to deliver the telegram to the home of C. A. Gifford, as the testimony was that the defendant agreed to carry it to Post Oak, it was error for the court to submit that issue to the jury, as the same was not made by the proof in the case." The legal effect of the contract as made in this case was that, in consideration of 25 cents cash paid by appellee's agent, and the guaranty of the price for sending the message by special messenger from Bowie to C. A. Gifford, at Post Oak, Tex., the appellant undertook

and agreed to transmit the message from Decatur to Bowie over its wire, and there to immediately hire a special messenger, and send it as speedily as possible to C. A. Gifford at Post Oak, and deliver it to Mr. Gifford, if he could be found by making inquiry of such persons at Post Oak as would most likely inform the messenger of his place of business or residence. The evidence shows that the free delivery limits at Bowie are one-half mile from the appellant's telegraph office, and that it had no office at Post Oak, and that C. A. Gifford resided on or near the main road leading from Bowie to Post Oak, and three miles nearer to Bowie than was Post Oak; and it is evident that if appellant had performed its contract as it agreed to do, by employing the special messenger at Bowie, the messenger, by proper inquiry at Post Oak, would undoubtedly have learned that Gifford lived on his road back home three miles out from Post Oak, and he could have easily delivered the message to the addressee; and this, we think, is what its contract with appellee's agent required it and its special messenger to do. Presumably it was known to both parties that Post Oak was simply the name of a country post office at which Gifford received his mail, and in the vicinity of which he resided and could be found, and that part of the address required of appellant's special messenger the duty of going to that point, and there inquiring for C. A. Gifford's business house or residence, and upon learning of his place of residence it would have been the messenger's duty to go to his residence, and deliver the message there, and nothing short of this would be a reasonable interpretation of this contract. See Gray, Com. Tel. § 23; Telegraph Co. v. Houghton, 82 Tex. 561, 17 S. W. 846; Pope v. Telegraph Co., 9 Ill. App. 283; Telegraph Co. v. Cooper, 71 Tex. 515, 9 S. W. 598. There were no free delivery limits around Post Oak, as the company had no office there, and the free delivery limit of the contract did not apply to it. We are therefore of opinion that the charge of the court, in effect, that it was the duty of the appellant to employ a special messenger under this contract, and to deliver the message at the home of C. A. Gifford, was not error, for it was the company's duty to find the man to whom the message was addressed, and deliver it to him, if by reasonable efforts and inquiry he could be found anywhere within the vicinity of Post Oak; and the appellant having failed to employ a special messenger or try to do so, but sending the message by mail, when it had been informed that mailing it would not be sufficient, and having demanded, received, and accepted a guaranty for the costs of a special messenger to deliver without limit as to amount, it was clearly its duty to hire the messenger and find the addressee, as the message indicated, as well as the actual information given the company that the greatest dispatch would

be required in the delivery of the message, to accomplish the purpose for which it was sent. Finding no error in the judgment, it is affirmed.

BALDWIN et al. v. ROBERTS et al.

(Court of Civil Appeals of Texas. May 30, 1896.)

**TRESPASS TO TRY TITLE—SECONDARY EVIDENCE—
CERTIFICATE OF RECORD OF LAND PATENT—
PAROL EVIDENCE—SUFFICIENCY OF PLAINTIFFS’
TITLE—UNRECOMMENDED LAND CERTIFICATE—
PRESUMPTIONS.**

1. In trespass to try title, where the record of the general land office of a land patent on which the rights of the parties depend was put in evidence, but contained interlineations and erasures which rendered it doubtful whether the patent was originally issued to plaintiffs’ ancestor or to defendants’ predecessor in title, and it was shown that the original patent could not be procured, a certified copy of such patent from the records of the county in which it was filed was admissible.

2. In trespass to try title, where the land office records of the patent on which the rights of both parties depended were put in evidence, and were found to contain interlineations and erasures rendering it doubtful to what person the patent was originally issued, and a certified copy from the county records was afterwards introduced, on proof that the original patent could not be procured, subsequent testimony that such original patent was issued to defendants’ predecessor in title, and that it contained no interlineations or erasures, being merely cumulative of the contents of the certified county records, was not objectionable as varying the land office records.

3. In the absence of a showing of legal title, a mere unrecommended land certificate is insufficient to support an action of trespass to try title.

4. In trespass to try title, where plaintiffs claimed under an unrecommended land certificate, and defendants claimed under an alleged transfer of such certificate and a subsequent patent from the state, the records of proceedings begun by defendants’ predecessor in title, which recited such alleged transfer, and which resulted in a decree awarding title to plaintiff in that action, and ordering a patent to issue, were admissible as part of the history of the title.

5. Such records were also admissible to show open and notorious claim to the land on the part of defendants and their predecessors in title.

6. They were also admissible to show that the patent was actually issued to defendants’ predecessor in title, and the manner of its issuance.

7. In trespass to try title, where plaintiffs claimed under an unrecommended land certificate, and defendants under a transfer of such certificate and a subsequent patent from the state, and such transfer was not clearly established, but the acquisition of legal title by defendants from the state was shown, and it was also shown that from the date of the alleged transfer, in 1846, until the commencement of the action, in 1893, defendants and their predecessors had held open, notorious, and continuous possession under claim of title, and had paid taxes on the property, and that during such time plaintiffs had made no claim of title, a transfer of such certificate will be presumed.

8. Where it also appeared that the original certificate was community property, it will be presumed after such lapse of time that the transfer was made to pay community debts.

9. In trespass to try title, where a copy of the records proper of the general land office con-

tained interlineations and erasures rendering it uncertain whether the patent was originally issued to plaintiffs’ predecessors in title or to those of defendants, error in excluding a certified copy (from the general land office) of an exhibit or extract tending to show that the land was patented to plaintiffs’ predecessor in title was harmless, where it appeared that, if it had been admitted, it would have been insufficient to rebut the evidence showing issuance of the patent to defendants’ predecessors.

Appeal from district court, Haskell county; Ed. J. Hamner, Judge.

Action by J. M. Baldwin and others against J. C. Roberts and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Baldwin & Lomax, for appellants. Farrar, Williams & Farrar, A. C. Foster, and Sayles & Sayles, for appellees.

Statement of the Case, with Conclusions of Fact.

TARLTON, J. June 2, 1893, the appellants (as plaintiffs), consisting of numerous persons of Mexican name, as heirs of Isidro Ramos and his wife, Juana Balbino Ramos, joined by J. M. Baldwin as a privy in estate, brought this suit of trespass to try title to recover from the appellees, as defendants, the Isidro Ramos league and labor survey, lying in Haskell county, Tex. The defendants prevailed in the lower court, and hence this appeal.

We find the following conclusions of fact:

(1) In 1830, Isidro Ramos and his wife, Juana Balbino Ramos, with their family of four children, lived in Bexar county. (2) In 1832, they moved to Nava, Mex., where, on June 23, 1833, Juana Balbino Ramos died, and where, on October 12, 1833, Pedro Ramos, a son, died, and where, on October 14, 1833, Pedro Jose Ramos, another son, died. The remaining children, consisting of two daughters, Juana Ramos and Gregoria Ramos, continued to reside in Mexico, never returning to Texas. (3) Isidro Ramos, the husband, returned to Bexar county prior to March 2, 1836 (the date of the declaration of independence), and resided there until about 1841, when he died. He was married but once. (4) Plaintiffs are the heirs and vendees of the heirs of Isidro Ramos and his wife, Juana Balbino Ramos. (5) July 12, 1838, the board of land commissioners of Bexar county issued to Isidro Ramos certificate No. 605, reciting that the grantee appeared and “proved according to law that he is a native citizen of Texas, a married man, and entitled to one league and labor of land, upon condition of paying at the rate of \$3.50 for every labor of irrigable land, \$2.50 for every labor of temporal or arable land, and \$1.20 for every labor of pasture land, which may be contained in the survey secured to him by this certificate.” This certificate was not recommended by the traveling board of land commissioners. Under an act of February 4, 1841 (Pasch. Dig. art. 4226), and an act supplementary thereto, of June 27, 1845 (Pasch. Dig. art. 4228), H. M. Cunningham, as administrator of John R. Cunningham,

ham, in January, 1846, filed his petition in the district court of Bexar county, Tex., reciting the following facts, substantially: That on August 13, 1838, Rafael Garza sold and conveyed to John R. Cunningham, now deceased, a land certificate for one league and labor of land, which was granted by the board of land commissioners of Bexar county to Isidro Ramos on July 12, 1838, as his own headright claim, and which by Isidro Ramos had been conveyed to said Rafael Garza on July 13, 1838; that the traveling board of land commissioners did not recommend said certificate for patent; that Isidro Ramos was a resident citizen of Texas previous to and at the date of the declaration of independence; that he was a married man and the head of a family, and had never received any other grants of land from the republic or from any other government; that petitioner, by virtue of the aforesaid transfers, is entitled to receive, as administrator, a certificate for said league and labor of land, for the benefit of the estate of John R. Cunningham; that Cunningham was taken a prisoner by the public enemy in 1842. The petition prayed for a decree that a certificate for a league and labor of land be granted and issued to him as administrator, according to the statutes. Upon a trial of the issues presented by this petition, had in accordance with the terms of the statute, the district court of Bexar county, on November 18, 1846, rendered judgment on a verdict of a jury therein returned, decreeing that the plaintiff, as administrator of John R. Cunningham, "recover of the state of Texas one league and one labor of land, as the assignee of Isidro Ramos, for the use and benefit of the estate of intestate, John R. Cunningham, deceased, and that the clerk issue a certificate for the same according to the statute in such cases made and provided." A certified copy of this decree was filed in the general land office on June 19, 1856. (6) The administrator of John R. Cunningham and those claiming in privity with him have since the date of this decree openly and notoriously claimed the ownership of the certificate and the title dependent thereon. They caused the land to be located through one I. G. Searcy, and the field notes to be returned to the general land office, together with the certificate No. 605, in 1855; and, while the survey was made in the name of Isidro Ramos, it cannot be questioned that it was made for and at the instance of the claimant of the Cunningham title. (7) In accordance with this claim, and in recognition thereof, the state, on April 29, 1870, issued its patent to the land in controversy, in the name of the "Heirs of John R. Cunningham, Their Heirs or Assigns," containing no reference to Isidro Ramos or his heirs, save that the land was located by virtue of the certificate issued to him. All patent fees and government dues were paid by those under whom the defendants claim. (8) The defendants' chain of title from John R. Cunningham is as follows: First, the will of John R. Cunning-

ham, probated in 1843, by which he bequeathed to Hugh M. Cunningham, his brother and heir at law, the certificate in question, under the general devise of all the testator's property, real and personal, in Texas; second, the will of Hugh M. Cunningham, probated in 1847, by which he devised the property in question to his brother Andrew Cunningham, recognizing the latter as his "sole and entire heir," and appointing him his executor; third, a deed dated January 2, 1879, from Andrew Cunningham to I. G. Searcy, conveying the land in suit, in consideration of the services of Searcy in locating and patenting the Isidro Ramos survey and other lands; fourth, a general warranty deed, dated August 1, 1884, to the land in controversy, from I. G. Searcy to R. A. Brown and John C. Roberts, in consideration of \$9,710 cash; fifth, a general warranty deed, dated June 1, 1889, from R. A. Brown and John C. Roberts to Joseph D. Roberts, conveying 300 acres of the land in controversy. These several instruments were all properly recorded. (9) The defendants have paid a full and valuable consideration for the land, without notice of any claim of plaintiffs, or of any adverse claimant except such as is given in the patent. They have continuously paid the taxes on the land. The plaintiffs, on the other hand, have never paid any taxes on the land, nor asserted any character of title thereto until the filing of this suit. (10) The original patent was delivered to A. B. McGill, for the claimants of the Cunningham title. It was by him sent to I. G. Searcy, who then claimed the land. It was by Searcy delivered to Brown and Roberts when they purchased. It was by Brown and Roberts delivered to R. C. Lomax, a member of the firm of Baldwin, Lomax & Jones. It was seen in 1892, a few months before the institution of this suit, in the possession of J. C. Baldwin, a member of the above firm, and an attorney for the plaintiffs. He failed to produce it on demand. (11) The defendants, in 1885, divided about 100 acres of the land into blocks and lots, located a town thereon, and sold a number of the lots. In 1888 they took actual possession of 300 acres more of the land, inclosed it, and built a house thereon, which they have used, occupied, and enjoyed ever since. In 1889 they took actual possession of 200 acres more, erected valuable improvements thereon, inclosing it, and since continuously occupying it.

Opinion.

We dispose of the questions deemed by us to be material rather in their logical order than in the order of their presentation in the appellants' brief.

1. We have found with the trial court, contrary to the contention of the appellants, that the original patent issued by the state to the land in controversy was in the name of the heirs of John R. Cunningham, as patentee, instead of Isidro Ramos. Assignments of error challenge the correctness of the court's action in admitting evidence up-

on the issue whether the name of the patentee was as found by the court, or as contended by the appellants. We dispose of these assignments as follows:

The court did not err in admitting in evidence, over the objection of the plaintiffs, a certified copy from the records of Haskell county of the original patent filed for record on July 17, 1884. This action of the court was preceded or accompanied by evidence as follows: A certified copy from the general land office of the patent as there recorded was introduced. From this record it appears that the patent was issued to the heirs of John R. Cunningham, their heirs or assigns; but this record, as well as the order directing the issuance of the patent, has the appearance of having been changed. On the file wrapper the order appears to have been originally in these words: "Patent to Isidro Ramos, April 27, 1870. Jacob Keuchler." An alteration in the order was made by erasing the name "Isidro Ramos," and inserting the name "Heirs of John R. Cunningham." The indorsement on the file wrapper made by the patenting clerk was originally in these words: "Patented to Isidro Ramos, April 29, 1870. Louis Maas." An alteration in this indorsement was made by erasing the name "Isidro Ramos," and by substituting the name "the Heirs of John R. Cunningham." In the record of the patent the words "Isidro Ramos" are not erased, but they are inclosed in parentheses, in black ink, and the words "Heirs of John R. Cunningham" are written in blue ink following the name "Isidro Ramos." The word "his" is also inclosed in parentheses, and the word "their" written in blue ink after and above it. Similar alterations were made in the record after the description of the land. The testimony of the commissioner of the land office, and of the witness McGill, skilled in the operations of the land office, tended to show that the patent was in the first instance, by mistake, written to Isidro Ramos as the patentee, instead of to the heirs of John R. Cunningham; that, as thus written, it was entered upon the records of the general land office; that, upon discovery of the mistake, the original draft of the patent, prepared, but never issued or delivered, was destroyed, and a corrected draft made, showing the patent to be to the heirs of John R. Cunningham; and that the interlineations and substitutions above indicated were made by the proper officers in the land office to correspond with the patent as actually issued. Was this theory correct? The original patent would best solve the question, and elucidate the very material issue of fact, in whose name was the patent issued? or, in other words, in whom did the state place the legal title to the land in controversy? As we have seen, the defendants derails title through the devisees or heirs of John R. Cunningham; and, as the representative of their claim, I. G. Searcy

caused the land to be located in 1855. To him the original patent was delivered from the land office in 1870. He retained it in his possession until he sold the land to Brown and Roberts, the appellees, about August, 1884, when he delivered it to them. From them it passed into the possession of the law firm of Baldwin, Lomax & Jones, who at the time represented Brown and Roberts in some litigation concerning the Ramos survey. A few months before the institution of this suit, it was seen by Jones in the possession of J. C. Baldwin, of the firm of Baldwin & Lomax, who represent the appellants in this case. Baldwin stated that he had not seen the patent since it was filed with the papers in the suit of Thompson v. Roberts (presumably the suit in which he represented the parties who are appellees in this case). It was shown that Foster (an attorney representing the appellees in this suit) and others made diligent and fruitless search for the patent among the papers of Thompson v. Roberts. Notice was given to J. C. Baldwin, in whose possession it was last seen by any other person than himself, and he failed to produce it. As a certified copy from the records of the general land office was already in evidence, and as it was questionable whether this was, on account of the interlineations and erasures above described, a true copy of the original, and as the original could not be produced after due notice to the person chargeable with its possession, we are of opinion that a proper predicate had been laid for the introduction of secondary evidence. *Jackson v. Deslonde*, 1 Posey, Unrep. Cas. 681, and authorities there cited. Besides, it was shown by the witness Jones that he had compared the original patent with the record of the patent, and that the recorded copy in evidence is a true copy of the original.

The fact that the court permitted the witnesses Searcy, McGill, Roberts, and Jones to testify that the original patent was issued to the heirs of John R. Cunningham, and that it had no alterations, interlineations, or erasures in it, furnishes no ground for serious complaint. This testimony was purely cumulative of the contents of the certified copy from the records of Haskell county, which we have held was, under the circumstances, properly introducible. So, this evidence did not tend to vary or contradict the land office record, but rather to explain the ambiguities existing in it.

2. Having found that the legal title to the land in controversy was vested by the state in the heirs of John R. Cunningham, and hence in their privies, the defendants in this suit, the question arises, have the plaintiffs made out even a prima facie case? In the absence of a patent in the name of Isidro Ramos, the sole muniment of title on which they rest their claim, in the light of this record, is the unrecommended land certificate issued July 12, 1838.

3. The proceedings instituted in the district court of Bexar county, and the decree dependent thereon, were read in evidence, over the objection of the appellants. It is difficult to see how they could urge the inadmissibility of these proceedings and this decree. From them, the certificate and the title to the land in controversy took their life. Without them, the certificate, unrecommended as it was, and the title which they claim, would have fallen stillborn. Without them, the plaintiffs would have had not even a pretext for this litigation. We think that they were admissible at least as a part of the history of this title, and as showing the open, notorious, and continuous claim on the part of the defendants and their privies, and as tending also to show the fact that the patent actually issued to the heirs of John R. Cunningham, and how it came thus to be issued by the state.

If the plaintiffs shall be permitted to invoke the proceedings by Cunningham in 1846 as sufficient to stamp the certificate with the seal of genuineness inuring to their benefit, we are yet of opinion that, as the legal title has been vested by the state in their adversaries, the appellants present no such case, under the facts justified by this record and found by us, as will entitle them to relief. We have found that from 1846 until the institution of this suit, in 1893, the defendants and those under whom they hold have asserted the open, notorious, and continuous ownership of the title in controversy; that they have paid all taxes upon the property; and that in the meantime the plaintiffs have been wholly passive and silent with reference to any claim to the property. Under these circumstances, we think it but fair to presume that Isidro Ramos transferred the certificate in question to John R. Cunningham. The cases are not rare wherein it has been held that, after a great lapse of time, a transfer or a conveyance will be presumed in favor of one asserting, during all that time, open and notorious claim of ownership against the supposed grantor. Especially is this true where, as in the case of the transfer of a land certificate, no written muniment is required. *Newby v. Haltaman*, 43 Tex. 317; *Ikard v. Thompson*, 81 Tex. 292, 16 S. W. 1019; *Parker v. Spencer*, 61 Tex. 155; *Manchaca v. Field*, 62 Tex. 141; *Capp v. Terry*, 75 Tex. 401, 13 S. W. 52.

4. In our view of this case, we find it unnecessary to determine whether the certificate issued to Ramos in 1838 should be regarded as his separate property at the time of its issuance, or the community property of himself and his wife. As it appears to be undisputed that the certificate issued under section 10 of the general provisions of the constitution of the republic, cogent reasons are advanced that it should be regarded as the separate property of the husband. *Edwards v. Beavers*, 19 Tex. 506; *Fishback v. Young*, Id. 515. But if we consider it as

the community property, in which, as heirs of the wife, the appellants would have had an inheritable interest, we, nevertheless, think that as the presumption should, under the facts of this case, obtain that the husband, Ramos, transferred the certificate to John R. Cunningham, a further inference should be indulged, after the great lapse of time during which the transfer has remained unchallenged, that it was executed for the purpose of paying community debts, or for other community considerations. *Varamendi v. Hutchins*, 48 Tex. 552; *Manchaca v. Field*, 62 Tex. 135, and authorities there cited.

5. The court, over the objection of the plaintiffs, admitted in evidence (1) a certified copy from the deed records of Bexar county of an instrument dated July 13, 1838, purporting to be a transfer from Isidro Ramos to Rafael Garza of certificate No. 605, filed for record in Bexar county July 13, 1838; (2) a similar certified copy of an instrument dated August 13, 1838, purporting to be a transfer from Rafael Garza to John R. Cunningham of said certificate, also filed in Bexar county, October 16, 1838. Neither of these instruments had ever been recorded in Haskell county. Under the authority of *Simpson v. Chapman*, 45 Tex. 560, and *Shifflet v. Morelle*, 68 Tex. 389, 4 S. W. 843 (the correctness of which we do not question), this action of the court was erroneous; but, for reasons already indicated, it is held by us to have been harmless and immaterial.

6. The court excluded, over the objection of the appellants, a certified copy from the general land office of an exhibit or extract from that office tending to show, among other things, that the land involved in this suit was patented to Isidro Ramos. If this exhibit or extract was admissible as a record of the land office, under article 2253, Sayles' Civ. St., we are yet of opinion that its exclusion was not detrimental to the plaintiffs; and this because, if it had been admitted, it would not have been reasonably sufficient to justify a conclusion other than that found by the court and by us, viz. that the patent in this instance was issued, not to Isidro Ramos, but to the heirs of John R. Cunningham.

These views, we think, sufficiently dispose of the questions presented in the appellants' brief, and require an affirmance of the judgment, which is ordered.

LILLARD v. DECATUR COTTON SEED OIL CO.

(Court of Civil Appeals of Texas. June 6, 1896.)

CORPORATIONS—AGREEMENT BY STOCKHOLDERS TO PAY CORPORATE DEBTS—VALIDITY.

Where the stockholders of a corporation mutually agreed to contribute in proportion to their respective holdings of stock for the pur-

pose of defraying the corporate debts, as such agreement rested upon sufficient consideration, and was made for its benefit, it may be enforced by the corporation in its own name.

Appeal from district court, Wise county; J. W. Patterson, Judge.

Action by the Decatur Cotton Seed Oil Company against S. A. Lillard. From a judgment for plaintiff, defendant appeals. Affirmed.

Bullock & Tankersley, for appellant. R. E. Carswell, for appellee.

Conclusions of Fact.

TARLTON, C. J. The verdict of the jury establishes the following conclusions of fact: In 1892 the appellee was incorporated as a private corporation. It was engaged at Decatur, Tex., from that date to the filing of this suit, on June 12, 1896, in the business of manufacturing oil, feed stuffs, etc., out of cotton seed. Its capital stock consisted of \$50,000, divided into 500 shares of the par value each of \$100. On and before June 18, 1894, its stock was owned and held as follows: D. Waggoner owned 200 shares; the defendant, Lillard, 50 shares; H. H. Halsell, 16 shares; J. F. Halsell, 170 shares; H. Greathouse, 14 shares; and A. J. Reagan, 50 shares. At that date the corporation had been operated at a loss of \$7,891.43. It was without funds to pay this amount. Accordingly, on the day last named, its stockholders held a meeting, at which all were present or represented, and at which it was agreed by and between them that each should pay the loss in proportion to the stock severally held. In accordance with this agreement, the stockholders D. Waggoner and H. Greathouse paid to the plaintiff each his proportional share of the loss, which was appropriated by it. The defendant, however, did not comply with his undertaking, but subsequently he executed a note, with the stockholders other than Waggoner and Greathouse, signing also the name of the plaintiff, including therein his proportional share of the loss. This note was subsequently paid exclusively out of the funds of the plaintiff. The amount representing the proportion of the loss which the defendant undertook to pay was \$789.14. From a verdict and judgment for that amount in favor of the appellee as plaintiff against him as defendant, the appellant appeals.

Opinion.

The petition of the plaintiff alleging the foregoing facts states a cause of action. The corporation was an entity, in which each of the stockholders was interested. It was in a certain sense their representative. The personal profit and advantage of each were involved in the payment of the debt of the plaintiff. The agreement of each stockholder looked as a source of benefit to the compliance with a similar agreement upon the part of each of the remaining stockholders. Such an agreement rests upon a sufficient

consideration, especially after a compliance with it on the part of some of the stockholders, as was the case with Waggoner and Greathouse. The relief sought by the plaintiff does not rest, as the appellant misapprehends, upon the doctrine of contribution, which arises purely out of the relations of the parties, but it rests upon a contract supported by a valid consideration. *Hopkins v. Upshur*, 20 Tex. 89; *Conrad v. La Rue*, 52 Mich. 86, 17 N. W. 706; *Lathrop v. Knapp*, 27 Wis. 222. As the agreement of the stockholders was made for the use and benefit of the corporation, and incidentally for the benefit of themselves, and as it rests upon a sufficient consideration, it is enforceable in the name of the corporation, and by it as a plaintiff. *McGown v. Schrimpf*, 21 Tex. 27; *Whitsitt v. Presbyterian Church*, 110 Ill. 125; *Linneman v. Moross' Estate* (Mich.) 57 N. W. 103, 39 Am. St. Rep. 531, note. The verdict is supported by the evidence, and the judgment is affirmed.

GULF, C. & S. F. RY. CO. v. PENDERY.

(Court of Civil Appeals of Texas. June 6, 1896.)

RAILROAD COMPANIES—NEGLIGENCE—ORDINANCE REGULATING SPEED—PERSONAL INJURIES—EXAMINATION BY PHYSICIAN.

1. The violation by a railroad company of a city ordinance regulating the speed of trains is negligence per se. *Railway Co. v. Brown* (Tex. Civ. App.) 33 S. W. 146, followed.

2. An instruction that a railway company is required to keep such a lookout for teams and street cars at a street crossing as a reasonably prudent and cautious person would keep under similar circumstances is proper.

3. The complaint in an action for personal injuries to plaintiff's wife alleged "serious internal and permanent injuries." No special exception was addressed to the complaint for more specific information in regard to the injuries, and evidence showing injuries to the ovaries was admitted without objection. *Held*, that it was not error to refuse to instruct the jury to disregard such evidence.

4. In an action for personal injuries to plaintiff's wife, a physician testified that the wife was suffering from a nervous condition, brought on by the injuries. *Held*, that it was not error to permit the wife to testify that when awakened suddenly at night, due to her condition, she felt exhausted and worn out.

5. In personal injury cases, the court will not order the examination of the body of the person injured by physicians appointed by the court.

6. Where, in an action for personal injuries, several physicians, whose testimony and credibility are unimpeached, testify to the extent of the injuries, and the court has refused to order the examination of the person injured, by physicians appointed by the court, it is not reversible error to refuse to allow plaintiff to be questioned as to his willingness to permit the examination.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

Action by E. C. Pendery against the Gulf, Colorado & Santa Fe Railway Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Terry, for appellant. Wynne & McCart, for appellee.

Conclusions of Fact.

TARLTON, C. J. Mrs. Etta F. Pendery, the wife of the appellee, E. C. Pendery, was on the 10th day of April, 1889, a passenger, with others, on a street car of the Ft. Worth Street-Railway Company. This car collided with a train of the appellant, the Gulf, Colorado & Santa Fé Railway Company, at a crossing on Belknap street, in the city of Ft. Worth. As a result of this collision, Mrs. Pendery was seriously and painfully injured. The injury sustained by her is to be ascribed to the negligence of the employés of the appellant, the Gulf, Colorado & Santa Fé Railway Company, operating its train on that occasion. The injuries inflicted upon Mrs. Pendery were of such a character as to justify the assessment of damages awarded by the verdict of the jury, in the sum of \$7,875.

Conclusions of Law.

We dispose as follows of the questions presented in the appellant's brief:

1. Under the authority of *Railway Co. v. Brown*, 33 S. W. 146, decided by this court, and approved by the supreme court, the contention of the appellant first urged under its twenty-first, twenty-second, and twenty-third assignments of error, to the effect that the court erred in treating a violation of the city ordinance regulating the speed of trains as negligence per se, must be overruled. We do not think that the charges complained of in these assignments merit the criticism of the appellant, that the jury would find for the plaintiff on the mere existence of negligence, without reference to the question whether injury proximately resulted therefrom. *Railway Co. v. Nelson* (Tex. Civ. App.) 29 S. W. 78.

2. With sufficient accuracy, the court, in its general charge, defined negligence as follows: "Negligence, as used in this charge, means a failure to exercise such caution and care as a reasonably prudent and cautious person would usually exercise with reference to a similar matter under similar circumstances." The court then instructed the jury that, even though guilty of negligence, the defendant would not be liable unless the injury complained of was the direct and proximate result of the negligence. Proceeding, the charge reads as follows: "If you [the jury] believe from the evidence that the agents or servants of the defendant, the Gulf, Colorado & Santa Fé Railway Company, in charge of and in operating the train which it is alleged collided with the street car upon which plaintiff's wife was a passenger, in approaching the crossing of the said street railway over which said street car was being operated, failed to keep a proper lookout for cars or other vehicles which might be approaching the crossing, and that the said agents or servants were guilty of negligence in not keep-

ing a better lookout, and in not exercising more caution and care, than they did at the time of said collision; * * * and if you further believe from the evidence that the collision with said street car was due to and resulted from such negligence on the part of such agents or servants of said defendant, the Gulf, Colorado & Santa Fé Railway Company, and that the collision would not have occurred but for such negligence on the part of said employés; and if you further believe from the evidence that the plaintiff's wife was injured by such collision,—then it will be your duty to find for the plaintiff, against the Gulf, Colorado & Santa Fé Railway Company. * * * " Reading together these several items or clauses of the charge, we interpret the instruction as meaning—and the jury must have so understood it—that the defendant would only be liable for the failure to keep a proper lookout in the event that its agents and employés failed to keep such a lookout as a reasonably prudent and cautious person would have exercised with reference to a similar matter under similar circumstances. This, we think, was a proper test of the requisite diligence. *Railway Co. v. Shieder* (Tex. Sup.) 30 S. W. 907. Without detailing them, we think that the facts and circumstances in evidence would justify an inference that the defendant's agents and employés failed to keep a proper lookout for cars and other vehicles that might be approaching the crossing, and that the pleadings of the plaintiff justified, with the evidence, the submission of such an issue. Thus, as stated on page 2 of the appellant's brief, the plaintiff alleged "that the agents and servants then and there in charge of defendant's (G., C. & S. F. Ry. Co.'s) train, negligently and carelessly failed to keep a proper lookout for said street car on said street."

3. In *Railway Co. v. Higbee*, 28 S. W. 737, a companion to the present case, decided by this court, and approved by the supreme court, special charge No. 12 requested by the defendant, upon a similar state of facts, was condemned by us. We adhere to the conclusion there announced, and overrule the eleventh assignment of error, complaining of the refusal of this instruction.

4. The plaintiff, E. C. Pendery, without objection on the part of the defendant, testified as follows: "My wife is in such a condition that she cannot receive the approaches of myself as her husband in the generative relation without pain, and always has been since the time of the accident to the present time." The effect of this testimony the defendant sought to avoid by submitting to the court special charges Nos. 2 and 4, the refusal of which is complained of in the third and fourth assignments of error. These charges were to the effect that the jury, in assessing the plaintiff's damage, would not take into consideration any evidence of mental or physical pain experienced by the wife during sexual intercourse with her husband.

It is insisted that the court erred in refusing these special instructions, upon the proposition that the damages thus indicated are not the necessary consequences of the injury, and should not have been submitted to the jury in the absence of special allegations. The plaintiff's petition alleging injury is as follows: "Wounding and bruising plaintiff's said wife in the pit of her stomach, and in her back, then and there causing her great pain and suffering, and serious internal and permanent injuries, and causing her to suffer in both body and mind, and then and there damaging plaintiff in the sum of \$15,000." The testimony of physicians, witnesses for the plaintiff (especially that of Dr. Howard, as set out on pages 28 and 29 of the appellee's brief, is to the effect that one of the "serious internal and permanent injuries" inflicted upon the plaintiff's wife was the displacement or prolapsus of the right ovary, and that, as a result of this condition of the ovary, sexual intercourse would be very painful to the woman. It thus appears that the testimony of the husband, which the defendant thus indirectly sought to exclude from the consideration of the jury, was within the scope both of the pleadings and of the evidence, which tended, as we have shown, to indicate that the pain testified about was the natural and necessary consequence of the injury inflicted. No exception was taken to the pleading on account of its general character. If the defendant had desired to be advised of the special character of the "serious internal and permanent injuries" complained of, we think it should have addressed a special exception to the petition, calling for specific information in that connection. In awarding compensation for physical and mental suffering, the court confined the jury to such as was experienced by the wife at the time of the accident and at a time prior to the filing of the amended petition, permitting the consideration of evidence with reference to such suffering since that day solely for the purpose of determining the permanent character of the injuries complained of. We therefore conclude upon this assignment that as no objection was urged by the defendant to the evidence referred to, and as its admission comes within the scope of the pleading, not excepted to, and as there was testimony tending to show that the character of pain and suffering in question was the natural and necessary result of the serious internal injury already described, the question as here presented assumes a different form than, and is to be distinguished from, that considered in *Campbell v. Cook*, 86 Tex. 630, 26 S. W. 486, relied upon by the appellant in this connection.

5. Mrs. Pendery, having testified that the injuries sued for in this case affected her with regard to being awakened at night instantly, was interrogated as follows by the plaintiff's attorney, "State how it affects you to be awakened nights instantly," to which

she replied, "I feel just exhausted and worn out." In admitting this testimony, the court overruled the defendant's objection, to the effect that it is not responsive to the question, that it is irrelevant and immaterial, that there is no pleading supporting it, and that it does not tend to prove any damage or the extent of her injury. The testimony of Dr. Keller, a witness for the plaintiff, was to the effect that Mrs. Pendery was the victim of a very nervous condition, called "neurasthenia," and that, according to medical science, this condition was the result of the injury in question. We think that the objections urged were properly overruled. The evidence of the physician would justify the inference that the nervous condition disclosed by the evidence objected to was a necessary consequence of the injury complained of.

6. The restrictive character of the court's charge already adverted to precluded the jury, as we think, from awarding the assessment of damages on account of any improbable future permanent injury. Hence the court was not required to grant the fifth and fourteenth special instructions, to the effect that the jury would not consider future permanent injury, in the absence of the probability of such a result.

7. It is believed that the requested instructions 7 and 10, which we find it unnecessary to set out, were properly refused, as argumentative. They unduly emphasize the liability of the company as dependent upon the presumption in the minds of the employees of the defendant as to the conduct of the street-car driver. Under the charge of the court, liability could not attach to the defendant in the absence of negligence on its part, affirmatively found by the jury. We think the rights of the appellant were thus sufficiently guarded.

8. Upon the authority of *Railway Co. v. Botsford*, 141 U. S. 250, 11 Sup. Ct. 1000, and upon the force of the reasoning, which commends itself to our approval, of Justice Gray (the organ of the majority of the court in that case), we hold that the court correctly refused the motion of the appellant to appoint physicians charged with the duty of examining into the injuries of the plaintiff's wife.

9. After the refusal of this motion, counsel for appellant asked the plaintiff and his wife, respectively, whether the witness would "object at this time to an examination of Mrs. Pendery by three physicians appointed by the court." To the answer to the question the court sustained an objection by the plaintiff. It explains its action on the ground "that the question was too much in the nature of a banter to the witness while on the stand, or an effort to make a proposition to him for effect, which could not then have been acted upon if accepted." As the court had refused, for sufficient reason, the motion to compel an examination of the kind suggested, and as the extent of the injury

sustained had been testified to by several physicians, subject to cross-examination, and as the character of these witnesses as experts or for integrity was not questioned, we are not prepared to hold that the action of the court in refusing to entertain this question, involving, as it decided, an attempt to banter or to impose upon the witness, was such as to require a reversal of the judgment.

10. The language of counsel complained of in the seventeenth assignment of error, if unjustified by the record, was used in the opening argument; and, as the trial court states in an explanation appended to the bill of exceptions complaining thereof, the defendant had ample opportunity to expose its unjustifiable character, if it existed, and to reply to any fallacy that might be involved in it.

11. When this cause was before us on a previous appeal (*Railway Co. v. Pendery*, 27 S. W. 213), we held that the verdict then involved, for \$6,500, was not excessive. Taking into consideration the additional time that elapsed between the rendition of the verdict in that instance and the trial had in this, involving a probable estimate by the jury in lieu of accumulated interest, the verdict in the present instance is not greatly larger than on the former trial. In any event, we think that the testimony of the physicians introduced by the plaintiff, showing serious, painful, and permanent injuries, with the dire attendant results, justified the sum awarded by the jury. We affirm the judgment.

GRESHAM v. GALVESTON COUNTY.

(Court of Civil Appeals of Texas. June 18, 1896.)

CONSTRUCTION OF CONTRACT—COMMISSION ON COLLECTIONS—DEFERRED PAYMENTS.

1. Under an order of the commissioners' court appointing defendant agent for the sale of school lands, and providing that he should be paid a commission on the "amount received" by him for the sale of such lands, defendant is entitled to a commission only on the amount actually received, and, as to deferred payments, no commission is payable until the same are collected.

2. Defendant has a lien for his commission upon the notes given for such deferred payments entitling him to the possession of the notes for the purpose of collection.

Appeal from district court, Galveston county; William H. Stewart, Judge.

Action by the county of Galveston against Walter Gresham. From a judgment for plaintiff, defendant appeals. Modified.

S. W. Jones, for appellant. Bradford Hancock, Co. Atty., and Maco Stewart, for appellee.

PLEASANTS, J. The nature and result of this suit is thus given by the appellant in his brief: "This suit was instituted by Gal-

veston county, the appellee, against Walter Gresham, the appellant, in the district court of Galveston county, Texas, on the 30th day of December, 1895, to recover of the latter the sum of \$45,894.41, alleged to have been collected and received for account of the appellee under and by virtue of a contract of agency between appellee and appellant for the sale of certain school lands belonging to appellee, exclusive of his commissions, and for which he had never properly accounted, and also to recover possession of certain promissory notes, the property of appellee. The plaintiff, in its petition, alleged that on November 30, 1874, Walter Gresham, the appellant, was, by an order or decree of the commissioners' court of Galveston county, appointed agent of that county, the appellee, to sell or to lease four certain leagues of land granted said county for public-school purposes, describing the same; that the said Walter Gresham at divers times, in pursuance and by virtue of the power and authority vested in him by said decretal order appointing him agent as aforesaid, had sold various smaller tracts of land out of said four-league grant, setting forth in a tabulated statement the names of the different purchasers, the contract price for each tract, the amount of the principal and interest collected by the said Gresham from each purchaser, and the amount still unpaid; that the aggregate of the several sales made by the said Gresham, exclusive of interest, amounted to \$39,852.62, and that he had collected on the several sales made by him, including the interest that had accrued, due thereon, the sum of \$46,954.01. Plaintiff's petition further alleged that there remains due to plaintiff from the several purchasers of said lands \$10,584.74, principal and interest, evidenced by promissory notes held by the said defendant; that the defendant had made leases of portions of said land, collecting as rent therefor, during his said agency, the sum of \$3,251.29, and that the total amount collected and received by the defendant in money, from all sources, for account of the plaintiff, during and in respect of his said agency, was \$50,205.30. Plaintiff, in its petition, charged that the defendant, for his services as aforesaid, was entitled to a commission of 10 per cent. only on \$43,103.91; that there were still in the hands of the defendant, belonging to plaintiff, and not accounted for, the said promissory notes and \$45,894.91 in money; and that, although plaintiff had often demanded of and from defendant an accounting and settlement, yet he had always neglected and refused to make either, and had also neglected and refused, though often requested, to pay to plaintiff the amount claimed to be due from him to it, or to deliver said promissory notes. Plaintiff prayed for judgment against the defendant for the sum of \$45,894.91, and for such other sums as might be shown to have been collected for its account by de-

fendant; that defendant be required to make a full showing and accounting of all sales, leases, and collections made by him, and to deliver up to plaintiff all of said promissory notes; and for general relief. On February 1, 1890, defendant answered, and in his answer admitted that on November 30, 1874, the commissioners' court of Galveston county, by its order or decree on that day made, passed, and spread upon its minutes, appointed and constituted him, the defendant, agent of said Galveston county, with power and authority to sell or to lease, upon such terms and for such prices as to him might seem best for the interests of said county, the four leagues of land mentioned and described in plaintiff's petition, giving and according, by said decretal order, to the defendant, as compensation for his services in that behalf, ten per cent. of the amount that might be received from the selling or leasing of said lands, appending to his answer, and making it a part thereof, a certified copy of said described order, marked 'Exhibit A'; admitted that defendant, in pursuance of the powers and authority vested in him by said order, had, at divers times since its passage, made sales of many smaller tracts of land out of said four leagues, and that the tabulated statements of such sales, as set forth in plaintiff's petition, was correct; admitted that, from the date of said described order up to the time of filing his said answer, defendant, as such agent, had collected and received in money for account of the sales and leases made by him of said lands, and interest accrued due thereon, \$50,205.30, and alleged that he had, in addition to such sum, collected and received in money for account of interest on bonds purchased by him with proceeds in his hands arising from said bonds, which purchase of bonds was by authority of said commissioners' court, the further sum of \$314.61, making a grand total collected and received by him, in money, during the aforesaid period, as agent as aforesaid, of \$50,519.91; and also admitted that defendant, at the time of filing his said answer, had in his possession, as agent as aforesaid, several promissory notes, executed by many of the purchasers of the different smaller tracts of land sold by him as aforesaid out of said four leagues, in evidence of unpaid balance of the purchase money therefor, appending to said answer a list descriptive of said notes, marked 'Exhibit C,' and showing their aggregate face value, principal and interest, to be \$10,584.74, and tendering in court the said several promissory notes to await the action of the court with respect thereto. But defendant, in his answer, denied that he had failed or at any time refused to account to the plaintiff or the commissioners' court of Galveston county for any moneys or other properties or effects belonging to plaintiff that may have come into his hands or possession, or under his control, or for

any of his acts or doings, as agent as aforesaid, or that he, the defendant, was, at the time of his said answer, in any wise indebted to the said plaintiff in anything or in any amount; but that, on the contrary thereof, he, the defendant, on December 30, 1878, December 31, 1879, May 31, 1881, September 7, 1882, June 3, 1883, December 9, 1886, June 21, 1888, January 6, 1890, respectively, and on divers other dates during the period of his said agency, had filed with the clerk of the said commissioners' court, and had submitted to said court, full and correct reports of all his acts and doings, receipts and disbursements, as such agent as aforesaid, with respect to said properties; and defendant appended to his said answer, and made it a part thereof, an itemized statement, marked 'Exhibit B,' showing that defendant had collected and received during his said agency from all sources in connection with said lands the sum of \$50,519.91, and had disbursed for expenses \$1,916.40, had paid to the treasurer of Galveston county \$42,437.45, and had reserved to himself, as compensation for his services, \$6,166.06, claiming that under the terms of said described order he, the defendant, was entitled as compensation for his services not only to ten per cent. of the amount actually received by him, but also to ten per cent. of the then face value of the promissory notes in his possession and on the two sales for which no deeds had then been recorded. Defendant prayed that his commissions as set forth in said Exhibit B, and claimed by him, be allowed. The facts as admitted in the pleadings and disclosed by the evidence are, in substance, as follows: On the 30th day of November, 1874, the commissioners' court of Galveston county passed a resolution or decretal order constituting and appointing Walter Gresham, the appellant, the agent of said county for the sale of certain four leagues of land situated in Somervell and Hood counties, Texas, granted to said Galveston county for school purposes, with power and authority to sell or lease the same upon such terms and at such prices as to him might seem best for the interest of said county, giving and according to said Gresham, as compensation for his services in that behalf, 10 per cent. of the amount that might be received from the sales and the leasing of said lots; that the said Gresham, under and in pursuance of said decretal order or resolution, at divers times between the date of said order (November 30, 1874) and that of the institution of this suit (December 30, 1893), made sales, and also leases, to different persons, of divers smaller tracts out of said four leagues of land, from which sales and leases he collected and received in money \$50,205.30, and in promissory notes, principal and accrued interest to December 30, 1895, and unpaid, \$10,437.45, and for interest on bonds in his hands for account of Galveston county the

further sum in money \$314.51; that, of the moneys actually collected and received by him, the defendant had paid into the treasury of Galveston county the sum of \$42,437.45, had expended for topographical and other surveys of said lands, officers' certificates of acknowledgments to deeds by the county to purchasers of said lands, and in the matter of court costs, the sum of \$1,361.25, and as premium on bonds or interest-bearing securities purchased by authority of the commissioners' court of said Galveston county the sum of \$555.25, and retained as compensation for his services, under the said contract between the plaintiff and himself, \$5,020.53, or 10 per cent. on \$50,205.30, amount actually collected and received by him; \$105.84, or 10 per cent. of \$10,584, the aggregate of the said several promissory notes; and \$87.06, or ten per cent. on \$870.06, the amount of his sales to C. L. Knott and G. W. Rowan. These last two sales were of recent date, and no deeds had passed, nor had anything been collected on them. The records of the commissioners' court failed to show that that court had authorized the purchase by Gresham of any bonds or interest-bearing securities, but he testified that he had been so authorized, that said court had been informed by him of the purchase, and that Galveston county had received the benefit therefor. The records of said court, after search therefor, also failed to show that said Gresham had made to the court reports of his acts and doings, etc., as agent as aforesaid, but both he and William Selkirk, the latter of whom had kept the books of account between the defendant and Galveston county, both testified that full and correct statements had from time to time during the period of said agency been rendered to the said court. The promissory notes were, under the court's instructions, deposited in the registry of the court. On February 10, 1896, the cause was tried before the court without the intervention of a jury, the trial resulting in a judgment in favor of the plaintiff, Galveston county, for the sum of \$1,138.06, with interest thereon from the date of the judgment at the rate of 6 per cent. per annum until paid, and all costs incurred in the suit, and discharging the defendant from all liability with respect to the promissory notes mentioned and described in the pleadings. To this judgment the defendant in open court excepted, gave notice of appeal, assigned errors, and filed an appeal bond; and the cause is now here for revision on appeal."

The court allowed appellant every credit claimed by him upon his account with the county, except the money retained by him in satisfaction of his claim for commissions upon the notes not yet collected, given for lands sold by appellant, and for commissions on sales of land made to C. L. Knott and G. W. Rowan, upon which last sales nothing had been collected, nor had deeds

been executed to the purchasers. We think there was no error in refusing to allow the appellant these credits. He, under the contract between himself and the county, is entitled only to commissions upon moneys collected by him. The evidence in the case shows that upon some of the sales made by him nothing could be collected. Judgments were obtained, and the lands sold under execution, and bought in by appellant for the county, and such may be the result of the sales for which the purchase money is not yet collected, and it would be unjust to compel the county to pay appellant his commissions in advance upon collections which might never be made. Besides, this is not the contract between the parties, and by it must their mutual rights and obligations be determined. The county obligated itself to pay appellant 10 per cent. on the sums collected by him upon sales which he might make for the county. The appellant's statement of his contract shows this was his interpretation of the contract, as he made no claim for commissions on sales upon which he was unable to realize any money. It is true that the county, in its petition, denied the right of appellant to commissions on the notes when the same should be collected, and prayed that appellant be required to deliver the said notes to the county; but this erroneous conception of its rights did not authorize the appellant to retain in his hands, of moneys collected, a sum sufficient to pay him in full of services by him contracted for, but not yet fully performed. But the court, in our opinion, erred to the prejudice and injury of the appellant in requiring him to surrender the purchase-money notes in his possession, and denying him the privilege of completing his contract with the county, and receiving the compensation secured to him under the order of the commissioners' court appointing him the agent of the county for selling and leasing its school lands. That order is in these words: "Whereas, the county of Galveston has large and valuable tracts of school lands in Hood county, Texas, that are being occupied and depredated upon by * * * trespassers; and whereas, it is deemed to be to the best interest of said county that the same should be sold as soon as practicable: Therefore it is agreed, and so ordered by the county court of Galveston county, that Walter Gresham, Esqr., of Galveston, be, and hereby is, constituted and appointed the agent and attorney of Galveston county to sell or lease in such tracts or parcels any or all of said lands upon such terms and for such prices as he may think for the best interest of said county; and as compensation for his services he is to receive ten per cent. (10 per cent.) of the amount that may be received from the leasing and sale of said lands." Under this order the appellant is under obligation to collect, if collectible, in whole or in part, the notes received by him from the purchasers

of the lands sold by him, and from the amounts realized he is entitled to a commission of 10 per centum upon the sum or sums collected upon each sale, and upon each of these notes he has at least a lien to the extent of his commissions. And of his right to retain the notes for collection he cannot be deprived until it is charged and proved that he has abused his authority, and is not worthy of the trust reposed in him by the court which appointed him; and of this there is nothing in either the pleadings or the evidence. The county, however, had the right to revoke the authority given the appellant to sell and lease its lands, and for any sale made after the revocation of such power appellant would not be entitled to compensation. For the error of the trial court in requiring the appellant to surrender the promissory notes in his possession the judgment of that court is reversed, and this court, proceeding to render the judgment which should have been rendered, adjudges and orders that the county of Galveston have and recover of the appellant the sum of \$1,138.06, with interest thereon at the rate of 6 per centum per annum from the 10th day of February, 1896, and for costs of suit in the district court, and for which execution may issue; and that the appellant recover from the possession of the officer of the district court the several promissory notes described in the judgment of the district court, to be by him collected and accounted for to the county of Galveston, in accordance with the terms and conditions of the order of the commissioners' court of that county appointing appellant the agent and attorney for selling and leasing the school lands of said county; and it is further ordered that appellant recover his costs in this court.

MACK et al. v. MITTENTHAL et al.

(Court of Civil Appeals of Texas. June 20, 1896.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—ACTION BY CREDITOR—SUFFICIENCY OF PETITION—NECESSARY PARTIES.

1. In an action brought by a preferred creditor to recover the value of certain goods taken by attachment from the possession of the trustee of an insolvent, a petition which fails to show the value of the goods conveyed to the trustee, and that the goods remaining in his hands were insufficient to pay plaintiff's claim in full, does not state a cause of action.

2. In such an action the creditors whose claims were postponed to a payment of plaintiff's claim were not necessary parties.

Error from district court, Potter county; H. H. Wallace, Judge.

Action by H. S. Mittenthal & Co. and others against Mack, Stadler & Co. and others to recover the value of goods alleged to have been wrongfully seized under attachment. There was judgment for plaintiffs, and defendants bring error. Reversed.

Stanley, Spoons & Thompson, for plaintiffs in error. Watts, Aldredge & Eckford and Thos. F. Turner, for defendants in error.

Reasons for Reversal.

HUNTER, J. This suit was brought by defendants in error to recover from the sheriff of Potter county, and from Mack, Stadler & Co., who were the sheriff's indemnitors, the value of a parcel of goods alleged to be of the value of \$1,511.10, seized under attachment issued out of the district court of Potter county, Tex., in a suit by Mack, Stadler & Co. against H. Berwald, and which parcel of goods was among a large stock of goods conveyed by H. Berwald to T. F. McGee, as trustee, to pay about \$42,000 of indebtedness. There were about 52 creditors named in the deed of trust. The goods were to be sold by the trustee, and the debts paid in full in the order named and set down in the deed of trust. The expenses of executing the trust were to be first paid, including a five per cent. commission to the trustee for receiving and paying out funds; next a note of \$800, due Link; next a note of \$2,000, due First National Bank of Amarillo; next \$3,032.99, due to defendants in error; and then follow 49 other creditors, with claims ranging in amount from \$16.75 to \$4,775, and aggregating over \$30,000; each claim to be paid in full in the order named, and the balance, if any, to be paid to H. Berwald. The petition fails to show the amount or value of the goods which passed into the hands of the trustee, and fails to show that there was not ample and sufficient goods left in the hands of the trustee to fully pay off and satisfy defendants in error's claim in full, even after paying Link's debt of \$800, and taking out the \$4,200 worth of goods seized and attached by the bank to secure its \$2,000 note. The defendants filed a general demurrer, which was overruled by the court, and also special demurrers covering the points here decided. There is no statement of facts here. Plaintiffs in error complain of the court's action in overruling their demurrers.

We are of opinion that the general demurrer should have been sustained. The petition was clearly defective in not stating that there were not goods enough left after plaintiffs in error's seizure to pay their debt in full. In some manner or other this fact was necessary to show that the seizure injured, impaired, or reduced the plaintiffs' lien and security, and we can find nothing in the petition or trial amendment to supply this defect. The trustee could maintain the action without this allegation, for he is entitled to possession of all the goods to pay on all the debts; but we do not understand that the plaintiffs are. They are only entitled to receive their part of the proceeds of the sale of the goods as allowed them under the deed of trust. As the deed of trust does not confer upon them the right to possession of the goods, the law does not confer it; so that they could not maintain an action to recover possession of the goods as the trust-

tee might. Their title is an equitable one, not legal, and they must, therefore, show that their security has been injured, depreciated, destroyed, or reduced in value to an extent which left it insufficient to pay their debt; otherwise they are not injured. If this allegation of fact can be made, then it would be clear that the creditors whose claims are postponed to the plaintiffs' are not necessary parties to the suit; for, if there is not enough to pay plaintiffs' claim, there is nothing for them. But, even if not made, we can see no necessity for making them parties, as plaintiffs can only recover the value of the goods seized to the amount of their debt, but not for any overplus that would go to the debts of the postponed creditors. There could be no overplus here, as the petition shows the goods seized were of the value of only \$1,511.10, while plaintiffs' claim is for more than \$8,000. Wallace, the conditional trustee, was not a proper party to the suit, as it is averred that McGee accepted the trust, and took possession of the goods, and was proceeding to execute the trust when the parcel set forth was seized and taken from him. We think the defendants in error can maintain this action for the value of the goods seized to the amount of their debt, especially where, as in this case, the trustee is made a defendant by reason of his being a surety on the sheriff's official bond, if there was not enough left to pay their debt. For the error above noted, we reverse the judgment herein, and remand the cause for a new trial.

**GALVESTON, H. & S. A. RY. CO. v.
SWEENEY.**

(Court of Civil Appeals of Texas. June 27,
1896.)

**RAILROAD COMPANIES — INJURIES TO EMPLOYEES —
PROXIMATE CAUSE — CONCURRING CAUSES — IN-
STRUCTIONS — NEGLIGENCE OF FELLOW SERVANT
— RULES.**

1. Plaintiff was conductor of defendant's freight train. Leaving a station on a down grade, the train parted, on account of a defective coupling, the caboose in which plaintiff was riding dropping behind. Thereupon the engineer stopped the train, as he should not have done in the exercise of proper care, and on the approach of the rear section started the engine in such a manner as to cause a second break in the train. Plaintiff was injured in a collision between the rear and middle sections. *Held*, that the separation of the rear cars by reason of a defective coupling was a proximate cause of the collision.

2. In such case it is proper to charge that, "if the negligence, if any, of the defendant and plaintiff's fellow servants were concurring causes of plaintiff's injuries, and together were the direct cause of plaintiff's injuries," and plaintiff did not contribute to them, defendant would be liable.

3. Any cause which may be legally considered a proximate cause of an injury must, if other causes existed, be regarded as concurring with these causes to produce the accident.

4. Whether in any given case the act charged was negligent, and whether the injury suffered was within the relation of cause and effect

legally attributable to it, are questions for the jury.

5. The rule which bars a servant from recovery of damages for injuries caused or contributed to by his violation of the rules of the master, relates only to contributory negligence of plaintiff; and where the negligence is that of a fellow servant it is not a defense if there be concurring negligence of the master.

6. A rule of the company which makes the conductor of a freight train responsible for the brakemen's performance of their duties, requires only that he shall exercise reasonable care and diligence to that end.

7. On the issue whether an engineer knew that the train had parted, there was testimony that while the train was running the engineer told a brakeman to go and see if the train was all right; that when he got to the top of the first car he failed to see the light of the caboose; that he then hallooed to the engineer that he thought the train had parted, and for him to put on steam, and to pull out of danger; that the engineer did so, and shortly afterwards a second break occurred. *Held*, that the evidence admitted of a finding that the engineer did not actually know of the original breaking.

8. Except in rare cases, unless the act is contrary to a statute, a servant's violation of a rule of the master is not negligence per se.

Appeal from district court, Medina county; Eugene Archer, Judge.

Action by Joseph J. Sweeney against the Galveston, Harrisburg & San Antonio Railway Company for personal injuries. From a judgment in favor of plaintiff, defendant appeals. *Affirmed*.

Upson, Bergstrom & Newton, for appellant. Perry J. Lewis and W. N. Parks, for appellee.

JAMES, C. J. The opinion delivered by us in connection with our judgment of affirmance is not deemed complete, and will be withdrawn, and this opinion substituted in its place. The affirmance is adhered to for the reasons given herein, upon consideration of the appellant's brief and motion for rehearing.

The action is for damages for personal injuries. Plaintiff was appellant's conductor on a freight train going west from San Antonio. On leaving Dunlay station on a down grade, the train parted, leaving the caboose and two loaded flat cars behind. Some distance further on, the train parted again between the second and third cars from the engine, and the collision occurred by the rear section running into the middle one. The conductor, being at the time in the caboose, was injured. Verdict for \$15,000.

Conclusions of Fact.

The testimony authorized the following findings: (1) That the coupling at the place where the first break occurred was defective, through negligence of defendant. (2) That there was no negligence on the part of plaintiff's fellow servants. (3) That if the jury had concluded there was negligence on the part of plaintiff's fellow servants contributory to or causing the collision, it was admissible for them to find that defendant's negligence concurred with that of the fellow servants in

causing the accident. (4) That there was no contributory negligence on the part of plaintiff. (5) We conclude, further, that the verdict was not excessive.

Opinion.

The accident occurred before the recent act relating to fellow servants. All the assignments but one refer to the charges. The other assignment is that the verdict is not sustained by the evidence. The conclusions of fact dispose of this assignment.

The issues were the contributory negligence of plaintiff, the negligence of the engineer and brakeman, plaintiff's fellow servants; a prominent contention being that the negligence of the engineer was an independent and the proximate and sole cause of the injury, the defect in the coupling where the break first occurred being, it is claimed, too remote a cause to be responsible in any way for the collision. The court gave the following charge: "If, however, you believe from the evidence that the defendant was guilty of negligence under the charges given you; and if you also believe from the evidence that the fellow servants of plaintiff were also guilty of negligence; and if you further believe from the evidence that such negligence, if any, of the defendant and plaintiff's fellow servants, were concurring causes of plaintiff's injuries, and together were the direct cause of plaintiff's injuries, and that plaintiff did not contribute to his injuries,—then the defendant would be liable, and you will find a verdict for the plaintiff." The proposition embodied in this charge is a correct one, but it is strenuously insisted that the testimony did not warrant the submission of the issue of concurring causes. There was evidence to show that after the train broke the first time the engineer stopped the engine, as he should not have done in the exercise of proper care; and was further negligent, when the rear section was approaching, in starting the engine in such manner as to cause the second breaking. Such act of the engineer would have been the immediate cause of the collision, or the cause most nearly related to the accident; but this is not the test of what is an intervening independent cause, and not even the test of what is proximate cause. *Gonzales v. City of Galveston*, 84 Tex. 7, 19 S. W. 284. It seems to us that any cause which may be legally considered a proximate cause of an injury, must, if other causes existed, be regarded as concurring with these causes to produce the accident, in the sense in which that term is used in the charge. In *Lane v. Atlantic Works*, 111 Mass. 139, it is stated that: "The act of a third person intervening and contributing a condition necessary to the injurious effect of the original negligence will not excuse the first wrongdoer if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the proba-

ble injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise. Whether in any given cause the act charged was negligent, and whether the injury suffered was within the relation of cause and effect legally attributable to it, are questions for the jury. *Railway Co. v. Mussette*, 80 Tex. 719, 28 S. W. 1075, and cases cited. It was an event that might be anticipated from the breaking of a train on a down grade that a collision would take place. The company had provided rules to govern the conduct of employees in such a contingency, thereby evidencing its knowledge that accidents such as this would naturally occur from the separation of its cars. Suppose there had been no second breaking, and through the negligence of the engineer in not keeping the forward part of the train in motion, or in stopping, or his other negligence, the collision had occurred, would it, as a matter of law, be contended, under the rule above stated, that the original negligence of the company would not be a proximate cause? We think not. The result must be the same whatever form the engineer's negligence may have taken. In order for the negligent act of a fellow servant to constitute a defense, it must be unmixed with negligence of the master. There was negligence on the part of the defendant in the separation of the rear cars by means of improper coupling, causing them to move down the grade. This act continued until the collision took place, and was one of its active causes. The presence of such cause throughout the occurrence emanating from the master would be sufficient to destroy the defense of fellow servant. The court should not have assumed to say that from the evidence the negligence of the fellow servant was the sole proximate cause of the injury, as is virtually contended. The charge was not erroneous.

Defendant asked the following charge, which was refused: "You are further charged that under the rules of the company the conductor of the train has charge and control of the train, and must see that brakemen perform their duties; and that it was the duty of the rear brakeman to be in the cupola of the caboose. Therefore, if you believe from the evidence that the rear brakeman, J. F. Crawford, was not in the cupola at the time of leaving Dunlay station immediately prior to the accident, and that the failure to be at such post contributed to plaintiff's injury, then you will find for defendant; and you must, under such circumstances, find for defendant, even though you find from the evidence that defendant was also guilty of negligence in furnishing a defective drawhead, which also contributed to the injury." The charge does not state the law. We recognize the rule which bars a servant from recovery of damages which are caused or contributed to by his violation of the rules of the master. *Railway Co. v. Wallace*, 76 Tex.

639, 13 S. W. 565; *Pilkinton v. Railway Co.*, 70 Tex. 229, 7 S. W. 805. This rule of law, it seems to us, relates only to contributory negligence of the plaintiff. It is immaterial on such issue how negligent the master may have been, for contributory negligence is not excused because the master's negligence may have concurred. Where, however, the negligence is that of a fellow servant, whether such negligence grows out of a violation of rules or otherwise, it is not a defense if there be concurring negligence of the master. So far as the above charge makes contributory negligence of the fellow servant an absolute bar to plaintiff's recovery, it is erroneous. So far as it makes the failure of plaintiff to see that the brakeman actually performed his duty, negligence, it is, in our opinion, erroneous in requiring of the plaintiff more than reasonable diligence in seeing that the duty was performed. A conductor's duty, under this rule, calls him to all parts of a train, and it is, in the nature of things, impossible for him to be present at the station of each employé to see that the duties of each are performed; and the only reasonable construction of the rule is that he shall exercise proper care to that end. We are of opinion that the general charge is unexceptionable.

The following special charge was asked by plaintiff and given: "The rules of the defendant require its employés to use great care when a train is parted, and require that the engineer shall give a signal of such parting by three blasts of his whistle, and keep his train in motion. If you believe from the evidence that the engineer knew that the train had parted, and failed to give such signal, or failed to keep his train in motion, and that such failure on his part was negligence, and if you further find that such failure was the proximate cause of plaintiff's injuries, and that it was not a concurring cause with negligence of the defendant, if any, then you will find your verdict for defendant." It is claimed that there was no testimony from which the jury could have found that the engineer did not know that the train had parted. The brakeman Smith testified that the engineer knew the train had parted, and stopped the engine until the detached cars were approaching, when he suddenly started the engine, and caused the second break. Parks testified that Smith told him on the night of the accident that while the train was running the engineer told him to go and see if the train was all right, and that when he got to the top of the first car he failed to see the light of the caboose. He then halloed to the engineer that he thought the train was broken in two, as he could not see the caboose light, and to put on steam and pull out of danger. The engineer did so, and before going very far the train broke in two again, and that the engineer did not stop the engine at all until after the second break. The above conflicting statements are all the

testimony on the subject of the engineer knowing of the first break, and it admitted of a finding that he did not actually know of the original breaking.

It is also contended that the charge should not have left to the jury whether or not the violation of the rules by the engineer was negligence, and practically that the court should have instructed the jury that such an act was in itself negligence. It is a negligent act of the fellow servant causing the injury which excuses the employer. *Railway Co. v. Johnson*, 83 Tex. 633, 19 S. W. 151, and it is well settled by our decisions that it is only where the act is contrary to a statute (except in rare cases) that a court is warranted in saying that it constitutes negligence per se. *Railway Co. v. Greenlee*, 70 Tex. 553, 8 S. W. 129, and numerous other cases. We cannot give a rule the force of a statute in this respect. It would place it within the power of a master to make that negligence which may not be negligence at all by means of rules. We think the court was right in giving effect to a violation of the rule by a fellow servant, only if it involved negligence. For the same reasons, there was no error in refusing charge No. 1 asked by defendant. We conclude that there were no errors in the submission of the case, and that the judgment of affirmance should stand. Motion overruled.

HOUSTON CEMETERY CO. et al. v. DREW et al.

(Court of Civil Appeals of Texas. May 21, 1896.)

APPOINTMENT OF RECEIVER—DISCRETION OF COURT—CEMETERY CORPORATIONS—NEGLECT TO KEEP PROPERTY IN REPAIR—RIGHTS OF STOCKHOLDERS AND LOT OWNERS—DISQUALIFICATION OF JUDGE.

1. The court appointing a receiver is invested with a large discretion as to the necessity for the appointment, and its decision of the facts, on the supporting and counter affidavits, is conclusive.

2. Where there are any grounds of relief prayed for that would authorize the appointment of a receiver, it need not appear conclusively that plaintiff is entitled to recover thereon; it being sufficient that he has reasonable expectation of obtaining such relief.

3. A petition against a cemetery association and its officers and directors, by a shareholder and several lot owners, alleged that defendants had failed to maintain the cemetery in proper condition; had unlawfully increased the stock; wrongfully misapplied a trust fund provided by the charter for the purpose of improving the cemetery, by loaning it to the company, and executing a deed of trust of the grounds in violation of law; and closed, altered, and changed the drives, roads, and walks, as shown by the map thereof, on the faith of which the lot owners had bought. *Held*, that it was within the discretion of the court to make an interlocutory order appointing a receiver, with the usual powers of that office, and with special authority to continue the business of the association, make all expenditures necessary to maintain the cemetery in a reasonable state of preservation, including repair of bridges, and the obtaining of such water as might be neces-

sary to prevent waste and destruction of the cemetery property.

4. The allegations of the petition were sufficient to excuse the complaining shareholder from seeking redress through the corporation itself. *Cowles v. Glass*, (Tex. Civ. App.) 80 S. W. 293, followed.

5. In a suit against a corporation by a shareholder, the objection that the transfer of stock to him was not made on the books of the company is cured by the intervention of the person from whom he received the stock.

6. A bill filed in the interest of complainant and all persons similarly situated does not make the latter parties to the suit.

7. Where suit is brought against the directors of a cemetery association, by a shareholder therein, for the appointment of a receiver, and for other relief, the fact that the judge before whom the cause is heard is related to a shareholder who is not a party to the suit does not disqualify him.

8. The judge, not being a lot owner, is not disqualified because some of his relatives are buried in the cemetery.

9. A lot owner in a cemetery association may maintain a bill in equity against the corporation and its directors and officers for failure to keep the walks, drives, and approaches in proper repair.

Appeal from district court, Harris county; S. H. Brashear, Judge.

Bill by Octavius C. Drew and others against the Houston Cemetery Company and others. From an interlocutory order appointing a receiver for defendant corporation, defendants appeal. Affirmed.

Fiset & Miller, for appellants. Ewing & Ring and E. P. Hamblen, for appellees.

GARRETT, C. J. This appeal is from an interlocutory order of the district court of Harris county appointing a receiver of the property of the Houston Cemetery Company, and of a trust fund held by said company in a trust capacity. The order was made after notice to the defendants in a pending suit, brought by Octavius C. Drew and others, lot owners in the cemetery, and a holder of a share of the stock in the company, against the corporation itself, and the president, directors, and secretary thereof, and the trustee in a certain deed of trust executed by the company upon the cemetery grounds. The petition alleged facts to show, and charged, that the defendants had failed to maintain the cemetery in a proper state of preservation and adaptation for the uses and purposes to which it was dedicated; that the defendants had, without authority, increased the stock of the company from \$10,000 to \$100,000, by issuing watered stock; that they had executed a deed of trust, in violation of law, upon a part of the grounds of the cemetery, and that they had wrongfully misapplied a trust fund provided by the charter and by-laws, for the purpose of improving and keeping the cemetery, by loaning it to the company, and executing the above-mentioned deed of trust; that they unlawfully imposed a tax upon the transfer of burial lots by the lot owners, and had closed, altered, and changed the drives, roads, walks, and other open places in the

cemetery, as shown by the map and plot thereof upon the faith of which the lot owners had bought. Plaintiff sought appropriate relief in respect to all the matters complained of, and prayed for the appointment of a receiver, who, by the interlocutory order appealed from, was appointed by the court, and invested with all the powers usual or incidental to his office, and specially authorized and directed to carry on and continue the business of the defendant company, and to take all such steps, perform all such acts, and make all such expenditures, and incur all such liabilities, as may be reasonably necessary to maintain the company's cemetery property in a reasonable state of preservation for the uses and purposes of a cemetery, including the repair or construction of such bridge or bridges as may be necessary to that end, and also the obtaining of such supply of water, at reasonable cost, as may be necessary to prevent the waste, decay, or destruction of such cemetery property, or any part thereof, and to protect the franchises of said corporation from forfeiture for nonuser or misuser.

It would not be proper for this court to express an opinion upon the points raised that will determine the rights upon the final hearing of the case. Our decision upon the order of the court below appointing the receiver should be without prejudice to the ultimate decision which the court may be called upon to make. The court appointing a receiver is invested with a large discretion as to the necessity, and its decision of the facts upon the supporting and counter affidavits, when they are conflicting, must be accepted as conclusive. The question, therefore, that remains for the appellate court, is to determine whether or not the case made is one in which a receiver ought to be appointed. If there are any grounds of relief prayed for that would authorize the appointment of a receiver, it need not be made to appear conclusively that the plaintiff is entitled to recover upon them; it will be sufficient if it appears that he has a reasonable expectation of obtaining such relief.

The defendant company was chartered by a special act of the 12th legislature, approved May 12, 1871 (Sp. Laws, 1st Sess., p. 323). It was empowered to acquire and hold not exceeding 500 acres of land in Harris county, to be held for cemetery purposes only, which it was authorized to inclose, lay out, ornament, and improve; and it might arrange and dispose of burial lots, on such terms and with such conditions, for the permanent care and preservation of the cemetery grounds or any part thereof, as may be agreed upon between the company and the purchasers. The company was required to have a map and plot of their grounds and cemetery made from an actual survey, with the lots, drives, walks, and alleys delineated thereon, and to deposit the same with the register of deeds, and to make the sales of lots with refer-

ence to the map. It was its duty before the sale of any lots, by resolution of the stockholders, to fix a percentage of the receipts from the sale of the lots in the cemetery as a permanent fund, the principal to be invested in bonds and mortgages upon unincumbered real estate in the county of Harris, the interest to be used for the purpose of improving and keeping the cemetery in order. This percentage could never be changed, and was a perpetual trust fund, to be administered as a trust by the directors of the company. The capital stock was divided into shares of \$100 each, the company to be organized when \$10,000 was subscribed for and 10 per cent. of the amount paid in; and the stockholders were authorized to fix the amount of capital stock, and to increase it to a sum not exceeding \$100,000. A resolution of the stockholders fixed 10 per cent. as the percentage of proceeds from sales of lots to constitute the permanent trust fund, and the capital stock was fixed at \$10,000. The capital stock was afterwards increased to \$100,000, upon the estimated increase in value of the land bought for the purposes of the cemetery; and certificates of stocks were issued to the shareholders at the ratio of 10 of the new shares for 1 of the old. This was apparently within the inhibition of the constitution (article 12, § 6) against the issuance of stock except for money paid, labor done, or property actually received. On December 31, 1893, the corporation, by its president and secretary, executed a promissory note to the defendant Thomas Tinsley, as trustee of the permanent trust fund of the Houston Cemetery Company, for the sum of \$8,285.52, payable one year after date, with semiannual interest at the rate of 7 per cent. per annum, and attempted to secure the same by a deed of trust upon a portion of the cemetery grounds. The fund had been used by the company, and was not then on hand; and, instead of replacing it, the company, which was the trustee thereof, undertook to lend it to itself. It does not appear to what purposes the money had been applied, but it was evidently misapplied, and the defendants should be required to restore the same. This may properly be done through a receiver. The court may in such case, however, enter an alternative decree making the appointment subject to the payment of the money into court within a specified time; but the court below did not see proper to do so in this case, and we cannot see that it abused the discretion vested in it, especially when this ground for relief is considered in connection with the various other grounds, as well as the fact that the company probably had no authority to create a lien upon the land bought for cemetery purposes, or to lend the money upon such security (Sp. Laws, supra; 4 Am. & Eng. Enc. Law, p. 55), or upon bonds.

Defendants have allowed the bridge which is the main approach to the grounds to be-

come out of repair, so that it cannot be used. They have also stopped the water supply, so that the flowers and shrubs are liable to be destroyed by drought. Whether or not it is a matter entirely within the discretion of the directors whether they shall use any funds besides the interest on the permanent fund and the lot assessments for the purpose of keeping up the cemetery is a question we will not anticipate by a discussion or decision thereof. Defendant corporation is certainly charged with the duty of maintaining the bridge in a proper state of repair. It seeks to justify its failure to do so on the ground that the lot owners will not pay their assessments, that the interest on the permanent fund is not sufficient, and that the proceeds of the sale of lots are not subject to such use. There is nothing in the charter that prevents the use of the proceeds of sales of lots for such purpose, and the question may arise as to whether they can be used or not, at the discretion of the company. But the order appointing the receiver does not require the repairs to be made out of any particular fund, and we do not anticipate that the funds of the company will be unlawfully appropriated by the court which will have the direction of its receiver.

It is urged on the part of the defendants that the plaintiffs could have had relief by mandamus to the company to build the bridge; but it would necessarily require considerable time to obtain it in that way, and defendants would be able to delay indefinitely performing a duty which there can be no doubt that they should perform; the only question made by them being as to how the bridge should be paid for.

The defendant company, whether as a quasi public corporation, or one strictly private, owes duties to its lot owners and shareholders, which it may be compelled by the courts to perform; and from the nature of its business, and the matters of neglect and breaches of duty charged against it in misappropriating the trust fund, and failing to collect the assessments, and to keep the bridge in repair, this seems to be a proper case for the appointment of a receiver, with all the powers conferred upon him by the order appealed from. There is no occasion now to pass on the alleged want of authority of the company to exact the fee required for consent to a transfer of lots by shareholders, nor upon the right of the lot owners to vote in corporate meetings.

The judge who granted the order appointing the receiver was not disqualified by reason of his relationship to one of the shareholders, who was not a party to the suit. *Winston v. Masterson*, 87 Tex. 200, 27 S. W. 768.

A petition or bill filed in the interest of a party and all persons similarly situated does not make the persons similarly situated parties to the suit. The fact that the father and other relatives of the judge were buried

in the cemetery, he not being a lot owner, did not disqualify him on the ground of interest in the suit.

The allegations of the petition were sufficient to excuse the complaining shareholder from seeking redress through the corporation. *Cowles v. Glass* (Tex. Civ. App.) 30 S. W. 293. There can scarcely be any doubt that a lot owner in a cemetery corporation has such an interest therein or may be protected in a proceeding of this kind. He is not the ordinary owner of an easement, and his right to have the drives, walks, and approaches kept in repair does not depend upon the law of easements. We do not think that the maxim that he who seeks equity must do equity can be applied to defeat the relief sought in this case. Watson was not in arrears on his assessments, and neither Drew nor House, as shareholders, could be affected by arrearages on their part. Besides, other relief was sought by the lot owners than such as depended in any way upon the payment of the assessments. They were directly interested in the preservation of the trust fund. The intervention of T. W. House cured the objection that the transfer of the share of stock by him to Drew had not been made upon the books of the company. There is no merit in the objection that there is a misjoinder of parties or of causes of action. The order of the court below appointing a receiver will be affirmed.

MESTON v. DAVIES et al.

(Court of Civil Appeals of Texas. May 28, 1896.)

PRACTICE ON APPEAL — BRIEFS — REAL-ESTATE AGENTS—COMMISSIONS.

1. Appellant's brief, containing practically all the evidence as given on the trial, much of which is irrelevant, violates amended rule 30 of the supreme court for the courts of civil appeals, requiring appellant to state in his brief all the material facts bearing on the issues, specifying the facts on which there is a conflict, and giving the substance of the evidence adduced by each party on such conflict.

2. Plaintiffs, real-estate agents, made repeated efforts to have defendant, a nonresident, place his land in their hands for sale, but defendant refused, by letter. On the same day defendant mailed this letter, plaintiffs wrote that if they sold the property they would expect the usual commissions, but defendant made no reply. Over a month later, plaintiffs telegraphed defendant: "Wire lowest price on land at once. Have cash customer,"—in answer to which defendant wired, "Twenty-seven thousand," and confirmed the telegram by writing plaintiffs, "If your party has a definite proposition to make, it must be done at once, by wire." Plaintiffs then wired offer, which defendant accepted in the same way. *Held*, that plaintiffs were not entitled to commissions.

Appeal from district court, Galveston county; William H. Stewart, Judge.

Action by Davies, Rood & Hannah against Francis I. Meston to recover commissions for the sale of real estate. Judgment for plaintiffs, and defendant appeals. Reversed.

Scott, Levi & Smith, for appellant. Jas. B. & Chas. J. Stubbs and R. S. Rowland, for appellees.

GARRETT, C. J. This action was brought by the appellees to recover of the appellant commissions for procuring a purchaser for land, which they alleged the appellant had authorized them to do, and for which he had promised to pay them 5 per cent. of the agreed price. Appellant denied having made any such agreement. Upon a trial of the case below, the appellees obtained a judgment against him for the amount claimed. The appellees were real-estate agents residing in the city of Houston, and the appellant resided in Pueblo, in the state of Colorado. Appellant's land consisted of several tracts lying in a body near Houston, in Harris county. All that passed between the parties in regard to the matter was by correspondence, of letters and telegrams; and these must be looked to, to furnish evidence of an agreement on appellant's part, if there was any, authorizing the appellees to find him a purchaser for the land, and to pay them a commission therefor.

Before proceeding to summarize the evidence produced on the trial below, we desire to say that counsel for appellant, in making the statement of the facts in their brief, have disregarded the amended rule 30 of the supreme court for the courts of civil appeals. The rule requires "a statement of all the material facts proved upon the trial, in so far as they bear upon the issues to be presented; specifying the facts upon which there is a conflict in the evidence, and giving the substance of the evidence adduced by each party upon such conflict." 31 S. W. vii. But the brief contains practically all the testimony of all the witnesses, in addition to the correspondence that passed between the parties, all extending through 37 pages, which is presented to the court as a statement of the material facts, in compliance with the rule. There are many irrelevant statements, and much repetition in the testimony of the witnesses, copied, with repeated direct and cross examinations of the same witness. To be compelled to read such is a wearing task, and a waste of time. The rule was made for the purpose of lightening the labor of the appellate court, and facilitating the disposition of cases, by requiring the very facts pertinent to the issues presented to be sifted by counsel from all the evidence, presenting a case free from useless matter, and given in a condensed form, without endless iteration. We have forbore to enforce the rule in this case, as it is a new one, but we shall do so hereafter.

A summary of the correspondence which is relied on to show the contract is as follows: It commenced on November 25, 1893, with the following letter addressed by the appellees to the appellant: "F. I. Meston, Pueblo, Col.: We understand that you represent the Ray-

nold Reynolds Hrs. and Henry Woodruff surveys in this county; the first tract containing 1,258 acres, and the latter 1,476. Do you care to sell these lands, and if so what is your price on same? Please let us hear from you at an early day. Davies, Rood & Hannah." To which the appellant replied: "Pueblo, Col., Dec. 2nd, 1893. Messrs. Davies, Rood & Hannah, No. 913½ Franklin Ave., Houston: We are in receipt of your esteemed favor of the 25th ult. The writer has title to the Raynold Reynolds and Henry Woodruff surveys in your county, also to other land adjoining,—in all, a solid body of 6,549.9 acres, about 13 miles west of Houston. For the present the property is in charge of J. S. Daugherty, of Dallas, Texas, whose control will expire within a short time; but, unless some definite offer is meanwhile obtained from another source, we shall feel like extending Mr. Daugherty's control of the property. Meanwhile you can confer with him, if you choose, or, if you have any proposition to make us, we shall be glad to consider it, as we are very anxious to dispose of this land at the earliest date possible. Francis I. Meston." In a reply to this letter, dated December 8, 1893, the appellees stated that, while they had no offer to make, they should like very much to have appellant quote them a price on the property, adding: "We are in a position here to sell the land, if it is possible to sell it at all, and have several parties now in quest of such a tract, whom we think we could possibly interest in it. We do not want to do Mr. Daugherty an injustice, but we have found it absolutely necessary to work with the principal, in order to meet with the best success." To this letter the appellant replied on December 8th that for the present he thought best to allow Mr. Daugherty control of the property; that Mr. Daugherty was willing to have others co-operate with him in the sale, and would make satisfactory terms with them,—and in conclusion, "Should the arrangement made with Mr. Daugherty prove in the near future to be unsatisfactory, we shall be glad to confer with you again." Appellees wrote appellant, December 15th, that they did not wish to get the land through agents or subagents; that they could not work for less than full commissions, nor be subjected to the inconvenience and delays of submitting propositions through one or more agents. "We have sold two very nice tracts of land in the last few days, and have customers for others; but we cannot work on less than full commissions, nor be subjected to the inconvenience and delays of submitting propositions through one or more agents. We can sell the land, at the price we understand you ask, with very little delay, but do not care to attempt the sale unless we can get it direct." On December 19th, appellant acknowledged receipt of appellees' letter of the 15th, and stated that Mr. Daugherty had control of the land for the time being, but that his option would expire in a short time;

that, as soon as Mr. Daugherty's option expired, he would be glad to confer with appellees again. On the same day on which the last-mentioned letter was written, appellees wrote appellant as follows: "Francis I. Meston, Esq., Pueblo, Col.: While we have not received an answer from our last communication, we take the liberty of addressing you again. We have a party with whom we have transacted considerable business in the past,—the representative of an investment company, with stockholders both West and East,—who is seriously considering your 6,549.9 acres, and with a strong possibility that he may start soon for New York to raise the money to take this property on a cash basis. If he decides to do this, we will expect you to give us the exclusive control of the property for a short time, so as to give him an opportunity to work up the deal. We can, before, inform you by letter or wire as to when he expects to start, and base our exclusive control from that time; giving us, say, fifteen days. If we sell the property, we shall expect the usual commission,—5 per cent. An early reply will greatly oblige. Davies, Rood & Hannah." Appellant never replied to this letter. More than a month afterwards (January 30, 1894), appellees again wrote that they had another party who wanted to handle the land on a basis stated by them, but mostly on a credit. The price was quoted as net to appellant. To this Meston & Co. replied that F. I. Meston was absent, but on his return would advise appellees. On February 9th appellees telegraphed: "Wire lowest price on land at once. Have cash customer." Appellant replied: "Twenty-seven thousand," and on February 10th confirmed the telegram by letter as follows: "Regarding your letter of the 30th ult., and your telegram of the 9th inst.: If your party has a definite proposition to make, it must be done at once, by wire, as we are about to tie up the property indefinitely. If you have any chances of making the deal, do not delay an hour, but wire us." On February 13th appellees telegraphed: "Letter received. Buyer on way from Chicago to inspect land." Again, on the 11th: "Offered third cash, balance one and two years, eight per cent." Appellant answered this telegram on the 15th: "We accept your offer. Will give special warranty only. Use wire freely. Act quick." Appellees answered: "Party will take land. Send abstracts of title at once." Appellant then advised appellees by telegraph that he had sent abstracts, and wrote them on the 16th as follows: "Please call at First National Bank, Houston, and Mr. W. H. Palmer, cashier, will hand you the abstract of title. We to-day wired Mr. J. S. Daugherty to deliver the same to the First National Bank, and presume he has done so. We have also written Mr. Daugherty to that effect to-day. We also inclose the opinions of Mr. McCormick & Spence of these titles. Please preserve them intact. Wire us as soon as you have received these

abstracts and opinions, and close the deal up promptly." The entire correspondence copied into the brief of appellant is referred to, and made a part of the conclusions of this court, for construction by the supreme court if necessary. Appellant afterwards declared the sale off, and did not convey the land to the purchaser produced by appellees. There are other questions presented by the appellant in his brief, but as we are of the opinion that the evidence failed to show an agreement on the part of appellant, either express or implied, to pay the appellees a commission to find a purchaser for the land, it will be unnecessary to consider them, or to refer to the further testimony in the case on which they are raised.

The evidence showed that appellees were real-estate agents, and that appellant must have been aware of the fact. But the repeated efforts of appellees to get control of the land were without success, for the appellant never did intrust it to them as his agent to sell. He did not reply at all to their letter of December 19th, that if they sold the property they would "expect the usual commission,—6 per cent." More than a month afterwards they commenced to write and telegraph offers. The telegrams of February 9th asked for the lowest price, which was given in reply by telegram, the letter confirming it stating, "If your party has a definite proposition to make, it must be done at once, by wire." The request for lowest price is consistent with the idea that appellees were representing the customer, and were looking to him for their commissions; for appellant had never made appellees his agents to sell the land, and the language may be construed as a net price to the appellant. The offer at last which was accepted by the appellant was accepted on the offer of appellees, and we fail to find any evidence to support a promise, either express or implied, on the part of the appellant, to pay appellees any commission for finding a purchaser for the land. *Dunn v. Price*, 87 Tex. 318, 28 S. W. 681. For the reason stated the judgment of the court below will be reversed, and judgment will be here rendered in favor of appellant.

BUCHANAN v. PARK et al.

(Court of Civil Appeals of Texas. May 30, 1896.)

PROBATE PRACTICE—CONVEYANCE BY ADMINISTRATOR—SUFFICIENCY OF DESCRIPTION—JUDGMENT—COLLATERAL ATTACK—PUBLIC LANDS—TITLE BOND—VALIDITY—TRESPASS TO TRY TITLE—EVIDENCE.

1. An order in probate, made on petition of an administrator, recited that he have and exercise full power to make title to 320 acres of land, located as the headright of the decedent, in favor of, etc. *Held*, that the order was not void for want of a sufficient description of the land.

2. The act of 1839 of the republic of Texas (Pasch. Dig. art. 4167), relating to land donated to emigrants, provided that no sale of a

claim to land by the individual, entitled to the same "of this government," shall be valid in law and binding on the person selling the same, until an unconditional deed shall be obtained by the grantee for said land. *Held*, that a title bond or contract for the sale of a claim to land to be located by virtue of a conditional headright certificate, executed by the donee in 1840, was invalid.

3. In trespass to try title, the court cannot inquire into the propriety of a previous order in probate, directing an administrator to convey land pursuant to an invalid title bond executed by the decedent, if the probate court had jurisdiction.

4. The probate law of 1848 (Hart. Dig. art. 1162; Pasch. Dig. art. 1313) gave the probate court jurisdiction to decree the specific performance of a contract by the decedent to convey land, and provided that the holder of such contract might file a written complaint in such court, praying that the administrator be required to make titles agreeably to the contract, whereupon the clerk should issue a citation, with a copy of the complaint, to be served on the administrator, and on return thereof served, the court should, if he found the sale was legally made, order, etc. *Held*, that an adversary proceeding was contemplated, and that such court had no jurisdiction to decree specific performance of such a contract in an ex parte proceeding, on petition of the administrator for authority to convey, to which the holder of the contract was not a party.

5. In trespass to try title, it appeared that B., who held a conditional headright certificate, executed to W. a title bond for the land in dispute, and at the same time W. executed to B. a title bond for other land; and that both B. and W. died before executing deeds pursuant to the bonds. *Held*, that it was error to admit in evidence a deed of the W. land, executed by W.'s surviving wife and administratrix, who had married again, and B.'s executor, to a third person, in the absence of any showing of authority for the execution of the deed by her.

6. In such case it was proper to admit in evidence the transcript of the probate court showing that, on the petition of one S., the land described in the title bond to W., was conveyed to S. in compliance with such bond, for the purpose of showing that B. received the benefit of such land.

Appeal from district court, Madison county; W. C. Gibbs, Special Judge.

Trespass to try title by J. H. Buchanan against N. H. Park and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Ball & Randolph and Dean, Brownlee & Dean, for appellant.

GARRETT, C. J. This was an action of trespass to try title, brought by the appellant to recover of the appellees a tract of land patented October 10, 1857, to heirs of J. E. Buchanan, by virtue of conditional certificate No. 332, issued by the board of land commissioners of Montgomery county, on the 1st day of January, 1840, for a headright of 320 acres, and upon which unconditional certificate No. 232 was issued by the same board on the 25th day of August, 1845. The appellant proved that he was the sole heir of J. E. Buchanan, to whom the certificate was issued. Black, one of the original defendants in the suit, after severance, recovered judgment for 100 acres of the land upon a plea of limitation, and the present

controversy concerns only the remaining 220 acres.

Over the objection of appellant, the appellees introduced in evidence a transcript from the records of the probate court of Leon county, in the administration of the estate of J. E. Buchanan, deceased, of an application made to the court, at its December term, 1850, in said estate, by the administrator, H. W. Bozeman, reciting that the deceased did, on the 10th day of December, 1840, covenant and agree by title bond with one Zachaeus Wilson, deceased, to execute to said Wilson a deed to his headright of 320 acres, and that at the same time said Wilson gave title bond to said Buchanan to make a deed to a certain tract of land, each dependent upon the other; that it would be to the interest and benefit of said estate that deeds should be given; and authority was asked to execute the deed. Also, of an order or decree of said probate court, made at said December term, as follows: "Whereas, Harmon W. Bozeman, administrator of the estate of James E. Buchanan, deceased, has filed his petition for an order to make title to land which decedent obligated himself to do before his death: Therefore it is ordered by the court that Harmon W. Bozeman, administrator of the estate of James E. Buchanan, deceased, have and exercise full power and authority to make title to three hundred and twenty acres of land, located as the headright of said decedent, in favor of and in behalf of the legal representatives of Zachaeus Wilson, deceased, so soon and at the time said legal representatives shall make a good and sufficient title to the land described in title bond of Zachaeus Wilson, dated the first day of December, A. D. 1840." The objections of the appellant to the petition and decree are that they show upon their face an *ex parte* proceeding, not warranted by law, and illegally brought and acted upon; that the land therein referred to was not in any manner adjudged, and the court did not pass upon the question of title, or adjudicate the rights or interests of any person whomsoever; and that the contract of sale therein referred to was in violation of law, and one which the court was powerless to enforce, and its action thereon was illegal and void. It was also objected that the decree was void for want of a sufficient description of the land, but this objection is clearly untenable. *Flanagan v. Bogges*, 46 Tex. 330.

It will be seen that the conditional certificate was issued January 1, 1840, that the bond for title was executed December 1, 1840, and that the unconditional certificate never issued until August 25, 1845. While the patent had not issued when the order of the probate court was made, it is probable that the land had already been surveyed, for the order refers to it as located. The bond for title was therefore a contract for the sale of a claim to land to be located by

virtue of a conditional headright certificate donated to emigrants by a law of the republic of Texas passed in 1839. *Pasch. Dig. art. 4167*. This law provided "that no sale of said claim to land, by the individual entitled to the same of this government, shall be valid in law and binding upon the person selling the same, until an unconditional deed shall be obtained by the grantee for said land." It has been held in several cases that a headright claim under this law, before the issue of the unconditional certificate, is not susceptible of sale. *Turner v. Hart*, 10 Tex. 438; *Smith v. Johnson*, 8 Tex. 423; *Newman v. Dallas*, 26 Tex. 642. A contract to convey land, where the law prohibits its alienation, is illegal and void, and cannot be enforced. *Hunt's Heirs v. Robinson's Heirs*, 1 Tex. 748; *Williams v. Chandler*, 25 Tex. 4; *Holmes v. Johns*, 56 Tex. 48; *Brown v. Simpson's Heirs*, 67 Tex. 225, 2 S. W. 644. From the size of the certificate it may be presumed that J. E. Buchanan was a single man, although the appellant testified that he was 61 years old. The donation to single men in the law follows the prohibition against alienation, but the statute has been construed by the supreme court, and the prohibition held to apply to both classes. *Cannon's Adm'r v. Vaughan*, 12 Tex. 390.

But if the probate court had jurisdiction to decree a specific performance of the contract, and its jurisdiction was properly invoked, no inquiry in this action can now be made as to the propriety of such a decree, notwithstanding the fact that the bond for title was invalid (*Houston v. Killough*, 80 Tex. 304, 18 S. W. 56); and the objection that the bond for title was void could not be entertained against the decree itself, which would shut off any inquiry as to the validity of the bond, if the court had jurisdiction to enter the decree. The probate court had jurisdiction at that time to decree the specific performance of a contract to convey land, as will be seen from section 53 of the probate law of 1848. *Hart. Dig. art. 1162; Pasch. Dig. art. 1313*. The inquiry then arises whether the jurisdiction of the probate court of Leon county to make the decree was invoked in such a manner as authorized action by the court. The power was special and limited, and must be found in the section of the law above mentioned, and must be strictly pursued. *Jones v. Taylor*, 7 Tex. 244; *Peters v. Phillips*, 19 Tex. 70; *Guilford v. Love*, 49 Tex. 715. The proceeding contemplated by the law is an adversary one, and, as was said in *Booth v. Todd*, 8 Tex. 138, is the only instance in which the litigation of a claim can be allowed in the probate court. To quote the law: "When any person shall sell property, and enter into bond, or other written agreement, to make title thereto, and shall depart this life without having made such title, the holder of such bond or written agreement, or his legal representative, may file a complaint in writing

in the county court of the county where letters testamentary or of administration of such deceased person, were granted, praying that the executor or administrator may be required to make titles, agreeably to the title bond, or other written agreement of deceased; whereupon it shall be the duty of the clerk of said court to issue a citation, with a copy of the complaint, to be served on the executor or administrator; and on the return thereof served, at some regular term of the court, the chief justice shall, if he find that such sale was legally made, order the executor or administrator to make titles, according to the tenor of the bond or other written agreement, to the property so sold by his testator or intestate; whereupon it shall be the duty of such executor or administrator to make such title in compliance with such order." An adversary proceeding is contemplated by the statute, to be commenced by the holder of the bond for title. He must, by a complaint in writing against the administrator, filed in court, invoke its jurisdiction. Instead of this, the administrator filed a petition in the county court of Leon county, and asked the court for authority to convey in compliance with the bond, which was granted in the conditional order above set out. The holder of the bond for title was not a party to the proceeding. In the case of *Jones v. Taylor*, above cited, the plaintiff relied on the deed of an administrator executed in pursuance of an order of the probate court which required him to execute titles to all lands for which the estate of the deceased stood bound. Chief Justice Hemphill said, in the opinion: "This order is comprehensive, and not made on consideration of the matters presented in a cause litigated between certain parties, but extends to all the obligations of the deceased to convey, and confers on the administrator a discretionary power to determine on the validity of such obligation, and to convey accordingly. And whether such be the extent of the power contained in the decree or not, at all events it is such as is not authorized by the statute. The mode of proceeding is in the section (53) specifically detailed. The vendee must file his complaint in writing. The chief justice, in the exercise of his judgment, must find (and this of course on satisfactory and competent evidence) that the sale was legally made, and the order must be for title in conformity with the tenor of the bond. The authority conferred on the probate court by the section is special and limited, and must be strictly pursued; otherwise, the acts and proceedings had thereon are nugatory, and confer no right." There is an obvious distinction between the facts in *Jones v. Taylor* and the case under consideration, but it remains that in both cases

the holder of the bond for title was not a party to the proceeding, and that the decree was made *ex parte*. Our conclusion is that the order is a nullity, and that the estate of J. E. Buchanan was not divested of the title to the land in controversy by reason thereof, and the deed executed in conformity therewith.

But, if the appellees should succeed in showing that the estate of J. E. Buchanan, or Buchanan in his lifetime, received the benefit of the land to be conveyed by Wilson, and should succeed in deraigning title down to themselves through said decree of the court, thus connecting themselves with the equity, then the plaintiff should not recover without restoring the consideration received of Wilson for the land (*Ledyard v. Brown*, 27 Tex. 405; *Houston v. Killough*, 80 Tex. 296, 308, 16 S. W. 56); and for this purpose the transcript of the proceeding in the estate of J. E. Buchanan would be admissible in evidence. Appellees have failed, however, by any competent evidence, to connect themselves with the equitable right to hold the land unless the consideration should be restored. It was error to admit in evidence the deed of Mrs. Corbet, Wilson's surviving wife and administratrix, joining Bozeman, Buchanan's executor, in a deed for the Wilson land to I. C. Shute. No authority for the execution of the deed by her was shown. It could not be shown by the recitals thereof. *Jones v. Taylor*, supra; *Terrell v. Martin*, 64 Tex. 121. And it is very questionable if her husband should not have joined her in the execution of the deed. It would seem that he should have done so. Pasch. Dig. art. 1284; *Mitchell v. Wright*, 4 Tex. 283. Also, see *Nickelson v. Ingram*, 24 Tex. 634; 7 Am. & Eng. Enc. Law, p. 174, and note 5. The deed from the heirs of Wilson to Jones for the land in controversy conveyed nothing, because the heirs were married women, and did not execute it in the manner required by statute. In order to show that Buchanan received the benefit of the 237 4/5 acres of land which Wilson obligated himself to convey to him, it was proper to put in evidence the transcript from the county court showing that, on the petition of I. C. Shute, the land was conveyed to him in compliance with Buchanan's bond for title; and extraneous evidence would be admissible to identify the land as the same land embraced in Wilson's bond for title.

Appellant has complained of the charge of the court in several assignments of error, most of which are well made, but it is not believed to be necessary to pass upon them, as it is not likely that the errors complained of will be repeated. The judgment of the court below will be reversed, and the cause remanded.

PRICE v. KENDALL.¹

(Court of Civil Appeals of Texas. June 4, 1896.)

BUILDING AND LOAN ASSOCIATIONS—INSOLVENCY—RIGHTS OF BORROWING MEMBERS.

1. A provision in the contract between a building and loan association and a borrowing member that, if the latter desires to have his shares of stock redeemed in the repayment of his debt, they are to be taken at a cash valuation not less than the amount of dues paid thereon, with 5 per cent. interest, does not entitle the borrowing member, on the insolvency of the association, to have applied, in an action by the receiver appointed for the association to recover the debt, the amount of dues paid and interest in part payment, the balance of the debt not being tendered.

2. A borrowing member of a building and loan association is not entitled, on the insolvency of the association, to have the amount of his dues paid in applied in payment of his debt, but must share pro rata with the other members.

Appeal from district court, Anderson county; J. R. Burnett, Judge.

Action by W. C. Kendall, receiver of the Palestine Loan Association, against F. E. Price, administrator of C. F. Sawyers, deceased. There was a judgment for plaintiff, and defendant appeals. Affirmed.

This action was brought by the appellee, as receiver of the Palestine Loan Association, to recover of the appellant upon certain obligations executed by his intestate, C. F. Sawyers, as a borrowing member of the association. The material facts shown upon the trial below are as follows:

(1) The Palestine Loan Association was an association duly incorporated under the laws of the state of Texas. C. F. Sawyers, who was a stockholder and borrowing member in said association, died on the — day of July, 1893, and the appellant is the administrator of his estate.

(2) On September 4, 1889, Sawyers borrowed of the association the sum of \$596, and entered into a written contract with it, whereby he agreed to pay the association the sum of \$800, of which \$596 was to bear interest at the rate of 12 per cent. per annum, upon the following conditions:

First. That the interest payments were to continue monthly until the stock of the association became of the par value of \$200 per share, under the by-laws, or until the loan should be otherwise discharged. Second. That shares of stock numbered 832, 833, 834, and 835 had been transferred to the association as collateral security for the loan, and that all dues upon said shares, payable under the by-laws, should be paid until the shares reached the par value of \$200 each. Third. That the association held a vendor's lien, a mechanic's lien, and a deed of trust upon part of block 42, in De Bard's addition to the city of Palestine, to secure compliance with the contract, and that the borrower should pay all taxes on said parcel of land, and keep

the improvements insured. Fourth. That all moneys paid by Sawyers into the association should be appropriated as follows: (1) To taxes, (2) to insurance, (3) to fines, (4) to all expenses and losses sustained upon said four shares of stock, (5) to interest, and (6) to dues. Fifth. That if Sawyers should pay all interest upon the \$596 as above stipulated, and pay the dues upon the four shares of stock as the same were payable under the by-laws, and pay all fines and other proper charges upon said shares until they matured, then the above obligation should become void. Sixth. That upon failure to pay interest or dues for six months the principal sum of \$800, and all interest due on the \$596 should at once become payable. Seventh. That said Sawyers might at any time return his debt by paying the principal sum due, with interest to the date of repayment, and in the event of repayment the stock should be released; and if he should desire to have his stock redeemed by the association in repayment of his debt, it should be taken by the association at the cash cancellation value thereof as determined by the association. Eighth. That if Sawyers' debt was not paid until the maturity of his four shares of stock, then his obligation above set out should be a full set-off against said four shares. Ninth. That Sawyers should pay 10 per cent. attorneys' fees, if the contracts were enforced by legal proceedings.

(3) The loan association held as collateral to the contract above set out the note of C. F. Sawyers for \$750, given for the purchase money of part of block 42 in De Bard's addition to Palestine.

(4) Upon said contract of date September 4, 1889, there has been paid \$307.90 interest and \$288 dues in installments of \$4 per month from July, 1888, to June, 1894, inclusive.

(5) Upon December 30, 1890, C. F. Sawyers and wife borrowed of the Palestine Loan Association the sum of \$1,730, and entered into a written contract with the association, whereby they obligated themselves to pay to the association the sum of \$2,000, of which \$1,730 was to bear 12 per cent. per annum interest. This obligation is conditioned exactly as that of C. F. Sawyers, of date September 4, 1889, above set out, except as to amounts and security. Ten shares of stock were transferred as collateral to secure this second contract.

(6) The loan association held as collateral to this second contract two mechanics' liens upon part of block 42 in De Bard's addition to Palestine.

(7) Upon said contract of date December 30, 1890, there has been paid \$638.80 interest, and \$720 dues in installments of \$10 per month from July, 1888, to June, 1894, inclusive.

(8) The payments made by appellant and his intestate were receipted for by entries in receipt books furnished by the association, which were ruled into columns, one column

¹ Writ of error denied by supreme court.

being for dues, another for interest, and another for fines and assessments; and all payments pleaded by appellant as payments of interest were entered in the interest column, and all payments pleaded as payments of dues were entered in the dues column.

(9) When appellant's intestate joined the Palestine Loan Association and purchased his stock, and at the dates of the contracts sued upon, the association was operating under a by-law which provided that nonborrowing members desiring to cancel and withdraw, or borrowing members desiring to pay up their loans, using pledged stock as part payment, should receive for their stock a cancellation price fixed by the board of directors, but which should not be less than the amount of dues paid in on each share and 5 per cent. per annum interest, and this amount was fixed by the board of directors as the cancellation price of the stock of the association.

(10) Through the defalcation of its secretary and treasurer and losses by the loss of interest on its loans upon adverse decisions of the courts holding them usurious, in December, 1893, the association became insolvent, with no hope of maturing the stock and attaining the ends of the corporation. Then the directors ceased making loans, and undertook to wind up the affairs of the concern, but the borrowers claimed usury, and the original cancellation value of their stock, and the nonborrowers also claimed the same cancellation value; and upon August 20, 1895, the affairs and assets of the association were placed in the hands of appellee as receiver.

(11) Appellant's intestate and appellant continued to pay interest and dues to the association up to June, 1894, but have made no payments since that time.

(12) The present actual value of each share of stock in the Palestine Loan Association is \$34, as estimated by allotting to each outstanding share, whether pledged or unpledged, its distributive portion of the net assets of the concern.

The court below held the contract usurious, and allowed the appellant credit upon the principal for all interest paid upon the loan, but refused to allow credit for the cancellation price of the stock as fixed by the directors in repayment of a loan, which was all dues paid upon the stock with 5 per cent. interest per annum, and, instead thereof, heard evidence as to the present actual value, and allowed credit for that amount.

Thos. B. Greenwood & Son, for appellant.
McMeans & Gill, for appellee.

GARRETT, C. J. (after stating the facts). Appellant's contention is that Sawyers' contracts should have been credited with all the dues paid by Sawyers, together with 5 per cent. per annum interest thereon in addition to the usurious interest paid by him, because the contracts stipulated that, if he desired to have his shares of stock redeemed

in the repayment of his debt, they were to be taken by the association at the cash cancellation value fixed by the by-laws; and at the time the contracts were entered into and when the association became insolvent there was a by-law which required the association to receive for their stock from borrowing members desiring to pay up their loans a cancellation price fixed by the board of directors, which should not be less than the amount of dues paid in on each share and 5 per cent. per annum interest thereon, which amount had then been fixed as the cancellation price. But, as will appear from an examination of the clause of the contract referred to and by the by-law, it was only in case that the borrower desired to pay up the loan that he was entitled to have his stock redeemed. His stock could be canceled only in repayment of his debt. By the plan of organization, whenever the stock of the association became worth \$200 by reason of the payment of dues and the accumulation of profits, it matured, and investing members received the par value of their shares, while the obligations of borrowing members were delivered up, and all shares were canceled. But the clause in the contract only provided that the stock of the borrower might be redeemed at its cancellation price in the repayment of his debt, and not as a partial payment thereon. It was necessary that at the same time the balance of the debt should have been paid or tendered in order that the borrower might avail himself of the cancellation price of his shares in making repayment. During his lifetime Sawyers kept up the payments of interest on his debt and of dues on his shares of stock, and after his death they were kept up by his representatives until June, 1894. No effort was ever made to have his shares redeemed in the repayment of his debt, and the appellant, in pleading the dues paid on the shares of stock as a credit upon the debt, does not tender the balance, or offer to pay it. The right to the credit is not shown by the contract.

Should the payments of dues or assessments made upon the shares of stock be regarded as payments in extinguishment of the debt? Some time before payments of dues upon the shares belonging to Sawyers ceased, it was discovered that the stock of the association, by reason of losses, was not worth the amount of dues that had been paid thereon, and in a sense the association had become insolvent, since it was not able to redeem its shares at the cancellation price, or by a return of all dues paid thereon. In winding up the affairs of the association the nonborrowing shareholders must perforce accept a pro rata distribution of the assets of the corporation upon their shares, whether they are sufficient to return all dues or not; and, unless the dues of borrowing shareholders are to be treated as payments upon their obligations, there can be no reason why they should not share the losses of the as-

sociation equally with the other shareholders. By the plan of the association, the borrowing member receives the par value of his stock in advance, and obligates himself to mature it by the payment of assessments, and when it becomes mature, if his obligation has not been sooner discharged, his stock is then canceled and his obligation discharged; but the stock never becomes matured until it is worth par value. Thus it will be seen that there is a plain distinction between the stock and the debt. The language of Judge Henry in the case of *Association v. Abbott*, 85 Tex. 224, 20 S. W. 118, regarding the payment of dues, although in discussion of the question of usury, is appropriate here: "Such payments are not for the use of borrowed money, but through them the shareholder acquires an interest in the property of the corporation. The shareholder is not necessarily also a borrower. If he is not one, he pays for his stock on the same terms that the borrowing stockholder does. There is no inconsistency in the double relation. If not also a borrower, the retiring stockholder withdraws the value of his stock. If he is also a borrower, he uses it to pay his debt with." There is no reason why the borrowing stockholder should be placed in any better attitude than those who are not, when the association has failed to carry out its undertaking, and ceased efforts to mature the stock. The default of the association is the default of all of the shareholders, whether they be borrowers or nonborrowers, and all losses that impair the value of the stock should be applied equally to every share. *McGrath v. Association*, 44 Pa. St. 383; *Strohen v. Association* (Pa. Sup.) 8 Atl. 843; *Towle v. Society*, 61 Fed. 446; *Rogers v. Hargo* (Tenn. Sup.) 20 S. W. 430. There is authority for the opposite doctrine, but the weight of authority as well as of reason is with the cases above cited and others in line therewith. Authority contra: *Bulst v. Bryan* (S. C.) 21 S. E. 537; *End. Bldg. Ass'n*, § 496, and citations. In the case of *Farrell v. Association* (Tex. Civ. App.) 30 S. W. 814, the question was not raised. The affairs of the association being in the hands of a receiver for winding up, it may be questioned whether it was proper in this suit to hear evidence as to the value of the shares, and credit the debt therewith, but no complaint is made of the judgment by the appellee. In his fifth assignment of error appellant says: "The court erred in adjudging that appellee had a vendor's and mechanic's lien, as set out in his petition, on the real estate described in the court's judgment to secure the payment of \$908.30, and in declaring said real estate subject to the payment of said sum." But he fails to point out in his statement that there was error in the respect complained of. We are only referred generally to the introductory statement of material facts. The judgment of the court below will be affirmed.

NEW YORK, T. & M. RY. CO. v. GREEN.
(Court of Civil Appeals of Texas. June 11, 1896.)

DEPOSITION—SUPPRESSION—FAILURE TO ANSWER
QUESTIONS—PLEADING AND PROOF—VARIANCE
—NEGLIGENCE—PROXIMATE CAUSE.

1. It is not error to refuse to suppress a deposition on the ground that the witness refused to answer cross interrogatories, where the interrogatories are unimportant.

2. Under Rev. St. 1879, art. 2233, providing that either party may use a deposition when cross interrogatories have been filed and answered, a cross interrogatory will not be suppressed because it directed the attention of the witness to a particular matter, and requested, in case he shall have answered a preceding interrogatory that such particular fact did not exist, to state that another fact did exist, where such preceding interrogatory was stricken out.

3. In an action by an engineer against a railroad company for injuries caused by the derailment of the engine, the petition alleged that the wreck was caused by the defective condition of the track, and the proof showed that such condition, coupled with a collision of the engine with a calf, caused it. *Held*, that there was no variance between the allegation and the proof.

4. Where the defective condition of the roadbed contributes to cause the derailment of the engine, whereby the engineer is injured, the railroad company is liable, though the accident is precipitated by a collision of the engine with an animal on the track. *Ward v. Bonner*, 15 S. W. 806, 80 Tex. 168, distinguished.

Appeal from district court, Jackson county; T. S. Reese, Judge.

Action by Grant Green against the New York, Texas & Mexican Railway Company for personal injuries caused by defendant's negligence. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This suit was brought by appellee to recover damages for injuries sustained by him in the wreck of an engine and train belonging to appellant, upon which he was the engineer in appellant's service. The petition charged that the wreck was caused by the negligence of appellant in allowing its road to be in a defective condition, in that the width of the roadbed or dump was not sufficient to support trains, the rails were worn out and worthless, the cross-ties were rotten, and there was no ballast under the ends of them. The petition further alleged that the road was defective and unsafe, because it was unfenced and open to trespass by cattle, but did not allege that this helped to cause the wreck. The petition alleged injuries both temporary and permanent. A special exception was sustained to the allegation of the unfenced condition of the track, and no amendment was made. After the evidence was in, plaintiff withdrew all claim for permanent injuries. The evidence showed that plaintiff was operating an engine, to which were attached stock cars, traveling westward over defendant's road, and that it struck a calf, and was derailed, thereby inflicting injuries which damaged plaintiff to the amount of \$4,000, found by the jury. The plaintiff sought to prove that the track was in bad con-

dition in the respects alleged in the petition, and that this was either the sole cause of the derailment of the engine, or that it was one of the causes co-operating with the presence of the calf on the track, and contributing to the result. The defendant sought to show that the track was in good condition; that, if its condition was bad at any point, it was not so at the point of derailment; and that hence the collision with the calf was the sole cause of the accident. As to the condition of the road in the neighborhood of the point where the engine left the track, there was a conflict of evidence. There was sufficient evidence to authorize the jury to conclude that the earth dump supporting the cross-ties was too narrow for the purpose; that the earth had been washed from under the ends of the ties, and they were left without sufficient support, and that many of the ties were rotten; and that this condition was known to the defendant, or ought to have been discovered with ordinary care, and remedied before the accident. But appellant contends that, though this be true, still the evidence of plaintiff fails to show that the track was defective at the point where the engine left it, and that the uncontradicted evidence offered by defendant shows that the track was perfect where the derailment occurred, but that the animal became fastened under the pilot, and that hence the striking of the calf was the sole cause of the wreck. Several witnesses for appellant testified that they visited the scene of the wreck after it occurred, and examined the track; that, at the point where the engine left the rails, the track was in perfect state, the ties and rails all remaining in their proper position; and that the engine had run some distance over the cross-ties, after leaving the rails, before the track was torn up. These witnesses ascertained the point at which the engine ran off the rails by the marks on the ties, which they say they were able to distinguish from those made by wheels of cars, which also quit the rails, by the difference in depth, resulting from the greater weight of the engine. But they say the marks of the engine wheels were on the northern ends of the ties outside the rails. Some of them swore positively that these impressions were those of the engine wheels, while others would only give their opinion to that effect. The fireman who was on the engine with plaintiff testifies that he was looking at the wheels of the engine when they quit the rails; that, when the calf was struck, it was caught and carried under the pilot, and was being pressed against the north rail, when the rail sprung outward, letting the wheels of the engine upon the ties inside the rails. If his statement is true, the witnesses for defendant are mistaken in their opinion that the impressions seen by them on the outside of the rails were those left by the engine when it was derailed. Other testimony offered by plaintiff showed that quite a number of the ties were broken both at the ends and in the middle, and that

of these some were rotten. From this the jury were authorized to conclude that the condition of the track described by the witnesses, and stated above, existed at the point where the calf was struck, and that this condition helped to bring about the derailment of the train. Defendant, in due time and in proper manner, moved to suppress the deposition of Dr. William Irvin, on the ground that he had evaded and had not answered some of the cross interrogatories. The motion was overruled, and exception duly taken. These crosses and the answers thereto are as follows: Cross interrogatory 3: "How many cases of injury from railway accidents had you treated previous to this case of Green's?" Answer to cross interrogatory 3: "I am not prepared to state, not having kept any record of them." Cross interrogatory 5: "Is it not true that you had never treated any case of railway injury, save injury to one S. C. Abbott, who had his fingers mashed, previous to your treatment of Green? If you answer in the negative, please name the cases." Answer to cross interrogatory 5: "I have treated cases of railway injury prior to Abbott's and Green's cases, the mentioning of which can be of no possible interest to you or value to your case." Cross interrogatory 7: "When is the last time you have been in any hospital or place where you could observe the treatment of railway injury cases by others? If you answer, then say if you were at said hospital as an attendant, physician, or student, and how long you remained there." Answer to cross interrogatory 7: "My first experience in hospital was that of a student of medicine, extending from 1858 to 1861. My last was at times during the late Civil War, as a physician." The fireman, Edmunds, whose testimony is above referred to, testified by deposition. Direct interrogatory No. 5, and the answer thereto, were as follows: "Did the rails of the track spread before the engine derailed? Did you see the wheels of the engine when they left the track, and was there anything under them at that time to cause them to be derailed?" Answer: "The rails spread before the engine left the track, and caused it to become derailed. I saw the two right front truck wheels and the right front driving wheel leave the rail. There was nothing under them until after leaving the rail. The right front truck wheel touched but a very small portion of the calf, if any, after leaving the rail. The right front back wheel and right front driving wheel ran over the calf while on the ties." On motion of the defendant made in due time and manner, this interrogatory and answer were suppressed, on the ground that the question was leading. Cross interrogatory 14 and the answer to same were as follows: "In a subdivision of direct interrogatory 5, you are asked if you saw the wheels of the engine when they left the track, and if there was anything under them at that time to cause them to become derailed. If you answer this subdivision, and say there

was nothing under the engine wheels when they left the track to cause them to become derailed, please say now if there was not the yearling then under the pilot, and if this was not exerting a great pressure against the rail, pressing it outward, and did not this cause a strain likewise on the opposite rail?" Answer: "I saw the wheels of the engine when they left the track, and there was nothing under them to cause them to be derailed. The yearling was then under the pilot, causing the amount of pressure put against the side of the right rail to be sufficient to mash the body of an eight or nine months old calf. I should judge that the pressure on the opposite lead wheel was light; hence the pressure on the rails was light." Defendant moved to suppress them also, on the ground that the cross interrogatory was based upon the hypothesis that the direct interrogatory 5 was properly framed, and had been answered by the witness, whereas that question and its answer had been suppressed, and the answer to the cross interrogatory fell with it. Over this objection, plaintiff was permitted to read the answer, and exception was reserved.

Proctors, for appellant. R. A. Pleasants, John H. Bailey, and J. D. Owens, for appellee.

WILLIAMS, J. 1. The court did not err in refusing to suppress Irvin's deposition. Most of the cross interrogatories were sufficiently answered, and those to which answers were not directly given were not sufficiently important in this case to require that the whole deposition be suppressed.

2. We do not think the court erred in permitting plaintiff to read the answer to cross interrogatory 14 addressed to the witness Edmunds. By article 2233, Rev. St. 1879, it is provided that either party may use a deposition on file when cross interrogatories have been filed and answered. This makes a deposition evidence for either party who may choose to use it, provided, of course, that it is legally admissible as evidence. One party who, by his questions, puts himself in a position to use the answers, cannot object to the use of them by his adversary. This is the general rule, and it is not disputed by appellant's counsel. *Smith v. Oldham*, 26 Tex. 536; *Railway Co. v. Cockrill*, 72 Tex. 619, 10 S. W. 702; *Alsop v. Insurance Co.*, 1 Sumn. 451, Fed. Cas. No. 262. But, on the authority of a dictum in the case last cited, appellant insists that the party propounding cross interrogatories may, "if he chooses, make his cross interrogatories dependent, and then the answer to the cross interrogatories, whether favorable or unfavorable, follows the fate of the direct interrogatory," and "that defendant has the right to ask questions on cross-examination in a deposition conditionally." The opinion of Judge Story does so state, and the rule may be conceded to be as laid down in the lan-

guage quoted. But how is the party to make his cross interrogatory dependent on the admission of the answer to the direct, and how is he to show that the question is asked conditionally? The reasoning in the opinion referred to would seem to require that, in asking the question, he should at least show that he will not himself use the answer to the cross interrogatory, unless the answer to the direct is used; so that while he may object to its use by the opposite party, should the answer to the direct be suppressed, or not offered, he cannot offer it himself should he find it to his advantage to do so; and his attitude should be made clear and unequivocal. The form of the interrogatory here used may be understood as simply directing the attention of the witness to a particular matter, and requesting, in case he shall have answered that a particular fact did not exist, to state that another fact did exist. No purpose on the part of the defendant not to use the latter fact if the other should not be admitted is expressed, and we cannot say that the form of the question was such as to preclude the defendant from using the answer after the suppression of that given to the direct interrogatory. If he was at liberty to do so, his adversary had the same right. In the case referred to, the direct question was objected to when propounded, and still the answer to cross interrogatories was admitted in behalf of the adverse party, because the party, in asking it, had not so shaped his question or his attitude as to preclude himself from using it in case it should be favorable to him.

3. The proof did not vary from the allegations because the petition alleged the cause of the wreck to have been the defective condition of the track, if the proof showed that such condition, coupled with the collision with the calf, caused it; and the court properly refused to charge that this was a variance. Under an allegation that defendant's negligence caused the injury, a recovery can be had, upon proof that such negligence proximately contributed thereto, i. e. that such negligence was one of the causes, without operation of which it would not have occurred.

4. The finding of a jury that the negligence of defendant in permitting its roadbed to be in an unsafe condition contributed to cause the derailment of the engine and the injury to plaintiff is sustained by the evidence. The fact that the calf upon the track precipitated the catastrophe, and co-operated with the defective roadbed in producing the result, does not exculpate the defendant. No one is responsible for the part the animal performed, but the defendant is responsible for the part its negligence performed. While it may be true that a collision with such an animal on a perfect track might wreck a train, it is obviously more likely to do so with a weak and improperly constructed roadbed. The fact that the rails

at once gave way, and spread, and that the ties were broken as they were, and the other circumstances, were sufficient to warrant the jury in concluding that the defective condition of the track helped to bring on the wreck. If the track was in the condition described by the witnesses, it is evident that it must have given way much more easily than a good track would have done. It is not essential that we should be able to see the exact extent to which the negligence of the defendant operated. It is enough that it did contribute immediately to produce the result. The case of *Ward v. Bonner*, 80 Tex. 168, 15 S. W. 805, relied on by appellant, was one in which the derailment of the engine was solely caused by collision with cattle on the track. No claim was made that any defect in the track helped to cause it. It was only asserted that, after derailment, the track was not strong enough to support the train. Here the proof tends to show that the defective roadbed was one of the causes, at least, of the derailment. The court there said: "The liability to injury caused by coming in contact with the animals trespassing on the road is one of the dangers incident to the operation of railways," and this is undoubtedly true. But the risk incurred in running trains over improperly constructed or negligently kept tracks is not one of the risks incident to the business. While the employé assumes the risk resulting from the trespassing of animals, he does not assume the increased risk resulting in collisions with them from defective tracks. But we are not prepared to concede that, if the train had left the track at a point where it was not defective, it would necessarily follow that plaintiff cannot recover if, after derailment, the wrecking of the train and the injury to plaintiff were partly caused by a defective condition of the track. We do not understand that the case referred to so holds. There the only evidence that the road was bad was the fact that it did not support the train running at the rate of 25 or 30 miles an hour, after it was derailed by the collision with the cows, but gave way under it. The court says that this fact was not evidence of negligence, and this, too, is true. But here there is independent evidence that the track was in bad condition, and, as remarked before, while the employé must take the risks arising in such derailments of trains where the company has performed its duty in looking after the track, he does not take the increased risks so arising where that duty is unperformed, and the track is unnecessarily dangerous. In such cases it is for the jury to determine whether the omission of the master has in fact directly contributed to the injury received by the servant, and this they are to ascertain, like any other fact, from a preponderance of the evidence. It is not essential that this fact should appear with any greater certainty than is essential to the finding of any other fact in civil cases.

The court did not err in submitting the questions to the jury, and in refusing an instruction to find for defendant. What has been said disposes of all the assignments.

TINSLEY v. HOUSTON LAND & TRUST CO.

(Court of Civil Appeals of Texas. April 30, 1896.)

VENDOR AND VENDER—ASSUMPTION OF NOTE—SET OFF—PAYMENT OF ATTORNEY'S FEES—CLERICAL MISTAKE—COSTS ON APPEAL.

1. Though land was conveyed with warranty against incumbrances, and a purchaser from the vendee was compelled to pay outstanding taxes, he is not entitled to credit therefor as against an innocent purchaser of a note executed for the purchase price, in an action to foreclose a vendor's lien securing the same.

2. R. sold an undivided half of land to C., taking a note, secured by vendor's lien, for the purchase money. R. before maturity transferred the note to plaintiff, guarantying its payment. C. conveyed his interest to T., who assumed the payment of the note. After both R. and T. had incumbered their interests, they partitioned the land between themselves, and agreed that each should discharge his own debts, and relieve the parcel set apart to the other of any charge resulting therefrom. In an action on the note and to foreclose the vendor's lien, R. pleaded that he was only guarantor of the note, and alleged the assumption thereof by T., and asked that the land set apart to T. be first sold to pay the debt, and that, in case he should have to pay the note, that he have judgment over against C. and T. Held, that the fact that R. did not allege payment of the incumbrances on his half of the land did not affect his right to the relief claimed against T.

3. In an action by a bona fide purchaser of a note secured by vendor's lien, one who assumed payment thereof cannot assert that he did not know that it provided for the payment of attorney's fees in case of suit.

4. Though a judgment to foreclose a vendor's lien, including by mistake land not subject thereto, will be corrected on appeal, costs will not be allowed defendant where the error was not called to the attention of the court below.

Appeal from district court, Harris county; S. H. Brashear, Judge.

Action by the Houston Land & Trust Company against Thomas Tinsley and others on a note and to foreclose a vendor's lien securing the same. From the judgment rendered, the defendant Thomas Tinsley appeals. Reformed and affirmed.

Isaac H. Oliver, for appellant. Ewing & Ring and Hutcheson, Campbell & Sears, for appellee.

WILLIAMS, J. As gathered from the pleadings and the judgment of the court below, there being no statement of facts, the case is this: C. S. Reichman sold to Charles Tinsley an undivided half of a piece of land in Houston, taking the note sued on for the purchase money, and executing a deed which recited it, and reserved a lien on the land to secure it. Reichman, before the maturity of the note, transferred it to the land and trust company, plaintiff below, guarantying its payment. Charles Tinsley conveyed the

land thus purchased to appellant, Thomas Tinsley, who assumed the payment of the note. Reichman, who remained the owner of the other undivided half of the tract of land, and Thomas Tinsley divided it between themselves, specific parcels being set aside to each. Both Reichman and Tinsley had incumbered their interests before the partition, and in the division each agreed to discharge his own debts and relieve the part set apart to the other of any charge resulting therefrom. The land and trust company brought this suit on the note against Charles Tinsley as maker and Reichman as guarantor to recover the amount of the note, and against Thomas Tinsley, as the purchaser of the land incumbered by the lien, for a foreclosure. Thomas Tinsley answered that Reichman had warranted the title to the land, and that it was free from incumbrances, when it was incumbered to the amount of \$105, due for taxes, which he had been compelled to pay; and claimed deduction from the purchase-money note for that amount. Reichman pleaded that he was only guarantor of the note, and alleged the sale of the land by Charles Tinsley to Thomas Tinsley, and the assumption of the note by the latter, the partition of the land, and the agreement under which it was made, and asked that the land set apart to Tinsley be first sold to pay the debt, and that, in case he should have to pay the note, he have judgment over against Charles and Thomas Tinsley. His answer did not allege payment of incumbrances on his half of the land. Charles Tinsley defaulted. By the judgment the plaintiff recovered against Charles Tinsley and Reichman the full amount of the note, with foreclosure of the lien on the undivided half of the land, but it was ordered that the lots set apart to Thomas Tinsley be first offered for sale, and, if they should fail to bring enough to pay the debt, that the undivided half of the whole tract be sold. Judgment was rendered over in favor of Reichman, as guarantor, against Charles Tinsley for the same amount, and against Thomas Tinsley for a like amount, less the sum which he had paid for taxes, which was deducted; and it was ordered that, in case Reichman should pay plaintiff's judgment, he have execution and order of sale against the Tinsleys, etc., for the amount so adjudged.

The first objection urged to the judgment is that it forecloses plaintiff's lien against appellant for the full amount recovered against Charles Tinsley and Reichman, when, by the verdict, it appears that appellant was entitled to a credit of \$105 as against Reichman. It is conceded that plaintiff is to be treated as an innocent purchaser of the note, but it is claimed that he took the lien subject to the partial defense against Reichman. We do not agree that this is true. The lien is an incident of the debt, and secures whatever amount plaintiff is entitled to collect on the note. The fact that Reichman did not al-

lege payment of the incumbrances on his half of the land does not affect his right to the relief claimed against appellant. Those incumbrances were upon his undivided half, and not upon appellant's. They need not be involved in this proceeding. If suit should be brought to enforce them against the undivided interest in the land, appellant can secure the same protection which has been given to Reichman. The judgment imposes upon appellant no burden which he is not bound to bear, and there is, in this particular, nothing of which he can complain. He is personally bound to Reichman to pay this debt; and his land, as between them, is primarily chargeable.

The evidence offered to show that appellant, when he assumed payment of the note, did not know that it provided for the payment of attorney's fees in case of suit, was properly excluded. He is chargeable, by his assumption of the note, with knowledge of its contents and will not be heard to say that he was ignorant of the extent of the liability which he assumed. The bill of exceptions perhaps states the case sufficiently to enable us to review this ruling in the absence of a statement of facts, but ordinarily we would not consider an assignment of this character in the absence of the evidence.

The seventh assignment of error points out a mistake in the judgment in the description of one of the lots received by appellant in the partition, by which land not obtained through that deed is made subject to sale. This will be corrected, but, as it is merely a clerical error, and was not called to the attention of the court below, it should not carry the costs of appeal in favor of appellant.

We take occasion to observe that we understand the portion of the decree which provides that appellant's lots should be first offered for sale to mean that there shall be no sale of them unless enough should be bid for them to satisfy the judgment, and that, if this should not be the case, the undivided half should alone be sold. Unless this is the meaning of it, there would be a sale first of a specific half and then of the undivided half of the same land, when only half is subject. The decree is somewhat vague on this point, and the process should be so guarded as to avoid confusion. There is nothing in this of which appellant can complain, as his land is unquestionably chargeable primarily with the debt. Reformed and affirmed at appellant's cost.

ANDERSON v. ANDERSON.

(Court of Civil Appeals of Texas. May 14, 1896.)

ACTION TO RECOVER LAND — DEFENSES — PAROL LEASE—STATUTE OF FRAUDS—PART PERFORMANCE—PLEADING—ANSWER.

1. In an action to recover land, defendant set up a contract by plaintiff's grantor to allow defendant to occupy the land for 10 years, in

consideration of cultivating it, and offered to show that such contract was evidenced by certain lost letters, and to prove the contents thereof; but it appeared that there were other letters, of later date, tending to show that no such agreement had been made. *Held*, that the question of the execution of the contract should have been left to the jury.

2. Taking possession and making improvements under an oral contract for the use of lands for more than one year is such part performance as will take the case out of the statute.

3. In an action to recover land, where defendant pleaded part performance of an oral contract with plaintiff's grantor for the use of the land, it was proper to sustain an exception to a portion of the answer setting up more than one contract evidenced by writing, and alleging that the terms of the oral contract were the same as those in "the written contract."

Appeal from district court, Galveston county; William H. Stewart, Judge.

Action by Thomas H. Anderson against D. S. Anderson. Judgment for plaintiff, and defendant appeals. Reversed.

Austin & Rose, for appellant. Jas. B. & Chas. J. Stubbs and A. O. Breitz, for appellee.

WILLIAMS, J. Appellee sued appellant to recover the land in controversy, claiming it under a deed from J. G. Anderson. Appellant had entered under J. G. Anderson, and set up in his answer that he was holding under a written contract with J. G. Anderson which entitled him to the exclusive possession and use of the land for 10 years, in consideration of services to be rendered by him in cultivating and improving it. He alleged also a parol agreement with J. G. Anderson for the use of the premises, together with the delivery of possession and the making of improvements under it, in order to show part performance, and to avoid the statute of frauds, and prayed that, whether the contract be found to have been put in writing, or to have been oral, its terms be established, and specific performance be decreed. He further pleaded that he had made improvements on the faith of the agreement, and asked judgment for their value in case he could not retain possession of the land. The court sustained exceptions to the part of the plea setting up the oral contract, and overruled exceptions to the part setting up the written contract and improvements; but on the trial before a jury the court refused to submit the question whether or not the contract was proved as alleged, and directed a verdict for the plaintiff for the land.

The contention of the defendant was that he first entered under an oral agreement with J. G. Anderson, which was to have been formally reduced to writing, the execution of which was delayed from time to time, but that it was acknowledged and its terms stated in letters written to him by J. G. Anderson, which had been lost, and that later this first contract had been rescinded by agreement between them, and another substituted, which was also evidenced by lost letters, the

contents of which defendant undertook to show. He introduced evidence tending to prove those facts, which should, in our opinion, have been submitted to the jury. If the testimony of himself and his son and daughter be accepted as true, there was a letter written to him by J. G. Anderson, in the latter part of 1891, making an offer, the terms of which were the same as those alleged by him, as constituting the contract finally agreed upon, and he had replied, accepting it. It is true that there were letters of a later date, written by both of the parties, which tended to show that no agreement had been made; but this presented a question of fact, for the decision of the jury. If the contract had been in fact concluded in 1891, these late letters would not have abrogated it, as in themselves they showed no subsequent agreement. They were simply evidence to be considered by the jury in determining whether or not the contract had been concluded as claimed by defendant. It is stated in the briefs of counsel for appellee that the view taken in the court below was that the evidence, all together, rendered it so uncertain what the contract was, if there was one, that specific performance could not be decreed, and that may be a conclusion warranted by all of the evidence. But still there was evidence which, if believed, might have been held by the jury sufficient to show, definitely, not only that an agreement was made in 1891, but what were its terms, and hence the court could not properly withdraw this question from the jury.

With regard to the alleged oral contract, we cannot say that the court erred in sustaining exceptions to the part of the answer setting it up. It is true that an oral agreement for a letting of land for a greater period than one year may be taken out of the operation of the statute of frauds by such part performance as, on principles of equity, entitles the lessee to specific performance. The delivery of possession under such an agreement, and the making of improvements in accordance with it, are held sufficient for this purpose. *Tayl. Landl. & Ten.* §§ 32, 33; *Wat. Spec. Perf. Cont.* §§ 274-276. "Improvements, to constitute part performance, or to entitle the vendee to compensation, need not necessarily consist of erections on the land, but may arise from skill and labor bestowed 'n cultivation," which, however, must enhance the land in value. *Id.* § 282. Hence, if the terms of the oral contract had been sufficiently alleged, a case might have been shown to entitle defendant to enforce it. But the part of the plea setting it up alleged that its terms were the same as those previously alleged as having been stipulated in the written contract. More than one contract evidenced by writing was alleged, and the court could not see which one was referred to. Of course, if there was in fact a contract reduced to writing, all previous negotiations would be merged in it. But, in

pleading, it was permissible for defendant to so shape his answer as to get the benefit of an oral agreement, in case he should fail to establish one in writing. Letters might not, within themselves, state all of the terms of an agreement so as to constitute a written contract, but might still be evidence tending to show the existence of an oral agreement. And, under pleadings shaped as were those of defendant, if the oral agreement were sufficiently stated,—if all of the evidence, taken together, should show, and the jury should find, the existence and terms of a contract, either written or oral,—appropriate relief should be given. We do not see that the question whether or not, independently of our trespass to try title statute, a lessee is entitled in equity to a lien upon the premises for improvements made by him on faith of a contract with the lessor, has any important bearing upon the case. Appellee seeks to retain possession of the premises during the term of the alleged letting. If he establishes the facts which he alleges entitle him to that relief, he can do so. The services rendered in improving the place were, according to his claim, done in consideration of such letting; and, of course, if he continues to hold under the alleged agreement, he will be entitled to no other compensation. On the other hand, if he held under no definite contract which entitles him to remain, it follows that his services were rendered as a part of that contract, too, and as a consequence he would then have no right to recover for them. He cannot have specific performance of his contract and compensation for his services too. And, if the agreement under which he held gave him no right to hold for a definite time, his services were still rendered in return for such right as he obtained under the agreement.

The court did not err in refusing to submit the issue raised by that part of the answer setting up the right to recover improvements. The parts of the answer which alleged notice to plaintiff of defendant's right, and the conspiracy between plaintiff and J. G. Anderson to defeat that right, were irrelevant. Plaintiff had only such right as his grantor had, and defendant's possession charged plaintiff with notice of it.

We do not think the court erred in excluding the fragment of the letter from J. G. Anderson to defendant. From it alone it cannot be told just what it means, and what weight should be given to it. Defendant should have offered evidence of the contents of the whole of the lost letter, if he desired to use it.

The allegations in plaintiff's supplemental petition in which he sought to charge defendant with the value of property of J. G. Anderson appropriated, and with moneys furnished by J. G. Anderson, were made in reply to those parts of defendant's answer which sought compensation for improvements. What we have said as to that claim

renders it unnecessary to further discuss the sufficiency of plaintiff's allegations. In the controversy between J. G. Anderson and defendant about their mutual accounts, if the former seeks the benefit, as offsets, of the sums charged in plaintiff's pleadings, he should plead them more specifically; at least, the claims for money advanced by him to defendant. That cannot, in the nature of things, be more peculiarly within defendant's knowledge than his own. As to property belonging to him which he claims defendant received as his agent, and appropriated, he may justly call upon defendant for an accounting, and the general allegations made would be sufficient.

We take occasion to say that the defendant's answers may be greatly simplified by the omission of unnecessary verbiage, and the plain statement of the contract relied on, and of the acts done under it. His pleadings are unnecessarily lengthy.

HAGANS et al. v. McCLAIN.

(Court of Civil Appeals of Texas. June 20, 1896.)

ACTION ON BOND—SUSPENSION FROM OFFICE—PLEADING.

Pending a suit to remove plaintiff from office, a bond was executed, conditioned that the principal therein, who was temporarily appointed instead of plaintiff, should pay to plaintiff all damages and costs sustained by reason of the suspension from office in case it should finally appear that the causes alleged in said suit were insufficient. After plaintiff's term of office had expired, the suit was dismissed for failure to give security for costs. *Held*, in an action on said bond, that a petition alleging a breach thereof by reason of the failure of defendants to prosecute said suit for plaintiff's removal, and permitting the same to be dismissed without proving the truthfulness of the causes alleged therein was insufficient, the petition nowhere alleging that the causes for removal were untrue.

Appeal from Dickens county court; C. A. McKnight, Judge.

Action by A. J. McClain against A. J. Hagans and others on a bond. A judgment by default was rendered for plaintiff, and defendants appeal. Reversed.

Browning & Madden, for appellants. John A. Green and Joe E. Rosson, for appellee.

STEPHENS, J. Pending a suit instituted November 20, 1891, upon the relation of J. G. Wilson, to remove from office A. J. McClain, county judge of Dickens county, the district judge, on the 11th day of December, 1891, made an order temporarily suspending said McClain from said office, and appointing A. J. Hagans in his stead, who, in pursuance of this order, on that day, with others as sureties, entered into bond as provided in article 3409, Sayles' Statutes, in the sum of \$800, payable to said McClain, and conditioned as follows: "The condition of the above obligation, however, is such that if the said A. J.

Hagans shall pay said A. J. McClain all damages and costs that he may sustain by reason of suspension from office, in case it shall finally appear that the cause and causes alleged in said suit are insufficient or untrue, then this obligation shall be void; but otherwise shall remain in full force and effect." In October, 1892, after there had been a mistrial of the cause in the preceding December, an order was entered, upon motion of the clerk, requiring the relator to give a cost bond, which operated a continuance of the cause till April, 1893, when it was dismissed for want of compliance with this order. Thereafter this suit was brought by appellee, A. J. McClain, against appellants, A. J. Hagans and the sureties on his bond, to recover damages, setting forth the above facts and alleging a breach of the bond, in the terms following: "That by the failure, refusal, and neglect of the defendants herein and of the said relator, J. G. Wilson, to prosecute said cause, and permitting the same to be dismissed as aforesaid, without proving, sustaining, and substantiating in said cause the sufficiency and truthfulness of the cause and causes alleged in said suit for plaintiff's removal, constitutes and is a breach of the said bond and obligation of the defendants herein, to plaintiff's damage," etc. Upon this petition judgment by default was taken, from which appellants have appealed, assigning error to the insufficiency of the petition to support such judgment.

The petition nowhere alleged, nor in any manner made it appear, that the causes for removal were insufficient or untrue, but the sole breach assigned was that quoted above, viz. the dismissal of the suit in April, 1893, after appellee's term of office had expired. The controversy having thus been determined by the lapse of time, the dismissal of the suit followed as a necessary consequence. *State v. Loomis* (decided by this court January 18, 1895) 19 S. W. 415; *Lacoste v. Duffy*, 49 Tex. 767; *Bolton v. San Antonio*, 4 Tex. Civ. App. 174, 23 S. W. 279. Such disposition of the original suit did not, in our opinion, show a breach of the bond. The judgment by default cannot, therefore, stand, for want of the essential allegation assigning a breach of the bond, and must be reversed, and the cause remanded for further proceedings, should appellee see fit to amend his petition.

HOUSTON & T. C. RY. CO. et al. v. STATE.
(Court of Civil Appeals of Texas. May 9, 1896.)

PUBLIC LANDS—RAILROAD GRANTS.

1. The Houston & Texas Central Railway was empowered by its charter (granted in 1848) to construct, not only its main road, but, "simultaneously" therewith, "a branch towards the city of Austin." In accepting the benefits of a supplementary act, the company was required to yield "all general branching privileges, except such as are expressly granted by the pro-

visions of its charter to certain points." Act Jan. 30, 1854, relating to donations of 16 sections of land to railroads, expressly provided that companies taking the benefits of such act, and already entitled to eight sections of land for every mile constructed, should not be entitled "to receive any grant of land for any branch road." Held that, though said railroad company may have retained the privilege of building a branch towards Austin, it could not acquire a grant of 16 sections of land for every mile so constructed.

2. Act Aug. 15, 1870, merging the Washington County Railroad Company in the Houston & Texas Central Railroad Company, and authorizing the latter to extend that road from Benham to Austin, did not give it the right to acquire 16 sections of public land for every mile so constructed, since Const. 1869, art. 10, § 6, then in force, forbade the donation of public lands to railroads.

Appeal from district court, Nolan county; William Kennedy, Judge.

Action by the state of Texas against the Houston & Texas Central Railway Company and others for the recovery of land. Judgment for plaintiff, and defendants appeal. Affirmed.

The following are the additional conclusions of fact adopted by the court of civil appeals from appellants' motion for additional findings:

"(1) That the appellants had a file made upon said land as follows:

"State of Texas, County of Bexar. To the Surveyor of Bexar District: By virtue of duty [forty?] certificates issued to the Houston and Texas Central Railway Company by the commissioner of the general land office on the first day of July, A. D. 1872, numbered from 40/4997 to 40/5036, inclusive, I hereby file upon the following vacant land in your land district, to wit: On the waters of the Colorados and Clear Fork of the Brazos, in Taylor county; beginning at the S. E. corner of John Trussells' $\frac{1}{2}$ league, near the Clear Fork of the Brazos, and on the line of Travis district; thence west to Trussells' S. W. corner; thence northerly, with his line, passing his N. W. corner, and continuing to the Clear Fork; thence, with the Clear Fork and the line of Young district, to the W. line of the county; thence south to or opposite to the M. C. Lunick survey; thence eastward, to and with Lunick, to or Martinez's N. E. corner; thence S. E. with Martinez's, C. Colenck, Ed Taylor, and James Jeffries E. lines, to David Harrison; thence north, east, and northwest, with the lines of Harrison, E. Islas, N. Gwatney, Thos. Linsey, W. F. Smith, T. Berwer, and W. S. Henry, to the N. E. corner of said Henry's league; thence S. E. and S. W., with Henry, Jas. Walker, Thos. Linsey, and Elsie Islas, to the L. Forsyth league, and, with its N. and N. E. line, to the line of the county; thence E., with county line of Taylor and Runnels, to the John Forbes survey; thence north, with Forbes, C. M. Jackson, W. F. Sparks, Robt. Triplett, and John Kincaide, to N. W. corner of the latter; thence east, with Kincaide and Triplett, to Smith league, and, with its W. and N. lines, to the

N. E. corner on the line between Bexar and Travis district; thence N. W., with said line, to the beginning. Robt. M. Elgin, Land Agent H. & T. C. Railway.

"All valid subsisting entries and surveys are hereby excluded from the above, as well as the rocky summits of mountains in vicinity of Mountains Pass. Robt. M. Elgin, Land Agt.

"Came to hand, and filed in my office, at 11 o'clock a. m., this 28th day of July, A. D. 1872, in File Book No. 4, page 131. C. Harnett, D. L. B. D., by L. C. Navarro, Dep.

"I, W. M. Locke, district surveyor Bexar district, do hereby certify that the foregoing is a true and correct copy of the original, on record in my office, in File Book No. 4, pages 130 and 131. Given under my hand, at San Antonio, this the 23rd day of October, A. D. 1890. W. M. Locke, District Surveyor Bexar District.

"General Land Office, Austin, Texas, March 24th, 1892. I, W. L. McGaughey, commissioner of the general land office of the state of Texas, do hereby certify that the above and foregoing is a true and correct copy of the original, with indorsements thereon, now on file in this office. In testimony whereof, I hereunto set my hand, and affix the impress of the seal of said office, the date last above written. [Seal.] W. L. McGaughey, Com'r G. L. L. D. Office."

"Also the map showing file delineated thereon.

"(2) That the parties agreed 'that all special acts of the legislature of the state of Texas, all railroad charters and amendments thereto, bearing upon the subject-matter of this litigation, may be considered in evidence without introducing same.'

"(3) That the land scrip certificates included in the suit, and the land located by virtue thereof, were issued for that portion of the road constructed between Brenham and Austin.

"(4) Also show the roads that got lands and sidings under the construction of the executive department.

"(5) That the lands were continued in the hands of Chas. Dillingham, receiver, first by order of the United States circuit court, and then further continued in his possession by an order of Associate Justice Lamar as follows: 'United States Circuit Court, Eastern District of Texas. Stephen W. Carey et al., Appellants, vs. The Houston & Texas Central Railway Company et al., Appellees. It appearing to my satisfaction from the annexed petition and affidavit that the appellants have taken and perfected appeals to the supreme court of the United States and the circuit court of appeals from the decree entered herein on the 16th day of November, 1892, which appeals are taken in good faith, and that no injury can accrue to the appellees by a stay of proceedings as herein directed, pending the hearing and decision of the said appeals, now, therefore, on motion

of R. H. Landale, solicitor for complainants, it is ordered that pending the hearing and decision of the said appeals taken by the complainants to the supreme court of the United States and the circuit court of appeals from the decree entered herein on the 16th day of November, 1892, Charles Dillingham, the receiver of the Houston and Texas Central Railway, be, and he is hereby, stayed from surrendering or delivering possession of the Houston and Texas Central Railway, or any of the line of railway formerly operated by the Houston and Texas Central Railway Company, and of which he is now possessed as receiver, and from permitting the said railways to be operated by any corporation or person other than himself, with liberty to the receiver, the appellees, or any of them, to apply to me to vacate the said stay, if the said appellant fail to prosecute the said appeals with due diligence. Dated, Washington, December 9th, 1892. L. Q. C. Lamar, Associate Justice of the Supreme Court of the United States, Assigned to the 5th Circuit.'

"(6) That the governor of Texas construed the law as entitling the said railway as being entitled to the specific land grant, and held in a letter to the commissioner of the general land office on the subject, among other things, as follows: 'I am of the opinion that the decision of the supreme court in the H. & G. N. R. R. case covers substantially the abstract right of the former railway; and I am not prepared to say that this company should be required to commence suit to enforce that right.'"

T. D. Cobbs, for appellants. C. A. Culbertson, Atty. Gen., for the State.

STEPHENS, J. This appeal is from a judgment rendered April 19, 1893, in favor of the state of Texas, for 16 sections of land in Nolan county, the suit having been brought in the name of the state by the attorney general, February 3, 1890. The trial was had without a jury, and the judgment rests upon concisely stated conclusions of fact, which we adopt. Since the trial, many of the important questions of law involved have been determined by our supreme court, in the following recent cases: *Houston & T. C. Ry. Co. v. State*, *Quinlan v. Railway Co.*, and *Galveston, H. & S. A. Ry. Co. v. State*, all reported in 34 S. W., at pages 734, 738, 746. We need not discuss the questions so fully considered in these cases, but proceed at once to consider the additional or peculiar features of the case at bar.

The Washington County Railroad Company was chartered in 1856, to construct and operate a railroad from a point on the Galveston & Red River Railway (the name of which was changed that year to the Houston & Texas Central) to Brenham, which it did, beginning at Hempstead. Of this line of road the Houston & Texas Central Railway Company afterwards became the owner, by purchase under

mortgage foreclosure; and by special act of the legislature passed August 15, 1870, the Washington County Railroad Company was merged in the Houston & Texas Central, and the latter authorized to extend that road from Brenham to Austin, which it did between the date of the special act and the 25th day of December, 1871, in consideration of which extension land certificates were issued to it in 1872, and located on the lands in controversy in June, 1873, within what had then just become the Texas & Pacific Reserve, as provided in a special act of May 2, 1873. In the preceding July, however, a sort of blanket file seems to have been made or attempted in behalf of the Houston & Texas Central Company, by virtue of these certificates, on a large body of land, including that in controversy, but without the application of any particular certificate to any particular section of land. Nothing further seems to have been done in pursuance of this file till the locations were made, in June of the succeeding year. It was expressly provided in the face of these certificates that they were to be located only on "unreserved" public domain. No patents have ever issued. The questions thus arising are: Were the certificates valid? If so, were the locations valid?

We are of opinion that the first, if not the second, question, should be answered in the negative. The constitution of 1869 (article 10, § 6) stood in the way of any grant of lands to railroads when the act of August 15, 1870 (which authorized the extension of the old Washington County Railroad from Brenham to Austin), was passed. Whatever new power this act attempted to confer upon the Houston & Texas Central Company to acquire land by building the road to Austin was withheld by the clause of the constitution referred to. *Galveston, H. & S. A. Ry. Co. v. State* (Tex. Sup.) 34 S. W. 749. Did the power exist independent of the act of 1870? The old Galveston & Red River Company (now the Houston & Texas Central) had the right under its charter, granted in 1848, not only to construct its main line, but also, "simultaneously" therewith, "a branch towards the city of Austin," besides general branching privileges. In accepting the benefits of a supplementary special act for its relief, it was required to yield "all general branching privileges, except such as are expressly granted by the provisions of its charter to certain points." It is claimed that it thus acquired, not only the right to build the road from Brenham to Austin as one of its branches "to certain points," but also the right to have 16 sections of land to the mile for so building it, under the general law on that subject as passed in 1854,¹ and extended for 10 years in 1866.² But this general law expressly denied to such companies (entitled to eight sections per mile) taking the benefits thereof the right "to receive any grant of land for any branch road." While

the privilege of building a branch towards or to Austin may have been retained, the further right to acquire 16 sections of land for every mile of such branch road was not. It follows, we think, that the certificates in question were issued without authority, and hence did not authorize the appropriation of any part of the public lands.

But, should this conclusion prove erroneous, we are still not prepared to hold that the second question would admit of any other than a negative answer, though we do not find it necessary at this time to so decide. *Cattle Co. v. Bacon*, 79 Tex. 5, 14 S. W. 840. The judgment is affirmed.

On Rehearing.

(July 3, 1896.)

This motion seems to concede that the act of 1870 gave appellant company a right to build a branch of its road from Brenham, instead of from some point on the main line, to Austin; and that it relieved said company of the restriction contained in prior legislation, which required it "to complete the main trunk of said road to the thirty-second degree of north latitude, or until they shall connect with some road reaching to or in the vicinity of the Red river, before they shall commence any branch road." From this it would seem to follow that appellant must derive its right to acquire the certificates in question, in part at least, from the act of 1870, which was passed at a time when the legislature had no power to confer such rights. We are therefore strengthened in the conclusion heretofore announced, that these certificates were invalid; and hence overrule the motion for rehearing.

The motion (No. 1,882) for additional findings, though founded in the usual misconception of the duty of this court in that respect, is granted; and the matters therein copied from the record, which we are requested to incorporate in our findings, we approve and adopt as correct statements, but they need not be again copied by us.

HASTINGS v. KELLOGG et al.

(Court of Civil Appeals of Texas. May 16, 1896.)

SALE—PAROL RESERVATION OF TITLE—VALIDITY—PURCHASE FROM VENDER—TITLE.

1. Rev. St. art. 2547 (*Sayles' Civ. St. art. 2468*), provides that, when any reservation is made of a use or property in chattels, the possession whereof has remained in another for two years, the same shall be taken, as to the creditors and purchasers of the person in possession, to be fraudulent, unless such reservation is made by deed in writing, proved and recorded. *Held*, that the title of the purchaser from the one in possession is not affected by the character of the consideration, so long as the latter is valid between the parties, and one who takes the chattels in payment of a debt due from the one in possession takes a good title.

2. The effect to be given the words "credit-

¹ Act Jan. 30, 1854.

² Act Nov. 13, 1866.

or" and "purchaser," in such statute, is not repealed by Rev. St. art. 2549 (Act 1885), which, in effect, declares a delivery of chattels by the owner under a parol contract whereby he reserves the title until the price is paid by the person to whom they are delivered, to be a chattel mortgage which rests in parol.

On Rehearing.

1. Under Rev. St. art. 2547, the possession of chattels for the prescribed period of two years after delivery need not be wholly by the person receiving them, but it is sufficient if it be held for two years by the loanee or vendee, or "those claiming under him."

2. A parol reservation of title in chattels is a parol chattel mortgage, and invalid. *Harrold v. Darwise* (Tex. Civ. App.) 30 S. W. 498, followed.

Appeal from district court, Mitchell county; William Kennedy, Judge.

Action by Lewis R. Hastings against E. C. Kellogg and others for the conversion of personal property. Pending the action, defendant E. C. Kellogg died; and it was revived against Maria A. Kellogg and others, his representatives. From a judgment for defendants, plaintiff appeals. Affirmed.

For former report, see 24 S. W. 846.

R. A. Jeffress and Smallwood & Smith, for appellant. R. H. Looney and C. A. Jennings, for appellees.

Opinion, Including Conclusions of Fact and Law.

TARLTON, C. J. Sult by appellant, Lewis R. Hastings, against Maria A. Kellogg and others, representatives of E. C. Kellogg, deceased, to recover the sum of \$3,600, as damages for the alleged conversion of 29 head of improved bulls. The appellees claim title to the bulls through one J. A. Walker, assignee of the insolvent firm of Peacock Bros. & Co., composed of J. A. Peacock, J. C. Peacock, F. M. Poole, and S. R. Redd. The plaintiff rests his claim upon an alleged verbal contract entered into in the month of June or July, 1885, in the city of Chicago, whereby the plaintiff sold to J. A. Peacock the bulls in question; the consideration for the same being the sum of \$2,175, the aggregate value of the bulls. It is averred in the petition that Peacock undertook to pay this amount from the proceeds of cattle to be shipped by him to the plaintiff during the season of 1886, and to be sold by Hastings. It is further averred that by the terms of the contract the bulls should be and remain the property of the plaintiff until the entire purchase price should be paid by Peacock.

Upon the facts, we conclude as follows:

During the summer of 1885 the plaintiff was a member of the firm of Gregory, Cooley & Co., doing business as live-stock commission merchants in Chicago, Ill. Allen Gregory, Henry Cooley, and Lewis R. Hastings constituted this firm. The firm of Peacock Bros. & Co., composed as already indicated, were doing business as cattle raisers in Colorado City, Tex. The plaintiff, Hastings, as a witness, states as follows the contract upon

which he relies: "In June or July, 1885, I made and entered into a contract with J. A. Peacock, in Chicago, Ill. The contract was verbal, and by it I sold him 29 head of improved bulls, the same being the crop of bulls I raised that year upon my farm in Iowa. I was to ship the bulls to him at Colorado, Texas, the following year. He was to pay me the average sum of \$75 per head for the bulls, aggregating the total sum of \$2,175, less the freight, by shipping to me at Chicago, Ill., a sufficient number of his own cattle during the cattle-shipping season of the year 1886, to be put on the market by me and sold, and out of the proceeds of the sale of same I was to pay myself the amount of his indebtedness to me for the bulls. By the terms of our contract the bulls were to be and remain my property until fully paid for, and I was to make Peacock a bill of sale to same upon compliance on his part with his contract of payment therefor. I agreed to bear the freight charges on the bulls from Iowa to Colorado, Texas. Peacock was to pay the freight on them at Colorado, and draw on me for the amount of same. I shipped the bulls to him, at Colorado, Texas, in the spring of 1886. There were 29 of them, in all. * * * Mr. Peacock paid the freight on them when they reached him at Colorado, Texas, but did not draw on me for the amount of same, as I had told him to do. In my contract of sale of the bulls, I did not reserve the title to them as security for the purchase money, for at that time I did not doubt Peacock's willingness and financial ability to pay what he contracted to pay. Peacock thought there was danger of the bulls not being able to stand the climate in Texas, and was not willing to assume the risk of the acclimation there, and on account of this it was fully agreed between us that all the bulls should be and remain my property until he should pay for them. He agreed to carefully look after and attend to said bulls, and hold them as my property, separate and apart from other herds, until he fully paid for such of them as lived, at the rate of \$75 per head, and I was to sustain the loss of all that should die on account of the climate. I reserved the title to the bulls on account of the matter of their acclimation, but at the same time it was agreed between us that they should be mine until paid for. When it was ascertained that they would stand the climate in Texas, that did not, under our agreement, vest the title to them in Peacock. He was not to own any of them until he paid the purchase price therefor. My understanding is that all of the bulls stood the Texas climate, and lived. * * * Under the contract, Peacock was bound to take all of the bulls that stood the climate, and pay me for the same at the rate of \$75 per head, by shipping to me at Chicago, during the shipping season of 1886, a sufficient number of his own cattle, to be sold by me on the market, and the proceeds of the sale thereof were to be applied by



me to the payment of his indebtedness to me for the bulls." The transaction is thus described by J. A. Peacock, as a witness for the plaintiff: "I did have a transaction with plaintiff with reference to the purchase of some improved bulls in Chicago, Ill., in the fall of 1885. I bought the bulls from him, and made the trade this way: I was to pay him \$75 per head for the bulls, with freight from his place in Illinois to Colorado, Texas, to be deducted. The number of bulls delivered were 29 head. This agreement was verbal, and no writing connected with it. The bulls were to be paid for out of a shipment of cattle during the shipping year 1886. They were to be kept separate from the balance of my cattle, and were to remain the property of Mr. Hastings until paid for by me. I got possession of these bulls in January or February, 1886. * * * I paid the freight on these bulls, which was about \$192 or \$193, but never paid any other money on them, except I gave my note for them in October, 1886." By the month of October, 1886, the bulls were acclimated. For the purpose of settling the demand of Hastings for them, J. A. Peacock executed the following note:

"\$2175.00. Chicago, Oct. 23rd, 1886. Ninety days after date, we promise to pay to the order of L. R. Hastings twenty-one hundred and seventy-five dollars. Payable at office Gregory, Cooley & Co., value received, without interest. [Signed] Peacock Bros. & Co., by J. A. Peacock."

On the back of this note are the following indorsements:

"Received on the within note one hundred and ninety-two dollars \$192.00. (Expense shipping.) L. R. H.

"Pay to order of A. Gregory. [Signed] L. R. Hastings."

This note found its way into the possession of Lewis R. Hastings, in Chicago. At or about the date of the execution of the note, Peacock caused the bulls to be removed, as his property, to his range in Tom Green county, and to be branded in his brand, thus: , and thus asserted absolute ownership over them. On December 18, 1886, the firm of Peacock Bros. & Co., and the individual members thereof, executed a deed of general assignment to J. A. Walker, assignee, for the purpose of paying the creditors of the firm. The assignee duly qualified. He took possession of the bulls in controversy, and held them until the spring or summer of 1887, when he delivered them to E. C. Kellogg, under the following circumstances: Kellogg was a creditor of Peacock Bros. & Co. As such he held two deeds of trust, for sums, respectively, of about \$50,000 and \$20,000, bearing date September 25, 1884, and November 18, 1885. These mortgages, among other things, covered the  brand of cattle, belonging to Peacock Bros. & Co., and their increase, estimated at 18,000 head, running in Tom Green and adjoining counties. Prior to the assign-

ment, J. A. Peacock and others had obtained from E. C. Kellogg a release of his mortgages on about 4,500 cattle. Kellogg charged that this release was fraudulently obtained, and accordingly filed a bill in equity in the United States circuit court at Dallas, seeking a cancellation of the release and foreclosure of his mortgages on the property, including the bulls in controversy, and seeking also the appointment of a receiver to take charge of the assigned estate in lieu of the assignee, Walker. This litigation resulted in a compromise whereby the bulls were turned over by the assignee to Kellogg, and subsequently sold as a part of the mortgaged property, Kellogg becoming the purchaser. In the meantime, Gregory, Cooley & Co., also creditors of the assignors, Peacock Bros. & Co., were represented in Texas by Allen Gregory, charged with the duty of collecting their claims. The appellant, with knowledge of the fact that Peacock Bros. & Co. had made the assignment in question, indorsed the note already described, to Allen Gregory, and sent it to him for collection, but without instructions, together with an account belonging to the firm of Gregory, Cooley & Co. Allen Gregory indorsed the note to Gregory, Cooley & Co., and made an affidavit, in accordance with the assignment statute, that it was a just demand due that firm by Peacock Bros. & Co., and filed it with the assignee, who accepted it. It has never been paid, though Allen Gregory thus sought to collect it with the account due his firm. A former judgment in this case was reversed by us, at the instance of the appellant, on the ground that the court improperly sustained an exception setting up the bar of limitations to the plaintiff's petition. *Hastings v. Kellogg*, 24 S. W. 846. The case is now before us for review after a trial on its merits.

We are of opinion that the facts above substantially set out disclose no such title or interest in the bulls in controversy as will permit the plaintiff to maintain his suit. Interpreting the transaction between the appellant and Peacock with reference to the sale of the property in the light of the plaintiff's own testimony, it appears to us that in October, 1886, after the period of acclimation had passed, when, "under the contract, Peacock was bound to take all of the bulls that stood the climate, and pay for the same at the rate of \$75 per head," the mere verbal reservation of title could not affect the defendant Kellogg. By the fifth clause of the second section of our statute of frauds (Act Jan. 13, 1840; Pasch. Dig. art. 3876), it is provided that "When any reservation or limitation shall be pretended to have been made of a use or property, by way of condition, reversion, remainder, or otherwise in goods and chattels, the possession whereof shall have remained in another as aforesaid, the same shall be taken as to the creditors and purchasers of the persons aforesaid so remaining in possession to be fraudulent within this act, and that the

absolute property is with the possession, unless such loan, reservation, or limitation of use or property were declared by will, or by deed in writing, proved and recorded as aforesaid." This provision, in all substantial respects, is now, and has ever since been, in force. Sayles' Civ. St. art. 2468; Rev. St. art. 2547. The transaction between Kellogg and the assignee of his debtor, Peacock, was in effect a transaction by which the former took the bulls in discharge of his indebtedness. He thereby became virtually a purchaser of the property (*Hayden v. Johnson*, 26 Vt. 770), and, as we think, a purchaser within the meaning of this statute. We are of the opinion that the word "purchaser," as here used, is to be understood in a broad and comprehensive sense. Its signification is not to be restricted by considerations of notice, or of the actual payment of money. It will be noted that it is not here qualified by the expressions "bona fide," or "for a valuable consideration." The clause of the statute under consideration follows subdivision 4 of the article, the two connected readings thus: "(4) * * * And in like manner, when any loan of goods and chattels or slaves shall be pretended to have been made to any person with whom, or those claiming under him, possession shall have remained by the space of three years [now two years], without demand made and pursued by due process of law on the part of the pretended lender; (5) or when any reservation or limitation shall be pretended to have been made of a use or property, by way of condition, reversion, remainder, or otherwise in goods and chattels, the possession whereof shall have remained in another as aforesaid; the same shall be taken as to the creditors and purchasers, of the persons aforesaid so remaining in possession, to be fraudulent within this act, and that the absolute property is with the possession, unless such loan, reservation, or limitation of use or property were declared by will, or by deed in writing, proved and recorded as aforesaid." In the case of *Grumbles v. Sneed*, 22 Tex. 578, the clause referring to the "loan of goods and chattels" came under review. It is there held, in the able and elaborate opinion of the late Justice Bell, that the appellee in that case was entitled to protection as a purchaser, within the meaning of the provision, though he had actual notice that his vendor was but a loanee of the slaves in controversy, the facts filling the remaining conditions of the statute. The court declined to consider the question of notice, as affecting the title of the purchaser; and this upon the ground that the provision under consideration "not only seeks to prevent frauds, but it seeks to prevent perjuries, also, and, in construing the first section of our statute and the last clause of the second section, it should be borne in mind that the prevention of perjuries was no less the object of the lawmakers than the prevention of frauds. To prevent frauds, and at the same time to prevent perjuries, the statute prescribed a kind of evidence by

which certain things shall be proved." So, in *Lott v. Bertrand*, 26 Tex. 604, it is, in effect, held that, unless the reservation of title in goods and chattles be declared in writing, the creditor or purchaser from one holding the actual possession would be protected, though he had actual notice of the outstanding claim. The rule is made to rest upon the letter of the statute, which, from considerations of public policy, will not permit one holding a mere verbal reservation of title or lien to assert it against a creditor or a purchaser with or without notice. If the fact of actual notice will not be permitted to affect the title of the purchaser, we can see no good grounds for holding that the character of consideration should affect it: provided, of course, that the transaction rests upon a consideration valid as between the parties thereto. Such, we have seen, was the case in this instance. This view is entirely consonant with other decisions of our courts. *Gay v. Harde-man*, 31 Tex. 245; *Lazarus v. Bank*, 72 Tex. 354, 10 S. W. 252; *Hastings v. Kellogg* (Tex. Civ. App.) 24 S. W. 846; *Harrold v. Barwise* (Tex. Civ. App.) 30 S. W. 498. It is true that under the act of 1885 (article 2549, Rev. St.) the transaction, as detailed by Hastings, constituted a chattel mortgage which rests in parol. It is also true that, under the general chattel mortgage act previously passed in 1879 (Rev. St. art. 3328), the chattel mortgage, not accompanied by delivery, is denounced as void "as against the creditors of the mortgagor and as against subsequent purchasers and mortgagees or lienholders in good faith." Tested by this standard, the character of the purchase by Hastings would not be protected. *Overstreet v. Manning*, 87 Tex. 657, 4 S. W. 248, and numerous subsequent decisions. It is not believed, however, that the act of 1885 should be construed as repealing the effect to be given to the words "creditor" and "purchaser," as used in the foregoing provisions of our statute of frauds, adopted in 1840, and embodied, as we have seen, in all subsequent codifications. If the reservation of title in the chattel, or the lien upon it, be not declared in writing, it is void, as against creditors and purchasers, without qualification, as violative of our statute of frauds and perjuries. Rev. St. art. 2547. If it be declared in writing, but be not duly recorded, it is void, as violative of our chattel mortgage act (Rev. St. art. 3328),—a statute of registration,—as against creditors and subsequent purchasers and mortgagees or lienholders, within the terms of that act.

In conclusion, therefore, we hold that as the vendor, Hastings, delivered the property in controversy to Peacock, with whom and with whose assignee the possession remained until it was transferred to the appellee Kellogg, and as the contract by virtue of which the appellant asserts his claim was merely verbal, it is invalid and unenforceable against Kellogg, the purchaser of the property in the manner already indicated. We are thus relieved of the

necessity of discussing the numerous remaining propositions submitted in the briefs of the parties. The judgment is affirmed.

HUNTER, J., disqualified, and not sitting.

On Rehearing.

(July 3, 1896.)

It is insisted in this motion that this court erred in applying to the facts presented the second section of the statute of frauds (Pasch. Dig. art. 3876; Sayles' Civ. St. art. 2468; Rev. St. art. 2547); and this because the possession of Peacock, the vendee of Hastings, did not continue for the prescribed period of two years before the purchase by Kellogg. As we have seen, Peacock took possession of the cattle in January or February, 1886. He held them directly until December, 1886, when they were delivered to his assignee, J. A. Walker. The latter held them until their delivery by him to Kellogg in the spring or summer of 1887. The possession thus obtained continued until the institution of this suit, November, 1888. Hastings v. Kellogg, 24 S. W. 846. As we read the statute, it applies to a possession held for two years by the loanee or the vendee, or "those claiming under him"; in other words, in privity with him. Such possession, in this instance, continued from January or February, 1886, to November, 1888,—a period of more than two years. The transaction, we think, is thus brought within the meaning and intent of this statute. In the case of Bank v. Tufts, 63 Tex. 117, cited in the motion, the possession had not remained for the prescribed period with the vendee in the executory contract, or with any one claiming under him. Had Barradell, the vendee, during the period of his possession, sold to a third party, as in this case, and had the possession of the two continued for the period of two years, we apprehend that a different result would have attended the disposition of that case. If Kellogg, the purchaser, had in this case sold the bulls in question to a third person after his possession, tacked to that of his vendor, Peacock, had continued for two years, we see no reason to doubt that the title of the third person would be protected under the terms of this statute. Hence, why should not the title of Kellogg, should he choose not to transfer it, be equally protected? If, however, we err in overruling the contention of learned counsel for appellant upon the construction of this statute, we must nevertheless adhere to the conclusion already announced. In Harrold v. Barwise (Tex. Civ. App.) 30 S. W. 498, this court held that a verbal reservation of title in chattels is but a verbal chattel mortgage, and that such a mortgage is invalid in this state. We see no good reason for overturning the rule to which we are thus committed. The decision referred to rests upon the distinct ruling in Gay v. Hardeman, 31 Tex. 250, followed by our supreme court in Lazarus v.

Bank, 72 Tex. 354, 10 S. W. 252. In the latter case we understand the ruling to be, in effect, that a parol mortgage or lien, unaccompanied by possession, does not affect the property, even, it would seem, as between the parties. The motion is overruled.

HUNTER, J., not sitting.

ROGERS et ux. v. MEXIA et al.

(Court of Civil Appeals of Texas. June 11, 1896.)

PUBLIC LANDS—CONFLICTING GRANTS—LAND OFFICE—ARCHIVES—MAPS—COMMISSIONER'S CERTIFICATE—EVIDENCE.

1. In an action to recover land, claimed by plaintiff by a grant from the state of Coahuila and Texas, executed in 1833, and by defendant by a patent issued by the state of Texas in 1860 (the land having been first surveyed under the certificate to defendant's predecessor in 1851), the certificate of the commissioner of the general land office, reciting that among the public documents which existed in the archives of the political chief of Texas, and which were known to have been deposited in said office in 1833, there was an abstract of said grant to plaintiff's predecessor, and giving the particulars thereof, but which by itself located no land, and could not serve as notice that the land in controversy was covered by said grant, was admissible in evidence.

2. An atlas, prepared under direction of the commissioner in 1847, containing a sketch of said grant, which was filed prior to that date, and upon which was delineated said grant, marked with the name of plaintiff's predecessor, and which showed the land districts, and furnished data from which the location of the grant could be ascertained, though it did not give the counties in which the land was situated, should be treated as an archive of the land office; and a certified copy thereof was admissible in evidence on the issue of notice to defendant of said grant.

3. A sketch containing said grant and the survey under the certificate issued to defendant's predecessor, taken from a map of the county wherein the land was situated, together with the certificate of the commissioner reciting that the sketch was a true copy from said map, and that the map was made by a certain person, and dated December 1, 1855, and was in the land office, in use as the official map of said county from said date to 1861, was also admissible.

Error from district court, Anderson county; A. B. Watkins, Judge.

Action by S. R. & E. A. Mexia against B. F. Rogers and wife to recover possession of certain land. From the judgment rendered, defendants bring error. Affirmed.

Gregg & Gardner, for plaintiffs in error. Thos. B. Greenwood & Son, for defendants in error.

WILLIAMS, J. The defendants in error, plaintiffs below, deraigned their title regularly from Jose Ignacio Aguilera, to whom 11 leagues of land, including that in controversy, were granted by the state of Coahuila and Texas November 26, 1833. The application for a concession of 11 leagues was made by

Aguilera March 10, 1830; the concession was issued at Leona Vicario March 22, 1830; petition of Aguilera to the surveyor general for a survey was made September 18, 1833; order of survey was issued at Nacogdoches by Vincente Aldrete, general commissioner of the state of Coahuila and Texas, to Jose Maria Carbajal to survey the 11 leagues October 17, 1833; report of survey was made by Carbajal, giving field notes and map of the land, at Nacogdoches, November, 1833; order for issuance of title was made by Aldrete, as commissioner, November 26, 1833; and final title was issued by him, at Nacogdoches, November 26, 1833. These documents were all contained in the protocol of the proceedings, a certified copy of which was produced from the general land office, and it is conceded that they are regular and sufficient to convey the eleven leagues claimed by appellees. This protocol was deposited in the general land office of Texas in 1873 by E. A. Mexia, who at that time obtained it from the custody of the authorities of Coahuila upon his agreement to so deposit it. The appellants, who were defendants below, claimed the land in controversy under a patent issued by the state of Texas to Jane Cuthbertson September 21, 1860, which conflicts with the grant to Aguilera, and sought to postpone the elder grant to their claim on the ground that they were innocent purchasers without notice of such grant. The land was first surveyed under the Cuthbertson certificate in 1851. This survey was twice resurveyed, and the field notes corrected, viz. on November 8, 1856, and April 21, 1860. The first survey embraced 1,263 acres, including all of the land covered by the patent when it was finally issued; the second embraced 1,152.6 acres; and the third 973¾ acres, and upon this the patent issued. The assignees of the Cuthbertson certificate, to whom the patent was issued, were Shadrack J. Cuthbertson, Thomas Cuthbertson, and Jesse D. Cuthbertson, between whom there was a partition of the land covered by the patent. Subsequently Jesse D. Cuthbertson died leaving all of his property to appellant Mrs. Rogers and her sister. Between them his estate was divided, Mrs. Rogers receiving the land in controversy and her sister other property. Mrs. Rogers has paid all of the taxes on this land since 1862, and never heard of the Aguilera grant until long after she acquired the land. In order to charge the claimants under the patent with notice of the senior grant, plaintiffs introduced the following evidence:

(1) The following certificate of the commissioner of the general land office:

"State of Texas, General Land Office.

"Austin, May 1st, 1894.

"I, W. L. McGaughey, commissioner of the general land office of the state of Texas, do hereby certify that there is, in the archives of this office, a book, known as 'Book 52,' containing public documents which existed in the

archives of the political chief of Texas, which documents are known to have been deposited in this office at the time of the opening thereof, year 1838, and have ever since been considered as archives of this office. I do further certify that among such public documents, contained in said book 52, there is an abstract of grants by purchase made by the governors of the state of Coahuila and Texas, from October 1st, 1828, to June 3d, 1830, dated Leona Vicario, June 11th, 1830, authenticated by the seal of the state of Coahuila and Texas and the signature of Santiagodel Valle, secretary, in which abstract there appears, among others, an entry which, being translated into English, reads as follows, viz.:

Names.	Dates of Grants.	No. of Leagues of Land.
To Citizen J. Ygnacio Aguilera	March 22d, 1830	11

"In testimony whereof, I have hereto set my hand and caused the seal of this office to be affixed, on the day and date above written.

"[L. S.]

W. L. McGaughey,

"Commissioner."

(2) Deposition of C. W. Pressler, which proved that, prior to 1847, the sketches that were on file in the general land office were lying around loose, and were not kept in any businesslike order; that in 1847 the commissioner caused to be prepared the books now known as Atlases A, B, C, D, E, F, and G, into which the sketches filed up to that time were pasted, among which was sketch No. 1 in Atlas G, now in the office, which sketch was filed in the land office prior to 1847; that H. Wilke, who compiled the map of Houston county in 1855, was then assistant draftsman, and, under Crosby, commissioner, was chief draftsman, in the land office. In connection with this deposition, plaintiff introduced a copy of the sketch No. 1, referred to therein as contained in Atlas G, with the certificate of the commissioner to its correctness, and to the fact that the date of its filing was not known. Upon it are delineated two surveys, of 11 leagues each, viz. one marked Jose Ygno Aguilera, and, adjoining it on the north, one marked Mani Rionda. North of these, adjoining each other in regular succession, are two surveys, of 6 leagues each, and one of 3 leagues, in favor of named grantees. All of them extend east and west across the Trinity river, and lie partly on each side of that stream. The courses and lengths of the lines are given. Under the map is the following note: "Note. 15 miles below this is the Saline on the Trinity, and the crossing of the Comanche road to Nacogdoches is about 3 miles lower. The crossing of the San Antonio road is about 70 miles from this lower survey of Aguilera. One of the 3 forks of the Trinity is below this a few miles."

(3) A sketch of the Jose Ignacio Aguilera grant, and of some surrounding and conflicting surveys, taken from a map of Anderson county

on file in the general land office, to which is attached the following certificate of the commissioner:

"General Land Office,
"Austin City, April 19th, 1894.

"I, W. L. McGaughey, commissioner of the general land office of the state of Texas, do hereby certify that the above sketch of the Jose Ignacio Agullera grant is a true and correct copy from the map of Anderson county, drawn by H. Wilke, and dated December 1st, 1855, in use in this office as the official map of Anderson county from said date to February, 1861. In witness whereof, I hereunto set my hand and cause the seal of office to be affixed the day and date first above written.

"[Seal.] [Signed] W. L. McGaughey,
"Commissioner of the General Land Office."

This sketch contains the Agullera, the Rionda, and various other surveys, among which is the Jane Outhbertson, marked patented.

(4) A certified copy from Record Book A of the office of the county surveyor of Anderson county of field notes ordered recorded June 11, 1855, which are in the English language, while the grant to Agullera is in Spanish, and which give the name of the person for whom the survey was made as Joseph Iguaín Agalesa. These field notes were found on record by counsel for plaintiffs by turning over the leaves of the book, page after page. It was also shown that in 1860 all of the public records of Houston county were burned, and that again in the seventies the courthouse of that county was burned, and only a few of the deed records were saved.

Conclusions of Law.

1. We think the copy of the abstract of the grant to Agullera was admissible in evidence. *Railway Co. v. Locke*, 74 Tex. 370, 12 S. W. 80. It is not material to inquire whether or not all of the statements in the certificate of the commissioner concerning it are admissible or not, as by itself it locates no land, and could not serve as notice that the land in controversy was covered by the Agullera grant.

2. The sketch contained in Atlas G. should be treated as an archive of the land office. The surveyors who surveyed lands granted by the former governments returned, with their reports, sketches or maps of the lands surveyed, to be kept among the archives of the land offices. It is to be presumed that such sketches of the surveys delineated in that in question were returned with the reports of surveys to the land office at Nacogdoches, and became archives of that office. The report of the Agullera survey states that a map of the land accompanies it. After the revolution it was made the duty of all persons having custody of archives to return them to the general land office, and this readily explains the presence of this sketch

there. *Hart. Dig. arts. 1814-1827, 1835*. Its authenticity and genuineness should be presumed from the facts that it was the duty of persons having possession of archives to return them to the land office, and of the commissioner to obtain and receive them, and that it is found there in proper custody. If it was not returned there, in its present form, from some office in which it had been deposited as an archive, but was compiled in the land office, from sketches and surveys that were so returned, it is still an archive and public map of that office; for by law it has always been the duty of the commissioner to prepare and keep maps showing the location of all land which had been appropriated, and such maps are evidence of such fact. *Smith v. Power*, 2 Tex. 70; *Gullbeau v. Mays*, 15 Tex. 410. Cases might be multiplied upon this point. In *Gullbeau v. Mays*, supra, in which originated the doctrine upon which appellants rely to protect them as innocent purchasers against a prior grant of which they had no notice, it is said: "Now, in cases of title emanating from the government, where the patent or testimonio had not been recorded in the county where the land lies, the archives of the general land office, and the maps of survey, and the record and maps of the county surveyor would be regarded as notice that the land was appropriated." In *Alhart v. Massieu*, 98 U. S. 491, a case involving the Agullera grant, the supreme court of the United States recognized the same doctrine. It is, of course, true that such maps and archives, in order to give notice, must contain information reasonably sufficient to show the locality of the land previously appropriated. This we think the map in question does. While it does not give the counties in which the land delineated is situated, it does show the land districts, and gives its situation on and extension of its lines from the Trinity river, and its size, shape, and connection with other surveys, roads, and a fork of a river. It furnishes data from which the location of the grant can be ascertained. This is evident from the fact that the map was compiled in 1855, giving the lines of this grant before it was filed in the land office.

3. We think the sketch from the map of Anderson county was admissible, and that the statements of the commissioner, that it was made by Wilke in 1855, and that it was the official map of the county in use in his office between the dates named, were all admissible. They were all facts which the records of his office might and should show, and it should not be presumed that the commissioner was attempting to certify to facts not appearing from the records of his office. To facts appearing from such records the statute authorizes him to certify. He expressly states that the date appears from the map. The name of the draftsman is immaterial, and the fact that it was an official map would be presumed from the fact that it was in the office. Whether or not the presence of this

map before the final survey and the issuance of the patent under which appellants claim would defeat their claim as innocent purchasers, we need not decide, in view of the effect given to the other map mentioned above. The opinions in *Guilbeau v. Mays* and other cases seem to fix the right of the junior grantee at the time of his location.

4. The admission of the field notes from the surveyor's record is unimportant, and need not be discussed. Affirmed.

MURCHISON et al. v. MEXIA et al.
(Court of Civil Appeals of Texas. June 18, 1896.)

PUBLIC LAND—NOTICE OF GRANTS BY FORMER GOVERNMENTS—ARCHIVES OF GENERAL LAND OFFICE.

1. To show constructive notice to claimants under a patent from the state of Texas of a prior grant by the state of Coahuila and Texas to A., an instrument certified by the commissioner of the general land office to be a copy of an abstract of grants by the governors of Coahuila and Texas, authenticated by the seal of such state and the signature of the secretary, appearing in an archive of the commissioner's office, is admissible.

2. So, too, a certified copy of a sketch contained in an atlas in the general land office showing surveys of grants should be admitted as an archive of the land office.

3. Such a sketch is sufficient to give notice of appropriation of the land delineated, though it does not give the counties in which it is situated, the land districts being shown, and there also being shown its situation on, and extensions of its lines from, a certain river, and its size, shape, and connection with other surveys, roads, and a fork of the river.

4. It is also proper to admit in evidence a sketch of the grant to A., certified by the commissioner of the general land office to be a true and correct copy from the map of the county in which the land was situate, drawn by a certain person and bearing a certain date, and in use in such land office, from its date, as the official map of such county.

5. That surveys made subsequent to the indorsed date of such map are delineated thereon as patented surveys does not disprove its date, it being proper that they should be marked on the map as they are made.

Appeal from district court, Anderson county; G. H. Gould, Special Judge.

Action by S. R. Mexia and others against W. F. Murchison and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

Gregg & Gardner, for appellants. Thos. B. Greenwood & Son, for appellees.

WILLIAMS, J. The defendants in error, plaintiffs below, deraigned their title regularly from Jose Ignacio Aguilera, to whom 11 leagues of land, including that in controversy, were granted by the state of Coahuila and Texas, November 26, 1833. The application for a concession of 11 leagues was made by Aguilera, March 10, 1830. The concession was issued at Leona Vicario, March 22, 1830. The petition of Aguilera to the surveyor general for a survey was made September 18, 1833. Order of survey was is-

sued at Nacogdoches by Vincente Aldrete, general commissioner of the state of Coahuila and Texas, to Jose Maria Carbajal, to survey the eleven leagues, October 17, 1833. Report of survey was made by Carbajal, giving field notes and map of the land, at Nacogdoches, November, 1833. Order for issuance of title was made by Aldrete, as commissioner, November 26, 1833, and final title was issued by him, at Nacogdoches, November 26, 1833. These documents were all contained in the protocol of the proceedings, a certified copy of which was produced from the general land office; and it is conceded that they are regular, and sufficient to convey the 11 leagues claimed by appellees. This protocol was deposited in the general land office of Texas in 1873 by E. A. Mexia, who at that time obtained it from the custody of the authorities of Coahuila, upon his agreement to so deposit it. Appellants claimed under a patent issued to the heirs of Robert Earl by the state of Texas, October 14, 1861, under a location of the certificate and survey made in 1800, which survey conflicts with the Aguilera grant; and appellants sought to sustain their title on the ground that they were innocent purchasers of the land claimed by them under the patent, without notice of the elder grant. There is no evidence as to whether or not the original locator, or his heir, had actual notice of the appropriation of the land by the grant to Aguilera. But it was shown that his heir conveyed the land claimed by appellant Ratney, as guardian of Edna Edens, to Ballis Edens, September 4, 1868, in consideration of services rendered by the latter as administrator of the estate of Robert Earl; that Ballis Edens conveyed it to his son B. F. Edens, January 4, 1868, for a recited consideration of \$200, of the payment of which there is no evidence but such recital; and that Edna Edens, a daughter of B. F. Edens, received it in partition of her father's estate. The land claimed by appellants Mrs. Mary Murchison and W. F. Murchison was conveyed to the latter, as administratrix of her deceased husband's estate, by the only heir of Robert Earl, for a valuable consideration paid by her husband before his death, on November 18, 1866; and under this deed Mrs. Murchison and W. F. Murchison, a son, claim it. Neither Ballis Edens nor Mrs. Murchison nor W. F. Murchison had any actual notice of the existence or locality of the Aguilera grant when the conveyances to them were made; and they, and those under whom they claim, have paid the taxes on the land. In order to show constructive notice to the claimants under the patent, the plaintiff offered the following evidence:

(1) A certificate of the commissioner of the general land office showing that an archive of his office, viz. Book 52, embracing public documents, contains, among such public documents, an abstract of grants by purchase made by the governors of Coahuila

and Texas from October 1, 1828, to June 3, 1830, dated Leona Vicario, June, 11, 1830, authenticated by the seal of the state of Coahuila and Texas, and the signature of Santiago del Valle, secretary, and that in this abstract there appears, among others, an entry which, being translated, reads:

Names.	Dates of Grants.	Number of Leagues of Land.
To Citizen J. Ygnacio Aguilera.	March 23d, 1830.	11

(2) A certified copy from the land office of a sketch which was shown to have been an archive thereof since 1847, known as "Sketch No. 1 of Atlas G." Upon it are delineated two surveys, of 11 leagues each, viz. one marked "Jose Ygno Aguilera," and, adjoining it on the north, one marked "Manl Rionda." North of these, adjoining each other in regular succession, are two surveys of six leagues each, and one of three leagues, in favor of named grantees. The map is marked, "Houston and Robertson Land Districts." All of them extend east and west across the Trinity river, and lie partly on each side of that stream. The courses and lengths of the lines are given. Under the map is the following note: "Note. 15 miles below this is the Saline, on the Trinity, and the crossing of the Comanche road to Nacogdoches is about 3 miles lower. The crossing of the San Antonio road is about 70 miles from this lower survey of Aguilera. One of the 8 forks of the Trinity is below this a few miles."

(3) A sketch of the Jose Ignacio Aguilera grant, and of some surrounding and conflicting surveys taken from a map of Anderson county, on file in the general land office, to which is attached the following certificate of the commissioner: "General Land Office, Austin City, April 19th, 1894. I, W. L. McGaughey, commissioner of the general land office of the state of Texas, do hereby certify that the above sketch of the Jose Ignacio Aguilera grant is a true and correct copy from the map of Anderson county, drawn by H. Wilke, and dated December 1st, 1855, in use in this office as the official map of Anderson county from said date to February, 1861. In witness whereof, I hereunto set my hand, and cause the seal of office to be affixed, the day and date first above written. [Signed] W. L. McGaughey, Commissioner of the General Land Office. [Seal.]" This sketch contains the Aguilera, the Rionda, and various other surveys, among which are the Earl and the Jane Cuthbertson, marked "Patented." It was shown by the defendants that the Cuthbertson patent, as well as the Earl, did not in fact issue until 1861.

(4) A certified copy from Record Book A of the office of the county surveyor of Anderson county, of field notes, ordered recorded June 11, 1855, which are in the English language, while the grant to Aguilera is in Spanish, and which give the name of the

person for whom the survey was made as Joseph Iguain Agalesa. These field notes were found on record by counsel for plaintiffs by turning over the leaves of the book, page after page. It was also shown that in 1860 all of the public records of Houston county were burned, and that again, in 1882, the courthouse of that county was burned, and only a few of the deed records were saved.

Conclusions of Law.

1. We think the copy of the abstract of the grant to Aguilera was admissible in evidence. *Railway Co. v. Locke*, 74 Tex. 370, 12 S. W. 80. It is not material to inquire whether or not all of the statements in the certificate of the commissioner concerning it are admissible or not, as by itself it locates no land, and could not serve as notice that the land in controversy was covered by the Aguilera grant.

2. The sketch contained in Atlas G should be treated as an archive of the land office. The surveyors who surveyed lands granted by the former governments returned with their reports sketches or maps of the lands surveyed, to be kept among the archives of the land office. It is to be presumed that such sketches of the surveys delineated in that in question were returned with the reports of surveys to the land office at Nacogdoches, and became archives of that office. The report of the Aguilera survey states that a map of the land accompanies it. After the revolution it was made the duty of all persons having custody of archives to return them to the general land office, and this readily explains the presence of this sketch there. *Hart*, Dig. arts. 1814-1827, 1835. Its authenticity and genuineness should be presumed from the facts that it was the duty of persons having possession of archives to return them to the land office, and of the commissioner to obtain and receive them, and that it is found there in proper custody. If it was not returned there, in its present form, from some office in which it had been deposited as an archive, but was compiled in the land office from sketches and surveys that were so returned, it is still an archive and public map of that office; for by law it has always been the duty of the commissioner to prepare and keep maps showing the location of all land which had been appropriated, and such maps are evidence of such fact. *Smith v. Power*, 2 Tex. 70; *Guilbeau v. Mays*, 15 Tex. 410. Cases might be multiplied upon this point. In *Guilbeau v. Mays*, supra, in which originated the doctrine upon which appellants rely to protect them, as innocent purchasers, against a prior grant of which they had no notice, it is said: "Now, in cases of title emanating from the government, where the patent or testimonio had not been recorded in the county where the land lies, the archives of the general land office and the maps of survey and the rec-

ords and maps of the county surveyor would be regarded as notice that the land was appropriated." In *Airhart v. Massieu*, 98 U. S. 491,—a case involving the Aguilera grant,—the supreme court of the United States recognized the same doctrine. It is, of course, true that such maps and archives, in order to give notice, must contain information reasonably sufficient to show the locality of the land previously appropriated. This we think the map in question does. While it does not give the counties in which the land delineated is situated, it does show the land districts, and gives its situation on, and extension of its lines from, the Trinity river; its size, shape, and connection with other surveys, roads, and a fork of the river. It furnishes data from which the location of the grant can be ascertained. This is evident from the fact that the map was compiled in 1855, giving the lines of this grant before it was filed in the land office.

3. We think the sketch from the map of Anderson county was admissible, and that the statements of the commissioner that it was made by Wilke in 1855, and that it was the official map of the county in use in his office between the dates named, were all admissible. They were all facts which the records of his office might and should have shown, and it should not be presumed that the commissioner was attempting to certify to facts not appearing from the records of his office. To facts appearing from such records the statute authorizes him to certify. He expressly states that the date appears from the map. The name of the draftsman is immaterial, and the fact that the map was official would be presumed from the fact that it was in use in the office. Whether or not we are correct in holding that the map contained in Atlas G was constructive notice of the Aguilera grant to subsequent locators, this map of Anderson county, being in the land office when the location of the Earl certificates was made, constituted such notice. The fact that the Earl and Cuthbertson surveys are delineated as patented surveys upon this map does not disprove the date indorsed upon it. It was entirely proper that surveys should be marked upon the map as they were made, and thus many were doubtless shown upon it which were made after the authorities had commenced to use it.

4. The admission of the field notes from the surveyor's record is unimportant and need not be discussed. Affirmed.

EDGEETT v. FINN et al.

(Court of Civil Appeals of Texas. May 6, 1896.)

INTOXICATING LIQUOR—RECOVERY ON BOND—PARTY AGGRIEVED—EVIDENCE.

1. Under Sayles' Civ. St. art. 3226a, authorizing the recovery of \$500 as liquidated damages on the bond of a liquor seller, by any person

"aggrieved by the violation of its provisions," a father can maintain an action to recover the penalty for the sale of liquor to his minor son, even though he consented to such sale; it being for the jury to determine whether, in view of the circumstances, the father was aggrieved by the sale to his son.

2. As bearing on the question of whether a plaintiff in an action on a liquor bond was aggrieved by the sale of liquor to his minor son, evidence that he drank liquor with his son in other saloons was admissible.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Action by S. B. Edgett against Ed Finn and others. Judgment for defendants was affirmed on plaintiff's appeal. On rehearing. Reversed.

Woods & Maxey and J. H. Randell, for appellant. Standifer & Eppstein and Decker & Harris, for appellees.

FLY, J. Appellant sued Ed Finn and his bondsmen on a liquor bond to recover the penalty of \$500 for infractions of the bond on the part of Finn, in selling liquor at 10 different times to the minor son of appellant, and allowing him to remain at the saloon. Appellees answered that appellant could not recover on the bond, because the liquor was sold to the minor at his instance and request, and that, therefore, he was not aggrieved by the sale. The case was tried by the court, and resulted in a judgment for Finn and his bondsmen.

Our conclusions of fact are: That the liquor was sold to the minor son of appellant, and he allowed to remain in the saloon, at the instance and request of the appellant. Finn was a retail liquor dealer at the time he sold the liquor, and had given the statutory bond, with Thomas Fox and J. C. Brunett as sureties.

The statute provides that the bond given by liquor dealers "may be sued on at the instance of any person or persons aggrieved by the violation of its provisions, and such person shall be entitled to recover the sum of five hundred dollars as liquidated damages for each infraction of the conditions of such bond." Article 3226a, Sayles' Civ. St. While a number of cases for the recovery of penalties for infractions of liquor bonds have been before the appellate courts of Texas, presenting numerous phases of the question, none similar to the one at bar has ever arisen. The question presented in this case is, can a father who has consented to the sale of liquor to his son recover of the party selling the liquor the statutory penalty? To entitle him to recover, he must be shown to have been aggrieved by the infraction of the bond. Webster defines "aggrieve" as "to give pain or sorrow to; to afflict; hence, to oppress or injure; to vex; to harass." It is said by the court of appeals of New York that "a person aggrieved by an act or an omission is one injured thereby." In *re Walter*, 75 N. Y. 356. We are of the opinion that the appellant has not shown that

he was injured by the act of the liquor dealer, but that the injury resulted from his own acts. He gave the liquor to his boy himself, and was responsible for his debauchery and drunkenness while in his minority. Not only was it shown that he gave him liquor in the saloon of Finn, but in half of the saloons of Denison. He is in no position to claim a penalty under the liquor law for a sale to his son, when he stood by, procuring and consenting to the act. His class was never contemplated in the framing of that statute. It was never intended to open up an avenue for persons to trade and speculate in the debauchery of their own children. The state is allowed to recover for an infraction, no matter if it was brought about by the connivance or consent of the parent or guardian of the child, because its right to sue is based on its right to protect the children of the commonwealth, even against the wrongs of their parents. *Goldsticker v. Ford*, 62 Tex. 385. There is but one case reported in Texas where the right to recover of a party assisting in the violation of the infraction is discussed, and that is the case of *Seiffer v. McLean*, 7 Tex. Civ. App. 158, 26 S. W. 315, decided by this court. In that case it was held that "no man can make his own misconduct the ground for an action in his own favor." The distinction is drawn between that case and cases where recoveries were had where the infraction of the bond was consented to by the parents, and the distinction was put on the ground that it was not a violation of law for the parent to consent that his child stay in a saloon, or that liquor be sold or given to him. The distinction was drawn without taking into consideration that the suits were brought, not by the consenting parent, but by the state. With that exception, it is the expression of the law as understood by this court. We are of the opinion that no participant in an infraction of a liquor bond can recover, as an aggrieved party, the penalty prescribed by the statute. It is provided in Iowa that the wife, child, parent, or other person who shall be injured in person or property, or means of support, by any intoxicated person, shall have a right of action against the person selling the liquor which caused the intoxication, for all damages actually sustained, as well as exemplary damages; and under that statute the supreme court held that, if the wife voluntarily contributed to the intoxication of her husband, she could not recover. *Huff v. Aultman*, 69 Iowa, 71, 28 N. W. 440. In New York, under a statute allowing the recovery of damages for the sale of liquor to a husband, it was held that the wife could not recover if the intoxication was produced by liquor procured by her. *Elliott v. Barry*, 34 Hun, 129. That is the true doctrine. To permit the recovery of a penalty for the infraction of a bond which was aided and abetted by the party suing for it would be to encourage the most

vicious of pursuits, and would be against public policy.

We are of the opinion that it was not error to admit the testimony of appellant and other witnesses to the effect that appellant, in numbers of instances, had gone into saloons and drunk with his son, and had permitted other liquor dealers than appellee Finn to sell beer to him. The testimony was permissible as tending to show the character and habits of appellant, and that he would not probably be aggrieved by the sale of liquor to his son.

It follows from what we have said that the second and ninth special instructions were properly refused, as they would have permitted a recovery on the part of appellant even though he had been responsible for the sales to his son, or to his remaining in the saloon. The fifth special instruction was also properly refused. The charge gave the law of the case fully to the jury. The evidence was quite conflicting. If the evidence of Finn and wife is worthy of credit, it showed that young Edgett was never in the saloon of Finn but twice, and that his father was with him both times, and gave the beer to his son, at the same time authorizing sales to him. The parties tried the case in their own vicinage, before jurymen living in the same community, and they saw proper to give more weight and credit to appellees' testimony than that of appellant. It was their right and prerogative so to do. We cannot pronounce that action wrong. None of the assignments are well taken, and the judgment will be affirmed.

On Rehearing.

The tenth paragraph of the charge is as follows: "Again, even though you should believe from the evidence that the said Finn or his bartender did, on or about said occasions, sell, give, or permit to be sold or given, said intoxicating liquor to the said Willard Edgett, in his said place of business, or did permit the said Willard Edgett to enter and remain in said place of business, and even though you should believe from the evidence that the said Willard Edgett's morals have been corrupted, or that he has formed habits of idleness and dissipation, or that he has been frequently intoxicated in public places, or at home, and has wasted some of his time and wages in said place of business, and even though you should believe from the evidence that, in consequence of the said Willard Edgett's said conduct, the plaintiff has suffered humiliation, shame, and mental pain, and also a pecuniary loss, still you will find for defendants, if you believe from the evidence that the plaintiff himself, by his course of conduct with his said son, encouraged him to form habits of dissipation, and thus caused, or helped cause, the said conduct of the said Willard Edgett." The charge was upon the weight of the testimony. The course of conduct of the father to-

wards the son was admissible to show that he was not aggrieved by the sale of liquor, but, when testimony was admitted showing that the father encouraged the son in drinking, the court was not authorized to instruct the jury that proof of such conduct, under the law, would prevent the father from recovery of damages; but the testimony should have been passed on by the jury, in arriving at a verdict. If the father was in the habit of giving his son intoxicants in saloons, this might go before a jury as a circumstance to show that the father would not be aggrieved by the sale of liquor to his son, but it would not be sufficient to justify a court in instructing a jury that such conduct precluded a recovery. Because the charge herein copied was upon the weight of the testimony, the motion for rehearing is granted, and the judgment of the lower court reversed and the cause remanded.

WILSON et al. v. HOUSTON et al.

(Court of Civil Appeals of Texas. June 6, 1896.)

VENDOR'S LIEN—ACTION TO FORECLOSE—RIGHTS OF SUBSEQUENT VENDEES.

Purchasers of an interest in land subject to vendor's lien, of whose rights the lienor has notice, and who have fully paid their immediate vendor for the part bought by them, but who are not made parties to an action to foreclose the lien, upon payment to the purchaser at the foreclosure sale of the amount for which the sale was made, are entitled to have the foreclosure sale and sheriff's deed set aside, and to a decree condemning the remaining interest of their vendor to reimburse them for the amount so paid.

Appeal from district court, Wichita county; George R. Miller, Judge.

Trespass to try title by M. L. Houston and others against A. B. Wilson and others. From the judgment rendered, certain defendants appeal. Reversed.

J. H. Cobb, for appellants. Hodges & Ofield, for appellees.

HUNTER, J. J. E. Streeper owned a tract of land in Wichita county, containing 320 acres. On the 28th day of April, 1886, he sold and conveyed same to M. M. Templeton for the consideration of \$750; Templeton paying him \$150 in cash, and executing his three notes for \$200 each, due in one, two, and three years, respectively, from above date. The deed contained covenants of general warranty, and expressly reserved the vendor's lien on the land to secure the payment of the notes, and was duly recorded May 1, 1886. On April 30, 1886, Templeton in the same manner conveyed the land to A. B. Wilson, by the same character of deed, for the consideration of \$800; Wilson paying him \$240 cash, and executing his three notes, one for \$160, and the other two for \$200 each, falling due in the order named, on the same days that Templeton's notes to Streeper be-

came due,—said notes payable to said Templeton; said deed also expressly reserving the vendor's lien to secure said notes; deed duly recorded May 1, 1886. On the same day,—April 30, 1886,—Wilson, by a general warranty deed, conveyed an undivided one-third interest in said tract to Mack Elrick, for the consideration of \$266.66; Elrick paying \$80 in cash, and executing his three notes for the balance, due in one, two, and three years, respectively, payable to said Wilson,—expressly retaining the vendor's lien to secure said notes; deed recorded July 30, 1886. On 20th June, 1888, Mack Elrick, by general warranty deed, conveyed his said undivided one-third interest in said land to A. J. Elrick and S. P. Elrick, who paid him \$350 therefor in cash, and moved upon the land in 1890, and have resided on it, using and cultivating it, ever since. On 30th April, 1886, A. B. Wilson also conveyed to William Elrick, by general warranty deed, another undivided one-third interest in said 320-acre tract of land, for the consideration of \$266.66; the vendee paying \$80 in cash, and executing his three promissory notes for the balance, payable to said Wilson in one, two, and three years, respectively, expressly reserving the vendor's lien to secure said notes. Said deed was duly recorded July 30, 1886. These notes were all paid by the parties who executed them, at or about the dates of their maturity, except the note last maturing, given by Templeton to Streeper, which fell due April 28, 1889; and Streeper brought suit on that note against M. M. Templeton, joining A. B. Wilson as defendant, in the district court of Wichita county, on the 11th day of April, 1893, and on the 7th day of June, 1894, recovered judgment thereon against Templeton for \$305.40 and costs of suit, and procured a decree foreclosing his vendor's lien on the entire 320 acres. Neither Mack Elrick, A. J. Elrick, S. P. Elrick, nor William Elrick was made a party to said suit, although all their deeds were duly registered as required by law at the date of the filing of said suit, except the deed from Mack Elrick to A. J. and S. P. Elrick, which the record before us does not show to have been recorded; but the said A. J. and S. P. Elrick were residing upon said land at the date of the institution of the said suit, so that, in contemplation of law, Streeper had notice at the time he filed his suit that the above-named parties had, subsequent to the date of his sale to Templeton, become owners of two parcels of said land, of one-third each, and that A. J. and S. P. Elrick were actually occupying one of said parcels, and that their deeds all contained covenants of general warranty. Rev. St. 1895, art. 4652 (old art. 4342); Hays v. Tilson (Tex. Civ. App.) 35 S. W. 516. The entire tract of 320 acres was sold on October 2, 1894, under an order of sale issued on this judgment, when Mrs. M. L. Houston became the purchaser at the price and sum of \$355.31, the exact amount of said judg-

ment and costs, and the sheriff, who made the sale, conveyed the land to said Mrs. Houston, who was the wife of J. R. Houston, appellee herein; and upon this title this suit of trespass to try title to recover the premises is brought. The four Elricks named, and A. B. Wilson, are parties defendant to this suit. The Elricks pleaded that the tract of land was of the value of \$3,200; that the one-third interest still owned by Wilson would sell for enough to satisfy the sum of \$355.31, and all interest and costs,—and, setting up the facts substantially as hereinbefore stated, offered to pay to Mrs. Houston what she had paid out and interest, and prayed that the sale of October 2, 1894, be set aside, and that Wilson's one-third interest in the land be decreed to be sold to reimburse them for what they were compelled to pay Mrs. Houston. The court, trying the case without a jury, decreed the Wilson one-third to Houston, and also the other two-thirds held by appellants, unless they should by the first Tuesday in August, 1895, pay into the registry of the court \$355.31, with legal interest from October 2, 1894. Complying, however, the Elricks were to have judgment for their two-thirds interest.

Under the second assignment of error, complaining of this judgment and decree, the appellants make the following proposition: "A subvendee of a parcel of land, the whole of which is subject to a vendor's lien, who has fully paid his immediate vendor for the part so bought by him, has the right to require the lienor to first exhaust the land still held by his vendor, before proceeding against the part sold to him." Their second proposition under said assignment is as follows: "A subvendee of land subject to a vendor's lien, who has taken possession thereof and recorded his deed, is not affected in any manner by a judgment of foreclosure and sale against his immediate vendor, to which he was not a party, and his rights remain the same after such proceedings as they were before." In their third proposition they claim the right to pay to Mrs. Houston all that was due upon said land to Streeper, and then have Wilson's interest sold to reimburse them for such payment.

In *Willis v. Sommerville* this court held that "the title of a vendor conveying by deed expressly retaining a lien to secure the unpaid purchase money is logically the same as that of a vendor who executes a deed without reservation in its terms, and who at the same time takes from the grantee a mortgage for the unpaid purchase money. In both cases the legal or superior title remains with the vendor until the debt is discharged, but in neither case is the transaction purely executory." 3 Tex. Civ. App. 513, 22 S. W. 782; 3 Pom. Eq. Jur. §§ 1254, 1259; *Markoe v. Andras*, 67 Ill. 34; *King v. Association*, 1 Woods, 386, Fed. Cas. No. 7,811. In such a case the parties to the trans-

action occupy, in respect to the lien, the relation of mortgagor and mortgagee. Templeton in this case would occupy the relation of mortgagor, and Streeper that of mortgagee, and the principles of equity regulating and controlling the "equity of redemption" apply in the one case the same as in the other; and the rights of subsequent grantees from the vendee in the one case, and from the mortgagor in the other, are substantially the same, and, we think, ought to be secured and governed by the same rules and principles of equity. If the Elricks had been made parties to the suit brought by Streeper to foreclose his vendor's lien, as was necessary to bar their right to discharge the debt, and thus redeem the entire tract from sale, they could, by proper pleadings, have procured a clause in the decree of foreclosure requiring Wilson's one-third interest to be sold to reimburse them for the sum they were compelled to pay. Thus stood the equities and rights of the Elricks at the date of the institution of Streeper's suit to foreclose his lien, and these rights and equities could not be barred and extinguished in that suit except by making them parties thereto. The purchaser at the foreclosure sale took no better title or higher right than Streeper had. The subsequent grantees of Wilson have the same rights and equities against Houston, the purchaser at the foreclosure sale and plaintiff below, as they had and could have pleaded against Streeper. It is true, they were not necessary parties to the foreclosure suit, in one sense, but unless they were parties such decree would not affect their equities. Whatever they could have pleaded against Streeper in that suit they can plead against the purchaser at Streeper's foreclosure sale in this. They are necessary parties, then, if it is desired to bar their equities. Mr. Pomeroy, in his excellent work on Equity Jurisprudence, states the general rule in similar cases as follows: "Whenever the mortgagor has conveyed separate parcels of the mortgaged premises by warranty deeds to successive grantees, and there are no special provisions in any of their deeds, and no other dealings between themselves or with the mortgagor which disturb the equities otherwise existing, a priority results, depending upon the order of conveyance. As between the mortgagor and all the grantees, the parcel in his hands, if any, is primarily liable for the whole mortgage debt, and should be exhausted before having recourse to any of theirs. As between the grantees, their parcels are liable in the inverse order of their alienation, and any parcel chargeable first in order must be exhausted before recourse is had to the second." 3 Pom. Eq. Jur. (2d Ed.) § 1224, and note 1 on page 1874; also *Id.* §§ 1225-1228; *Pierce v. Moreman*, 84 Tex. 596, 20 S. W. 821. We think that the rule here enunciated more than covers the case at bar, and the court below erred in not applying the substance of this rule in the

decision of this case, as the pleadings and evidence of appellants clearly entitled them to the sale of Wilson's interest to reimburse them for the incumbrance they were adjudged to discharge, and for which Wilson was primarily liable. We therefore order that the judgment in this cause be reversed, and remanded to the lower court for the single purpose of entering the decree herein that William Elrick, A. J. Elrick, and S. P. Elrick, upon payment into the registry of the district court, for Mrs. M. L. Houston, the sum of \$355.31, with interest at the rate of 6 per cent. per annum from October 2, 1894, within a reasonable time from the date of the rendition of this judgment in the district court, to be fixed by the district court, the sale made by the sheriff of Wichita county under Streeper's foreclosure decree, and the deed executed by said sheriff to Mrs. M. L. Houston for said 320 acres of land, of date October 2, 1894, be set aside, canceled, and for naught held, and that the said Elricks have decree in their favor against the said Wilson, condemning his one-third undivided interest in said land to sale, to reimburse the said Elricks in full for the said sum of money and interest so deposited and paid by them. This court would render the decree here, but, as it will affect the title to lands in Wichita county, it is deemed better policy to have the decree entered in the district court there, and hence we order it accordingly. We further order that the costs of this appeal be taxed against appellees, but that they have judgment in the district court against the Elricks for all their costs incurred in that court, with the like judgment in favor of the Elricks against A. B. Wilson.

CULBERTSON v. METROPOLITAN ST. RY. CO.

(Supreme Court of Missouri, Division No. 2.
June 30, 1896.)

STREET RAILWAYS — PERSONAL INJURIES — NEGLIGENCE — EVIDENCE.

1. In an action against a street cable railway company for the death of plaintiff's decedent, caused by a collision with a buggy in which deceased was driving, it appeared that deceased, on seeing defendant's car, turned to the right, in which direction there was not room for a buggy to pass between the tracks and the street curb, whereas, if he had turned to the left, the accident could have been avoided. *Held*, that it was reversible error to admit, over defendant's objection, a city ordinance requiring vehicles, when meeting each other, to keep to the right, as it had no application to a meeting between a street-railway car and a buggy.

2. On the issue as to whether defendant's watchman was negligent in signaling deceased to cross, the conditions at such time being undisputed, evidence that the watchman was drinking is inadmissible.

3. To entitle an expert to be asked as to within what distance a cable car could have been stopped, the conditions existing at the time must be incorporated in the question.

4. The fact that deceased was signaled by defendant's watchman to cross the tracks of

defendant's cable road did not relieve deceased of the duty to use ordinary care for his protection from approaching trains.

5. In instructing the jury as to the duty of defendant's gripman on its cable car to watch out for persons upon the tracks, they should be informed also of the paramount duty of using every reasonable precaution for the safety of the passengers upon the car.

6. Negligence of defendant's flagman stationed at the crossing of two cable street railways in signaling a person to cross the tracks is not "negligence in operating the car" (Rev. St. 1889, § 4425); and therefore, when the negligence of the flagman is relied on, in addition to the alleged negligence of defendant's gripman, it is error to instruct solely for the penalty imposed by such section.

Appeal from circuit court, Cass county;
W. W. Wood, Judge.

Action by Mollie Culbertson against the Metropolitan Street-Railway Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

The plat referred to in the opinion will be found on the opposite page.

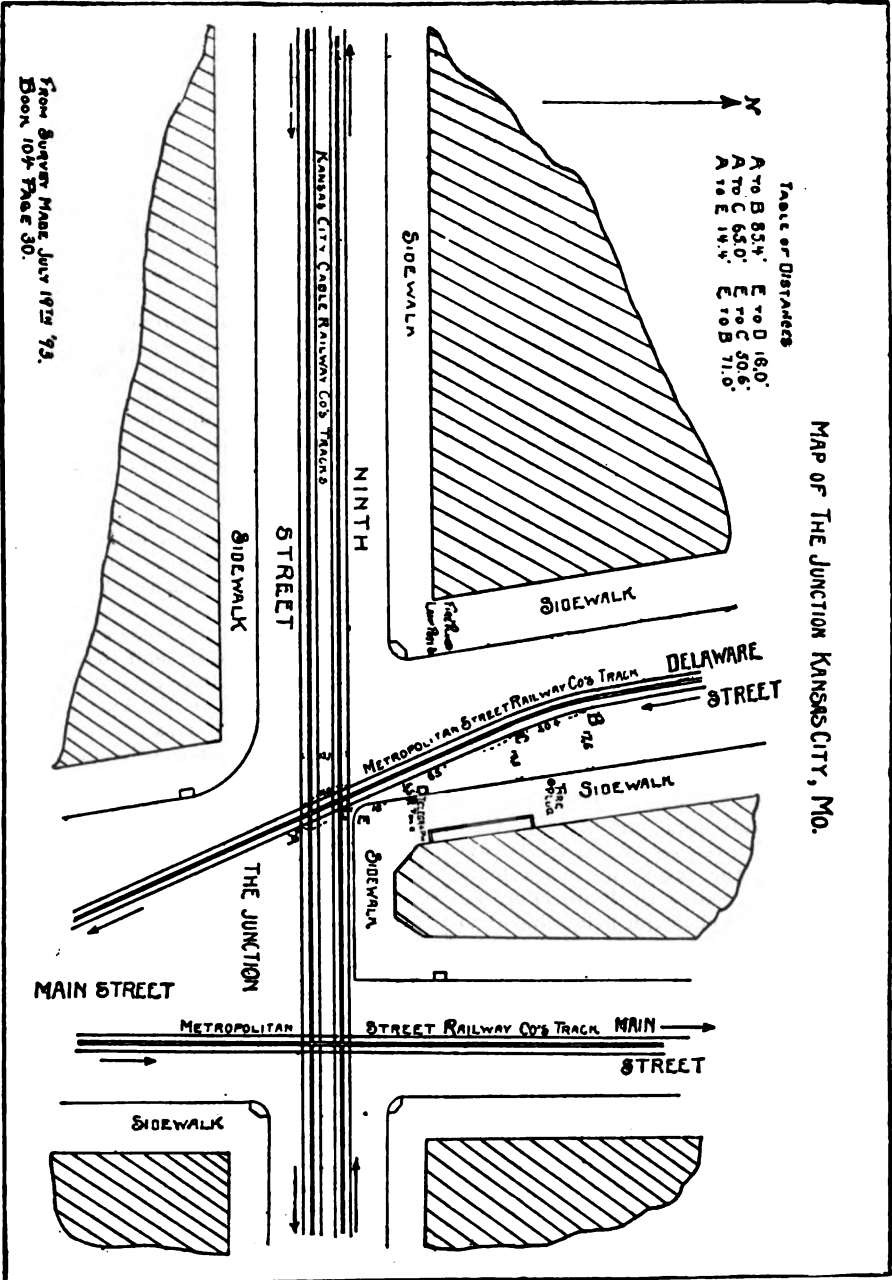
R. T. Railey, Jas. Black, and Pratt, Ferry & Hagerman, for appellant. Buckner, Bird & Lake and W. L. Jerrott, for respondent.

GANTT, J. This is an action by the widow of William Culbertson, deceased, for damages occasioned by the killing of her husband in a collision between a cable street car on defendant's road, in Kansas City, with a buggy in which plaintiff's husband was riding and driving at the time. The action was commenced in Jackson county, and a change of venue was awarded to Cass county, where there were a verdict and judgment for \$5,000, from which defendant appeals.

Plaintiff's husband was killed a few feet north of the "junction" of Delaware and Ninth streets, in Kansas City, on May 27, 1893. To intelligently understand the situation, reference must be had to the plat accompanying this opinion, which was in evidence in the circuit court. The street-car line runs south on Delaware street, and at Ninth street crosses the double-track cable railway of what was then known as the "Kansas City Cable-Railway Company," or "Ninth Street Line," running east and west. The cable ropes of the two companies pass at right angles, but the Ninth Street Line has the upper rope; and hence, for one of the Metropolitan Street-Railway Company's trains or cars to pass over this crossing its gripman must, in order to avoid striking the rope of the other line, at a proper distance before reaching the crossing, loosen his grip, and drop the cable which pulls his train or car, and allow his train, of its own momentum, to cross the Ninth street tracks. Delaware street approaches Ninth on an upgrade of nearly 6 per cent. In the practical operation of the road, defendant's trains stop or slow down about 100 feet north of this crossing, and, upon a signal from a flagman stationed at the junction, the gripman puts his

train in full motion until he gets to a slight curve in the track, where he drops his cable rope at the point known as the "let-go," and then the train proceeds with the momentum thus acquired up the grade, and across the tracks, where the grip again takes hold of the cable. The defendant's road, as it approaches this crossing from the north, makes a curve to the east, and runs southeasterly until it comes within a few feet of the sidewalk on the east side of Delaware street, opposite the building standing in the angle between Main and Delaware. For some

distance from the junction north there is not enough room between defendant's street-car track and the sidewalk for an ordinary single buggy to pass; but on the west side of the street, between the track and the sidewalks, there is ample roadway for vehicles. Just south of the junction, Main and Delaware streets run together; and from that point south the street is known as "Main Street," and the tracks on the prolongation of what was Delaware street extend north-eastwardly to a junction with tracks of the same company on Main street. Between the



two sets of tracks, after they cross Ninth street, there is a broad paved roadway, in which a team can stand in safety. On the day plaintiff's husband was killed, he drove north between the hours of 5 and 6 o'clock in the afternoon, on Main street, between the Main and Delaware streets tracks, into this intervening space between the roads. At this point, according to Mr. Brent, who was riding in the buggy with Culbertson when he was killed, they came to a dead standstill about 25 feet from the Ninth street track. He details their movements from this on. He says, at a signal from a man who turns the "gypsy" at this junction, Mr. Culbertson, who was driving, started north across the Ninth street tracks, into the mouth of Delaware street. He started as slow as a horse could start. He crossed the Ninth street tracks right at the corner of the Times or Junction ticket office building, and on the tracks of the defendant's street railway, and was driving down the track north. Just as their hind wheels were on the north track of the Ninth Street Line, they saw a cable car just north of them on these same tracks, in the act of starting south, directly towards them. Thereupon they pulled their horse into the right or east of the track. The car was then somewhere between 50 and 100 feet from them, according to his guess. When Culbertson saw the car approaching, he made a desperate effort to turn to the right, or east of the car, and, seizing his whip, increased the speed of his horse; and, when near the point 16 feet north of the north rail of Ninth Street Line, the car and the buggy collided, for want of space for both between the track and sidewalk, and Culbertson was thrown out on the rock sidewalk, right about the telegraph pole, and injured so that he died. The gripman stopped his car so that its front or south end extended a few feet south of the buggy. The gripman, at the time, was making the crossing; that is to say, he had "let go" the cable, and it was moving with acquired momentum, and deceased was driving rapidly north, attempting to get where the space was wider between the sidewalk and the tracks. Had deceased turned to the left when he discovered the car on the track, he could have easily avoided the collision. Point D on the plat represents the telegraph pole alluded to by the witnesses. E is the junction of the east rail of defendant's track with the north rail of Ninth street track, at the southwest corner of the Times or Junction building. C is the south end of the curve in the road, and B is its north end. From the junction of the rails of the two roads at the corner to the telegraph pole is 16 feet, the point of collision. From their junction to the let-go is 50 feet 6 inches. From E to the beginning of the curve is 71 feet.

The petition charges 13 distinct acts of negligence, the most important of which are the failure to have a competent flagman; fail-

ure to have sufficient number of flagmen; that the flagman negligently signaled Culbertson to cross; that the flagman negligently permitted Culbertson to drive on the tracks when the train had been signaled to cross; that the watchman was negligently stationed on the north side, instead of south side, of the crossing; that the gripman negligently failed to stop his car after Culbertson got into a place of danger.

The testimony for the plaintiff consisted of the evidence of Mr. Tuttle, who made the plat in evidence. He explained the points and relative distances, and the manner of making a crossing by two cable lines. Mr. Brent, in addition to the portions of his evidence already noted, testified that Culbertson turned the horse to the right, although he (Brent) remembered no vehicles being to the left. He gave as the reason for going to the right that "it was the natural inclination of every driver to go to the right, and because the law required him to do so." As supporting this theory, plaintiff offered section 701 of the Revised Ordinances of Kansas City, requiring each vehicle meeting another to turn to the right, although the defendant at the time objected to the introduction of such section as incompetent and having no application to the case where a vehicle met a street car. This is one of the errors relied upon in the argument. Ordinance No. 48,075 was offered, this being an ordinance to regulate the method of crossing, and required the defendant's cars, before making the crossing, to stop or slow down 100 feet north thereof, for a signal. Other witnesses testified for the plaintiff, and the tendency of their testimony was to show that there was but a single watchman at the crossing; that he gave a signal, which Culbertson evidently took for him to cross, and these witnesses so understood it; and that Culbertson undertook to make the crossing at the time the train was north of the curve; and that the gripman was not looking ahead until at or about the time the collision occurred. Some of this testimony was also to the effect that there were vehicles on the west of Delaware street which might have interfered with Culbertson's driving at such place, but they practically concede that Culbertson whipped up his horse, and drove rapidly, turning to the right, and that the whole transaction occurred almost instantaneously. A. J. Akers (who, at a former trial, had testified for the defendant, and such testimony was offered by the defendant) was called as a witness for the plaintiff, and it appeared that, at the time of the accident, he had been in the employ of the Ninth Street Line as a sort of watchman for foot passengers upon the pavement; and he testified that Looney, the defendant's flagman, was under the influence of liquor upon the day in question, and had been in the habit of getting under the influence of liquor, of which fact the superintendent of the road had prior to that

time been advised. This testimony was contradicted by that of defendant's witness John Peterson and Looney, and, besides this, the testimony showed that Akers and Looney had had some trouble; but, in addition to permitting proof of the condition of Looney at the time, the court, over the objection of the defendant, permitted the plaintiff to prove that he had been in the habit of getting under the influence of liquor prior to that time, and that defendant was notified thereof.

Upon the defendant's behalf, there was ample testimony that the unfortunate accident was brought about solely through the fault of Culbertson, who, after starting to go over the crossing, instead of turning to the left, where there was plenty of room, attempted to whip up his horse and drive in to the right, ahead of the train, and there was not time after the appearance of danger to stop the car. W. C. Grimes testified that he was driving in an open buggy south on Delaware street, and was approaching the crossing of the two lines at the junction when his attention was attracted to the gypsyman attempting to turn Culbertson's horse to the left. Grimes had stopped just before the crossing of the Ninth street tracks, to let the car going east pass, and there was plenty of room for Culbertson and his buggy, after the car passed east, to have turned to the west of witness, or even east, when he would have been out of danger, but the horse about this time turned towards the corner of the sidewalk, and, going faster, was caught at or about the telegraph pole. M. A. Pursley, who was the assistant ticket agent in the Burlington ticket office at the southwest corner of Ninth and Delaware streets, saw the accident from his office, and saw Culbertson's horse and buggy first when they were on the Ninth street tracks; and he says there was plenty of room then for the driver to have turned out to the west, and to have avoided the collision. George W. C. Bryant saw the accident from the same point; saw Culbertson drive onto the Ninth street tracks at the same time defendant's car was coming up Delaware street to make the crossing. He says that Culbertson saw the car, rushed his horse up, turned to the right, and tried to beat the car. J. C. Ashton was seated on the west side of the grip car, near the gripman, and did not see the horse and buggy until just before the accident, when they were within four or five feet of the front of the train, at which time the gripman had already let go of the cable, and was trying to stop the car, and, from the time he first saw the appearance of danger, the grip car went about its own length. He says that the gripman had been ringing his bell from the time he got the signal to cross, and applied his brakes to stop the car about the time the witness first saw the horse. Charles A. Morrison saw the horse and buggy about the time Culbertson was going to cross the Ninth street tracks, and the car was then about 45 feet

distant, and the horse was going as fast as the car; that there was nothing to prevent the buggy from turning to the left; and that, when the car stopped after the collision, it was not to the Ninth street track. E. R. Wilson stood by the telegraph pole where the accident happened; saw Culbertson drive on the Ninth street tracks from behind the east-bound Ninth street car, and then, coming in a good, fast trot, after angling the corner, whipped his horse up. The approaching cable train was then in the curve, and the gripman, when he first saw him, was letting go of the cable rope, was bent over to let it go, and, as he raised up, applied the levers to stop the car. That the time intervening between the seeing of the horse on the Ninth street tracks and the car at the curve, and the accident, was very short. He also says that Culbertson could have turned to the left without any hindrance. S. B. Middleton was in the junction ticket office at the time of the accident. Culbertson's horse was going slowly when he first saw it, south of Ninth street, but after that the horse seemed to take two or three jumps, which brought him to the telegraph pole where the accident occurred. Robert Dunlap, a police officer, was stationed, at the time of the accident, at the junction near the Burlington ticket office, and first saw Culbertson driving north between the two tracks on Ninth street. At that time he saw the defendant's train approaching the crossing, and yelled to Culbertson to "look out," and just then Culbertson reached for his whip, and struck his horse, which, instead of getting off of the track, went at a lively gait right into the car, a distance of about 15 feet. The car was leaving the curve when Culbertson reached for the whip, and appeared to be in danger. The gripman was looking for the place to make the let-go. Culbertson drove to the north, and seemed to try to beat the car to the point of accident, but failed. The distance between the car and the buggy when Dunlap first saw the situation was about 45 feet, and the whole of the car had not passed the telegraph pole when it was stopped. He saw nothing west of the track to prevent Culbertson turning there. The time occupied by the car in going from the point where the let-go is to the Ninth street track is about nine-tenths of a second, the cable running about 900 feet a minute. Witness thought it was about 22 feet from the let-go to the point of the accident, but the front of the grip car is about 11 feet in front of the place where the gripman stands. There is a space of about from 5 to 10 feet in which the let-go must be made in order to make the crossing. Cornelius Cronin, a policeman, was stationed about 12 feet north of the junction, near the telegraph pole, and did not see Culbertson until after he had passed over the Ninth street tracks, and the car was then about 20 feet away. Culbertson was driving right towards the car, and attempted to get away

from it by driving down the east side at a lively gait. That the whole thing happened quicker than it would take one to tell it. J. W. Overholtzer was the conductor of, and on the rear end of, the Ninth street cable which was going east, and saw the entire accident. The Ninth street train had just passed over the defendant's track, and stopped, and he heard some one hallooing, and at the same time saw the defendant's train coming. Culbertson was driving slowly at first, but, when he noticed the car coming, he slapped his horse excitedly with the lines, picked up his whip, and tried to rush past on the east side of the track, and to beat the car through the narrow space between the track and the telegraph pole. There was nothing in the way on the west side of the track. Culbertson was within about 25 feet of the car when he whipped up his horse. Alfred Cochran was standing near the telegraph pole at the time of the accident, and heard the bell of defendant's car. Looking, he saw that the car had just turned the curve; hear some one yell; saw the horse and buggy; yelled to Culbertson to turn to the left, but the latter paid no attention, but struck his horse with the whip, and seemed to want to go down the east side, and beat the car, while there was nothing on the left-hand side to prevent his driving that way. A. J. Akers, upon the former trial, testified that he had supervision over the crossing at Ninth and Delaware streets, and saw defendant's train on Delaware street, and then saw a buggy with two men coming north. The gypsyman first threw the lever or gypsy which depresses the cable, and signaled the defendant's car with a white stick which he used for that purpose, but did not flag the buggy to come across. There was a Ninth street car standing at the junction, going east. Culbertson drove around the rear end of that car, north on defendant's track, and the witness thought he was going to cross over to the west side of Delaware street. As Culbertson came up, the gypsyman or flagman yelled at him to get off of the track, and tried to ward him off with his club towards the west. Culbertson paid no attention, but came right along the defendant's track, and encountered the watchman, who tried to wave him off; and then the witness yelled at him, as he was standing a little further north still, and about that time Culbertson urged his horse on, and ran right into the place of collision. Fred Looney was the man who attended to the gypsy, which depresses the cable in order to let defendant's cars cross the Ninth street tracks. He is the man that plaintiff claims was the defendant's sole watchman at the junction. He says he signaled the car when it was north of the curve, and gave no signal to Culbertson. He first saw Culbertson when the horse dashed by him, and struck at the horse with a stick, and yelled, "Pull over to the left!" Culbertson paid no attention, whip-

ped up his horse, and drove north into the narrow space where the collision happened. Witness looked before signaling defendant's car, and the track to the south was then clear. There was a Ninth street car going east, standing at the junction, and Culbertson must have come from behind that car. Witness tried to stop Culbertson, but did not have time to stop the car before the collision occurred. J. W. Stewart was the conductor of defendant's train, and was a few feet from the front end of the coach, which was an open or summer car. He was collecting fares of passengers, and heard some one yell; looked up, and saw Culbertson about 30 feet in front of the car as it was then rounding the curve. After rounding that curve, there was not much time to act. The gripman took his lever with both hands, and went over with it, and made the throw, which was the only way to do it, and came up holding his brakes. Culbertson whipped up his horse, and drove right unto the car. C. H. Mosely was the gripman on defendant's car. He says there is a let-go just after the train gets out of the south end of the curve, and a space of only four or five feet where the let-go can be made. What is known as a "grip trap" marks the place of the let-go. A gripman, when he gets in the curve, must keep his eye on the grip trap, in order to make the let-go at the proper place; otherwise a severe accident may occur. When he was just about through the curve, he heard some one yell, and, glancing up, saw the horse and buggy right in front of the car, when over with his lever, made his throw for the let-go, and came up with his brakes set. The thing was all over then; the accident had occurred. If he had not made the let-go, what is known as the "throw sheave" would have been injured, the machinery broken, and the train wrecked, injuring the passengers thereof. Witness had been looking for the grip trap when he glanced up and saw Culbertson. The horse and buggy dashed right in front of the grip car, although before that he had kept his eye on the track towards the south after getting the signal, and saw nothing between the train and the crossing.

Sections 690 and 844 of the Revised Ordinances of Kansas City were offered, providing that no person should drive upon the streets at faster than a moderate gait, or in such a manner as to come in collision with or strike any other object or person, and that street cars should at all times be entitled to the track, and that the driver of every vehicle on the track shall turn out so as to give the street car unobstructed passage. John Peterson saw Looney on the day of the accident; was working with him at the time; and says that Looney was not intoxicated. He also says that Akers and Looney had some time previous to the trial had some trouble, and there was some feeling between them. A. J. Johnson was a watchman at the junction at the time of the accident,

and saw two men coming down the street in a buggy. That the watchman who attends the gypsy threw it, put his foot on it, and signaled defendant's train. That just about that time Culbertson came along in the buggy, and the watchman there and others yelled at him to stop and get out of the way, and, as he drove by the gypsyman, the latter struck at his horse, and tried to turn it to the left, or up Ninth street. Just as this was done, Culbertson whipped up the horse, and drove right on down to the point of collision. Culbertson had plenty of time to turn out of the way. He could have seen the car coming, and the witness thought that he must have seen it. W. F. Gulon, a newspaper reporter, was standing in front of the Burlington ticket office; saw Culbertson and Brent come down Main street, and stop before crossing the Ninth street tracks, and until a car on that line passed east. As soon as that car passed, Culbertson drove right down on the crossing without a signal, and, as soon as he reached the crossing, the gypsyman attempted to stop the horse, and other watchmen and flagmen began to yell, to attract his attention to the danger he was in. Culbertson could easily have turned to the west, and gotten out of danger. However, he whipped up his horse, which dashed ahead into the place of collision. The gripman was ringing his bell, and tried to stop as soon as the danger became apparent. E. C. McVey, a traveling salesman, was seated on the grip car, by the side of the gripman; says the car was signaled to come ahead, and, just after the train started, he saw the buggy right on the track ahead of him; that Culbertson drove out from behind the car, on the Ninth street track, suddenly, and the gripman tried to stop the car at once, and made the quickest stop he ever saw. S. M. Calloway witnessed the accident from a buggy on West Ninth street; saw Culbertson before he reached the Ninth street tracks; says they were driving in a trot then, and immediately thereafter started up faster; saw no signal given them to cross; that the gypsyman grabbed at the horse as it went by, and the watchman yelled; that Culbertson could have turned east or west when on the Ninth street tracks, but did not seem to notice defendant's train until he got onto the Ninth street tracks, and, when first seen, the gripcar was past the curve. The car was stopped very quickly by the gripman. The instructions will be noticed in the opinion and the discussion of the case.

1. There was manifest error in admitting in evidence, in behalf of plaintiff, section 701 of the Revised Ordinances of Kansas City, which reads: "Sec. 701. In all cases where persons meet each other in vehicles in any street, avenue, alley or other public place in this city, each person so meeting shall turn to the right of such street, avenue, alley or other public place, so as to enable such vehicles to pass each other without collision."

To its introduction defendant strenuously objected at the time. This ordinance, in the very nature of things, is only applicable to those persons who are driving in vehicles which are free to move to the right or left as occasion may require, and not to street cars running in grooved tracks or on fixed rails, and which cannot be moved from these fixed tracks without great danger to passengers therein, and to the car itself. The ordinance would be absurd if it was intended to apply to railroads. Booth, St. Ry. Law, § 302; Spurrier v. Railway Co., 3 Wash. 659, 29 Pac. 346; Hegan v. Railroad Co., 15 N. Y. 380. This much counsel for plaintiff concedes now, but urges that it was not introduced for such purpose, but was introduced to show deceased was in the exercise of ordinary care in driving to the right. We are not impressed with this reasoning. The effect of the evidence was obvious. It said to the jury that plaintiff's husband was in the exercise of care, and obeying a positive ordinance, in driving to the right, when in fact that ordinance was wholly inapplicable to the case. It could not possibly throw any light on the conduct of deceased in driving to the right at that point. It was his duty to get off of the track, as the cars had the right of way; and it was a matter of no concern whether he went to the right or to the left if there was sufficient roadway on both sides. The point wherein he was charged by defendant with gross contributory negligence was that, seeing there was not sufficient roadway between the tracks of defendant and the elevated stone sidewalk on the right, he recklessly attempted to beat the car through this narrow passage, and the effect of this evidence was to justify him in going to the right, instead of the left, which offered a safe roadway. Especially hurtful was this evidence in view of the testimony of Brent that "deceased drove to the right because the law says he shall go to the right." Nor was the error cured by the eighth instruction. The office of that instruction was to inform the jury that another ordinance required Mr. Culbertson, when driving on the tracks of defendant, to turn aside at the approach of a car, so as to leave the track unobstructed. It nowhere undertakes to withdraw this Ordinance 701 or any other evidence in conflict with the eighth instruction. Considering that this section 701 was admitted over the specific objection "that it does not apply to street railroads laid along the street, for the reason that the car cannot turn to the right or left," and that its effect was necessarily harmful, and that it was not explicitly withdrawn from the jury by a timely instruction, it must be ruled reversible error.

2. Error is assigned in permitting plaintiff to prove, not merely that Looney, the man in charge of the gypsy, was under the influence of liquor at the time he gave the signals for the train to move south over the crossing, but to go further and show by Akers that Looney

was a man addicted to drinking intoxicating liquors, and that he (Akers) had notified the division superintendent of this habit of Looney's. To properly understand the objection to this evidence, reference must be made to the record. It is there disclosed that Akers was asked as to whether Looney was sober or intoxicated, and he answered that he was a man that drank more or less, some days more than others; that he was on this day "under the influence of liquor"; that he had talked with the superintendent, Graves, about Looney's being a drinking man. On cross-examination, he admitted he never saw Looney take a drink; did not know whether he took more than one drink on that day or not; only knew by smelling it on him; stated no other facts tending to prove intoxication. Evidence of intoxication which unfits one for his duties is competent in some cases in investigating whether his acts are negligent or not. The mere habit of taking an occasional drink cannot, however, be regarded as any evidence of intoxication in the practical administration of justice, whatever abstract theories physiologists may advance on this subject. The evidence should and must go further, and show that the liquor affects the particular individual in such a way as to incapacitate him to some extent to attend to his duties. In this case no such evidence was offered. It was left to the speculation and imagination of each juror to surmise how much liquor Looney drank on that day, and how much influence it had over him at the moment of the giving of the signal to cross. Indeed, it is difficult to see how it was at all material. It was certainly immaterial whether he was drunk or sober if he was negligent in directing the car to move over the crossing when he did. If he was negligent, the company is liable, whether he was drunk or sober. There is no dispute whatever about his giving the signal, and how could it affect defendant's liability that he gave it while "under the influence of liquor"? Had there been any question whether he signaled the train to come on, and the surrounding facts were not known, proof that he was so drunk as to be incapable of properly discharging his duties might have been introduced, from which inference of negligence could be drawn. But that is not this case. Trent swears that Looney gave the signal, and that he and others understood it was intended for Culbertson to drive on. Looney admits he gave it, but says it was for the car to come on. Whether it was a negligent act so far as defendant is concerned depends not on whether he was drunk when he did it, but whether the signal, in view of all the surroundings and attendant circumstances, was a negligent act, irrespective of his intentions or condition. The nature of his act, as already said, must be adjudged by the relative positions and distances of the cable car and the buggy of deceased from each other, the speed at which they were traveling, and whether a reasonably careful driver in charge of the bug-

gy could have safely crossed the Ninth street tracks to the west side of Delaware street after the signal was given the car to make the crossing. These facts must have determined the prudence or negligence of the act, and not the physical condition of Looney at the time. Doubtless, there are many cases in which it would be a strong circumstance tending to prove negligence; but upon the admitted facts of this case, and from plaintiff's own standpoint, we cannot see how the previous habits of the gypsyman would elucidate the facts in issue. We can see, however, how they might easily prejudice the jury against the defendant. *Warner v. Railroad Co.*, 44 N. Y. 465; *Railroad Co. v. Randall* (Ga.) 11 S. E. 706; *Railroad Co. v. Colvin* (Pa. Sup.) 12 Atl. 337.

3. The proper hypothetical question was not asked Trueblood. The place in controversy, or the grade at this point, and the other conditions existing there, were not incorporated in the question. The witness, without any qualification, was permitted to state within what distance a train could be stopped. In what distance a train under ordinary circumstances could have been stopped is one thing, and a very different thing within what distance this train could have been stopped; due regard being had to the safety of the train in making the let-go, and of the safety of the passengers, at this particular place, and under the peculiar circumstances, after the gripman discovered Culbertson was trying to pass on the east. As to these particulars he had not qualified himself. A service of five or six months only in working on another cable line was hardly sufficient of itself to enable the witness to testify intelligently, without more details as to facts surrounding this case; and, as a matter of fact, his evidence is quite different from that of other witnesses on this point.

4. Among other instructions, the court gave the following for plaintiff: "(6) If the jury shall believe from the evidence in the case the flagman stationed at the crossing near which the plaintiff was injured signaled Culbertson to go over said crossing, then said Culbertson had the right to presume the train of defendant would not move over the crossing while he was diligently complying with the invitation of said flagman; and, if you find that said Culbertson was so invited to go over said crossing, then no negligence can be imputed to him in his attempt to go over, unless the danger of so attempting to go over at that time was so imminently and obviously apparent that no prudent person would have attempted so to do." The principal vice in this instruction is that notwithstanding the evidence greatly preponderated against plaintiff's claim that the flagman signaled her husband to pass over the crossing, but, on the contrary, made strenuous efforts to prevent his doing so, by warning him, and attempting to drive his horse back, and urging him to the left, instead of the right, the court tells the jury that Mr.

Culbertson had a right to presume the cars would not move over the crossing while he was diligently complying with such invitation. This matter occurred in broad daylight, on an open street. The cars were in full view of deceased, had he looked in the direction he was driving; but counsel for plaintiff and her witnesses say he was "oblivious." This court has, time and again, condemned the giving of an instruction indulging such presumption in a case where the evidence was so conflicting. Besides, it is not the law that a traveler, especially an adult, as in this case, laboring under no disabilities, can disregard all the laws of prudence himself, and blindly trust the street-railway companies to take care of him, and to observe all the requirements of the law and the ordinances. Whether deceased was guilty of contributory negligence, on the one hand, and the defendant of negligence, on the other, were questions of fact for the court and the jury. Railroad tracks are places of danger, though trains are run thereon under the most careful observance of the strictest regulation; and a traveler approaching such a track is bound to use reasonable care to look out for cars before attempting to cross, and it is only when he himself is in the exercise of reasonable care for his own safety that he has the right, in the absence of information to the contrary, to rely upon the presumption that the company in charge of the cars will perform its duty, and observe the requirements of the law and ordinances. This instruction required no exercise of prudence whatever upon the part of deceased; and counsel for plaintiff, by insisting he was oblivious of the coming train, seem to concede that he was exercising no care for his safety. Such a one cannot invoke the presumption of compliance with duty on the part of others. The rule of contributory negligence is not changed or abrogated by reason of a statute or ordinance imposing the duty on account of a violation of which the injury results. *Weller v. Railway Co.*, 120 Mo. 635, 23 S. W. 1061, and 25 S. W. 532; *Lynch v. Railway Co.*, 112 Mo. 420, 20 S. W. 642.

There is another serious objection to this instruction. It is this: It impliedly assumes that the accident was caused while deceased was making the crossing, when in fact he made the crossing safely, and the sole cause of his injury was that he turned to the right, and drove into the narrow passage between the tracks and the sidewalk on the east of the street, and, to use the language of plaintiff's brief, "from a review of all the huge mass of testimony, it will be seen that the whole case was predicated upon the negligence of the gripman as the proximate cause of the injury." This being so, there was no good reason for plaintiff praying an instruction as to the crossing, nor for the court giving it, if the case depended entirely upon the subsequent actions of deceased and the

gripman. The crossing was safely made, and there was ample room and time for deceased to have driven to the west, and have avoided all danger of collision. Granting that the signal was to Culbertson, it was in no sense an invitation to him to drive to the right, and into a dangerous defile, when he could as readily have driven to the left, out of danger.

5. Plaintiff's third instruction should have been modified to the extent of qualifying the duty of the gripman to keep a constant lookout by informing the jury that he had also the paramount duty of using every reasonable precaution for the safety of the passengers on his car, and that if deceased rapidly and unexpectedly approached the car at the moment the gripman was making the let-go, and when his attention was necessarily directed to that important and essential duty, such a momentary diversion of his attention was not negligence on the part of the gripman. The two duties are consistent.

6. The court, in its first instruction, required the jury to render a verdict for the absolute penalty of \$5,000 if they found defendant was guilty of the acts or omissions set out in said instruction, that such act or acts or omissions on the part of the defendant, its agents, servants, or employees, so found to exist, were carelessness and negligence which directly contributed to said Culbertson's death, and that he was in the exercise of ordinary care. Defendant challenges this instruction because it fixed the verdict arbitrarily at \$5,000. The acts specified in the instruction included negligence "in failing to employ capable watchmen," and "in failing to have a sufficient number of watchmen at the junction in question," and then "negligence in the gripman in operating the train." Now, negligence in employing incompetent flagmen, and in not having a sufficient number of competent flagmen, is not "negligence in operating the car or train"; and in such cases the verdict is not fixed at \$5,000, but the jury may give a sum not exceeding \$5,000. It has been uniformly ruled that where different acts of negligence are alleged and relied upon in this state, and some of them bring the case within the penalty clause of section 4425, Rev. St. 1889, and others bring the case within section 4426, it is error to instruct solely for the penalty. *Crumpley v. Railroad Co.*, 98 Mo. 34, 11 S. W. 244; *King v. Railway Co.*, 98 Mo. 235, 11 S. W. 563; *Rapp v. Railroad Co.*, 106 Mo. 423, 17 S. W. 487.

7. We have responded to the very able and exhaustive briefs of counsel for appellant on the foregoing points, but it seems to us that the last proposition, that the demurrer to the evidence was erroneously overruled, is well taken. Before driving upon the Ninth street crossing, Culbertson, the deceased, had he looked, could have seen the train approaching from the north. According to Mr. Trent, who sat in the buggy with him,

they had passed safely over the Ninth street tracks, and were immediately upon defendant's track, going north. When the hind wheels of Culbertson's buggy had just passed, or were yet on the north rail of Ninth street track, it is certain that Culbertson then saw the train was approaching. Instead of turning to the left of defendant's tracks, which would have required an immeasurably short time, he seized his whip, and, lashing his horse, plunged quickly forward to his right, with the intent of beating the approaching car through the narrows between the track and the sidewalk. The horse was shown to be gentle and readily handled. All this time, as Culbertson knew, the train was moving south to the crossing, with the bell ringing. In two seconds the buggy had collided with the cars. There is no evidence that the gripman did or could have seen Mr. Culbertson prior to the buggy coming on the track north of the Ninth street line, nor would ordinary care demand he should do so. The theory upon which the recovery is sought is that the gripman did not exercise care to prevent injury to deceased after discovering him in peril. As to this, the evidence does not show that the gripman knew or anticipated that deceased would attempt to go to the right when he first saw him at the crossing, and that, receiving the signal which governed his movements, he put his car under full headway, to make the crossing, and kept his eye along the street, for the plate over the let-go. Making the let-go successfully, he raised his eyes, when all the evidence indicates that he, for the first time, discovered deceased rapidly approaching from the east side; and the proof is uncontradicted that the train was stopped opposite the buggy, by the rapid and successful action of the gripman. To hold the gripman to a higher degree of care than was here exhibited would be utterly unreasonable; but, if he had been negligent in not stopping sooner, we think the whole evidence shows a clear case of contributory negligence on the part of deceased in attempting to beat the cars beyond the narrow roadway, by rapid driving to the right, and that this conduct of deceased was the proximate cause of his death. In view of all the facts, we simply reverse the judgment.

SHERWOOD and BURGESS, JJ., concur.

WILSON v. STATE.

(Supreme Court of Arkansas. June 27, 1896.)

CRIMINAL LAW—VENUE—PROOF.

The venue in a criminal case need not be proven beyond a reasonable doubt.

Appeal from circuit court, Green county; Felix G. Taylor, Judge.

Leonard A. Wilson was convicted of assault and battery, and appeals. Affirmed.

The appellant was indicted for assault and battery, alleged to have been committed in Green county, was convicted, and appealed to this court. The evidence tends to show that the offense was committed on Lower White Oak Island, and that this island is in the St. Francis river, and that the river is the boundary between Craighead and Green counties. Instructions were given by the court and excepted to by the defendant, but the giving of them was not made a ground of the motion for new trial. According to the rulings of this court the exceptions were waived by failure to make them grounds of the motion for a new trial, and are not before us for consideration. The appellant asked the court to give to the jury the following instruction, to wit: "(2) The jury are instructed that, before they can find the defendant guilty, they must find, beyond a reasonable doubt, that the crime, if any, was committed in Green county, Arkansas." The court refused to give this instruction, to which the defendant excepted, filed a motion for a new trial, making the refusal to give this instruction a ground of his motion, which was overruled, whereupon he appealed to this court. There was conflict in the evidence, some of which tended to show the offense was committed in Green county, while some of the evidence tended to show that it was committed in Craighead county.

Leonard A. Wilson, pro se. E. B. Kinsworthy, Atty. Gen., for the State.

HUGHES, J. (after stating the facts). Was there error in the court's refusal to instruct the jury that, unless the venue was proven beyond a reasonable doubt, the defendant could not be convicted? Upon this question there is diversity of judicial opinion, and it may be that a majority in number of the rulings are that the venue must be proven beyond a reasonable doubt. Bishop, in the first volume of his *New Criminal Procedure* (section 34, subd. 2), says: "As in other issues the proof is not required to be delivered in the words of the indictment. Any ordinary evidence suffices which in fact leads the jury to the conclusion beyond, it is perhaps commonly assumed, a reasonable doubt. But we have some authority for saying that the doctrine of reasonable doubt does not extend to this issue, being only jurisdictional,"—citing *Cox v. State*, 28 Tex. App. 92, 12 S. W. 493; *Achterberg v. State*, 8 Tex. App. 463; *Hoffman v. State*, 12 Tex. App. 406, 407, to which we add *Richardson v. Com.*, 80 Va. 124; *Andrews v. State*, 21 Fla. 598; *State v. Dent*, 6 Rich. (S. C.) 382. We believe that this is the more reasonable view of this question, as the question of venue is a question affecting only the jurisdiction of the court, and does not in fact affect the question of the defendant's guilt. The venue must be proven, but the question is whether it must be proven beyond

a reasonable doubt or by a preponderance of the evidence only. As Bishop says, it is often, and perhaps generally, assumed that it must be proven beyond a reasonable doubt; but we see no reason in this assumption. To hold that it may be proven by a preponderance of the evidence, and that the doctrine of reasonable doubt has no application where the quantum of proof required to show the venue in a criminal case is involved, deprives the defendant of no right, for it is only his guilt that is required to be proven beyond a reasonable doubt. We are of the opinion that it is sufficient, in a criminal prosecution, to prove the venue by a preponderance of evidence only. There was no error in the court's refusal to give instruction No. 2 asked by the defendant. The judgment is affirmed.

SIMONS v. PAGE et al.

(Supreme Court of Tennessee. June 11, 1896.)

JUDGMENT REVIVED AGAINST EXECUTOR—RES JUDICATA.

Where, on scire facias, judgment recovered against a decedent is revived against his executor, without any answer being interposed by the latter to said writ, the judgment is conclusive upon the executor that he has assets to satisfy the judgments, and he cannot afterwards defeat, by bill in chancery, the satisfaction of the judgment from his own goods, on the ground of "no assets" or "plene administravit," unless he was prevented from making such defense by fraud or accident.

Appeal from chancery court, Shelby county; J. L. T. Sneed, Chancellor.

Bill by Ellen Simons against J. C. Page and others. There was a judgment for complainant, and defendants appeal. Reversed.

W. W. Goodwin, for appellant Page. Henry Craft, for appellee.

ALLEN, Special Judge. Complainant filed her bill in the chancery court against defendants to enjoin the collection of two executions issued upon a judgment of this court rendered at the last term in two cases styled "Ellen Simons, Administratrix, Plaintiff in Error, v. Page," being Nos. 52 and 55 on Shelby law docket of this court at the last term. The facts are as follows, to wit: J. C. Page recovered two separate judgments against James Simons before a justice of the peace, for \$400 and \$304.20, respectively. James Simons died, leaving his wife, Ellen Simons, surviving. The widow, Ellen Simons, petitioned the county court to appoint her administratrix of the estate of said James Simons, deceased, and she was appointed and qualified as such administratrix. J. C. Page had writs of scire facias issued by the justice of the peace before whom said judgments had been rendered against James Simons, which writs were directed to Ellen Simons as administratrix of James Simons, deceased, commanding her to appear before

said justice and show cause why these judgments against James Simons should not be revived against her as administratrix. These writs were duly served on said Ellen Simons as administratrix of James Simons, deceased, but she made no appearance before the justice, and never answered said writs of scire facias, and both of said judgments were revived against the said Ellen Simons, administratrix of James Simons, deceased, on September 20, 1891. On September 5, 1893, executions were issued from these judgments against Ellen Simons, administratrix of James Simons, deceased, and were returned by the officer indorsed nulla bona. Upon this return being made of these executions, the attorney of plaintiff, Page, made application in writing in each of said cases as follows: "To J. M. Coleman, J. P.: Application is hereby made to you, on behalf of plaintiff, J. C. Page, to transmit to the circuit court of Shelby county, at the next term of said court, to be held on the third Monday in September, the papers in the cases of J. C. Page v. Ellen Simons, administratrix of James Simons, being numbered 13,950 and 13,951 on your docket, together with the executions issued in said cases and returned nulla bona, to the end that further proceedings may be had therein against the administratrix de bonis propriis and for devastavit committed by her. [Signed] Wm. W. Goodwin, Atty. for Piffs." When said Coleman, justice of the peace, made his indorsement upon the papers in each of said cases as follows: "These papers are sent to the circuit court of Shelby county by order of plaintiff's attorney, for further proceedings. This September 9, 1893. [Signed] J. M. Coleman, J. P." All the papers, including the executions, returned nulla bona, in each of said cases, together with said application of the attorney of plaintiff to transmit said papers, were transmitted to said circuit court and filed in said court. On October 21, 1893, orders for writs of scire facias were entered by the circuit court of Shelby county in each of said cases, which was as follows: "In this cause, upon motion of the attorney for plaintiff, it is ordered that writs of scire facias issue, to be served upon Ellen Simons, requiring her to appear on Saturday, the 28th day of October, 1893, and show cause if any she have, why executions should not issue in this cause, to be levied of her own goods, upon the judgment heretofore rendered by J. M. Coleman, a justice of the peace of Shelby county, and upon which execution has heretofore issued and been returned nulla bona as to assets in her hands as administratrix, which executions have been transmitted to this court for further proceedings in accordance with the statutes in such cases provided." And scire facias was issued from the circuit court in each of said cases, and is as follows: "State of Tennessee, to the Sheriff of Shelby County—Greeting: Whereas, in the circuit court of

Shelby county, in Memphis, on the 21st day of October, 1893, thereof, in the causes of J. C. Page, Plaintiff, v. Ellen Simons, Administratrix, Defendant, on motion of the attorney for plaintiff, it was ordered that scire facias issue and be served upon Ellen Simons, requiring her to appear on Saturday, the 28th day of October, 1893, and show cause, if she have any, why execution should not issue in this cause, to be levied of her goods, upon the judgment heretofore rendered by J. M. Coleman, a justice of the peace for Shelby county, and upon which execution has heretofore been issued and returned nulla bona, as to assets in her hands as administratrix: You are therefore commanded to make known to said Ellen Simons the tenor and effect of this writ, and summon her to appear before the judge of our court, at the courthouse in the city of Memphis, on the 28th day of October, 1893, then and there to show cause, if any she have, why said execution should not issue as aforesaid. Herein fail not, and have you then and there this writ. Witness, John A. Strehl, clerk of said circuit court, at office in Memphis, the 3d Monday in Sept., 1893. John A. Strehl, Clerk, by L. E. Boswell, D. C." These writs were not served on Ellen Simons, and alias writs were issued, which were in the same form and language, which were served, and she, through her counsel, filed a plea of "no assets" and "fully administered." To this plea the plaintiff demurred, and the court sustained the demurrer, and gave the defendant further time to plead or make further answer to said writ of scire facias; and, no cause being shown by plea or answer why execution should not issue de bonis propriis against the said Ellen Simons, judgment was rendered against her in each of said cases; and she appealed to this court, and assigned errors, and the judgment of the circuit court was affirmed by this court at the last term.

It is insisted by the complainant that said Page failed to make of record in the circuit court a suggestion that the administratrix had committed a devastavit, and there was no foundation for these writs of scire facias. Also, that the writs of scire facias, upon which said judgments de bonis propriis were based, never contained the suggestion of a devastavit having been committed by the administratrix. Hence the insistence is that the circuit court did not have jurisdiction to render said judgments de bonis propriis against Ellen Simons, administratrix, and therefore said judgments are void.

It is also insisted that the plea of "no assets" and "fully administered," to said writs of scire facias, did not raise the question now urged by the complainant, and that the question is still res non adjudicata; that it was not involved in the pleadings in the litigation in the circuit court, nor on appeal in this court. The proceedings in these cases were under sections 3109-3111,

Mill. & V. Code, which are as follows: "If a justice's execution against an executor or administrator be returned 'No property found,' the justice who rendered the judgment or who holds the papers in the cause, shall, on suggestion and application of the plaintiff, his agent or attorney, return the papers to the next circuit court of his county." "Upon said papers, scire facias shall be issued, and all other proceedings be had for the satisfaction of such judgment, either out of the goods and chattels, lands and tenements of the defendant, in case he has wasted the assets, or out of the real estate of the deceased." "The like proceedings shall be had in case of an execution issued after the death of the debtor, and returned 'Nothing found' on a judgment recovered in his lifetime." When the said Ellen Simons, as administratrix, failed to appear before the justice, and suffered said judgments against James Simons, deceased, to be revived against her, without any plea or answer to said writs of scire facias issued by the justice, this was an admission by her that she had assets in her hands as administratrix belonging to the estate of James Simons, deceased, sufficient to satisfy said judgments, and was conclusive upon her that she had assets to satisfy said judgments. 3 Williams, Ex'rs (7th Ed., by R. & T.) pp. 533, 548, 549; Blount v. Hopson, 1 Yerg. 399; White v. Archbill, 2 Sneed, 595; Graham v. Ruble, 1 Cold. 170. "If, therefore, upon fieri facias de bonis testatoris, on a judgment obtained against an executor [or administrator] either no goods can be found which were the testator's, or not sufficient to satisfy the demand, that is evidence of a devastavit; and, therefore it is very reasonable that the executor should become personally liable, and chargeable de bonis propriis." 3 Williams, Ex'rs, 549. "This action may be brought upon the judgment against the executor, upon a bare suggestion of a devastavit, without any writ of *fi. fa.* first taken out upon the judgment. But the usual course is, first, to sue out a fieri facias upon the judgment, and, upon the sheriff's return of nulla bona, to bring the action, and state the judgment, the writ, and return in the declaration or statement of the claim, and on the trial the record of the judgment, the fieri facias, and the return will be sufficient evidence to prove the case." *Id.* "In this form of action the judgment was de bonis propriis. The executor or administrator might plead that he did not waste, etc., in manner and form, etc., and under this plea he might give in evidence that there were goods of the testator which might have been taken in execution, and that he showed them to the sheriff. But the executor could not plead 'plene administravit,' or any other plea which put his defense upon want of assets; for such plea would be contrary to

what was admitted by the judgment, and, if the truth were that he had no assets, he should have set it up in his defense to the original action, and, having neglected to do so, he was not permitted to say so afterwards." *Id.*

Under the statute, the circuit court had jurisdiction of the proceedings, and the complainant waived the question of jurisdiction of the court, if that was a question, by appearing and pleading "no assets" and "fully administered" to the writs of scire facias. The written application of the attorney of Page, the creditor, made to the justice to transmit the papers to the circuit court, did suggest a devastavit, and that application was transmitted and filed with the other papers in the case in the circuit court. The order of the circuit court, which directed the issuance of the scire facias, stated there was a judgment before the justice of the peace, and that execution had issued from said judgment, and had been returned nulla bona as to assets in her hands as administratrix, and that the papers had been transmitted to the circuit court for further proceedings in accordance with the statutes in such cases, and directed said writ of scire facias to issue, to be served on said Ellen Simons, requiring her to appear and show cause, if she had any, why execution should not issue in these cases to be levied of her own goods. Now, while this order does not state that a devastavit had been committed, the facts stated in said order make out a case of devastavit, which facts were also recited in the writ of scire facias, and could have been met only by a plea or answer denying that she had wasted the assets of said estate, unless it was that the order and writ failed to state a sufficient cause of action to give the circuit court jurisdiction of the proceedings; and in that event, the administratrix should have defended said action on that ground. But she failed to make either of these defenses, and pleaded "no assets" and "fully administered." She was concluded by the judgment from making this defense, and her plea was stricken out, and judgment went against her *de bonis propriis*. The only defense offered by her in the circuit court was the defense she should have made before the justice in answer to the scire facias issued there to revive said judgments against her as administratrix of James Simons, deceased; and, failing to make the defense there that there were "no assets" and "fully administered," she was concluded by the judgments from ever afterwards making that defense. And if she could not make that defense in that proceeding after judgment had been revived against her as administratrix, it would be strange, indeed,

if she could, on the ground there were really no assets of said estate, enjoin the collection of the executions issued from the judgments *de bonis propriis* by bill in chancery court, which she has attempted to do in this case unless she was prevented from making her defenses at law by fraud, accident, or some wrongful act of defendant, unmingled with negligence on her part, which is not alleged.

The cases of *Frierson v. Heirs of Harris*, 5 Cold. 148, and *Hillman v. Hickerson*, 3 Head, 576, are to the effect that the writ of scire facias is a proceeding, and must be based on a suggestion of record, and must be awarded by the court. And when an administrator has been guilty of devastavit, a suggestion of the devastavit must first be made of record as the ground for issuing the writ of scire facias, and the writ of scire facias must also contain a suggestion of devastavit. If the suggestion of record states that there is a judgment against the administrator, and that execution has issued from said judgment and been returned nulla bona as to assets of the estate in hands of administrator, this is, in the opinion of the court, equivalent to a charge of devastavit; but, like a suggestion of devastavit, it is not conclusive, but is sufficient to support a judgment *de bonis propriis*, unless the administrator pleads and shows that he has not wasted the estate, which he can do in the face of the return of nulla bona. But if the suggestion of record does not state such facts as make out a case of devastavit of themselves, then there must be a suggestion of devastavit made of record on which to base a writ of scire facias, and said writ must contain a charge or suggestion that the administrator has committed devastavit, in order to support a judgment *de bonis propriis*. The administrator may answer the writ of scire facias, and show that he has not committed a devastavit, by showing that there were goods of the intestate which might have been taken on the execution, and that he showed them to the sheriff, or that, after judgment, which in law amounts to a confession of assets, the goods or assets of the estate were destroyed under circumstances which exonerated the administrator from personal liability, because not constituting a devastavit. *Criffith v. Beasley*, 10 Yerg. 434; *White v. Archbill*, 2 Sneed, 595; *Graham v. Ruble*, 1 Cold. 171. Notwithstanding the judgments *de bonis propriis* against Ellen Simons, administratrix, may operate harshly upon her, the judgment being valid, the court is unable to grant her any relief on her bill, and the decree of the chancellor is reversed, and the bill dismissed.

SIMMONS et al. v. LEONARD et al.

ROBNETT et al. v. SAME.

(Court of Chancery Appeals of Tennessee.
Dec. 23, 1895.)

TENANCY IN COMMON — RIGHT OF CO-TENANT TO
HOMESTEAD—RECORD ON APPEAL—SHOWING
AS TO GRANTING OF APPEAL.

1. A judgment in ejectment gave a portion of the land to some of the plaintiffs, declared that all the parties held as tenants in common, and required defendant to pay costs and the value of rents and profits. Execution was issued on such judgment, and levied on the interest decreed to defendant. *Held*, that the fact that defendant had held possession of the whole tract prior to the action, and had defeated some of the plaintiffs under a plea of limitations, did not take the case out of the general rule that a tenant in common is not entitled to homestead.

2. Where the record fails to show that the prayer for an appeal was granted, the case will be stricken from the docket.

Appeal from chancery court, Marshall county; W. S. Bearden, Chancellor.

Actions by D. P. Simmons and others against J. M. Leonard, executor, and others, and by A. S. Robnett and others against Mrs. D. E. Leonard and others. Judgment for plaintiffs, and defendants appeal. Appeal stricken from docket.

W. W. Walker and P. C. Smithson, for complainants. J. H. Lewis and W. J. Leonard, for defendants.

BARTON, J. It is stated by counsel for both complainants and defendants in this case that the question involved is whether or not the defendant Mrs. D. E. Leonard is entitled to claim a homestead in the tract of land involved in this litigation; she having held and claimed it under a claim of right to entire property for some years prior to the litigation, but the result of the litigation being that complainants had recovered something more than an undivided one-half interest, and therefore at the termination of the suit were held to be tenants in common. The case was originally an ejectment bill, and it is said, as stated, the defendants recovered an undivided interest, and that a decree was rendered against defendant for costs, and for rents and profits while she held the land. On this judgment for costs and rents an execution was issued and levied on the interest which she was decreed to hold, which was sold, and now she claims a homestead in this interest. It is not denied by her counsel that the law in this state is that a tenant in common cannot claim homestead as a rule, but it is submitted, having held and claimed the entire estate, and successfully as against some of the original complainants, by reason of the bar of the statute of limitations, that this presents a different question from the former ruling of our courts on this subject. We are cited to no authorities, and can see nothing in this case that would distinguish it from any other where land was owned by tenants in common, as, according to the statements of counsel for

both sides, it was in this case; at least, such are the undisputed results of the suit, as to which there is no further contest made.

But this cause must be stricken from the docket as not being properly in court in any event. A final decree was rendered in the cause on the 8th of December, 1894. That part of the decree relating to the appeal recites as follows: "But defendant, being dissatisfied with the judgment of the court, prays an appeal to the next term of the supreme court, and, on application of the plaintiffs to make bond in double the value of two years' rent of the place, so that they may take immediate possession pending defendant's appeal, it is agreed that twenty days from today, 8th of December, 1894, be allowed the defendant to make appeal bond, or otherwise comply with the law by taking the oath for poor persons, before the clerk and master, or any justice of the peace of the county, and also for both sides to make bond for double the value of two years' rent of the place, it appearing that the rents are worth \$150 per year. Each side will execute bond in the sum of \$600 to cover the said rents, and if the plaintiffs execute said bond they will be allowed to take immediate possession of the place, unless the defendant execute a like bond in twenty days." This is all the reference made in the decree as to the appeal, from which it appears that the chancellor did not grant the appeal, or, at least, the record fails to show that he did. It has been decided by our supreme court that the cause is not in this court unless the record shows an appeal was prayed and granted, and the cause will therefore be stricken from the docket. The decree recites the agreement of the parties as to allowance of time for an appeal bond, but does not show that the action of the court was invoked or had on the appeal. *Bailey v. State* (Tenn. Sup.) 32 S. W. 250; Mill. & V. Code, § 3876; *Caruth. Law Suit* (Martin's Ed.) §§ 280-287; *Craighead v. Rankin*, 6 Baxt. 131; *O'Riley v. Zollicoffer*, 4 Yerg. 298; *Childress v. Marks*, 2 Baxt. 12; *Snyder v. Summers*, 1 Lea, 482.

NEIL and WILSON, JJ., concur.

Affirmed orally by supreme court, January 9, 1896.

MORALES v. STATE.

(Court of Criminal Appeals of Texas. June 2, 1896.)

Dissenting opinion. For majority opinion, see 36 S. W. 435.

DAVIDSON, J. I desire to enter my dissent from the opinion of the majority of the court upon two questions:

1. It is held that the charge is insufficient. I do not propose to enter into a discussion of this question, or the different phases of the

charge. The reporter, in the statement of the case, will report the charge in full as to the questions involved in the opinion of the court. I think the charge is sufficient, and correctly presents the issues of the case. And I especially desire to dissent from that phase of the opinion, which, if not directly, indirectly holds that the charge as an entirety cannot be looked to by the jury. It seems from the opinion, whether intended or not, that it is held that, after having given a definition of the different phases of the homicide, in applying the law to the facts, all of these different ingredients set out in said definitions should be repeated in every phase of the charge in applying the law to the facts. I think this is wrong. Having given a full and ample definition of murder in both degrees, and malice, manslaughter, adequate cause, and sudden passion, it was sufficient, in applying the law to the facts, to call the jury's attention to the fact that these matters had been theretofore fully expressed in previous portions of the charge.

2. I desire to dissent from that portion of the opinion which reverses the case upon the ground that the defendant was not warned before his confession, made to Spradley and Manchaca, was used against him as impeaching testimony. I do not desire here to discuss the question as to whether or not a defendant can be impeached by using unwarned confessions. I express no opinion at this time upon that question. What I desire to say here is that the bill of exceptions does not show that the defendant was unwarned at the time he made the confessions testified to by the witnesses Spradley and Manchaca. The bill recites "that the state, for the purpose of impeaching the defendant, proved by the witness J. M. Spradley that the defendant told witness, while under arrest, in jail, in the town of Nacogdoches, on the same day defendant was brought to Lufkin, that defendant told said Spradley that he killed deceased for his money, but that he got no money; and by the witness Manchaca, that he [defendant] killed deceased for his money, and that the old negro, Dick Sherman, got a part of the money, and that he threw the rest of said money away when he was arrested. The defendant objected to the introduction of said evidence, for the reason that the defendant had not been cautioned by either said Spradley or Manchaca at the time of or before such statement was made, if any, that any statement the defendant might make to either of them might be used against him as evidence at the trial of his case, and the state could not be permitted to prove the statements or confessions made by the defendant, while under arrest, without first showing that the defendant had been duly cautioned as the law directs, for the purpose of impeaching said defendant, or for any other purpose. Which objections the court overruled, and admitted the testimony." It will be seen that this bill does not recite, as a fact, that the defendant

was not cautioned. It simply states, as his ground of exception, that the defendant was not cautioned. By signing and allowing this bill, the judge did not establish the truth of the grounds set forth in the bill, but simply certified that such exceptions had been presented to him, and that he had overruled the same. In this state of case, we must presume that the objections urged were not sustained by the evidence; else the bill of exceptions would have shown it. It is well settled in this state, by an unbroken line of authorities, so far as I am informed, that where the court signs and approves a bill of exceptions, he does not undertake thereby to certify as correct the grounds of objection; for, if he did, there is hardly a bill of exceptions that comes before an appellate court but what would require a reversal of the judgment. He simply certifies the fact that the bill of exceptions was taken and the matters urged as grounds of objection. See *Smith v. State*, 4 Tex. App. 626; *Hennessy v. State*, 23 Tex. App. 340, 5 S. W. 215; *Huffman v. State*, 28 Tex. App. 174, 12 S. W. 588; *Ezzell v. State*, 29 Tex. App. 521, 16 S. W. 782; *Mallory v. State* (decided at Austin term, 1896) 36 S. W. 750. In such state of case it has been held: "The judge's signature to or authentication of the bill does not establish the truth of his ground of exception. It merely certifies that the bill was presented to him, and his disposition of it." *Ezzell v. State*, 29 Tex. App. 521, 16 S. W. 782. It will be seen, by reference to the bill above quoted, that the only allusion in the entire bill to the fact that the defendant may or may not have been cautioned is urged simply as a ground of objection to the admission of the testimony. I desire, therefore, to dissent from that portion of the opinion which overrules the unbroken line of decisions in this state with reference to this question without even an allusion to them. If the rule announced by the majority in this case is to govern bills of exception in the future practice in this state, it will necessitate a reversal of almost every case that is brought before this court. When confessions, dying declarations, and testimony of that character is introduced, there is a predicate to be laid. This, of course, devolves upon the state, before using it as original testimony. Whether a proper predicate has been laid for the introduction of such testimony is not a question for the jury, usually, but for the decision of the court; and where bills of exception are taken to the introduction of this testimony, they must recite as a fact, not as a ground of objection, that the proper predicate was not laid authorizing the introduction of such evidence. As said before, I do not desire to enter into a discussion of the case as to whether confessions made after arrest, the accused not being warned, can be used as impeaching testimony. An intimation of that sort was thrown out in the *Quintana Case*, 29 Tex. App. 401, 16 S. W. 258, and expressly held

in the opinion of the court in *Phillips v. State*, 34 S. W. 272. There is another rule in this state, and, so far as I am apprised, backed by an unbroken line of decisions, that a bill of exceptions must manifest what is the supposed error relied upon by the party taking the bill, and that no inference will be indulged in favor of the allegations of the bill. We think it must be clear and explicit, and it devolves upon the party taking the bill to make it so. For collated authorities, see *Willson's Cr. St.* §§ 2368, 2516. If there is an opinion on the converse of this proposition in Texas, it has escaped my attention. Viewing this bill in the light of the authorities cited, it is not sufficiently shown that the defendant was not cautioned at the time he made the statements testified to by *Spradley and Manchaca*, and the only way that we can arrive at that conclusion is by indulging the presumption and inference that it was so because the defendant objected on that ground. This we cannot do, under the authorities already cited. For the reasons indicated, I dissent from the opinion of the majority of the court.

HALSELL et al. v. DECATUR COTTON SEED OIL CO.

(Court of Civil Appeals of Texas. June 17, 1896.)

IMPEACHING TESTIMONY—LIMITATION.

A witness for defendant having testified to the nonexistence of an agreement on the part of certain stockholders to pay a certain corporate loss, plaintiff introduced certain entries, dated two weeks after the alleged agreement, made by said witness as secretary of the corporation, which tended to establish said agreement, and to contradict the testimony of said witness. *Held*, that it was error to omit to charge that the entries could be considered only for the purpose of impeaching said witness, particularly where an instruction to that effect was requested.

Appeal from district court, Wise county; *J. W. Patterson*, Judge.

Action by Decatur Cotton Seed Oil Company against *H. H. Halsell* and others. From the judgment rendered, defendants appeal. Reversed.

Chas. Soward and *Bullock & Tankersley*, for appellants. *R. E. Carswell*, for appellee.

TARLTON, C. J. This is a companion case to that of *Lillard v. Same Appellee*, recently decided by us. 36 S. W. 792. A question here arises which was not presented in that case, and which requires a different disposition of this appeal. The witness *Lillard* having testified to a purport indicating the nonexistence of the agreement on the part of the several stockholders to pay each proportionately the corporate loss, the plaintiff introduced in evidence certain entries, made by *Lillard*, as secretary of the corporation, in a book known as the "Journal" of the company. These entries were dated some two

weeks after the alleged agreement. The appellants were ignorant of them. They tended in themselves to indicate the existence of the agreement relied upon, and hence to contradict the preceding testimony of *Lillard*. For the latter purpose, and for that alone, were they admissible. They did not constitute original evidence binding the appellants, who were in no sense parties to these declarations of the secretary of the company. They were too remote to constitute *res gestae*. Consequently the defendants requested an instruction from the court to the effect that these entries could be considered only for the purpose of impeaching the witness *Lillard*. We think that this charge should have been given. Where testimony is admissible for a particular purpose, and a charge is requested accordingly, qualifying and limiting its effect, that charge should be granted, unless the remaining testimony will admit of but one construction. *Shumard v. Johnson*, 66 Tex. 72, 17 S. W. 398; *Railway v. Poole*, 63 Tex. 246; *Railway Co. v. Johnson*, 72 Tex. 100, 10 S. W. 325; *Railway Co. v. George*, 85 Tex. 158, 19 S. W. 1036. Our conclusion would have been different had no special instruction been requested. *Walker v. Brown*, 66 Tex. 556, 1 S. W. 797. The course of the testimony is not such as to enable us to say that, had the charge been given, the verdict would have been the same. We cannot affirm that the error is immaterial. Reversed and remanded.

MILES et al. v. DANA.

(Court of Civil Appeals of Texas. April 30, 1896.)

NEW TRIAL—GROUNDS.

1. Under Rev. St. 1879, art. 1373, providing that where judgment has been rendered on service by publication, where defendant has not appeared, a new trial may be granted, on application, for good cause shown, supported by affidavit filed within two years, the fact that the plaintiff by whom the affidavit for publication was made denying knowledge as to defendant's residence was at the time a subagent of defendant for the sale of the land, and could readily have informed himself as to defendant's residence, together with the showing that the judgment was taken at the first term, and that plaintiffs were without title to the land recovered, warrants the granting of a new trial.

2. In trespass to try title, in which judgment was rendered on service by publication, to entitle a defendant to a new trial the burden is not thrown on him to prove a good title in himself. It is sufficient if he can show that plaintiffs were not entitled to recover.

Appeal from district court, Liberty county; *Charles F. Stevens*, Special Judge.

Trespass to try title by *George W. Miles* and others against *Francis E. Dana*. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

Lanier, Kirby & Martin and *Perryman, Gillaspie & Bullitt*, for appellants. *Coleman & Ross*, for appellee.

GARRETT, C. J. On June 26, 1893, the appellants, George W. Miles, Walter F. Harris, Emily Harris, Eliza Senechal, Harriet Etter, and W. S. Swilley, as plaintiffs, brought a suit of trespass to try title in the district court of Liberty county against the appellee, Francis E. Dana, and the Singer Manufacturing Company, as defendants, for the recovery of one-third of a league of land situated in Liberty county, Tex., a part of the league originally granted to William Swall. They alleged that the residence of said Francis E. Dana and the domicile of the Singer Manufacturing Company were unknown to them. On the same day the plaintiff W. S. Swilley filed in the suit an affidavit in writing that he was one of the plaintiffs, and that the place of residence or domicile of neither of the defendants was known to him, and asked for citation by publication according to law. Citation was issued on June 26, 1893, in due form, and was caused to be published by the sheriff in a newspaper published in Liberty county for four successive weeks, and due return thereof was made on August 4, 1893. The court appointed an attorney of the court to represent the defendants, and he filed an answer in their behalf on August 16, 1893, in which he demurred to the petition and pleaded not guilty. On August 25, 1893, Ellen Lee Mason, joined by her husband, James M. Mason, filed a petition in intervention in the cause, by which they sought to recover the land for themselves as the devisees of James Morgan, deceased. The cause was tried September 1, 1893, when the plaintiffs put in evidence a conveyance of the land to Daniel P. Coit through administration of the estate of William Swall; showed that they, except Swilley, were the heirs of Coit and his surviving wife; and conveyances by Coit's heirs to B. F. Cameron and W. S. Swilley on April 24, 1893, and Cameron to Swilley June 24, 1893. Evidence offered by the Masons was excluded by the court on the objection of plaintiffs. The attorney for the defendants introduced in evidence a sheriff's deed to J. G. Minter which undertook to convey the land to him as the property of W. C. Abbott; also, a deed from Minter to the Singer Manufacturing Company. Whereupon the court rendered judgment in favor of the plaintiffs for the land sued for. The interveners excepted, and gave notice of appeal, which they perfected. A statement of facts was filed in the cause on September 1, 1893. The judgment against Ellen Lee Mason and her husband was afterwards affirmed on certificate by this court on February 8, 1894. Francis E. Dana, the appellee, filed an application in the district court of Liberty county on May 18, 1894, for a new trial of said cause, notice of which he caused to be served upon the appellants, the Singer Manufacturing Company, and Ellen Lee Mason and her husband, James M. Mason. His application was numbered and docketed as a separate suit. He

set out the proceedings ending in the judgment against him for said land, and averred that he had never been served with a citation in the suit, and had no notice whatever of the pendency thereof until long after the rendition of the judgment therein; that he was a business resident of Kings county, N. Y., and had an agent in Harris county, Tex., and that the whereabouts of the Singer Manufacturing Company and its agents were notorious, all of which was either known to the plaintiffs or might have been ascertained by the use of reasonable diligence; that the judgment was rendered at the first term of the court after the citation was issued, and that he had no opportunity to appear and defend himself, or to appear by counsel of his own selection; that he was the owner in fee simple of the land, and had a good defense to the suit,—and set out facts to show that the heirs of Daniel P. Coit had been divested of their title to the land by sale thereof in the administration of the estate of said Coit, as well as to show title in himself. The Singer Manufacturing Company and Ellen Lee Mason and her husband answered the application for a new trial by disclaiming any interest in the land. The appellants demurred thereto, made a general denial of its allegations, and pleaded not guilty, and, specially, the proceedings and judgment already had and obtained by them. Upon a hearing of the appellee's application, and a new trial of the cause in the court below, appellee obtained judgment for the land.

In addition to the facts already stated, it appeared that W. S. Swilley, who made the affidavit for publication, was a subagent for the sale of the land in controversy, as the property of the appellee, having been employed for that purpose by appellee's agents in Houston, Harris county, and that, when he made the affidavit, he knew that appellee was represented by Harrell & Moore of Houston. In a letter to Harrell & Moore, dated March 24, 1893, he stated that Dana's title was not good, and suggested that if he had other title papers they should be recorded. The courthouse of Liberty county was burned in the year 1872, and all the records, including the records of all the courts and file papers, were destroyed, except two volumes of deed records. Another fire occurred in 1874, when all the records were destroyed. The land in controversy is the lower one-third of the league of land situated in Liberty county, Tex., granted to William Swall. It was conveyed by the administrator of Swall to Daniel P. Coit, who was common source of title. Daniel P. Coit died seised of the land in controversy, and letters of administration were granted upon his estate in the probate court of Liberty county in the year 1842, on June 27th, to his widow, Eliza Coit, and W. C. Abbott. The land was sold as the property of the estate in due course of administration by order of the court, and conveyed to James Morgan by a deed, executed by W. C. Abbott, as adminis-

trator of said estate, on the 7th day of April, 1846, and duly acknowledged by said Abbott May 20, 1846, and filed for record and recorded on said date in the deed records of Liberty county. In support of this conclusion there was introduced in evidence a copy of an order made by George W. Miles, judge of probate for Liberty county, republic of Texas, made June 27, 1842, appointing Eliza Colt and W. C. Abbott administratrix and administrator of Daniel P. Colt, late of said county, deceased; also, the original deed, above mentioned, which contained the recital that "I, W. C. Abbott, administrator of the estate of D. P. Colt, deceased, being thereunto duly authorized by the honorable probate court for the county of Liberty, by an order bearing date the 10th day of March, 1846, proceeded to sell the therein described third of a league of land, and James Morgan, having bid the sum of two thousand dollars, the said sum being the highest bid, be it therefore known that, for and in consideration of the sum of two thousand dollars as aforesaid, to me in hand paid by said James Morgan, that I, said W. C. Abbott, administrator as aforesaid, have given, granted," etc. Eliza Colt, George W. Miles, W. C. Abbott, and James Morgan are all dead. Eliza Colt became the wife of George W. Miles, and died, after him, in 1866. The copy of the order of the probate judge appointing Eliza Colt and W. C. Abbott administrators of D. P. Colt, deceased, was found in the possession of the widow of W. C. Abbott, among his papers. Appellee had paid all taxes of the land, and the heirs of Daniel P. Colt and his wife, Eliza Colt, had not paid taxes thereon nor asserted any title thereto until April, 1893. James Morgan conveyed the land in controversy, along with several other tracts, to John Haggerty, A. H. Dana, and Thomas E. Davis, of the state and county of New York, by his deed dated February 15, 1856, which was proved for record. Haggerty, Dana, and Davis, grantors in the foregoing deed, joined by several other persons purporting to be stockholders of the New Washington Association, an incorporated company of the state of New York, filed a petition in the district court of Harris county against William Abbott and others, as stockholders, also, to have said land sold as the property of said association for the payment of certain debts adjudged in favor of some of the plaintiffs against said association in a suit in New York. The petition showed that Haggerty, Dana, and Davis were trustees for the association, and held the land as such. On December 3, 1859, a judgment was rendered in said suit, ordering the sale by the sheriff, as under execution, of the lands belonging to said association for the payment of the debts set out in the judgment; and on May 21, 1860, it was ordered by the court that further sales should be made for one-fourth cash and the balance on 12 months' credit at 8 per cent. interest. The execution docket of Harris county, showed the issuance of an or-

der of sale on June 27, 1860, directed to the sheriff of Liberty county. The land in controversy was sold by the sheriff of Liberty county on the first Tuesday in November, 1860, to the appellee, Francis E. Dana, as appears from the sheriff's deed put in evidence. This deed was duly acknowledged, and was filed for record in the record of deeds for Liberty county on December 13, 1870, and again on November 28, 1888, after the destruction of the records. From the view taken of the case by this court, it is not necessary to state the substance of the petition and orders of the court in the suit in Harris county, or the entries on the execution docket of the order of sale issued to Liberty county, or of the sheriff's deed to Francis E. Dana for the land in controversy, more fully than has been done. But, as it is contended by the appellants that the above-stated proceedings were not sufficient to convey the title to appellee, and it is deemed by them material to a recovery by him that he should show title in himself, we refer to the copies in the record, and make them a part of our conclusions, for consideration by the supreme court if necessary.

The judgment obtained by the appellants against appellee for the land in controversy was upon service by publication. His residence was alleged to be unknown, and the affidavit of Swilley, made as a basis for the service of citation by publication, stated this ground. The citation was issued on June 26, 1893, and cited appellee to appear at the next term of the district court of Liberty county, to be holden at the courthouse thereof, in the town of Liberty, on the first Monday in August, 1893, which was the day then fixed by law for the next regular term of the court. By an act of the 23d legislature, which took effect on the 1st day of July, 1893, the time of holding court in Liberty county was changed to the fifth Mondays after the second Mondays in January and July each year. Gen. Laws 23d Leg. p. 104; Const. art. 3, § 30; *Halbert v. Association* (Tex. Sup.) 34 S. W. 639. This was after the court had convened for the August term under the old law. When the new law took effect, it seems that the court reconvened for the summer term under it, and then rendered the judgment which the appellee sought to set aside. This term of the court cannot be regarded as the term next succeeding that to which the citation by publication was returnable, and the appellee had until the appearance day of that term to file his answer. Rev. St. 1879, art. 1264. If the appellee had brought the judgment before this court on writ of error, it should have been reversed on that account. But the statute provides that, "in cases in which judgment has been rendered on service of process by publication, where the defendant has not appeared in person or by an attorney of his own selection, a new trial may

be granted by the court upon the application of the defendant for good cause shown, supported by affidavit, filed within two years after the rendition of such judgment." Id. art. 1373. So it was not necessary for the appellee to take the case up by writ of error in order to set the judgment aside, and thereby rest his chance of a reversal upon such error as might appear of record. He could apply to the court for a new trial within two years from the rendition of the judgment, and his application need not have been numbered and docketed as a separate suit. For good cause shown the court should grant him a new trial. The same strictness does not apply to an application for a new trial in a publication suit under the statute, as to a suit for new trial after adjournment of the court, when there has been personal service on the defendant, since the latter proceeding is governed by the principles of equity. *Mussina v. Moore*, 13 Tex. 7; *Kitchen v. Crawford*, 13 Tex. 516; *Snow v. Hawpe*, 22 Tex. 168; *Schleicher v. Markward*, 61 Tex. 99. The effect of the statute is to allow two years in which to make a motion for a new trial in such cases. It would seem that the fact that judgment was taken against appellee at the first term of the court ought to be sufficient, of itself, to entitle him to a new trial, when it is shown, upon his oath, that he had no notice whatever of the pendency of the suit. But, in addition to this fact, it must be considered that, while the affidavit for publication may have been literally true, yet the party making it was himself an agent for the sale of the land as appellee's property at the appointment of persons who represented the appellee and could have informed him of his residence. Yet it is not necessary to hold that a new trial should have been granted independent of the fact of a meritorious defense on the part of appellee. This must be a defense, however; for we do not agree with counsel for appellants that the burden of proof rested on the appellee to show a good title in himself. It was sufficient if he could show that the appellants were not entitled to recover. This, we think, appellee did, and, in addition thereto, connected himself with the title by evidence which may or may not have vested in him an absolute title sufficient to enable him to recover upon the strength thereof. We deem it unnecessary to decide whether or not appellee had a title sufficient to enable him to recover as plaintiff in a suit for that purpose.

The original deed from W. C. Abbott, as administrator of the estate of Daniel C. Coit, deceased, was executed 50 years ago. It recites that the administrator was authorized by the probate court of Liberty county to sell the land. All of the records of the county had been destroyed by fire,

but the appointment of Abbott as administrator of the estate was shown by the copy of an order of the probate judge found among his papers, after his death, in the possession of his widow. Although this order showed that Eliza Coit had been appointed administratrix with him, it will be presumed, from the lapse of time and the recital in the deed and other circumstances, that the land was duly sold in the course of administration, and that Abbott had been ordered by the court to execute the deed alone. The George W. Miles whom Eliza Coit married after the death of Daniel P. Coit was probably the probate judge, and she may have resigned as administratrix, or had never qualified, or Abbott alone was ordered to make the sale for that reason. It was further shown, by the refusal of two of the heirs of Daniel P. Coit, who were plaintiffs, to answer interrogatories propounded to them by the appellee, that they had never asserted any claim to the land nor paid taxes thereon. Appellee acquired his title in 1860, and has paid all taxes thereon ever since. The deed fails to recite that the sale had been confirmed by the probate court, but the law in force at the time does not seem to have required that this should be done. Hart. Dig. arts. 1016-1018 (Act Feb. 5, 1840). But confirmation would also be presumed from the execution of the deed, if it should be held necessary to have the sale confirmed by the court as a judicial sale. The law at the time did not require the order of confirmation to be recited in the deed. It is sufficiently clear, from the evidence, that the administration was pending in Liberty county, republic of Texas, and that the land was situated in Texas. Although the administrator's deed does not describe the land as situated in Texas, it describes it as situated in Liberty county, and the court judicially knows that Liberty county was then a county in the republic of Texas. The copy of the order appointing the administrators also has the caption, "Republic of Texas, County of Liberty." The judgment of the court below will be affirmed.

HARTON v. LYONS et al.

(Supreme Court of Tennessee. July 17, 1896.)

FRAUDULENT CONVEYANCES—DEPOSITIONS—TIME OF TAKING—OBJECTIONS—DECLARATIONS OF GRANTOR IN POSSESSION—ADMISSIONS OF GRANTEE—INNOCENT PURCHASER—RIGHTS IN EQUIT.

1. Objections by minor defendants to depositions, on the ground that the cause was not at issue when they were taken, were not tenable where it appears that, if their guardian ad litem had not then answered the cross bill, they were represented by him in the examination of the witnesses, and that the cross-examination of each witness by him was sufficient to test the truth of the evidence, and that the answer of said guardian was merely formal, and was filed several months before the taking of said depositions.

2. On an issue as to the fraudulent character of a deed, statements made by the grantor immediately after its execution, and at times subsequent thereto, and while he was in possession, controlling the land, to the effect that said deed was a sham to keep from paying a security debt, were competent as part of the res gestæ.

3. Land was conveyed by a husband, through mesne conveyances, to his wife. After the decease of said wife, said husband and his second wife conveyed the premises to defendant. *Held*, in an action by the heirs of the deceased wife to recover the land, that statements of the husband, in the presence of his first wife, in reference to the fraudulent character of the deeds conveying title to her, and the declaration of said wife at that time, cautioning her husband not to speak of it, were competent to show that she understood that the transaction was fraudulent.

4. The statement of the husband's immediate grantee, as proven by the grantee's son, made while he held title to said land, that said husband had conveyed the land to him to keep from paying a security debt, and that he was to convey it back whenever called upon, was competent as showing the intention of the maker and holder of the deed.

5. Where land was conveyed by a husband, through mesne conveyances, to his wife, in order to delay creditors, a subsequent purchaser from the husband cannot attack the deed to said wife, and set it aside, for fraud; nor can he claim to be an innocent purchaser, without notice, where the deed to said wife was registered prior to his subsequent purchase.

6. The heirs of a wife, to whom land was conveyed by her husband, through mesne conveyances, in order to delay his creditors, cannot, in equity, recover the land from one who subsequently purchased it from the husband, for full value, without fraud on his part, where the husband was in possession, exercising control over the land, at the time of the purchase from him, and the purchaser immediately after took and remained in possession of the land, though the fraudulent deeds had been duly recorded, but the grantees therein had never been in possession.

Beard, J., dissenting.

Appeal from chancery court, Madison county; A. G. Hawkins, Chancellor.

Bill by Elizabeth L. Harton against David Lyons and others to recover certain land. A cross bill was filed by defendant Lyons, and from the decree rendered certain parties appeal. Affirmed.

John L. Brown and E. L. Bullock, for complainant. Haynes & Hays and Caruthers & Mallory, for defendants.

ALLEN, Special Judge. This bill was filed in the chancery court of Madison county by Elizabeth L. Harton against David Lyons and others to have the court set aside and declare void a deed to 140¼ acres of land, executed by John R. Hicks and wife Fannie K. Hicks to defendant David Lyons, dated September 17, 1888, and to have complainant's interest therein fully determined, and for an account as to rent of said land, against said Lyons. Complainant, Elizabeth L. Harton, and all the defendants except David Lyons, are brothers and sisters and nieces and nephews of Fannie T. Hicks, deceased, former wife of John R. Hicks, and they are alleged to be

her lawful heirs; she having died intestate, without issue, on June 19, 1887. And it is alleged that the said Fannie T. Hicks was the owner of said property at her death, under a deed from James Hicks to the said Fannie T. Hicks dated January 8, 1880, which conveyed said land to her as her separate estate, and that John R. Hicks married again (his second wife's name was Fannie K. Hicks), and on September 17, 1888, said John R. Hicks and wife Fannie K. Hicks executed a deed to defendant David Lyons purporting to convey to said Lyons the fee in said land, and containing the usual covenants of seisin and warranty, the consideration being \$5,000 paid by said Lyons to John R. Hicks. John R. Hicks was in possession of said land at the time he made said deed to Lyons, and had lived on it, and controlled the possession of the same, continuously, for 20 years or longer, prior to said conveyance to Lyons. And Lyons went into possession of said land under said deed in November, 1888, and he has been in possession of said land ever since; being in possession when said bill was filed, and continuously until now. And defendant Lyons, by his answer, admits that on January 8, 1880, James Hicks, by his deed of that date, purported to convey all the right, title, and interest which he had in and to the tract of land to his daughter-in-law Fannie T. Hicks, but without any covenant of seisin and warranty, the only consideration being love and affection. This defendant also avers that John R. Hicks had the title to said land, and was in the sole, exclusive, and adverse possession of the same, claiming the same as his own, when he sold and conveyed said land to defendant Lyons, and that defendant Lyons was put in possession of said land by said John R. Hicks and wife, who were seised—or appeared to be seised—and possessed of said land. Defendant Lyons also averred: That he was an entire stranger in Madison county, having come down from his home in the North to buy a home in the South. Said John R. Hicks being in possession and control of said land, claiming to own it, he purchased said land of Hicks, and paid him \$5,000 for the same, believing he was getting a good title to said land, and he never at any time had any notice or information that complainant had any interest or claim in said land. That he acted in good faith, with no intention of committing a fraud on complainant and his co-defendants, and says he is an innocent purchaser of said land, for value, without notice of their alleged claim, or of any defect in the title. That since his said purchase he has paid the taxes on said land, and put valuable, permanent improvements on the same. Defendant Lyons also filed a cross bill in said case,—making complainant and his co-defendants in the original bill defendants to said cross

bill,—in which he charged: That the title of the said land in the said Fannie T. Hicks originated in, and was the result of, a fraudulent conveyance on the part of John R. Hicks, in which the heirs of said Fannie T. Hicks are privies in estate, and that a court of equity will not aid them to effectuate their fraud, but will repel them. And he shows the conveyances of said land to have been as follows, to wit: From Wyatt A. Taylor to John R. Hicks, deed dated and registered September 10, 1866, to 150 acres 124 poles, for the consideration of \$3,400; from John R. Hicks to James B. Percy, deed dated and registered July 24, 1879, 140 $\frac{1}{4}$ acres, for recited consideration of \$3,000; from James B. Percy to James Hicks, deed dated and registered January 8, 1880, 140 $\frac{1}{4}$ acres, consideration \$3,000; and deed from James Hicks to Fannie T. Hicks, dated and registered January 8, 1880, 140 $\frac{1}{4}$ acres, consideration being love and affection. All of said deeds contained covenants of seisin and warranty, except the last mentioned deed from James Hicks to Fannie T. Hicks. And that said Percy was a brother-in-law of John R. Hicks, and said James Hicks was his father. That no part of the recited consideration was paid either by Percy or James Hicks. That John R. Hicks was bound as security, and made and procured these conveyances in order to transfer said land to his wife Fannie T. Hicks, and avoid the payment of security debts; and the same was a fraudulent scheme and device on the part of said John R. Hicks, James B. Percy, James Hicks, and Fannie T. Hicks for the purpose of hindering and delaying the creditors of said John R. Hicks in the collection of their debts, and especially one Potts, administrator, who had a judgment for \$642.56, which was sued on the day the conveyance was made by John R. Hicks to Percy. That said Potts, administrator, filed his bill on June 29, 1886, against John R. Hicks and Fannie T. Hicks, attacking said conveyance for fraud, and seeking to have the same set aside, and the land subjected to the judgment against John R. Hicks, which was settled without being prosecuted to a hearing on the merits. Also, said Lyons alleged that he was an innocent purchaser, and sought relief on that account. There was a demurrer to so much of said cross bill as sought relief on ground of innocent purchaser, which was overruled, and the defendants to the cross bill were allowed to rely on said cause of demurrer in their answer.

Issue was joined on the cross bill, the minor defendants answering by their guardian ad litem. The depositions of four witnesses were taken, who proved, substantially, that John R. Hicks made different statements, after he made the deed to Percy, while he was in possession of said land while his wife Fannie T. was living, to the effect that the con-

veyance from him to Percy, his brother-in-law, was a sham to keep from paying a security debt for one Brown to Potts, administrator of the Rice estate. Some of these statements were made to a relative after the conveyance was made, and on one occasion his wife Fannie T. was present, and she told him to hush talking about it; that they were not going to leave the place. They also established the fact that John R. Hicks continued to reside there on the place, and controlled it as his own; that no change was made in the possession and management of the place. Also, that Percy made a similar statement in regard to his deed; that John R. Hicks held himself out as the owner all the time before and after his wife's death; that James Hicks made the deed to Fannie Hicks the same day Percy deeded land to him. James Hicks is dead, and nothing was found among his papers indicating that he had paid Percy for said land, or that he had had such a transaction.

No proof was offered to disprove these statements made by John R. Hicks. But defendants to the cross bill—especially the minor defendants—filed exceptions to proof of John R. Hicks' statements, and the statement of Percy, on the grounds of incompetency, and also excepted because the cause was not at issue when the proof was taken. We find the cause was at issue, but, if the guardian ad litem had not then answered the cross bill, they were represented by him in examination of said witnesses, and the cross-examination by him of each witness was full, and sufficient to test the truth of this evidence. Besides, the answer filed by the guardian ad litem was a mere formal answer, setting up no special defense, and simply trusted their rights to the protection of the court. This answer was filed several months before the taking of said depositions. It is manifest that no advantage was taken of the minors at any time, in taking said depositions, and no reason exists for sustaining this exception.

The court is of the opinion that the proof of the statements made by John R. Hicks immediately after he made said deed to Percy, and at different times after that, while he was in possession, controlling and managing said land, were entirely competent as part of the *res gestæ* of the possession, as explanatory of his possessions. *Brooks v. Lowenstein*, 95 Tenn. 267, 268, 35 S. W. 89; *People v. Vernon*, 95 Am. Dec. 70, note, and authorities cited.

The conversation between the witness R. O. Hicks and John R. Hicks, in the presence of Fannie T. Hicks, in reference to the nature and character of the deed to Percy, when John R. Hicks explained that said deed was a sham to avoid paying a security debt, which was not denied by her, and the declaration of Fannie T. Hicks at that time, when she said: "Hush! there was no use talking about it; they were never going to leave there,"—was at least a tacit admission by her

of the truth of the facts asserted in her presence by John R. Hicks, and were competent to show that she understood that the transaction was a sham, as explained by her husband. *Daugherty v. Marcum*, 3 Head, 323-325. The statement of James Percy, as proven by his son Dan J. Percy,—made while he held the title of said land,—that John R. Hicks had conveyed the land to him to keep from paying a security debt, and that he was to convey it back whenever he called on him, corroborates the statements made by John R. Hicks, and is competent, as showing the intention of the maker and holder of the deed. This witness proves, also, that his father conveyed the land to James Hicks pursuant to this understanding with John R. Hicks. There are other exceptions to the testimony of these witnesses and the rulings of the chancellor, which are not material to mention, as it is obvious that enough competent proof was introduced to show that said deeds from John R. Hicks to Percy, from Percy to James Hicks, and from James Hicks to Fannie T. Hicks, were a fraudulent scheme to defeat the creditors of John R. Hicks, by which he conveyed to his wife Fannie T. Hicks, in this roundabout way, the title of his land.

It is manifest that David Lyons purchased said land in good faith from John R. Hicks and wife Fannie K., and paid a full price for the same, and is in possession of the same under his deed from John R. Hicks and wife. It is also manifest that said Lyons' title is defective in this: that the title of said land was not in John R. Hicks, or in Fannie K., the second wife of John R. Hicks, at the time the deed was made by them to Lyons; and his title could not prevail against the complainant in the original bill and defendants in the cross bill, provided Fannie T. Hicks, deceased, acquired a valid title, either by voluntary conveyance without fraud, or by purchase for valuable consideration, which descended to her heirs at her death. The court is satisfied that the deed under which Fannie T. Hicks held said land was nothing more than a voluntary deed of conveyance from her husband, John R. Hicks, made for the purpose of hindering, delaying, and defeating the collection of certain indebtedness of the husband, and the same was therefore fraudulent, and voidable at the instance of such creditors. This being true, the next question is, is defendant Lyons an innocent purchaser, or can the said Lyons, who is in possession of said land, and whose title is attacked, show, under his answer and cross bill, that the title of Fannie T. Hicks was procured through fraud, and thereby defeat complainant's suit against him? St. 27 Eliz. c. 4, provided that every voluntary conveyance of land should be meant and intended by the parties to be fraudulent and void, against purchasers of said land. Chancellor Kent says: "It is settled in England that a voluntary conveyance, though for a meritorious purpose, will be deemed to have been

made with fraudulent views, and set aside, in favor of subsequent purchasers for a valuable consideration, even though he had notice of the prior deed." 4 Kent, Comm. 463. In the case of *Cathcart v. Robinson*, 5 Pet. 264, Chief Justice Marshall, delivering the opinion of the court, said: "This, being a voluntary conveyance, is at this day [1831] held by the courts of England to be absolutely void, under St. 27 Eliz., against a subsequent purchaser, even though he purchased with notice." It has been held by this court that the act of 1801 superseded this English statute, and was intended by the legislature as a substitute for St. 13 & 27 Eliz.,—the former having reference to fraudulent conveyances of personal property as well as lands, and designed to protect creditors against such conveyances; the latter confined to lands, tenements, etc., and designed to protect subsequent purchasers for value against such fraudulent conveyances; the provisions of the two English statutes being combined into one in our act of 1801 (Mill & V. Code, § 2424). "Our law provides for the registration of voluntary conveyances of lands, and when registered they operate as a notice to all subsequent purchasers. After registration of a voluntary deed for land, a subsequent purchaser for value cannot claim to be an innocent purchaser without notice. But, if the voluntary conveyance was intended to defraud a subsequent purchaser, the notice of registration will not affect his right to attack the voluntary conveyance for actual fraud." *Laird v. Scott*, 5 Heisk. 346. This being a case where the voluntary conveyance was made to hinder and delay creditors, and not to defraud subsequent purchasers, the subsequent purchaser cannot attack said deed and set it aside for fraud; nor can he claim to be an innocent purchaser without notice, the conveyance having been registered prior to said subsequent purchase. Therefore the chancellor was right in sustaining the demurrer in the answer on final hearing to so much of the cross bill as claimed that defendant Lyons was an innocent purchaser.

The next question is whether said Lyons, as a subsequent purchaser for value, without fraud on his part, and being in possession of said land, can repel complainant's suit, brought against him in a court of equity, to recover said land, by showing that complainant's title was acquired by and through a fraudulent conveyance. "A complete title to lands cannot exist without possession, and when the owner of the estate loses this, though he has the right of possession and of property, he loses something which the dispossessor acquires. The first degree of title is said to be bare possession or actual occupation of land, without any apparent right, or pretense of right, to hold and continue such possession, as where one dispossesses another, which may, of course, be defeated by the rightful owner; but in the meantime, until some act is done by the rightful owner to divest this possession and assert his title,

such actual possession is *prima facie* evidence of a legal title in the possession, and it may, by length of time and negligence of him who hath the right, by degrees, ripen into a perfect and indefeasible title." *Marr v. Gilliam*, 1 Cold. 507, 508. Lyons is in possession of said land, not as a trespasser, but under a deed from John R. Hicks and wife Fannie K. Hicks; the said Hicks having held possession of said land until he put said Lyons in possession under his deed. Lyons acted in good faith in the purchase of said land, and paid to the vendor a full price for it. John R. Hicks and wife Fannie K. Hicks joined in the deed to him. Lyons knew nothing about the death of Fannie T. Hicks, the first wife, nor that John R. Hicks was living with a second wife, whose first name was the same as first wife's. He was a stranger, and knew none of these facts. He very naturally presumed that Hicks and wife Fannie K. were the rightful owners of said land, and that they could make a good title to the same, inasmuch as they were in possession, claiming to own the land. Judge Wright, delivering the opinion of the supreme court in *Parks v. McKamy*, 3 Head, 297, 298, said: "No principle of law is better settled than that an action will not lie to enforce a contract made in violation of a statute or of the common law, or which is immoral in its character, or against public policy. The parties stand in equal guilt, and neither will receive the aid of a court of justice. In such a case, it is said, the defendant is the better,—that is, in the safer attitude,—he being required to say or do nothing, while his adversary is the actor, and has to show the case." "The defendant—not because of any favor to him, but because he is such—can, upon well-settled principles, allege and show the invalidity of the contract. This does not impair the rule that the parties to a conveyance to defraud creditors are bound by it, since neither can invoke the aid of a court of justice to undo it." That was an action where a bond was executed by the defendant, McKamy, to Parks, and there was proof tending to show that the bond was executed as a fraudulent device to hinder and delay the creditors of Parks in the collection of their debts out of certain personal estate which the plaintiff pretended to sell to the defendant, and in consideration of which the bond was given. The court held that the plaintiff could not recover on the bond. In the case of *Nichol v. Cabe*, 3 Head, p. 92-97, the facts were that Asbury Nichol, deceased, the husband of Mary Nichol, and the father of the other complainants, was in jail in Cocke county on a charge of counterfeiting, and being anxious to procure bail, and for the purpose of qualifying a friend named Aaron R. Clark to become his bondsman, he made Clark a deed to his land, in which he recited \$400 as the consideration paid; but there was not in fact any money paid, or to be paid, for the conveyance. Clark was re-

fused as bondsman, and Nichols was convicted and sent to the penitentiary, where he soon died. Clark took possession of the land, and conveyed it to Cabe, who was his stepson, and Clark left the country. Cabe paid nothing for the land, and knew of the circumstances why the land was conveyed to Clark. The widow and children of Nichol brought suit to recover the land, on the ground that the deed from Nichol to Clark was a mortgage, etc., which had been satisfied. The chancellor dismissed the bill because the object in conveying to Clark was improper and against public policy, and it was appealed to this court. Judge Caruthers, in delivering the opinion of this court, said: "It is insisted that the whole scheme was to get the criminal out upon bail, that he might make his escape from justice. If that were so, it would be such an unlawful purpose as would stain the hands of all concerned, and exclude them from the courts." But there was no evidence that such was the intention. Mr. Story's *Equity Jurisprudence* (257) says, "In general, a contract which contemplates a fraud upon third parties is regarded as so far illegal between the immediate parties that neither will be entitled to claim the aid of a court of equity in its enforcement." But none of these cases go so far as the case of *Swan v. Castleman*, 4 Baxt. 257. In that case, after referring to the above authorities, this court go further, and hold that though a conveyance obtained by fraud be only voidable, and can be impeached and set aside only at the suit of the party defrauded, or his privies, yet if the property conveyed is in the possession of a third party, and the fraudulent conveyee has come into a court of equity for assistance in the assertion of his claim, and to obtain the benefit of his fraud, he will be repelled, upon the maxim that "He who comes into that court asking its aid must do so with clean hands." This is not to give active relief to a party who has no title, but is simply a principle on which his opponent is repelled from the court, the court helping neither the one nor the other,—not the complainant, because it would be helping him reap the benefit of his fraud, nor the defendant, because he might have no legal title, yet, being defendant and in possession, his condition is best. *Id.* 257-270. The heirs of Fannie T. Hicks, deceased, were never in possession of said land. She was a fraudulent conveyee, from whom they claim to inherit their title. We think that the heirs of a fraudulent conveyee, who has never been in possession, should not be allowed to recover land of a defendant who has purchased it for full value, without fraud on his part, from the fraudulent conveyor, who was in possession, exercising ownership and control over it, at the time of the purchase of him. The title of Fannie T. Hicks, deceased, having been acquired through fraud, her heirs, being out of possession, cannot set up their title and recover possession from the defend-

ant, who is in possession under his purchase from the fraudulent conveyer in possession and control, for full value, without fraud on the part of defendant. Not being able to show a clean title in themselves, they cannot recover on the weakness of defendant's title. Their title having been acquired through a fraudulent conveyance, they being out of possession, and defendant Lyons being in possession, the defendant as such had the right to impeach their title for fraud, and repel them from a court of equity, without showing a legal title in himself. The decree is affirmed.

BEARD, J., dissents.

BOSTICK et al. v. HAYNIE.

(Court of Chancery Appeals of Tennessee.
Jan. 25, 1896.)

CONTRACTS—RESCISSION—LACHES—DEED—INVALID
PROBATE—HOMESTEAD—APPEAL—
PAUPER'S OATH.

1. One who was defrauded in the purchase of land was not entitled to have the contract rescinded, where, several months after discovering the fraud, and after consulting counsel, he joined with his vendor in a deed of the land to another in satisfaction of an incumbrance thereon, and further recognized the validity of the transaction by taking a deed from the latter to himself.

2. Under Mill. & V. Code, § 2852, providing that notaries should take acknowledgments under the same rules as county court clerks, an acknowledgment by a notary outside of his county is void.

3. The fact that the wife did not join in the oath prescribed for poor persons, on appeal by herself and husband from the judgment denying the right of homestead, did not prevent either party from claiming such homestead.

Appeal from chancery court, Davidson county; Thomas H. Malone, Chancellor.

Bill by A. G. Bostick and another against J. B. Haynie to rescind a contract for the sale of lands and for other relief. From the decree rendered complainants appeal. Modified.

J. P. Atkinson and W. G. Brien, for complainants. E. A. Price, for defendant.

NEIL, J. The original bill in this cause was filed for the purpose of rescinding a contract for the sale of lands, and an amended bill was filed claiming homestead out of a portion of the lands involved, as alternative relief, in case rescission should not be granted. The facts are as follows: In the early part of December, 1891, the complainant A. G. Bostick, a colored man, residing at that time in Williamson county, this state, and owning a small farm near Triune, in that county, wishing to remove to Nashville, and, with a view to that purpose, to exchange his farm for city property, applied to B. E. Matthews, a real-estate agent in Nashville, to carry out the plan for him, and returned to his home in Williamson county. Mat-

thews undertook the work, and between the 8th and 10th of December, 1891, he addressed a letter to complainant, at Triune, informing him that he had succeeded in getting on foot the arrangement desired. Complainant, upon receipt of this letter, promptly came to Nashville, and was informed by Matthews that he had perfected a plan whereby complainant could exchange his farm for a house and lot on North Hill street in Nashville, but that, in order to carry out this plan, it would be necessary for the complainant in the trade to take five "uptown" lots belonging to the intending seller at \$5 per front foot. To this the complainant assented, on the assurance from Matthews that the lots were worth the purchase money, \$1,350, and that he (Matthews) would be able to sell them at a profit of \$600 or \$700, and upon his further assurance to the complainant that, if he would let him (Matthews) manage for him, in a few years he would make complainant a rich man. The complainant trusted the whole matter implicitly to Matthews, and did whatever Matthews told him to do; and, while complainant does not seem to have a very clear idea of what the trade was, he seems to have understood that his farm was to be valued at \$1,500, and the Hill street property at \$1,600, and that one should be exchanged for the other, leaving him in debt for the Hill street property to the amount of only \$100, and that he should, in some way—his understanding of the matter is not clear—buy the uptown lots in the trade. The key to the whole matter is that he trusted Matthews entirely, and let him arrange the transaction as he wished. So, when the deeds were drawn, they were so worded that complainant was made to purchase the Hill street property, paying thereon \$600 of the value of his farm, and assuming a debt of \$1,000, an incumbrance thereon due to one Brown; and \$900 of the value of his farm was placed upon the uptown lots as a part payment thereon, and he executed his notes for \$350 balance of the purchase price of the lots. These "uptown lots," so called, were of little actual value, being liable to overflow, and sometimes being 10 feet under water, but seem to have had a speculative value among trading men. The result of the transaction thus far was, through the management of the real-estate agent, that the complainant, instead of exchanging his farm for a house and lot in Nashville, had exchanged the bulk of it for some overflowed lots, and only about one-third of it, or a little over, for a house and lot incumbered to the amount of two-thirds of the value of his farm, and with no means, or reasonable expectation of means, on his part, to lift the incumbrance. The chief dependence for paying this indebtedness was the expected exercise of the real-estate agent's skill in working off the uptown lots; but, like many other speculative schemes, it failed to turn out as

hoped for. The resultant loss of the property in course of time was inevitable, but the manner of this loss will be stated further on.

To return, however, to the deed. It appears that the complainant can read, but that the deed was neither read to him, nor did he read it at the time the trade was consummated; owing, as we believe, to his entire reliance on the real-estate agent, and his confident belief that this agent would so arrange matters as that the original purpose would be carried out,—the exchange of his farm for a house and lot. It is clear that the complainant had no adequate conception of the situation he was in until about eight or nine months after the trade was made. It was in August, 1892, when he learned the true state of things. This was when Mr. Brown's trust deed matured. Mr. Brown called upon the complainant for the payment of the debt. Thereupon the complainant, not understanding the situation, consulted counsel, and had the deed explained to him. Realizing the state of things, he then endeavored to borrow some money from a building and loan society to meet the debt, but was unable to do so. Mr. Brown then advertised the house and lot for sale, and did sell it at public auction. At this sale under the trust deed the complainant became the purchaser, but was unable to comply with the terms of the sale. The matter rested in this condition for a while, and at last the following plan was fallen upon by all concerned. Complainant A. G. Bostick and his wife, also a complainant herein, joined in a deed with their vendor, defendant, J. B. Haynie, to said Brown, on the 2d day of December, 1892, wherein they conveyed to him the said house and lot. In this arrangement the deed of trust was canceled and settled. Brown, being then the owner of the property, reconveyed it to the complainant, December 3, 1892, taking his notes therefor, maturing at intervals, with J. B. Haynie's indorsement. The instrument provided, in substance, that, upon failure of complainant to pay any of the notes, all should mature, and the vendor, Brown, should have the right to sell the property for payment of the notes. Complainant having failed to pay the notes, the property was sold, pursuant to the instrument, by Mr. Brown, and at this sale Mrs. Lulu Haynie became the purchaser at \$1,100, and complainant has been compelled to vacate the property. The defendant, Haynie, had nothing to do in making the trade, except in so far as Matthews was his agent, and except in executing the deeds to the Hill street lot, and to the uptown lots. The whole trade was worked up by Matthews, and he received, or undertook to receive, commissions from both sides; that is, Haynie paid him \$100 commissions, and he had the complainant's note for \$75 as commissions, but, when the matter turned out so badly, he surrendered this note without

payment. It is proper to state, also, that the complainant has sold and conveyed one of the uptown lots.

Without discussing the question as to whether the foregoing facts make out a case of fraud practiced upon the complainant by the defendant through his agent, Matthews, we think it is impossible to grant complainants any relief upon the theory of rescission for fraud. We base this conclusion upon two principles, as follows: First. He who seeks relief in a court of equity upon the ground of fraud must do so promptly, after discovery of the fraud. *Smith v. Greaves*, 15 Lea, 459, 468; *Gilbert v. Hunnewell*, 12 Heisk. 292; *Knuckolls v. Lea*, 10 Humph. 577; *Ruohs v. Bank*, 94 Tenn. 73, 74, 28 S. W. 303. Secondly. Equity will not, in general, grant rescission where the parties cannot be restored to their original status. 21 Am. & Eng. Enc. Law, 89. In *Gilbert v. Hunnewell*, 12 Heisk. 292, 293, it is said, quoting and adopting a passage from Story on Contracts: "It is solely at the option of the party upon whom the fraud is practiced whether he will be bound by the agreement or not. Yet, if he determine to avoid a contract because of the fraud, he must give notice of such determination to the other party within reasonable time after his discovery of the fraud; and if, with a knowledge of the fraud, he acquiesce in the contract expressly, or do any act importing an intention to stand by it, or remain silent under circumstances which plainly indicate a continuing assent thereto, he cannot afterwards avoid it; for practically no man is injured if he know of the deceit which is practiced and consent to it, since the deceit then becomes an agreed fact of the case. So, also, if he treat the subject-matter as his own, by selling or leasing, he cannot avoid the contract on the ground of fraud, even though he should afterwards discover some new incident of the same fraud, making it more to his injury than he supposed." And in *Ruohs v. Bank*, 94 Tenn. 57, 28 S. W. 303, the same doctrine is strongly laid down. At pages 72, 73, 94 Tenn., and page 307, 28 S. W., the following extract from *Tied. Sales*, § 163, is quoted with approval: "It is also necessary that the defrauded party should do nothing, after the discovery of the fraud, which would in any way admit the existence and validity of the contract. Such an admission, if clear, will operate as a bar to his right of rescission for fraud. For example, it would be fatal to his right to rescind where he has mingled the property with his own, or offered it for sale, or in any other way exercised any rights of ownership over the goods." And, at page 73, 94 Tenn., and page 307, 28 S. W., the following is quoted with approval from 2 Pom. Eq. Jur. § 897: "The person who has been misled is required, as soon as he learns the truth, with all reasonable diligence to disaffirm the contract, or abandon the transaction, and give the other party an opportunity of rescinding it, and of restoring both of them

to their original position. * * * If, after discovering the untruth of the representations, he conducts himself with reference to the transaction as though it were still subsisting and binding, he thereby waives all benefit of and relief from the misrepresentations." Complainant concedes that he discovered, in August, 1892, that the deed had not been written according to the contract, yet on December 2, 1892, he recognized the transaction as valid and subsisting by joining in the deed to Mr. Brown, conveying the property to him in satisfaction of the Haynie deed of trust, and further recognized the transaction by taking a deed to the property from Mr. Brown on December 3, 1892. These last two deeds were after he had consulted counsel. He experimented with the matter in this manner, until the property was finally sold under the power of sale reserved in the last-mentioned deed. Then he filed his bill. The original bill was not filed until May 20, 1893. We think it is very clear that the complainant is not entitled to a rescission.

We will next consider the question whether the complainants are entitled to the homestead claimed under the amended bill. Complainant A. G. Bostick is the head of a family, and the Williamson county tract was all the land he owned, and he resided upon it with his family at the time of the inception of the above-mentioned trades. There is no controversy about these matters. The point, however, upon which the right to avoid the deed in favor of the homestead claim is based, is that the certificate of acknowledgment is void as to the wife of complainant A. G. Bostick. The special point of attack is that the probate as to the married woman was taken in Williamson county by a Davidson county notary public. There is no dispute upon this point. The notary public says that he did take the acknowledgment in Williamson county on the 18th of December, 1892, but did not then affix his seal, and that he subsequently retook the acknowledgment in January, 1893, in Davidson county, and affixed his seal; but upon this point the weight of the proof is against him, and in fact the certificate upon the deed is dated December 18, 1892. Upon its face the certificate appears to have been made in Davidson county, and the acknowledgment and privy examination there, inasmuch as it begins, "State of Tennessee, Davidson County." But we find as a fact that the probate was taken in Williamson county by the aforesaid Davidson county notary public. Does this make the probate void? In the case of *Neely v. Morris*, 2 Head, 596, 597, it was said in reference to a protest of a note taken by a notary public out of his county: "This protest was a nullity. Under our statute, the authority of a notary public is confined to the county for which he was appointed and commissioned. Act 1835, c. 11. He has no more power or authority to do an official act in a different county than a justice of the peace

or other county officer." In *Garth v. Fort*, 15 Lea, 683, 686, it was held that where a justice of the peace of Robertson county, this state, was commissioned to take the privy examination of a married woman, and he went over into Montgomery county and took the probate there, the act was wholly void. The sections of the Code (Mill. & V. Code, §§ 2461-2468) that provide for the creation of notaries public plainly show that their powers are confined to the county in which they are created. Mill. & V. Code, § 2852, provides that they shall take acknowledgments in the same manner and under the same rules and regulations as given county court clerks. It could not be contended that county court clerks could take acknowledgments outside of their respective counties. On the whole, we are clearly of opinion that the probate to the deed in question was and is void. The result is that the complainants are entitled to homestead in the Williamson county tract.

The defendant has suggested, as a difficulty in the way of this court considering the homestead question at all, that the appeal is prosecuted upon the oath prescribed for poor persons, and that the wife did not join in the oath. There is no merit in this suggestion. In the case of *Grills v. Hill*, 2 Sneed, 711, 715, 716, it is said: "An objection has been suggested to the legality of the proceeding by which the suit was allowed to progress under the pauper law, on the oath of the husband, without that of the wife, who was also a party with him. That was proper, as we have decided, in another case, that where a husband and wife are parties, it is only necessary for the oath to be taken by the former; but it is otherwise where this relation does not exist between the joint parties. In that case all must take the oath required." To the same effect is *McPhatridge v. Gregg*, 4 Cold. 324, 326. The same result is also reached from another view. The deed of the husband and wife, without the privy examination of the wife, conveying land then occupied as a homestead, the legal title to which is in the husband, will not convey the homestead right either against the husband or wife. *Mash v. Russell*, 1 Lea, 543. Consequently, the husband could prosecute the suit alone for homestead in such a case.

Let a decree be entered here in accordance with the foregoing principles, and let the cause be remanded to the chancery court of Davidson county with directions for the appointment of commissioners and the assignment of homestead to the complainants in the tract of land described in the amended bill. The costs of this court and of the court below will be equally divided between the complainants and the defendant.

BARTON and WILSON, JJ., concur.

Affirmed orally by supreme court, March 9, 1896.

HOUSTON, E. & W. T. RY. CO. v. KELLER.
(Court of Civil Appeals of Texas. May 14, 1896.)

RAILROAD COMPANIES—FORECLOSURE SALE—LIABILITY OF PURCHASING COMPANY—REORGANIZATION—RIGHTS OF JUDGMENT CREDITORS OF OLD COMPANY—JUDGMENT LIEN—EXTINGUISHMENT.

1. In an action by judgment creditors of a railroad company against a reorganized body composed of purchasers at foreclosure sale of the property of the former company, it appeared that plaintiffs, whose judgments were first liens on the property, had agreed with one J., who represented persons proposing to reorganize the old company, that they would accept the bonds of the new company in payment of their judgments, and assigned such judgments to a trustee to be exchanged for the bonds. J. and his associates purchased the road at foreclosure sale, and used the judgments to secure a reduction of the amount to be paid in cash. J. testified that in all the proceedings he had acted for himself individually, and that he was to acquire the property, and turn it over to the new company, and that he was to have the profits from the transaction. But it appeared from the written agreement that he not only acted for himself, but as the representative of all the other parties to the agreement; that issuance of bonds by the reorganized corporation was contemplated; that plaintiffs consented to await reorganization, and to take the bonds within a specified time, and transferred their judgments to be delivered to J. "in exchange for the bonds to be issued by the new company." *Held* that, on failure to deliver the bonds within the specified time, the new company, having obtained the benefit of the judgments, was liable to plaintiffs for the amount thereof.

2. Where judgment creditors of a railroad company permit foreclosure sale of its property to be made without objection, and contract with a reorganized company to take bonds of such company in payment of their judgments, they lose their judgment lien on the property.

Appeal from district court, Harris county; Samuel H. Brashear, Judge.

Action by Theodore Keller against the Houston, East & West Texas Railway Company. Judgment for plaintiff, and defendant appeals. Modified.

After the decision rendered in this case on former appeal, reported in 8 Tex. Civ. App. 537, 28 S. W. 724, plaintiff amended his pleadings, and alleged the facts out of which we held the liability of the defendant for the judgments sued on arose. Exceptions to the petition were overruled, and this ruling is assigned as error; but, as the facts shown by the evidence upon which plaintiff relies for a recovery were alleged in the pleadings, it will be more convenient to determine whether or not those facts are sufficient to establish the liability than to consider the pleadings and evidence separately. Those facts show that in 1885 the railroad and all of the property, rights, and franchises, of every character, of the Houston, East & West Texas Railway Company, were put in the hands of a receiver by the district court of Harris county, and that, by the decree of that court, such property was ordered sold to pay judgments which had been established against the company, including those sued on by the plaintiff, secured by liens having precedence over

the mortgage securing the bonds of the company, and also to pay such bonds. This decree required that the railway and all of the property and franchises of the company should be sold for not less than \$1,200,000, and that, of this sum, \$375,000 should be paid in cash, to satisfy the preference liens securing judgments of the class to which those sued on by plaintiff belonged, but that receipted claims of that class produced by the purchaser should be accepted by the commissioner as so much cash, and that the remainder of the purchase money might be paid in first mortgage bonds of the company. The decree also provided that the title to the property should pass to the purchaser free from all claims except the current obligations and liabilities of the receiver. The decree of foreclosure was first rendered by the district court, and an appeal was taken by the trustee for the bondholders to the supreme court, contesting the priority given to such claims as plaintiff's, and the decree was by that court reformed without affecting such priority. From this judgment a writ of error to the supreme court of the United States was sued out by the trustee for the bondholders, and, while it was pending, the following instrument was executed by a number of the holders of claims against the railway company, including plaintiff: "The undersigned, creditors of the Houston, East and West Texas Railway Company, hereby agree, one with the other, and with E. S. Jemison, of the city and state of New York, to accept for their several claims, principal and interest, the first mortgage bonds of said Houston, East and West Texas Railway Company, to be hereafter issued by the company organized by the purchasers of said railway at foreclosure sale, at the rate of not exceeding twenty thousand dollars (\$20,000) per mile, at their face value, that is to say, one bond for each one thousand dollars of said claims, and for fractional portions of said claims certificates entitling holders thereof to said first mortgage bonds, when presented in amounts aggregating one thousand dollars, said certificates bearing interest at the rate of five per cent. per annum from date of issue, said bonds to be payable forty years after date, and to bear interest at the rate of five per cent. per annum from date, interest payable semiannually, and to be for one thousand dollars each. To this end, we hereby assign our respective claims to T. W. House, to be held by him in trust to be delivered to the said E. S. Jemison, or his assigns, in exchange for said bonds to be issued as aforesaid. The claims held by us are judgments against said Houston, East and West Texas Railway Company, rendered by the district court of Harris county, for the respective amounts and at the respective dates set opposite our names; said judgments having been given priority of payment in the final decree rendered by the district court of Harris county in the case of Jacob Binz et al. versus the said railway company et al., on

the 19th day of November, 1889, as modified by the decree of the supreme court of Texas, made on the 29th day of March, 1890. [13 S. W. 655.] This agreement is made upon the condition that said bonds are to be delivered to us in exchange as aforesaid within three months after the foreclosure sale under said final decree, or as soon thereafter as practicable, not to exceed the period of six months from the date of said foreclosure sale. If this agreement shall not have been assented to by the holders of claims in an amount satisfactory to said Jemison, prior to the date of said foreclosure sale, then the same to be null and void. This agreement is one of several, similar in all respects, and each paper shall have the same force and effect as if all were one instrument. Witness our hands, this 26th day of May, 1890." The cause was afterwards dismissed from the supreme court of the United States, and the final decree was entered by the district court, as before stated, in accordance with the judgment of the supreme court. The sale was made under the final decree of foreclosure on the 7th day of August, 1892. The property was purchased by E. S. Jemison, and the sale was reported to the court, and confirmed by its order on the 25th day of October, 1892. The terms of sale were not at once complied with, but on the 19th day of November, 1892, the court, upon motion of the purchaser, granted a "short additional time for the purchaser to comply"; and on the 20th day of February, 1893, the court made another order extending the time until the next term of the court, reciting "that the delay in complying with the terms of his purchase by said E. S. Jemison has been brought about wholly unexpectedly to him, and without apparent fault on his part, and that he has partially complied with the terms of his contract." At the next term thereafter, and on the 26th day of April, 1893, the commissioner reported to the court that Jemison had complied with the terms of sale; stating, further, that, in so doing, he had passed before him (the commissioner), as part of the money to be paid in cash, the judgments here sued on by plaintiff, which had been allowed in part payment. The court thereupon entered a decree reciting that Jemison had complied with the terms of sale, and that it was made to appear that he had assigned to the Union Trust Company of New York his bid and all of his rights under it for the purchase of the railway and its appurtenances, and ordering the commissioner to make to such company a deed conveying the property "free from all charges and incumbrances except current obligations of the receiver," and further ordering the receiver to deliver the property to the purchasing company upon its demand. The order further provided for the closing up of the receivership upon the delivery of the property to the trust company. On the 26th day of May, 1893, the commissioner executed to the Union Trust Company a deed conveying the property to it, which re-

cited the proceedings prior and subsequent to the sale, as well as the sale and purchase by Jemison, and his assignment of his bid to the trust company, and recited that such conveyance was made in consideration of the premises, and of \$1,200,000 paid to the grantor by Jemison and the trust company, as shown by his reports to the court. On the 8th day of May, 1893, the Union Trust Company made a deed conveying the same property to the defendant in this suit, the reorganized Houston, East & West Texas Railway Company, reciting the judicial sale of the property, the bid by Jemison, and his assignment of same to the Union Trust Company, and that Jemison and his associates were in fact the purchasers, for whose use and benefit the trust company acquired and held the legal title, and were entitled, under the laws of Texas, to have and exercise the rights, powers, and privileges granted to the corporation under its charter. This conveyance further recited that it was made in pursuance and accomplishment of the objects, purposes, trusts, and conditions specified and set forth in the conveyance from Jemison to the trust company, and in consideration of \$5,760,000 to be paid by the railway company, as follows, viz.: \$1,920,000 of the capital stock of the railway company issued in the name of Jemison or his appointees, and transferred by them to the trust company; and \$3,840,000 in first mortgage bonds secured by mortgage to the trust company, in trust for the holders of such bonds. On the 15th day of May, 1893, the defendant company executed to the Union Trust Company, as trustee, a mortgage on its properties to secure its first mortgage bonds issued by it, in accordance with its plan of organization adopted by the purchaser, to pay the purchaser of the road at the rate of \$20,000 per mile of completed road. On June 13, 1893, bonds of the defendant company, of the character and in amount provided for in the contract signed by plaintiff, were placed in the hands of T. W. House for plaintiff, and he was notified of the fact, and then declined, and has ever since declined, to receive them, on the ground that they were not tendered within the time required by the agreement.

The foregoing are the facts which were shown by the record on the former appeal, and upon which this court held that "it sufficiently appears that those who reorganized the corporation were represented by Jemison, and that his acts were done for their benefit. It further appears that the corporation, as reorganized, has taken the property under the arrangement made by him, and has received the benefits of it; and we think it is chargeable with any liability assumed by Jemison in his dealings with the plaintiff's judgments." On the last trial, in addition to those facts, the testimony of Jemison himself was introduced. It is to the effect that he was interested in and controlled all of the bonds of the old company, and bought up a number of the claims to

which priority had been adjudged, and that these, including plaintiff's, were used as cash in complying with the terms of sale; that the plan of reorganization contemplated the issuance of bonds of the reorganized company in lieu of those of the old, and that, under the bond of reorganization, he undertook, on his own responsibility, to turn over the railroad to the reorganized company, free of all incumbrances; that the bonds which he agreed to give plaintiff were his own bonds, and, in making the contract with plaintiff, he was acting for himself individually, and not for the Union Trust Company or the reorganized railroad company, and whatever profit there was in the transaction accrued to him; that the plan of reorganization was a proposition made by himself to all of the creditors of the old company, to which the new company was not a party, and in no wise interested, and provided that he should turn over the property to the new company free from all claims, of every kind and character, and the creditors who accepted the bonds of the new company did so in pursuance of that plan.

Baker, Botts, Baker & Lovett, for appellant. W. P. Hamblen, for appellee.

WILLIAMS, J. (after stating the facts). The lien by which plaintiff's judgments were secured was foreclosed by the final decree, and the property was ordered to be sold to pay them, as well as other charges upon it. As was held by us on the former appeal, it is clear that in such cases the purchase money paid into court takes the place of the property, which passes by the sale to the purchaser freed from the liens thus foreclosed. The lienholders look to the purchase money as the fund out of which their claims are to be satisfied. But, instead of paying into court so much of the purchase money as would have been required to meet plaintiff's claims, the purchaser retained it in his hands, using the judgments as having been paid, and agreeing to otherwise satisfy plaintiff for them. Of course, it is not and it cannot be contended that the purchaser was not bound to comply with his agreement with the holders of the judgment, or else pay either to him or to the court enough money to satisfy them; but the contentions are—First, that the agreement has been complied with by the tender of the bonds stipulated for, and that plaintiff is bound to accept them; and, second, that, even if there has not been such compliance with the contract, any liability resulting therefrom is not that of the defendant corporation. In our former decision, we decided the first question in favor of plaintiff, holding that the tender of the bonds was not made in time, and that plaintiff was not bound to take them; and the court now adheres to that view. We deem it unnecessary to say more upon that point than is

said in the opinion then rendered. Upon the facts then before the court, we also held that the company was liable for the amount of the judgments, and we have no doubt of the correctness of that holding, based upon those facts. The testimony of Jemison was not then before us, and it introduces into the case a question on which there is more doubt. He states that, in making the contract with plaintiff, he was acting for himself individually, under an arrangement by which he was to acquire the property, and turn it over to the corporation to be organized, free from all incumbrances, reaping for himself whatever gain resulted from the transaction. If this was the substance of his arrangement with plaintiff, if plaintiff agreed to allow Jemison, individually, the use of his judgments, and to look to him alone for the bonds or their equivalent, in case they should not be delivered, then it would be impossible to hold the defendant company liable. But Jemison does not state that such was the case. We understand his statement to have reference to the arrangement between him and others co-operating with him in reorganizing the corporation. We must look to the written instrument and the facts existing at the time of its execution, as well as to the things subsequently done, to determine the real nature of the proceeding. The insolvent corporation was in the hands of the court at the suit of creditors seeking payment of their claims, and, as is usual in such cases, those most interested set about to secure a reorganization. A part of the plan was to induce the holders, not only of bonds, but of other liens, to accept bonds of the reorganized company in lieu of their claims. Those who signed the instruments which plaintiff signed became parties to this plan, contracting with each other, and not simply with Jemison, and contemplating action by the corporation, after reorganization, with such contract as its basis. The recitals of the instrument show this, and Jemison is mentioned simply as the active representative of the movement. The substance of the agreement is that the signing creditors consent to await the reorganization of the corporation, and then to take the bonds within the time specified, instead of enforcing payment through the court; and, to put this in practicable shape, the judgments are transferred, not to Jemison, but to a trustee to be delivered to Jemison or his assigns "in exchange for the bonds to be issued by the new company." The rights of the bondholders were already represented by trustee. This new company was not necessarily to be reorganized by Jemison alone, but by the purchasers at the contemplated foreclosure sale. There seems to us to be no doubt that plaintiff could have been held to this agreement by any other purchasers, who bought and exercised the right of reorganization given by statute in pursuance of the plan adopted, as well as

by Jemison. There is nothing in the contract or in the circumstances attending its execution to suggest that the signers were to look alone to Jemison for the satisfaction to which they might become entitled. Looking to the acts that were done in the furtherance of the plan, we find from the recitals in the deeds that Jemison throughout acted not only for himself, but as the representative of those who are called his associates, and who, with him, became entitled to the rights acquired by the purchase. All of those who were thus associated, and not Jemison alone, were the purchasers of the property. It was by all of them, through Jemison, that plaintiff's judgments were utilized in paying for the property, and whatever liability resulted therefrom was that of all of them. So, we think, it cannot be maintained that plaintiff was bound, if, indeed, he was entitled, to look alone to Jemison. The purchasers of the property were bound by the terms of sale to pay into court a sufficient sum of money to satisfy all such claims as that of plaintiff. Instead of so doing, they retained in their hands, with plaintiff's consent, the money which he would otherwise have received, upon the agreement that he should be paid in bonds to be issued by the reorganized company within the given time. Their title to the property, and their consequent right to exercise the franchises of the old corporation, were thus secured. Plaintiff was entitled to the bonds, or else to the money due on his judgments. He was bound to accept the former if delivered within the stipulated time, but, if they were not so delivered, he was unquestionably entitled to the latter. If he did not receive the satisfaction provided for in the agreement, he was entitled to that for which the decree of the court provided. *Miller v. Railway Co.*, 40 Vt. 399; 1 Thomp. Corp. § 275. In the case cited, it was held that a creditor (bondholder) of the sold-out corporation, who had agreed to accept bonds of the reorganized company in lieu of those of the old, and to whom bonds of the stipulated character had not been delivered, was restored to his original right to participate in the purchase money of the property. There can be no doubt that, in this case, plaintiff, but for his contract, could have required the purchasers to pay into court a sufficient sum of money to pay off his judgments. Not having done so, we think it clear that, as the agreement was not complied with, he is entitled to collect them by suit. The court having passed to the purchaser the title to the property on the assumption that it was paid for, there is no need to resort to it. The fund is not in its possession.

The question remains whether or not the corporation is liable. As we have said before, generally a corporation reorganized under the charter of a sold-out company by the purchasers of the property at foreclosure

sale is not responsible for the debts of the old company. But it may be made so by agreement. That which was originally a debt against the old company may become that of the new company through the plan of reorganization. Here it was contemplated that this company should become the debtor by the issuance of its bonds. The agreements entered into by the purchasers, by their very terms, were to be executed by the corporation. Under those agreements, the corporation took the property, and exercised the rights which it could obtain in no other way, and has carried out most of the obligations assumed for it by those who organized it. In our opinion, it has not the right to hold this property, which, to the extent of plaintiff's judgments, is unpaid for, and refuse to assume the liability that accompanies it. It was bound to issue and deliver the bonds as stipulated, and, failing in that, was bound to pay the money due on the judgments into court. Having done neither, we see no just objection to allowing plaintiff to recover. *Vilas v. Page*, 106 N. Y. 439, 13 N. E. 743; 1 Thomp. Corp. § 267. The bonds issued for the amount of plaintiff's judgments are still in the hands of the trustee, and as, under his agreement with the company, Jemison is not entitled to them in case the company should pay the judgments, they are within its reach. As plaintiff was entitled to look to the company for compliance with the contract, the delivery of the bonds to Jemison cannot impair his rights. Since the foreclosure sale was completed without objection on plaintiff's part, and the title thereunder passed to the purchasers, the purchase money standing in its place, his lien on the property was gone; and his right rests, not upon the original judgment, but upon the transactions out of which the liability of the defendant in the process of reorganization arose. In order to restore his lien on the property, it would be necessary to set aside the sale. If that stands, the lien cannot exist. Hence we think the court erred in declaring a lien on the property, and in that respect the judgment will be corrected.

The judgment as to interest is not one of which, in our opinion, appellant can complain, if, indeed, there is any error in it. The length of this opinion renders it impracticable to discuss that question. Reformed and rendered.

On Rehearing.

In addition to what is said in opinion, we desire to refer to the act of March 29, 1889 (*Sayles' Civ. St. Supp.* art. 4260a), which provides that a corporation organized by purchasers of the franchise, etc., of a sold-out corporation, take the position of the road sold, "subject to the same liabilities, claims and demands as in the hands of the purchaser or purchasers of the sold-out corporation."

HELFENSTEIN v. MEDART et al.

(Supreme Court of Missouri, Division No. 2.
June 30, 1896.)

INJURY TO EMPLOYE—ASSUMPTION OF RISK—EXPERT TESTIMONY—HARMLESS ERROR.

1. That an employé, injured by the bursting of a grindstone at which he worked, was at the time, in violation of a rule of the employer, changing his clothes before time to quit work, will not prevent recovery for the injury; no act of his having contributed to the bursting of the stone, his work of grinding still being in progress, the article to be ground being held against the stone by machinery, and he being two feet to one side of a direct line from the stone, while his work at times required him to stand directly in front of it.

2. An employé does not assume the risk of a grindstone bursting from being run at an excessive speed, he being ignorant of what was an unsafe rate of speed for it, and having relied, in reference thereto, on his foreman.

3. A witness who testifies that he is a mechanical engineer; that he graduated several years before from a university, and since then has been engaged in civil and mechanical engineering; that he has given some study to the investigation of the strength of grindstones, and the safe rate of speed at which such stones of various size might be run; and that he thinks he can state what is a safe rate of speed,—is qualified to testify as an expert in regard thereto.

4. The determination of whether a witness is competent to testify as an expert is largely within the discretion of the trial court.

5. In an action for injury to an employé from the bursting of a grindstone, the periphery speed of which at the time was 4,355 feet per minute, though it is error to allow testimony for plaintiff as to the speed at which such stones are run in other factories, still it will be held harmless; it not being shown thereby that grindstones had burst in the other factories, and defendant having introduced testimony that in a certain factory similar stones had been run at a speed of 4,200 feet per minute, and that no stone had been broken in that factory for 10 years.

Sherwood, J., dissenting.

Appeal from St. Louis circuit court; Rudolph Hirtzel, Judge.

Action by Ernestine Helfenstein against Philip Medart and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Nathan Frank, Seymour D. Thompson, and Chas. P. & J. D. Johnson, for appellants. J. Hugo Grimm and Rassleer & Schnurmacher, for respondent.

BURGESS, J. The widow of William Helfenstein brought this suit in the circuit court of the city of St. Louis to recover damages for the death of her husband. The venue was subsequently changed to the circuit court of the county of St. Louis, where a trial was had to a jury, resulting in a verdict and judgment in favor of plaintiff in the sum of \$4,500. Defendants bring the case to this court by appeal for review.

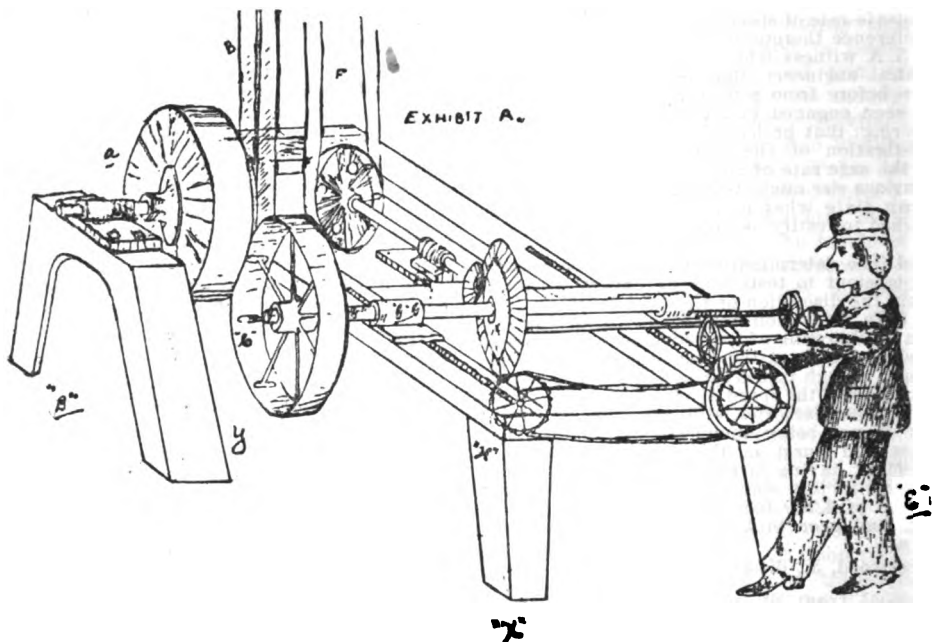
At the time of the accident, and for eight months prior thereto, deceased was in the employ of defendants as a grinder in their factory in the city of St. Louis, and as such it was his duty to polish iron or steel cast-

ings by holding them in contact with a grinding stone revolved by means of a pulley and belting operated by steam power. The petition contains the following averments: "But plaintiff states that defendants, wholly neglecting and disregarding their duty in that behalf, furnished said Helfenstein with a grinding stone, on said 8th day of February, 1893, of an unusually large circumference, and connected the same by belting with a pulley of large circumference, which had theretofore been used in connection with a considerably smaller grinding stone; that by connecting this larger stone with said large pulley the stone was revolved at a very high and dangerous rate of speed; and that defendants knew, or by the exercise of ordinary care might have known, that by connecting said grinding stone with said pulley as aforesaid, and causing said stone to revolve at the high rate of speed aforesaid, the said stone would fly to pieces, and injure any person who happened to be near it. And plaintiff states that on February 8, 1893, while said Helfenstein was in the employ of defendants as aforesaid, and was standing in front of the grinding stone, at which he had been working until a short time before, said grinding stone suddenly flew to pieces, on account of the high speed at which it was revolving, and the parts thereof, and also an iron splasher which was fastened in front of it, were violently hurled against said William Helfenstein, striking him in the right hip, and wounding and injuring him." The answer, after denying all allegations of negligence contained in the petition, alleged that the bursting of the stone was one of the dangers assumed by deceased in his employment; that, at the time it burst, deceased, knowing the dangers incident to his action, had voluntarily placed himself in front of the stone, while not in the discharge of his duty, and was by reason thereof guilty of contributory negligence. Plaintiff replied to the answer, and denied all new matter contained therein.

At the time of the accident defendants conducted a large factory in said city for the manufacture of all sizes of iron pulleys. The pulleys manufactured by them consist of a cast-iron hub, with radiating spokes, with a flat circular rim of wrought iron or steel attached to the ends of the spokes. A part of the process of manufacture was to grind down the edges and faces of the rims of the pulleys by means of grindstones, mounted in machines constructed for that especial purpose. There were six or seven of said machines in use in defendants' factory, in the grinding department, which department was under the supervision of a foreman, and it and other departments were under the supervision of a superintendent. At the time of the injury deceased was about 28 years of age, and up to the time he entered the service of defendants he had been a whitewasher. For about a month after he

began work he was called a "handy man," and was then put to work grinding stones. No instructions were given him, but the man working nearest to him in the same business gave him advice and assistance. He was still working on small pulleys, at which new hands were put to grinding. He did not know the speed of the grindstone, nor did the foreman the limit of speed at which they might be safely run. Each grinding machine consisted of a heavy wooden square frame about — feet long, 7 feet wide, and $3\frac{1}{2}$ feet high. At the left and rear corner of these machines, the grindstone used for grinding the pulleys was mounted on a shaft or axle, the latter being at right angles with the frame, and the face or outer edge of the

stone being towards him. An iron shaft was set in the frame running from right to left in a way to admit of a mandrel being keyed to it, so that one end projected beyond the frame in front of the grindstone. To the end of the mandrel the pulley to be ground was attached temporarily, and the shaft and mandrel were geared in the frame in such a way that a grinder operating the machine could, while standing at a corner of the frame diagonally across from the stone, place any part of the pulley to be ground in contact with the stone, by means of a lever with a circular handhold fixed to the machine at that corner. The position of the grinder and plan of construction of the machine will appear from the following map:



A being the grindstone, C the pulley being ground, G the mandrel, and E the position at which the operator stands.

The pulley being ground could not be placed in contact with the stone, or the grinding itself done, without the operator stood at that point and manipulated the lever mentioned, although it was necessary for the grinder, in the discharge of his duties, at times, while a stone was revolving, to leave his position, and pass in front of the stone. There was, at or near E, a brake, so that, when the operator got the pulley in proper contact with the stone, he could, by applying the brake, keep it there. It was sometimes necessary for operators of the machines to get in front of the stone, when the edge of the pulley was being ground, to see if it was grinding true, and when oiling, cleaning the machine, or hammering the pulleys. When hammering the pulleys, the operator would sometimes be in front of the stone as long as two hours at a

time, during which time the pulley was stopped. There was a splasher in front of the stone to prevent the operator being splashed with water while working in front of the stone. When the grinder was standing at the lever, he was about seven feet out of the line of the centrifugal motion or force of the revolving stone, and out of the way of flying fragments from the stone in case of its flying to pieces. The stones used in the machines, when first placed in them, varied in size from 48 to 72 inches in diameter. The engine and shafting used in the factory were geared so as to cause the stones to revolve, when the machine was in operation, at two different rates of speed, according to the size of the stone used therein, designated by the grinders "fast speed" and "slow speed." The fast speed was obtained by means of a belt and pulley on the main or driving shaft 36 inches in diameter and another on the stone shaft or axle 18 inches in diameter, and the slow speed

by means of a 30-inch pulley on the main shaft and a 24-inch one on the stone shaft; and a change of the speed was effected by transferring the belt from one set of pulleys to the other. It does not appear that either the grinders or the defendants knew the number of revolutions the stones made at either rate of speed, but it does appear that the stones had been run in the factory for many years prior to the accident to deceased at the speeds mentioned, and that that speed was maintained because it was the rate at which the grinding of the pulleys could be done to the best advantage. The stones generally wore out in the machines, or were ground down to a size at which they were discarded, in from two to five weeks, according to their size and texture. When a fresh stone was required by a grinder for the machine he was operating, it was his duty to select one for himself, suited to his purpose, from the stock on hand, and to call on the foreman of the department to detail other hands to assist him in mounting the stone in the machine. The cylinder of the engine made 102 revolutions in a minute, and the main shaft about 163 revolutions per minute. No change of speed could be made while the machinery was in motion, and was generally made during the noon hour, or after working hours. Usually the grinder determined for himself when he would change the speed, but in this instance, when deceased put in the new stone, which was about 51 inches in diameter, he called on the foreman, and asked him whether he should change the pulleys and put on the slow speed, and the foreman told him that he did not think it was necessary, and the change was not made. The same afternoon of the day in which the stone was adjusted, and a few minutes before quitting time, when deceased was standing at a point marked X on the plat, and about two feet out of the line of the stone, removing his overalls, the stone flew to pieces, and he was struck by pieces of the stone, or by the splasher, and received injuries from which, within two days thereafter, he died. The deceased had not quit work at the time of the accident. The stone was then grinding the edge of a pulley, and, when it burst, broke out some of the spokes of the pulley. There was an unwritten rule of defendants, which deceased knew, forbidding the employes from changing their clothing before the whistle signal for them to quit was blown, though this was often done without the knowledge of the foreman, and while the machinery was in operation. The stone that burst was not exceeding 51 inches in diameter, and the evidence showed that its periphery speed, with the engine running 102 and the gearing shown to have been in use at that time, was 4,355 feet per minute, while the maximum rate of safe speed at which such a stone could be run was 3,400 feet periphery measure per minute. Ten or twelve different stones had burst in the factory in the 13 years preceding the accident, about

one-half of which showed no defects or cause for their bursting, running at fast speed, and the other half at slow speed. Of one or two of these, deceased had knowledge at the time of his injury.

At the close of plaintiff's evidence, defendants prayed the court to instruct the jury "that, under the pleadings and evidence, plaintiff is not entitled to recover." The court refused to give the instruction, and defendants duly excepted. The same instruction was offered by defendants at the close of all the evidence. The court refused to give it, and defendants again excepted.

The following instructions were given on behalf of plaintiff, to the giving of which defendants duly saved their exceptions: "(1) The court instructs the jury that if they believe, from the evidence, that on February 8, 1893, the plaintiff was the lawful wife of William Helfenstein; that prior to and on said day the said William Helfenstein was in the employ of defendants as a grinder; that on said day, while in the discharge of his duties as such grinder, he was, without negligence on his part directly contributing thereto, injured by the bursting of the grinding stone at which he was at work, and subsequently died from said injury; that said grinding stone burst because it was revolving at too high a speed; and that defendant knew, or by the exercise of ordinary care might have known, that said stone was revolved at said high speed, and, as a result, was likely to burst,—then your verdict must be for the plaintiff. (2) The court instructs the jury that it was the duty of defendants, in operating their machinery, to use and exercise care, skill, and caution, to protect the lives and persons of its employes, and not to expose them to unusual danger from the operation of said machinery; and the degree of care must be proportionate to the dangerous nature of the means, instruments, and machinery used. (3) The jury are instructed that if they believe, from the evidence, that the agent of defendants, whose duty it was to superintend the work of the department in which Helfenstein was working, knew, or by the exercise of ordinary care and prudence might have known, that said grinding stone was being revolved at a high rate of speed, and likely to burst as a result thereof, then such knowledge of said agent would be the knowledge of defendants, and the failure to know that said stone was so revolving and was likely to burst was the neglect of the defendants. (4) In determining whether plaintiff's husband, William Helfenstein, exercised reasonable care in working at the stone in question, you are instructed that he was required to exercise such care as a careful and prudent grinder would have exercised under like circumstances. (5) Although you may believe, from the evidence, that the deceased, William Helfenstein, knew, or by the exercise of ordinary care might have known, that

the stone in question, besides running at a high speed, was likely to burst as a result thereof, and continued to work at the same, yet, if the danger was not imminent and obvious, and not such as to threaten immediate injury to him from the use of said stone at the time, and under the circumstances of the injury, or if he might have reasonably supposed that he could safely work about it by the use of care and caution, he cannot be said to have been guilty of such contributory negligence as to defeat a recovery by plaintiff, provided that, while working at said stone, he exercised such care as a careful and prudent man of his calling would exercise under like circumstances. (6) The court instructs the jury that if they find, from the evidence, that the stone was being revolved at too high a speed, and that it was likely to burst in consequence thereof, yet, if you find that, while the situation was sufficiently serious to arouse in plaintiff's husband a suspicion or fear of danger, and that, under the circumstances, Helfenstein submitted to defendants' foreman the question whether or not the pulleys should be changed so as to reduce the speed, and was informed by him that there was no necessity to change the pulleys, and that plaintiff's husband relied upon what the foreman said, and upon that reliance used the machine at the speed in question, then the mere fact of Helfenstein's undertaking to work at the stone under those circumstances would not make him guilty of contributory negligence, so as to prevent a recovery in this action by the plaintiff, provided you further find and believe, from the evidence, that the foreman aforementioned had authority to regulate and advise what pulleys the grinders should use, and what speed should be applied for the running of said grindstones. (7) The court instructs the jury that if they find, from the evidence, that the injury to and death of plaintiff's husband directly resulted from negligence or carelessness of defendants in operating their machinery at the time of the accident, as defined in these instructions, then such injury received was not the result of the ordinary risk and danger assumed by plaintiff's husband when he entered into defendants' service, nor naturally incident thereto. (8) By the term 'negligence,' as used in these instructions, is meant the failure to exercise the care usually exercised by persons of ordinary caution and prudence under like circumstances, and by the term 'reasonable care,' or 'ordinary care,' is meant such care as is usually exercised by persons of ordinary prudence under similar circumstances. (9) The court instructs the jury that the fact that William Helfenstein, at the time of the injury to him, was taking off his overalls, and that it was against defendants' rules so to do will not itself prevent a recovery by plaintiff, unless, in so removing his overalls, and standing at the place where he was

hurt, he was guilty of an act of negligence directly contributing to his injury; that is to say, unless you find that, but for the fact of his removing his overalls, and standing at said place, he would not have been injured, he cannot be found guilty of contributory negligence on that account. (10) The court instructs the jury that, if they find for the plaintiff, they may award her such sum in their verdict, not exceeding five thousand dollars, as they may deem fair and just, under the evidence in this case, with reference to the necessary injury resulting to her from the death of her husband."

The court slightly altered and gave the following instruction (No. 2) offered on behalf of the defendants, and also gave the following instructions (Nos. 1 to 5, inclusive) offered on behalf of the defendants: "(2) And the jurors are also instructed that if they believe, from the evidence, that the statement by the defendants' foreman to deceased, to the effect that he did not think it was necessary to change the pulleys on the shafting which propelled the stone in question from a fast to a slow speed, was not in the nature of a command or direction by the said foreman, as such, to the deceased, as an employé, but was a mere expression of opinion upon the part of the foreman relative to the matter, and that the deceased, under his employment, was empowered to change or to have the said pulley changed from a fast to a slow speed as in his judgment was necessary, then the defendants are not liable in this action, because of the said advice of, or opinion expressed by, said foreman." "(1) The jurors are instructed that if they believe, and find from the evidence, that the deceased knew that there was danger of the stone in question bursting while the same was revolving, and that, so knowing, he stood in front of said stone, in a position where he was liable to be struck with pieces of the same, in the event it flew to pieces; that it was not necessary, in the discharge of the duties of his employment, to so stand in front of said stone, and while thus in front of it the same flew to pieces, and a piece thereof or the iron splasher struck him, inflicting the injuries from which he died; and that he was so injured by reason thereof,—then the deceased was guilty of contributory negligence, and plaintiff is not entitled to recover, even though the jurors may also believe and find that the defendants were guilty of negligence in running said stone at an unsafe speed. (2) The jurors are also instructed that if they believe, from the evidence, that the speed at which the stone in question was revolving at the time it broke into pieces was such speed as persons of ordinary prudence would have adopted in running stones of similar dimensions, in similar machines, under similar circumstances, then they should find a verdict in favor of defendants. (3) And if the jurors believe that the said stone was being run at a reasonably

safe speed at the time, and that it broke in pieces from some unknown cause, or some cause that the defendants by the exercise of reasonable care could not anticipate or foresee, then they are not liable in this action. (4) The jurors are also instructed that if they believe, from the evidence, that the stone in question, at the time it broke in pieces, was being revolved or run at a rate of speed at which stones of similar kinds and dimensions are customarily run without breaking in pieces, and that the defendants had no reason to apprehend that the stone would burst in pieces, then they were not guilty of negligence in the premises, and the verdict should be in their favor. (5) And if the jurors believe that the deceased knew that stones of the kind in question were generally used at the speed testified to, and, while being used in the manner testified to, were liable to fly in pieces and injure persons working about the same, and thereafter continued in his said employment, and working around said stone, then such danger was one of the risks incident to his employment, which he thereby assumed, and plaintiff is not entitled to recover."

1. The first point insisted upon by defendants is that, at the time deceased received the injury from the effects of which he died, he was not in the discharge of his duty towards defendants, but was in a place of danger not in the line of his duty, which he voluntarily assumed, and for which they are not liable. It is not claimed that deceased was, at the time of his injury, violating any rule of the company made by it for the protection of those in its service, but that he was violating a rule forbidding its employes from changing their clothing before quitting time, and, in order that he might do so without being observed by the foreman, he voluntarily placed himself in a place of danger. While the injury was on the right side of the back, near the lower end of the spine, extending to the right buttock, which would seem to indicate that he had his back turned towards the stone at the time of its bursting, it does not appear that he was necessarily neglecting his duty at the time. The stone was still grinding on the pulley. The evidence did not show that the violation of the rule by deceased had anything whatever to do with the flying to pieces of the stone. On the contrary, it tended to show that its rapid periphery speed did cause it. In *Beach, Contrib. Neg.* (2d Ed.) § 45, it is said: "Some mere collateral wrongdoing by the plaintiff that has no tendency to occasion the injury cannot, of course, avail the defendant, through whose negligence the injury has been suffered." So in *Baker v. City of Portland*, 58 Me. 190, it is said: The fact that the plaintiff "was smoking a cigar in the streets in violation of a municipal ordinance, while it might subject the offender to a penalty, will not excuse the town for a neglect to make its ways safe and convenient for travelers, if the commis-

sion of the plaintiff's offense did not in any degree contribute to produce the injury of which he complains." *Beach, Contrib. Neg.* (2d Ed.) § 45. The violation of the rule by deceased in changing his clothes before quitting time was merely collateral to the accident, and had no more to do with producing the injury than the smoking of the cigar by plaintiff had in the *Baker Case*. There was no rule prohibiting operatives from going in line with the stone while it was running. On the contrary, their duties frequently required them to do so, and, when hammering on the pulley, to remain in line with the stone for as long as two hours at a time. Moreover, it appeared that deceased was not standing on a line with the stone, but that he was at least two feet to one side of a direct line from it, in the direction in which he was standing. The case of *Schaub v. Railway Co.*, 106 Mo. 74, 16 S. W. 924, is not, we think, in point. In that case deceased left his post of duty on top of a moving car, swung himself off on one side, and collided with another car standing on a side track, which caused his death; and it was held that the railroad company was not liable. Now, in the case at bar, if deceased, while changing his clothing, had by his own volition come in contact with some part of the machinery or its appliances, about which he was engaged at work, it may be conceded that defendant would not be liable; but that is not this case. In the case of *Francis v. Railroad Co.*, 110 Mo. 387, 19 S. W. 935, Francis, an employe of defendant, was killed while violating one of its rules, made for the protection of its employes, forbidding them from getting on switch engines while in motion; and it was held that the company was not liable. In the case in hand, deceased did not, by reason of the violation of any rule of the company, cause the stone to burst, or by any act of his own come in contact with it, and does not come within the rule announced in either of those cases. Whether or not deceased was, under the evidence, guilty of negligence which contributed to his injury was, we think, for the consideration of the jury.

It is next contended that, even if deceased did not leave his post of duty, still the bursting of the stone, with the resulting injury to him, was a risk or incident of his employment which he voluntarily assumed. While it may be conceded that a "servant assumes the risk, more or less hazardous, of the service in which he engages, he has a right to assume that all reasonable attention will be given by his employer to his safety, and that he shall not be carelessly and needlessly exposed to risks which might be avoided by ordinary care and precaution on the part of his employer." *Boyce v. Fitzpatrick*, 80 Ind. 526. The evidence in this case, however, tends to show that deceased did not assume the hazard, if any, occasioned by the running of the stone at an excessive and dangerous rate of

speed. Defendants' foreman in the grinding room, Daniel H. Markham, testified that, when deceased went to go to work on the stone, he asked him whether he should change the pulleys or not, and he told him that it was not necessary. To change the pulleys was to change the speed of the stone. While deceased may have been familiar with the operation of the machinery, he did not know what was an unsafe rate of speed for the revolution of the stone, and had the right to rely upon the superior, or supposed superior, knowledge and judgment of his foreman with respect thereto, and to act in accordance therewith, and in so doing did not assume the danger attending the running of the stone at an excessive and dangerous rate of speed. It is true that he assumed all risks that were reasonably incidental to the character of his work, but he did not assume risks which might occur by reason of the negligence of his employer, and which he could not have been expected to anticipate. Plaintiff's ninth instruction, given upon this theory of the case, was in accord with what has been said, and, when considered in the light of the evidence, we think, free from objection. But it is argued that this instruction is in conflict with the first instruction given on the part of defendant. A careful reading of the instructions has satisfied us that they are not subject to this objection. They were simply based upon adverse theories of the questions presented by them as disclosed by the evidence, and not upon the same state of facts. The evidence was sufficient to justify the instruction upon either theory. It was the evidence that was conflicting with respect of the facts covered by these instructions, and not the instructions themselves.

A further contention is that there was no evidence tending to show that the stone was, at the time of the accident, being run at an unsafe rate of speed. This contention is predicated upon the assumption that the witness Flad, who testified as an expert in behalf of plaintiff to the effect that the periphery rate of speed at which the stone was running at that time was not safe, was not qualified to testify as an expert with respect to such matters, and that there was no evidence aside from his statements which tended to show the rate of speed to be unsafe. The witness testified that he was a mechanical engineer; that he was graduated at the Washington University in 1881, and since then had been engaged in both civil and mechanical engineering; that he had given some study to the investigation of the strength of grindstones, and the safe rate of speed at which such stones, differing in diameter from 40 to 72 inches, might be run and were run in similar establishments to that of defendants in the city of St. Louis, and thought that he could state what was a safe rate of speed; and that, for a stone 51 inches in diameter, the periphery or surface speed should not exceed 3,400 feet per minute. It has been said that "a witness, other-

wise qualified, may express an opinion on a matter pertaining to his special calling or profession, although his knowledge of that particular matter has been derived from study rather than from actual experience. It is the doctrine of the courts that study of a matter without practical experience in regard to it may qualify a witness as an expert." *Rog. Exp. Test.* (2d Ed.) p. 45, § 19; *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743; *Lawson, Exp. Ev.* p. 10, rule 6. Under the rule thus stated, the witness was, we think, qualified to testify as an expert. Moreover, it was for the court to determine whether or not the witness was qualified to testify as an expert; and as his competency to testify as such was a matter resting largely in the discretion of the court, and as it does not appear that such discretion was abused, the judgment should not, in any event, be reversed upon that ground. There was other evidence tending to show that the surface rate of speed of the stone at the time approximated 4,355 feet per minute.

During the examination of the witness last named by counsel for plaintiff, there occurred the following: "Q. You have heard the testimony given during part of this day, have you not? A. Yes, sir. Q. With that testimony in mind, are you in a position to say to the jury what the customary speed of the grinding stones as used by the Medart Patent Pulley Company is, and where they are used for a similar purpose? A. If you ask me whether they were similar, I would say, 'Yes.' Q. Are you able to say, from your experience, what the customary speed is at which stones may be run when grinding, and what is a safe rate of speed? A. I can say what it is in my opinion. Q. What would, in your opinion, be the customary highest rate of speed a grinding stone of 51 inches in diameter and 6 or 7 inches in width might be run in polishing a pulley? By Defendant: We object to that because that is a matter for the jury to decide, and, besides, it is immaterial, irrelevant, and has no bearing on the issues of the case." This objection was overruled, and defendants excepted. It is now insisted that the witness was allowed to state a conclusion to the jury, based upon the hearing of a part of the other testimony in the case. It is well settled that an expert witness should not be allowed to give his opinion, as such, upon a part of the facts in the case; but it will be observed that the objection in this instance did not go to that question, and only went to the last question. Hence the rule invoked by counsel for defendant is not applicable to it.

A still further objection is urged against the testimony of this witness, in that he was permitted to testify, over the objections of defendants, to the rate of speed of similar grindstones in other factories engaged in a similar business to that of defendants. It has been repeatedly held, in actions for damages on the ground of negligence, that evidence, when offered on the part of de-

fendant, as to the custom of other persons, or corporations in the use of the same kind of instrumentalities or appliances to that alleged to have caused the injury in question, or their manner of use, was immaterial, and furnished no defense to the action. *Koons v. Railroad Co.*, 85 Mo. 592; *Hosic v. Railway Co.*, 75 Iowa, 683, 37 N. W. 963; *Hamilton v. Railroad Co.*, 36 Iowa, 31; *Earl v. Crouch* (Supp.) 16 N. Y. Supp. 770; *Wright v. Boller*, 42 Hun, 77; *Railway Co. v. Wright*, 115 Ind. 378, 16 N. E. 145, and 17 N. E. 584; *Metzgar v. Railway Co.*, 76 Iowa, 387, 41 N. W. 49; *Railroad Co. v. Mugg*, 132 Ind. 168, 31 N. E. 564. The defendants could not in any way be held responsible for the negligence of others, and this evidence was therefore immaterial, and should have been excluded; but, as it did not show that any person had been injured by the bursting of grindstones in other factories, we do not think the judgment should be reversed upon that ground alone. And especially do we think this should not be done when the evidence is considered in connection with that of defendants' witness Deslinger, superintendent of the Globe File Company, which showed that stones in that company, similar to the stone which flew to pieces and caused the injury to deceased, had been run up to a speed as high as 4,200 feet per minute, and that not one stone had broken in that establishment for 10 years. When the evidence in regard to the matter now under consideration is considered altogether, it seems to us to be more in favor of defendants than against them.

It is also insisted that there was a fatal variance between the allegations of the petition and the proofs, or, rather, a failure of proof. It is quite clear to us that there was not a failure of proof, and that the petition, when considered as a whole, stated a good cause of action. At most, there was but a variance between the allegations and the proof, and that question cannot be raised for the first time in this court. While the petition alleged that it was the duty of the defendants to furnish deceased with good and reasonably safe and sufficient machinery with which to perform his work, and to see that the machinery at or near which he was set to work was in a reasonably safe condition, it also alleged that defendants, disregarding their duty, furnished deceased with a grinding stone of unusually large size, and by carelessly and negligently adjusting it caused it to revolve at an excessive rate of speed, in consequence of which it flew into fragments, and caused the injury from which he died. The averments were not alone that the grindstone was unsafe, but that the rate of speed at which it was revolved was unsafe; and the evidence tended to sustain that theory of the case. Clearly, there was not a failure of proof.

Plaintiff's instructions are also criticised, and numerous objections urged against

them, but, after a careful reading and comparison of them with those given in behalf of defendants, we are unable to see the force of the criticisms, and think them unwarranted. When taken altogether, the instructions presented the case very fairly to the jury. Finding no reversible error in the record, the judgment is affirmed.

GANTT, P. J., concurs. SHERWOOD, J., dissents.

HANDWERKER v. DIERMEYER et al.

(Supreme Court of Tennessee. July 22, 1896.)

MUTUAL BENEFIT INSURANCE—BENEFICIARIES—VESTED RIGHTS—POLICY PAYABLE TO WIFE—DEATH OF BENEFICIARY BEFORE MEMBER—EFFECT.

1. The laws of a mutual benefit society and its certificate authorized the member to dispose of the certificate by will. A member, whose certificate was payable to his wife, signed a paper addressed "to the officers and members," which recited that, "it is my will that the benefit named in this certificate be paid to F., my wife." The paper was not attested nor probated as a will. *Held*, that such paper gave the wife no vested interest in the certificate.

2. The laws of a mutual benefit society provided that a member might surrender his certificate with directions to whom a new one was to be made payable, and that the old certificate should thereupon be canceled, and a new one issued according to such directions. *Held*, that where a member survived his wife, to whom his benefit certificate was payable, the certificate was his property, and her heir acquired no interest in the fund through her on her death.

3. A wife, to whom mutual life policies issued on the life of her husband are made payable, does not become vested with an interest which is a separate estate on the issuance of the policies; but the policies are choses in action of the wife, and on her death before the death of her husband they become his property.

Appeal from probate court, Shelby county; J. S. Galloway, Judge.

Judicial settlement of the account of J. G. Handwerker, as guardian of Mary Getz and Elizabeth Diermeyer, formerly Elizabeth Croisant. From the order of distribution the guardian appeals. Reversed.

Wm. M. Randolph & Sons, for appellant.
W. B. Glisson, for appellees.

McALISTER, J. The question presented upon this record is in respect of the proper distribution of a fund by a guardian between two wards. The facts are practically undisputed, and are thus clearly stated in the brief of counsel for the guardian, viz.: Prior to the year 1879, Frances Croisant, then a widow, married George Getz. Her first husband's name was Croisant, and by him she had two children, Elizabeth Croisant and Lewis Croisant. After her marriage to George Getz, she had two children by him, Frances and Mary Getz. During his lifetime, George Getz, the husband, took out a benefit certificate in the

Knights of Honor, which was made payable to his wife, the said Frances Getz. He also took out two policies of life insurance in the New York Globe Mutual Insurance Company, which were also payable to his wife, Frances Getz. Subsequently, in the year 1879, during the yellow fever epidemic, the following members of the family died intestate, and in the following order: First, Lewis Croisant, one of the children of the first marriage; then Mrs. Frances Getz, the mother; then George Getz, the husband; then Frances Getz, one of the children of the second marriage. At the time the benefit certificate was taken out, and at the date of the death of all the parties, the laws of the Knights of Honor provided, viz.: "Each member, upon application, shall enter upon his application the name or names of his family or those to whom he desires his benefit paid, subject to such further disposal of the benefit as the member may hereinafter direct, in accordance with the laws of this order; and they shall be entered in the benefit certificate according to such direction." This further law was also in force, to wit: "A member may at any time, while in good standing, surrender his benefit certificate with the direction to whom a new certificate is to be made payable, and a fee of fifty cents shall be forwarded by the reporter of his lodge under seal to the supreme reporter, who shall thereupon cancel the old certificate, and cause a new certificate to be issued to such member, payable as he shall direct." The two policies of life insurance were taken out by George Getz in the Globe Mutual Life Insurance Company, and each policy was for \$1,000. The policies were payable to Frances Getz, the wife of George Getz. The record shows that J. G. Handwerker qualified as the guardian of Elizabeth Croisant and Mary Getz about the 17th of May, 1890. The guardian collected the sum of \$2,600, \$2,000 on the benefit certificate in the Knights of Honor, and \$600 on the policies in the Globe Mutual Life Insurance Company, which was the pro rata on these policies, the company having become insolvent. About the 1st of October, 1894, the ward, Elizabeth Croisant, married her present husband, W. C. Diermeyer. On the 16th of October, 1894, J. G. Handwerker, as guardian, filed a report of his accounts with his said two wards for the years 1888-1894, inclusive. This report did not attempt to make any division of the two funds, and again called attention to the fact that the court should divide the same. After some further reports and references not necessary to be mentioned, the court adjudged that the ward Elizabeth Croisant was entitled to one-half of the \$2,000 from the benefit certificate in the Knights of Honor, and one-half of the \$600 from the two life policies; and that the ward Mary Getz was entitled to the other half of said two funds.

From this decree the said J. G. Handwerker, guardian, appealed to the court, and has assigned errors.

The third assignment is as follows: "The court erred in not finding and decreeing that under the laws of the Knights of Honor and the terms of the benefit certificate, Frances Getz, wife of George Getz, to whom the certificate was payable, took no vested interest in the certificate, and the only interest she had therein was a mere expectancy; and upon her death, before her husband, this expectancy ceased, and upon the death of George Getz, this certificate descended from him to his two children, Frances Getz and Mary Getz, in equal proportions, or \$1,000 each. And that upon the death of the child Frances Getz her \$1,000 passed equally to her full sister, Mary Getz, and her half-sister, Elizabeth Croisant,—that is to say, \$500 to each,—making Mary Getz the owner of \$1,500, and Elizabeth the owner of \$500, instead of \$1,000." The fourth assignment is that the court erred in decreeing that the ward Elizabeth was entitled to one-half of the \$600 derived from the two policies of insurance, and in not decreeing that she was only entitled to one-fourth of said fund, to wit, \$150. The fifth assignment is that the court erred in not decreeing that on the death of Frances Getz, the wife, the two life insurance policies payable to her, being choses in action, became the property of George Getz absolutely by reason of the fact that he was her husband, and on his death the two policies passed to his children, Frances and Mary Getz, one-half to each, and upon the death of the child Frances Getz her \$300 passed one-half to her sister, Mary Getz, and one-half to her half-sister Elizabeth Croisant; making Mary the owner of \$450 and Elizabeth the owner of \$150. As opposed to the contentions of the guardian, it is insisted by counsel for Elizabeth Croisant that, the insurance policies having been made payable to Frances Getz, the wife, she immediately became vested with an interest of which she could not be deprived; citing Mill. & V. Code, § 3135; Gosling v. Caldwell, 1 Lea, 454. The argument is that the interest with which she became vested was a separate estate, and that as such, upon her death, it went to her three children equally under the statute of distribution; citing Insurance Co. v. Booker, 9 Heisk. 619; Tennessee Lodge v. Ladd, 5 Lea, 721; Mill. & V. Code, § 3278, subsec. 3. In respect to the benefit certificate in the Knights of Honor, two contentions are made: First, it must be treated as insurance, and is governed by the rules above cited; second, if it does not pass under the statute of distribution as insurance, it passes under the terms of the benefit certificate and the laws of the order which authorize the member to dispose of it by will, which was done in this case. It is insisted the record shows that when George Getz applied to become a member of the order he directed his benefit to be

made payable to his wife, Frances Getz. That when he took the third degree, and received his benefit certificate, he made this disposition of it by will, viz.: "To the officers and members of the Supreme Lodge Knights of Honor—Brothers: It is my will that the benefit named in this certificate be paid to Mrs. Frances Getz, my wife,"—signed by George Getz. The insistence, therefore, is that the direction of the payment made by George Getz in his benefit certificate was his will, and although the legatee, Mrs. Getz, died before the testator, that her issue surviving the testator would take the estate bequeathed to her. Mill. & V. Code, §§ 3036, 3276. We think this contention cannot be sustained. In the case of Tennessee Lodge v. Ladd, 5 Lea, 721, in speaking of a similar direction in a benefit certificate, this court said, viz., "Such an instrument, attested by two witnesses, might be proved as a will of the fund under our law," citing McLean v. McLean, 6 Humph. 452. It may be remarked, in the first place, that there is no proof in this record of the attestation of the said alleged will by two witnesses, or, indeed, by any witness. Said instrument has not been probated as a will, nor can we see from this record how it is susceptible of such formal proof. It is very clear to us that the wife took no vested interest in this certificate, but a bare expectancy, which was contingent upon surviving her husband. Under the rules and by-laws of the Knights of Honor, any member of the order has a right to change the beneficiary in his certificate, and as long as he lives, the said certificate is within his absolute power of disposition. In the case of Association v. Wynne, 96 Tenn. —, 33 S. W. 1045, the policy provides, viz.: "The member or insured may, upon the approval of the president, change the beneficiary herein named by surrendering this policy, and designating another beneficiary, having a lawfully insurable interest in the life of the insured, in which event the within-named beneficiary shall have no claim upon, or be entitled to receive anything whatever from, the association." In respect of that policy the court said, viz.: "Under such a policy the beneficiary acquires no vested interest until the death of the assured occurs. Until the event takes place, owing to the right of revocation which is by the condition reserved to the assured, the beneficiary has a mere expectancy, depending upon the will and act of the assured, and this expectancy does not rise to the dignity of a property right." We think, upon the death of Frances Getz, her child acquired no interest in said fund through her, but the certificate remained the property of the father, George Getz, and upon his death descended to Mary Getz and Frances Getz, his two living children. Elizabeth Croissant, the stepdaughter, could not inherit any part of the fund from her stepfather. Upon the death of Frances Getz, the daughter, her interest passed to her full sis-

ter, Mary, and her half-sister, Elizabeth Croissant, share and share alike.

If it be assumed or insisted by counsel for Elizabeth Croissant that the benefit certificate was the property of Frances Getz, it being a chose in action, it became the property of the surviving husband. The same may be said in respect of the life policies,—although payable to Mrs. Getz, they were mere choses in action, which, upon her death, became the absolute property of the husband. It has been held that a life policy is a mere chose in action. See *Scobey v. Waters*, 10 Lea, 551; *Protection Co. v. Hamilton*, 5 Sneed, 269; *Olmsted v. Keyes*, 85 N. Y. 593. In *Rice v. McReynolds*, 8 Lea, 37, the court said, viz.: "We take it to be too clear for argument or need of authority that the husband is entitled to receive and reduce to possession during coverture all choses in action, whether in the form of notes, debts, or legacies belonging to the wife at the time of their marriage or accruing to her afterwards. If he fails to reduce them to possession during the coverture, and survives the wife, then his administrator, as personal representative, is entitled to them, and may sue for and recover them. *Tune v. Cooper*, 4 Sneed, 296." In *re Wills of Miller*, 2 Lea, 57, 58; *Joiner v. Franklin*, 12 Lea, 422; *Wade v. Cantrell*, 1 Head, 346. The question now being decided rose on the case of *Olmsted v. Keyes*, 85 N. Y. 593, cited in the able argument of counsel for defendant in error. In that case a policy was made payable to the wife. She died before her husband. The question was presented in respect of the distribution of the proceeds. The court said: "The general rule of the common law is that the husband may, during the joint lives, reduce his wife's choses in action to possession, and thus appropriate them to his own use; or he may release them or assign them, so as to bar the wife's right to survivorship. But during the joint lives the husband cannot assign or release so as to bar the wife surviving her choses in action, payable after his death, or upon contingencies or at times which do not come or happen until after his death. In such cases, however, his assignment is good as against the whole world but his wife surviving. A husband can dispose of his wife's property in expectancy against every one but the wife surviving. All the choses of the wife, not reduced to possession during the joint lives, by the common law passed to the husband upon her death,—all, without any exception,—and there is no authority to the contrary; and this is true whether such choses are then payable, or are mere reversionary or contingent interests payable at a future day, or mere possibilities. If, after his wife's death, her husband does not release, assign, or reduce to possession her choses in action during his lifetime, then after his death his personal representatives are entitled to administration upon them for the benefit of his estate as part of his assets

* * * Now, to apply these principles," continued the court, "to this case, the wife's interest in this policy was a chose in action. At her death it passed to her husband." So that, in any view of the case, Elizabeth Croissant is only entitled to one-fourth of these funds, to wit, the sum of \$500 in the Knights of Honor and \$150 in the policies of insurance. The decree of the chancellor is reversed, and a decree entered here in accordance with the opinion.

LEWIS v. TURNLEY.

(Supreme Court of Tennessee. July 21, 1896.)

PAROL EVIDENCE—LIMITATION OF ACTIONS—SET-OFF.

1. Where the agreement of the grantor to have the insurance covering the buildings on the land conveyed transferred to the grantee, omitted by mistake, is not inserted in the deed because, if inserted, it would have necessitated the rewriting of the deed, parol evidence is admissible to show such agreement.

2. In an action to enforce a vendor's lien, a set-off for failure of the grantor to comply with his agreement to have transferred to the grantee insurance covering buildings conveyed, made at the time of and as a part of the contract of conveyance, is not barred by limitations, though barred at the time the cross bill setting up such set-off was filed, where it was not barred at the time the original complaint was filed.

Appeal from chancery court, Dyer county; John S. Cooper, Chancellor.

Suit by H. C. Lewis, administrator, against C. E. Turnley. From the decree both parties appeal. Reversed.

W. S. Draper and Moore & Wells, for complainant. W. E. Bell and Hays & Biggs, for defendant.

McALISTER, J. This bill was filed in the chancery court of Dyer county for the enforcement of a vendor's lien and the collection of a note. The note was given for a one-half undivided interest in a lot in the town of Fowlkes, Tenn., upon which was located a gin mill, machinery, etc. The note was executed by the defendant, C. E. Turnley, payable to the order of William Harper. Harper died in January, 1891, and this bill was filed in 1892 by his administrator, H. C. Lewis, against C. E. Turnley, the maker of the note. The defendant, Turnley, filed an answer and cross bill, in which he admitted the purchase of the land and the note in suit. In his cross bill he charged that there were valuable buildings and machinery on the land, which greatly enhanced its value, and that these improvements constituted the principal inducement to the trade. It is further charged that at the time of said trade the vendor, William Harper, had said improvements insured to the amount of \$1,600, which insurance did not expire for several months; and that it was a condition of the trade for the land that the policies of insurance should be transferred to defendant and his partner,

King, who had purchased the other one-half interest in the property; that Harper, although often requested to make the transfer, failed to do so; and that, while the improvements were so insured in the name of Harper, a fire occurred, which totally destroyed said buildings and machinery. Defendant also charged that said Harper agreed, and that it was part of the consideration of the contract, that, if the property should burn before he complied with his agreement, he would be bound for the insurance; that defendant was thereby damaged to the extent of one-half of said insurance, to wit, the sum of \$800, which amount he seeks to set off against complainant's claim, and recover the excess as a counterclaim. The answer and cross bill were filed in November, 1893. The contract for the sale of the land and improvements was made on the 11th of August, 1886. The original bill was filed in 1892. Complainant demurred to the cross bill, assigning, among other grounds, that said cause of action set up in said cross bill was barred by the statutes of three and six years. This demurrer was overruled by Chancellor Livingston, but the order overruling the demurrer recited that defendant in cross bill is permitted to rely in his answer on the statutes of limitation, which defense was accordingly incorporated in the answer filed to the cross bill. The cause was finally heard by the Honorable John S. Cooper, chancellor, who pronounced a decree in favor of complainant for the sum of \$499.80 balance due on said notes, with interest, and ordered a sale of the property for the satisfaction of said amount, which was declared a lien on the property. The chancellor denied defendant any relief on his cross bill, and dismissed the same, taxing complainant with two-thirds of the costs of suit and defendant with the remaining one-third. Complainant appealed from so much of said decree as taxed him with any part of the costs. Defendant, Turnley, also appealed from the decree of the chancellor dismissing his cross bill and pronouncing judgment against him for the amount of said notes, and declaring the same a lien upon the property. We are thoroughly satisfied, from a careful reading of this record, that it was a stipulation of the original contract that the policies of insurance on the improvements should be transferred to the defendant and to his co-purchaser, King. It is shown that the lot was intrinsically of little value, and that the improvements constituted the material inducement to the trade, and were the real consideration for the purchase notes. The defendant, Turnley, agreed to pay for an undivided one-half interest in this property the sum of \$1,000, and William Harper, the vendor, promised that he would attend to the transfer of the policies immediately. He did not send the policies as he had contracted to do, and several letters were written him by King, calling his attention to this matter. After the lapse of about

two months he did send the policies by mail, but upon examination it was found there had been no transfer by the company to the purchasers. The policies were received on Thursday, and on Saturday night following the buildings and improvements were consumed by fire. The policies, while issued by good and solvent companies, were not collectible by Harper, the vendor, for the reason he had sold and conveyed the property to the defendant; nor were they collectible by the defendant, since there had been no assignment or transfer of the insurance; so that, when the fire occurred, the defendant suffered a total loss of his improvements. The record shows further that when the policies were received on Thursday, and the defendant discovered there had been no transfer or assignment of the insurance, he immediately sent to Dyersburg for an insurance agent to come over to Fowlkes station, where the property was situated, and insure it. The insurance agent promised to come on Monday, stating that he could not come before that time. As already stated, the property was burned Saturday night, before the defendant could procure any insurance. We are satisfied this loss was brought about by Harper's breach of contract to transfer the policies of insurance. It is insisted, however, that the deed from Harper to the defendant, conveying this property, contained no stipulation for the transfer of the policies, and that the proof on this subject was incompetent and illegal, as tending to alter, vary, and contradict the terms of a written instrument. The proof shows that, when the deed and notes were drawn, the defendant insisted they should both recite the stipulation in respect of the transfer of the policies, but that Harper stated that was unnecessary, that the notes would have to be written over again, that he was good, and would stand for the policies being transferred. This contract having been distinctly proved, and the reasons shown why it was not embodied in the written instrument of conveyance, it presents a case where only a part of an entire contract has been reduced to writing, and comes within the rule announced in many cases, but more recently in *Hinds v. Wilcox*, 96 Tenn. —, 33 S. W. 914, and *Steinberg v. Wilcox*, 96 Tenn. —, 33 S. W. 917.

The only remaining question is whether this claim is barred by the statute of limitations of six years. As already stated, the defendant sets up this defense in his answer and cross bill by way of set-off and recoupment. It is provided by Mill. & V. Code, § 3628, viz.: The defendant may plead by way of set-off or cross action: (1) Mutual demands held by the defendant against the plaintiff at the time of action, brought and matured when offered in set-off; (2) any matter arising out of plaintiff's demand, and for which the defendant would be entitled to recover in a cross action; (3) any matter

growing out of the original consideration of any written instrument for which the defendant would be entitled to recover in a cross action; (4) any equities between the defendant and original party under whom the plaintiff claims, which by law have attached to the demand in the plaintiff's hands, and for which the defendant would be entitled to recovery against such original party. *Moore v. Tate*, 87 Tenn. 725, 11 S. W. 935. It is plain that the claim of defendant for a recovery of damages for a breach of this agreement is a proper matter of set-off under the express provision of this section. *Lowry v. Hawes*, 10 Heisk. 688. Is, then, such cross claim barred by the statute of six years? It is admitted by defendant that more than six years had elapsed from the date of the contract to the filing of the cross bill in which this counterclaim was first presented, but the insistence of defendant is that, since this defense is evolved from the consideration of the original contract, the filing of the original bill saves the bar of the statute in favor of the defendant; and such contention we hold to be the law. Says Mr. Wood in his work on Limitations of Actions (volume 2, § 281), viz.: The rule may be said to be that, if a defendant pleads a set-off, the plaintiff may reply the statute; but a set-off is available as a simultaneous cross action would be, and, if it is to be barred at all, must be barred at the time of the commencement of the action. In other words, the bringing of an action by one party saves from the operation of the statute all such claims of the defendant against the plaintiff as are properly the subject of set-off and which are pleaded as a set-off in that action. Where there are cross demands between the parties, which occurred at nearly the same time, both of which would be barred by the statute, and the plaintiff has saved the statute by suing out process, but the defendant has not, it has been held that nevertheless the defendant may set off such demands. *Ord v. Ruspini*, 2 Esp. 569. In that case Lord Kenyon remarked that, as the transactions between the plaintiff and defendant were all of the same date, and as the bills seemed to have been given in the course of these transactions, and for their mutual accommodation, it would be the highest injustice to allow one to have an operation by law, and not the other, and that he would, therefore, hold the latter to be good as well as the former, and suffer them to be set off. The author, in commenting on this case, says: "It will be observed, however, that in this case the demands were similar, and had relation to the principal claim, and, in order to give effect to the last-named rule this condition must always exist;" citing *Mann v. Palmer*, 3 Abb. Dec. 162. In consonance with this text it was held by this court in *Williams v. Lenoir*, 8 Baxt. 395, that upon a proper plea of set-off the statute of limitations will not operate as a bar against de-

fendant's claim, nor run at all after the commencement of plaintiff's suit, in cases of mutual accounts arising between the parties about the same time. And where a plea of the statute of limitations of six years is made to the set-off, it must be stricken out for immateriality. It was further held in that case that the cases of *Stone v. Duncan*, 1 Head, 103, and *Harris v. Snider*, 9 Humph. 743, holding the general doctrine that a debt barred by the statute of limitations cannot be allowed as a set-off do not conflict with this ruling. In accord with *Williams v. Lenoir* are *Railroad Co. v. Parks*, 86 Tenn. 554, 8 S. W. 842; *Dunn v. Bell*, 85 Tenn. 582, 4 S. W. 41; *Caldwell v. Powell*, 6 Baxt. 82. We therefore hold that the set-off pleaded in this case, being evolved from the original consideration, is not barred, for the reason that the principal claim sought to be enforced is not barred, and that Turnley is entitled to recover \$800, without interest, for breach of insurance stipulation. After crediting complainant's claim for balance of purchase money and interest, Turnley will be entitled to a decree for the excess, with costs.

DOUGLAS v. BANK OF COMMERCE et al.
(Supreme Court of Tennessee. June 30, 1896.)

FOREIGN ASSIGNMENT—REGISTRATION—VALIDITY—WHO MAY OBJECT—INDORSEMENT—WHAT LAW GOVERNS—ATTACHMENT—MATURITY OF DEBT—DEMAND FOR PAYMENT—NOTARY'S CERTIFICATE—EVIDENCE OF DEMAND—ATTORNEY'S FEES—ALLOWANCE TO FOREIGN ASSIGNEE.

1. Under Mill. & V. Code, §§ 2809, 2337, 2844, 2890, requiring all deeds for the conveyance of personal property, etc., to be registered, in order to be valid as to creditors or bona fide purchasers, foreign assignments for the benefit of creditors, including personalty situated in this state, to be valid against creditors, must be registered in this state, though they are in accordance with the laws of the state where they are executed.

2. A nonresident attaching creditor is entitled to show that a foreign assignment for benefit of creditors, including personalty in this state, was invalid on the ground that the assignment was not registered in this state.

3. An indorsement in this state, by the drawer, of a draft drawn and accepted in a foreign state, is governed by the law of this state, and therefore demand from and notice to the drawer or indorser is required.

4. A bank which discounted a draft drawn on a nonresident, without knowing that on the same day he had declared his insolvency, was entitled to sue out an attachment against his personalty in this state without causing the draft to be presented for payment.

5. A demand made at a bank where the note was, on its face, made payable, was sufficient, notwithstanding that the notary failed to certify that he made it of some person in the bank.

6. Under Mill. & V. Code, §§ 2470, 2471, providing that instruments or publications made by any notary public under seal shall be received in evidence, etc., the certificate of a notary is competent evidence of demand for payment of an inland bill, and the dishonor thereof.

7. Though certain drafts had not matured, and no demand had been made or notice of dishonor had been given to the nonresident draw-

er thereof, the holder was entitled to sue out attachments against the property of such nonresident, upon the latter's declaration of his insolvency, where the drafts were not such paper as was contemplated by the original contract.

8. One who received drafts, and credited the same upon the running account of the drawer, is not entitled to sue on the same before the maturity thereof, though the drawer has declared his insolvency.

9. Though a foreign assignment will not affect the personality of the insolvent in this state, unless the assignment is registered, a foreign assignee was justified in endeavoring to sustain the assignment in this state, and therefore he should be allowed attorney's fees out of the proceeds of sale of said personality.

Appeal from chancery court, Shelby county; W. D. Beard, Chancellor.

Bill by Howard Douglas, as assignee of John Streight, against the Bank of Commerce and others, to determine the respective rights and priorities of the parties to the proceeds of sale of the personalty of said Streight, which was situated in this state. From the decree rendered, the assignee and some of the defendants appeal. Modified.

Truley & Wright and Morgan & McFarland, for appellants. Smith & Trezevant, D. E. Myers, W. A. Percy, and H. C. Warinner, for appellees.

GILLHAM, Special Judge. On July 3, 1896, John Streight, a resident of Hamilton county, state of Ohio, made a general assignment of all his property situated in that state and elsewhere, to the complainant, Howard Douglas, as assignee, for benefit of all his creditors, without preference, which was on that day executed and registered in that county. The conveyance, in form and execution, was in compliance with the laws of that state, as was its registration. Streight was a lumber dealer and mill man, and then owned and operated at Memphis, Tenn., an extensive sawmill plant, and carried on a lumber business. To this assignment there were no schedules attached as is required by our general assignment law of 1881, nor was it verified by the oath required by that act, nor was it ever registered in this state. Shortly after the assignment was made (the earliest being on the same day, July 3, 1893), various of his creditors, some of whom were residents of this state, and others nonresidents, sued out attachments against him, as a nonresident of the state, and had the same levied on his property in Shelby county. On the day the assignment was made the assignee Douglas, accepted the trust and duly qualified under the laws of Ohio, and, by wire, directed his agent at Memphis to take possession of all the property there, which he did on that day, and before the attachments were levied. The attachments so levied are upon claims against John Streight aggregating about \$39,000, and the claims involved herein against him, upon which no attachments were issued, amount to about \$36,000. On the 9th day of August, 1893, Howard Douglas, as assignee of John Streight, filed in the chancery

court of Shelby county his bill against all the attaching creditors, the officers who had made the levies, and others, claiming that by the assignment to him in Ohio he was vested with the title to all the property so attached; that he was in possession of the same when attached, and was entitled to be restored to its possession; that the conveyance was good and valid under the law of Ohio, where made, and where the grantor was domiciled; and that, being valid there, it was likewise valid everywhere. The prosecution of the attachment suits were enjoined, and the whole litigation brought into this cause. Later a receiver—by the court—was appointed, who sold the property so attached, and has realized a fund, now on hand, of about \$36,000. The chancellor, on demurrer to the bill of Douglas, assignee, held the Ohio assignment invalid, as against the attaching creditors, because not registered in this state, and on final hearing directed the fund to be distributed to the attaching creditors, so far as necessary to satisfy the same, and in the order of the levies of their respective attachments; the balance to the general creditors. From this decree the assignee and some of the creditors have appealed, and assigned appropriate errors. Conflicts also arose between the assignee and various of the attaching creditors, and between the creditors, over the validity of their claims and attachments.

The matters here in controversy, raised by the appeals and assignments of error, are (1) the validity of the Ohio assignment; (2) the sufficiency of the levies of the attachments; (3) the right of the Vicksburg Bank, a non-resident of Tennessee, to raise the question of the invalidity of the Ohio assignment; (4) validity of the claim of the American National Bank upon the Wells acceptance for \$2,360.35; (5) validity of the attachment of Bank of Commerce on the draft for \$820, as not being due when the attachment was issued; (6) validity of the claim of Bank of Commerce on the Vos Naac, Lee & Co. note for \$1,160, for alleged want of proper demand for payment, and for evidence of presentment for payment; (7) validity of the attachments of the Coldwater Logging Company on the drafts claimed not to have been due when the attachment issued, aggregating \$4,872.55; (8) validity of the claim and attachment of the Coldwater Logging Company on the Herron-Taylor draft for \$3,557.95, less \$1,225.00, for alleged want of notice of dishonor to John Streight; (9) validity of the attachment of E. C. Atkins & Co. on bills not due when attachment was sued out, amounting to \$1,003.15; (10) validity of the attachment of John Oberly on bills not due when his attachment was issued, amounting to \$752.07; (11) right of solicitors for Howard Douglas, assignee, to a fee out of the fund for services to him as assignee herein, as against the successful attaching creditors.

The first assignment involves the validity

of a foreign general assignment of personality situated in this jurisdiction, when there had been no registration of the conveyance in this state, as against attaching creditors of the assignor. For the complainant it is, with great force and earnestness, urged upon us that under the comity existing between the courts of the several states, and of the states of this government, it is our duty to uphold a conveyance of personality made in conformity with the law of the domicile of the owner, although the property be actually situated in this state. The defendants, while admitting generally the doctrine founded upon comity contended for, insist that the law of the domicile of the owner cannot overcome such registration and other positive laws of the state where the property is situated as are distinctly politic and coercive. Section 2809, Mill. & V. Code, provides: "All mortgages and trusts of personality shall be in writing, and proven and registered as hereinafter provided, to be valid against the creditors of the bargainor or purchasers under him for value, and without notice." Section 2837, *Id.*, under title, "What shall be Registered," says (subsection 5): "All instruments of writing for the absolute conveyance of personal property." (Subsection 8): "All mortgages and deeds of trust of either real or personal property." (Subsection 12): "All other deeds of every description." Under title of "Place of Registration," section 2844 provides: "All deeds, bills of sale, agreements and other instruments for the conveyance or mortgage of personal property, shall be registered in the county where the vendor or person executing the same resides, and, in case of his non-residence, where the property is." And under title, "Effect of Registration," section 2890 says, "Any of said instruments not so proven or acknowledged and registered, or noted for registration shall be null and void as to existing or subsequent creditors of, or bona fide purchasers from the makers without notice." Do these statutes apply to such foreign assignments, and require registration to make them valid against attaching creditors in this forum? Is the question; for if, to be valid, they must be registered, the complainants must fail, but, if not, then, under the principle of comity established by general law, the Ohio assignment must be upheld. This court has decided that, to be effectual against creditors, a general assignment made in this state under the act of 1881 must be registered. *Bank v. Noe*, 86 Tenn. 29, 5 S. W. 433. If an assignment made in this state is within our registration laws, it would seem logically to follow that one made in another state must also be registered, to be good against creditors. However, the exact question was before this court, at Jackson, in 1887, in case of *German Bank v. Cochran, Lyman & Co.*, decided by an oral opinion. There the assignor was

domiciled in Hamilton county, Ohio, and made a general assignment under the Ohio law, conveying, with other property, some personal property in Shelby county, Tenn. It was not registered in this state, and some of the assignor's creditors attached the property in Shelby county, on the ground of non-residence of the assignors. The trustee intervened, and filed his answer and cross bill, setting up the Ohio assignment, and claiming under it. The creditors demurred to his cross bill, the main ground of demurrer being that the Ohio assignment was void, as against them, for want of registration in this state. The chancellor sustained the demurrer, and upon appeal to this court the decree was affirmed. The settled policy of this state is that both domestic and foreign assignments conveying personalty situated in this state, to be valid against creditors, must be registered.

We are therefore of opinion that no rule of comity should control, as against our registry laws, and that the doctrine of comity does not affect registration laws; that, for want of registration, this assignment is invalid, as against the creditors who in this cause have attached the property of the assignor, and fixed liens upon the same.

2. That the several levies, while somewhat irregular, yet are sufficient.

3. That the Vicksburg Bank, although a non-resident of this state, is entitled to invoke the Tennessee law, as against this assignment.

4. We think that the claim of the American National Bank on the Wells draft for \$2,360.35, made by John Streight at Chicago, Ill., on R. A. Wells, at the same place, and by him accepted, payable at his office in Chicago, and afterwards indorsed and negotiated by the drawer to the American National Bank at Nashville, Tenn., should not have been allowed. It is conceded that no demand for payment, or notice of dishonor, was given to the drawer, Streight. We find the fact to be that the indorsement by Streight to the American National Bank was made in Tennessee. The Illinois law provides that the assignor of such paper is liable to the holder, without demand or notice—First, where the holder has pursued the maker to insolvency; and, second, where suit against him would have been unavailing. It is clearly proven that both the maker, Streight, and the acceptor, Wells, were insolvent when the paper matured, on July 28, 1893, and that suit against either or both would have availed nothing. We think the Illinois statute does not apply, and for the reason that the assignment or indorsement of the paper was made in Tennessee, and not in Illinois; that the indorsement in Tennessee was a new and independent contract, and, having been made in Tennessee, the law of this state controls. *Trabue v. Short*, 5 Cold. 293; *Green v. Bond*, 5 Sneed, 328; *Daniel*, Neg. Inst. §§ 898, 899, 902, 905, 907, 910. To hold the drawer or indorser, our law requires,

in such case, proper demand and notice; and, without more, it is clear that no recovery can be had. It is, however, further claimed that the paper was accommodation paper; that Streight had no funds in the hands of the acceptor, and had no reason to believe that he would pay it; that Streight was primarily liable, and therefore not entitled to demand and notice. But this contention, we think, is not sustained by the proof, which is that Streight and Wells each accepted about \$10,000 of such paper, of which this is part, and that each was to take up and pay that which he accepted. We do not think that this is a case of an accommodation acceptance, within the rule invoked. Exception to this claim, on the part of the assignee and others, was by the chancellor disallowed, and same was decreed to be paid as a part of the claim of the American National Bank. We think this was error, and that the decree, as to this item, should be modified.

5. Bank of Commerce claim on draft for \$820:

"(Copy.) \$820. Memphis, Tenn., July 3rd, 1893. At sight, pay to the order of the Bank of Commerce eight hundred and twenty dollars, account pay roll, value received, and charge to account of

John Streight, John F. Bennett,
"Cincinnati, Ohio. Manager."

This draft was discounted by the Bank of Commerce on July 3, 1893, the day the assignment was made. The attachment upon it was issued the next day, July 4th, and, of course, before it could be presented for payment at Cincinnati, Ohio. The bank's contention is that they took the draft as cash, not knowing at the time that an assignment had been made, or would be that day made; that it was a fraud upon the bank to so obtain its money, and for these reasons it became at once due. The chancellor disallowed the claim, because the suit and attachment were brought before maturity of the debt. We think, upon the facts proven, that the claim should be treated as due at the time of the attachment, that the same was not prematurely brought, and that the chancellor's decree should, in this particular, be modified.

6. Claim of Bank of Commerce on the Vos Naac, Lee & Co. note for \$1,160:

"(Copy.) \$1,160.00. New York, March 4th, 1893. July 8th, after date, we promise to pay to the order of John Streight eleven hundred and sixty and ⁰⁰/₁₀₀ dollars, at Fourteenth Street Bank. Value received.

"Vos Naac, Lee & Co."

Indorsed: "John Streight."

This note matured July 11, 1893, and was on that day protested in New York; and on July 14, 1893, the bank filed a second bill in the chancery court, and obtained attachments on this and other claims. Exceptions were taken to this claim by the American National Bank, Douglas, assignee, et al., on the ground that there was no evidence

that legal demand had been made, or notice of dishonor given to the indorser, John Streight. The certificate of the New York notary certifies that he did "present the original note, hereto annexed, to the Fourteenth Street Bank, and demand payment, who refused to pay the same." He fails to certify that he sent out notices of protest, but it is proved that on the 14th day of July, 1893, the Bank of Commerce received from the notary proper notices of dishonor, one of which is mailed on the same day to John Streight, at Cincinnati, Ohio. The chancellor disallowed the claim, from which decree the bank appeals. We think that the demand, having been made at the Fourteenth Street Bank, where it was on its face made payable, was a good and legal demand, notwithstanding the fact that the notary fails to certify that he made it of some person,—the teller, or some such party. 1 Daniel, Neg. Inst. § 956; Wormly v. Waldran, 3 Sneed, 548; Gardner v. Bank, 1 Swan, 423; Bank v. Napier, 6 Humph. 270; 1 Daniel, Neg. Inst. § 656; 3 Rand. Com. Paper, § 1134; Hildeburn v. Turner, 5 How. 69. It is further earnestly contended that as this was on an inland bill the certificate of the notary is not competent evidence, as here offered, and that there is no proof of a demand having been made. We think that the certificate is proof of the demand and dishonor. Courts admit such certificates as prima facie evidence. 2 Daniel, Neg. Inst. § 945. Notice given by any party to the bill is sufficient. Id. §§ 986, 991. We think it was error in the chancellor to disallow this claim, and in this respect the decree will also be modified.

7. Claim of Coldwater Logging Company on the drafts not due at date of the attachments, aggregating about \$4,872.55, composed of three items,—drafts for \$3,757.95, \$902.30, and \$212.30. These claims were excepted to by the American National Bank et al. The chancellor quashed the attachments, as to these items, and dismissed the bills, on the assumption that the debts were not due when the attachments were issued, and, further, for the reason that no demand or notice of dishonor had been given to the drawer, Streight. From this decree the Coldwater Logging Company has appealed, and assigned errors. The main contention of the company is that under the contract the paper was to be bankable, that it proved not to be such, and that the company could, in this respect, rescind the contract, and, of right, treat the debt as due at the time the attachment suits were brought. Upon a full and careful consideration of the law and the facts, we have reached the conclusion that the paper given and accepted was not such as was contemplated by the contract, and that the company had a right to sue upon the original consideration, and to treat it as due at the time the attachments were sued out. The decree in this regard, also, is incorrect, and will be modified.

8. Claim of the Coldwater Logging Company on draft for \$3,557.95, less a credit of \$1,225. This is the Herron-Taylor draft. It was past due when the attachment was filed, and was by the chancellor allowed. Exceptions to its allowance were filed by the American National Bank, which bank has appealed from the allowance of the same, and has assigned error. The paper was protested at Vicksburg, and notice sent to the State National Bank, Memphis. The main contention is that the drawer, Streight, is not shown to have received proper and legal notice of dishonor of the draft. We think that he waived this, and that the decree is correct, and should be affirmed.

9. The claim of E. C. Atkins & Co. on attachments for drafts not due, amounting to \$1,003.15. E. C. Atkins had a running account against Streight, and took the drafts in question, and credited them on the general account. One witness (N. A. Gladding) says that the drafts were not taken in absolute payment of the account, but the original bill was filed upon the drafts, and was sworn to by the same party, Gladding. By amended bill it is sought to change their ground, and to recover on the original indebtedness. We think that the acceptance, and the crediting of such bills on the account, under the circumstances here proven, suspended all right of action until they matured. 2 Daniel, Neg. Inst. § 1272. The chancellor's decree in this respect is correct, and is affirmed.

10. Claim of John Oberly on drafts aggregating \$752.07, and an open account for \$117.58. The chancellor held that the account for \$117.58 was due when the attachment of Oberly was issued, and sustained it for that amount, but disallowed the claims on the drafts for \$347.03, \$272.92, and \$132.12, because the same were not due when the suit was instituted. This, we think, both as to the allowance and disallowance, was correct, and the chancellor's decree in this respect is affirmed.

11. The decree orders a reference to fix the fees of Messrs. Turley & Wright for services rendered to the assignee in this cause down to the time the receiver was appointed. This is excepted to by the American National Bank et al., and errors assigned upon it. We think it was the duty of the assignee to make this contest, and to try to sustain the assignment, and, upon the same principle, that an executor who in good faith defends, when contested, the validity of the will, is allowed reasonable solicitors' fees out of the estate, although the will be not established. The fees should in this case be ascertained and allowed, to be paid ratably by the attaching creditors in proportion to the sums realized by each herein. The decree in this respect is affirmed.

The decree will be modified as herein indicated, otherwise affirmed. The costs of the appeal will be paid out of the fund, and the

case remanded for further appropriate proceedings.

BEARD, J., being disqualified, did not sit in this case.

On Rehearing.

A petition for rehearing has been filed by the American National Bank, asking us to reconsider our former ruling as to the sixth assignment, involving the Vos Naac, Lee & Co. note, and its allowance to the Bank of Commerce. This we have carefully considered. The point made and relied upon in the petition is that the certificate of the notary in New York is not evidence of demand having been made; that it is not admissible in evidence to prove such fact. Mill. & V. Code, § 2470, provides, "The attestations, protestations and other instruments of publication, made or done by any notary public under seal, shall be received in evidence." And section 2471 says, "In an action against the drawer or endorser of a bill of exchange, or any negotiable paper protested for non-acceptance or non-payment, the notary's certificate, either in or on the protest, that he gave notice of the dishonor of the paper by the drawer or endorser, shall be prima facie evidence of the fact of such notice." That such certificate of a Tennessee notary is admissible is well settled. *Rosson v. Carroll*, 90 Tenn. 120, 16 S. W. 66, and cases there cited. But it is contended that the statute includes only notaries of this state and does not apply to the certificates of such officers of other states or countries. It is said that this precise question has never been decided by this court. By the act of 1835, c. 11, § 5, it was provided, "The attestation, protestation and other instruments of publication of the several notaries public of this state shall and may be received in evidence in any court of record, or before any justice of the peace in this state." It will be noticed that this statute refers only to certificates of notaries of this state. But in the Code of 1858 the compilers changed this act to read, "The attestations, protestations and other instruments of publication made or done by any notary public under his seal, shall be received in evidence." Section 1799. Section 1800 of that Code reads: "In an action against the drawer or endorser of a bill of exchange or any negotiable paper protested for non-acceptance or non-payment the notary's certificate, either in or on the protest, that he gave notice of the dishonor of the paper by the drawer or endorser, shall be prima facie evidence of the fact of such notice." These sections have been carried into our Code of 1884, as sections 2470 and 2471, without change. It will thus be seen that the compilers of the Code of 1858 changed the phraseology of section 1799 by omitting the words, "the several notaries of this state." The manifest intention was to make the section apply to the certificates of all notaries who act over their official seals, whether act-

ing under the authority of this or any other state or county. Such we think has been the understanding of the profession and the commercial classes of the state ever since the adoption by the legislature of the Code of 1858. We therefore think, both upon the authorities cited in the original opinion, and upon a review of our statutes, that the certificate of a foreign notary, when offered in evidence in our courts, is prima facie evidence, when it so recites, of demand for payment and dishonor of the paper. The petition for rehearing is therefore dismissed, at costs of the American National Bank.

HEWITT v. MAYOR, ETC., OF PULASKI et al.

(Court of Chancery Appeals of Tennessee.
Dec. 7, 1895.)

ESTOPPEL—OFFER TO COMPROMISE—WHEN BINDING—DEDICATION—PRESUMPTION.

1. In an action to restrain a city from selling the uninclosed commons in the rear of certain lots on the ground that the owner's right of way to the rear of his lots would be interfered with, the defendant answered, alleging an intention to reserve an alley way in the rear of said lots, and that, therefore, the owner would not be damaged by such sale. *Held*, that upon the refusal of the owner to accept the proposition to leave open an alley way as a compromise to end litigation, the city was not bound thereby in a subsequent action, brought by the vendee of the lots to compel the city to open and maintain such alley way.

2. Where a city sells lots for business purposes running back to the commons in the rear, which remained uninclosed for several years, no presumption is thereby raised of a dedication of a right of way over such commons to the rear of the lots.

Appeal from chancery court, Giles county; A. J. Abernathy, Chancellor.

Bill brought by Austin Hewitt against the mayor and aldermen of Pulaski to compel the defendants to open and maintain an alley in the rear of certain lots in said city. There was a decree dismissing the bill, and complainant appeals. Affirmed.

John T. Allen, for appellant. Z. W. Ewing, for appellees mayor, etc., of Pulaski. Hume R. Steele, for appellees Stone, Porter, and White.

WILSON, J. This bill was filed January 31, 1894, to compel defendants to open, and keep open, free from obstruction, an alley, 10 feet in width, in the rear of two lots in the city of Pulaski, on which he has business houses. February 19, 1894, the mayor and aldermen of Pulaski moved to dismiss the bill, stating in writing 13 grounds in support of the motion. The motion was overruled, but without prejudice, and thereafter the defendants answered, controverting the right asserted in the bill, and interposing the plea, as defense, that the question raised in the bill had been adjudicated under a previous bill against these defendants by one McGrew,

from whom complainant had purchased the lots, and that he was bound by the decree in that case. The case was heard in the court below July 25, 1894, upon the pleadings, exhibits, the agreed state of facts, and the exceptions to certain statements embraced therein as evidence, and the chancellor dismissed the bill, with costs. The learned chancellor based his decree upon the conclusion that the matter in issue had been settled by the decree of the supreme court in the case of said McGrew against these defendants.

The complainant appealed to the supreme court, and has assigned errors. The facts appearing in the record, and proper to be stated to present the contentions of the parties are, briefly, as follows:

First. B. F. McGrew owned what may be designated, for the purposes of this case, lots Nos. 49 and 50, in the city of Pulaski, Giles county, Tenn. These lots fronted on First Main street in said city, and ran back eastwardly some 165 feet, to what is known in the record as the "Commons." These commons were the property of the city, but had been uninclosed for a long number of years, and had been used by the public, and especially as a rear ingress to and egress from the business houses erected on lots 49 and 50 and adjacent houses on parallel lots fronting on First Main street. The defendants Stone, Porter, and White own a lot, with a business house on it, fronting on First Main street, south of and adjoining lots 49 and 50, and between them and Jefferson street. On the north of them, Dr. Abernathy owned one, and, north of his, complainant owned one, fronting on said street.

Second. Some time before complainant purchased lots 49 and 50 from McGrew, the latter filed a bill against these defendants, charging that the mayor and aldermen were about to sell these uninclosed commons in the rear of his business houses to Stone, Porter, and White, and that these gentlemen were threatening to fence and inclose them, so that he would be deprived of his right of ingress to and egress from the rear of his premises, which would cause him great damage and inconvenience, and greatly lessen the value of his property. The averments of his bill presented a state of facts upon which it is insisted that the corporation or municipality had dedicated said commons to the public for the purposes of rights of way over them; that the business houses fronting on First Main street, and on lots running back to them, had been erected in reference to this easement right; that by long-continued and uninterrupted use of said commons as a means of rear ingress and egress an easement right to such use of them had been acquired, and that the title to said lots fronting on said street, having been derived from the municipality, the owners thereof were entitled in law to a rear ingress and egress over said commons as a way of necessity. Under these

averments, the municipality was enjoined from consummating its contemplated sale to Stone, Porter, and White. The defendants to that bill—being the defendants to this—answered, and under the pleadings and proof therein the chancellor made the injunction perpetual. An appeal was taken to the supreme court, and that court, in March, 1893, reversed the decree of the chancellor, holding that the commons were the property of Pulaski, and that it had the right to sell the same. The opinion of our court of last resort in that case, epitomized in its judgment of record, is as follows: "B. F. McGrew vs. Mayor and Aldermen of Pulaski et als. Giles Equity. This cause was this day heard before the honorable supreme court of Tennessee, upon the transcript of the record from the chancery court of Giles county, the assignment of errors and brief of the defendant the board of mayor and aldermen of Pulaski, the reply of complainant, and argument of counsel; and the court being of opinion that the grounds or commons in question in this cause and described in the pleadings have never been dedicated to the public use, and that complainant has no easement in and to any part of the same, but the defendants have the right and power to sell the same; and that, therefore, the chancellor was in error in holding that said land or commons had been dedicated to the public use, and in making said injunction perpetual: It is therefore ordered, adjudged, and decreed that the decree of the court below be and is reversed and set aside, the injunction dissolved, and the bill dismissed." McGrew and his surety on the prosecution bond were taxed with the costs. After this action of the supreme court, the sale of these commons by the municipality to Stone, Porter, and White was consummated, and this time they proceeded to inclose them. Their purchase extended up to the south line of Hewitt's property, fronting on First Main street, and north of lots 49 and 50, and running back parallel with them, but further east; and their inclosure, therefore, prevented ingress to and egress from the rear of the business houses on lots 49 and 50 over these commons.

This bill, as stated, was filed by Hewitt, asserting an easement right to an alley 10 feet in width over said commons as a way of access to and from the rear of his houses on said lots 49 and 50. The complainant purchased these houses and lots from McGrew, the complainant in the previous litigation with these defendants over these commons. He purchased one the day after the decision of the supreme court therein, and the other some months later. Mr. Hewitt, the complainant to this bill, was not a party to the record in the case of McGrew against these defendants. But, as a matter of fact, he knew the nature and character of that litigation, and the issues involved in it, and he was a party to it in the sense that he had an agreement with McGrew to

pay part of the costs, which he fulfilled. His insistence in this bill is that the alley way he claims was not in issue in the case of McGrew, and that the supreme court decision was predicated upon the assumption that this alley outlet would be left open. This position rests for support upon the following averments, which appear in the answer of the mayor and aldermen made to the bill of McGrew: "It is true that respondents have contemplated selling said ground to their co-defendants, and a price has been agreed upon; but no formal deed has been made, and, if there had been, it could make no difference, for complainant has no right to prevent respondents selling what belongs to them as commons. As to the declaration of their co-defendants about closing all of said grounds, respondents cannot speak; but they do know that in the contemplated sale to said co-defendants it is the mutual intention and agreement that a passway of ten feet between said land and the south side of Hewitt's property shall remain open and unsold; so that complainant and any one else can with wagons and any other vehicle pass to the rear of the lots which front upon First Main street, and that complainant will have an abundance of room for egress and ingress to his said houses, and be in no way interfered with or prevented from getting to his said houses from the front or the rear. It will thus be seen that a sale of said ground can and does in no way damage complainant, and it is insisted that his suit is evidently frivolous." In further support of this proposition that the supreme court did not pass upon the right to have this alley, it is argued that the assent to it, as above stated in the answer of the mayor and aldermen to the McGrew bill, was affirmed and reiterated in the assignment of errors and argument of counsel for the city filed in the supreme court, and that, in view of these recognitions or concessions, the opinion and decree of that court did not include it.

The following does appear in the brief of counsel appearing for the mayor and aldermen in that suit, filed in the supreme court: "It is stated in the answer, and not denied, that complainant has his whole front on North First Main street, and can reach his property from that side. That the mayor and aldermen proposed, in making this sale in question, to leave him a ten-foot alley in the rear, so as to have easy access from that side; so that he is not cut off from egress or ingress, both in front and rear. It follows, therefore, that the sale of the property in question cannot seriously damage the interests of complainant." The substance of the contention, in this aspect of the case, is that the supreme court rendered its decree upon the assumption, based upon the above averments of the answer of the mayor and aldermen, and the written brief of this counsel in the McGrew case, that in the

sale of the commons a 10-foot alley was to be reserved, thus giving the complainant, McGrew, access to and from his houses from their rear. Upon the basis of this proposition it is insisted that the mayor and aldermen had no right to repudiate the agreement or concession thus made in their answer to the McGrew bill, and reiterated before the supreme court; and that the defendants Stone, Porter, and White, being parties to that suit, and cognizant of the character and nature of the answer of the mayor and aldermen, were affected with its legal consequences. It is therefore contended that the defendants are estopped from closing the alley, which, in the original agreement of sale, it was, in effect, agreed would be reserved in the McGrew litigation, and this reservation, it is claimed, exists for the benefit of McGrew's vendee. It is insisted by defendants, in answer to this position of complainant, that the proposition of the mayor and aldermen in their answer to the McGrew bill with reference to the reservation of an alley way affording access to the rear of McGrew's houses, in their contemplated sale of the commons to Stone, Porter, and White, was made to avoid his threatened litigation, and as in the nature of a compromise, and that he refused the offer, insisting upon a right of easement over all of said commons, and that, their said offer being rejected, left them at liberty to sell all of them, the courts having decided they were the property of the municipality. Complainant, in legal effect, anticipating and answering this position, avers in his bill that he had no idea that the mayor and aldermen would violate their promise in respect to the reservation of the alley, whatever might be the result of the McGrew litigation; that he purchased these houses and lots believing that if the suit went against McGrew there would be the alley outlet in any event, and that he was so assured by McGrew. He further insists that said lots were laid off and sold by the municipality for business purposes, and that at the time there were open commons in their rear, which served as an outlet, and which had been so used for many years without opposition, and hence no application had been made by the owners of these lots to the city authorities to dedicate for the use of these lots any particular way over these commons as an outlet from their rear. It is then insisted that, being a purchaser of these lots, and holding a title running back to the municipality, he is entitled to a rear outlet as a way of necessity over the adjacent property owned by it, and hence that it has no right to sell said commons, embracing said alley, so as to close up his outlet to the rear. The case was heard upon an agreed state of facts. They are quite lengthy, and it is unnecessary to state them in detail.

The foregoing embraces a reasonably full

synopsis of the facts, except that we find as further facts the following: First. "That to avoid litigation with McGrew, over their contemplated sale of these commons to Stone, Porter, and White, the mayor and aldermen did prepare to reserve a ten-foot alley across the commons in rear of these houses fronting on First Main street up to Hewitt's south line; that the intention of so reserving it was stated in their answer to his bill, but that this was all in the nature of a proffered compromise." Mr. McGrew, it is stated in the agreed state of facts, would swear that no such proposition of compromise was made to him until after the decision of his case by the chancellor. But we think, and so find as a fact, that his memory is at fault in this. We are satisfied from an examination of that entire record that the proposition to reserve an alley in the projected or contemplated sale to Stone, Porter, and White was communicated to him before he filed his bill, to avoid litigation with him, and that it was carried into the pleadings in his suit to effect a settlement of it. But we are unable to see that it makes any difference in the correct result to be reached in this case, in view of the decision of the supreme court in that case, whether it was made before or after the decision of his case by the chancellor; for, when made, it was rejected, on the ground that, in his view, he was entitled to the use of all the commons in rear of his premises as an outlet. We further find as a fact that complainant believed, when he bought these houses and lots from McGrew, that a 10-foot alley, substantially as located and described in his bill, would be reserved or left open by the purchaser of these commons from the municipality; and that such an alley would be a convenience in the use of his lots and premises purchased from McGrew. But his belief was founded on a conclusion he made from the situation as disclosed in the litigation of McGrew and what McGrew assured him. It had no legal basis in anything done or said by these defendants which creates an estoppel on them to dispute its legal correctness.

The complainant assigned six errors to the decree of the chancellor dismissing his bill covering his contentions as herein stated. Briefly stated, they are as follows: First. That the chancellor erred in holding that the municipal authorities of Pulaski had the right to sell to Stone, Porter, and White all the ground covered by their deed to said firm, including the alley claimed by complainant. Second. That he erred in holding that said authorities had the right to sell all of said ground or commons, under the decision of the supreme court in the case of McGrew against these defendants. Third. Error in not holding that said authorities and the defendant firm were estopped from denying the right to the alley by the statements made

in the answer and agreed state of facts filed in the case of McGrew against these defendants, and by the statement made by counsel in the assignment of errors filed in the supreme court in that case. Fourth. That the town of Pulaski, having originally owned all the ground, and laid off and sold lots for business houses, reserving open commons in their rear, it could not sell said commons so as to close up all the passage over them, if to do so would cause inconvenience to the owners of the lots sold by it. Fifth. That he erred in not holding that the town authorities had dedicated to the public, or to complainants, the alley in controversy, as a rear outlet to his lots. Sixth. That he erred in not holding that an easement had been acquired from the rear of the lots of complainant over said commons to Jefferson street.

The first three assignments of error are predicated on the theory that the alley in controversy was taken out of the litigation in the McGrew case against these defendants by the averments in the answer of the board of mayor and aldermen, and the language used by counsel in his brief filed in the supreme court, and that what was said and done by defendants in that case amounted, in legal effect, to an agreement to reserve and keep open the alley claimed. Upon this theory the assumption is made that the question of the right to include this alley in a sale of the "commons" was not passed upon by the supreme court in that case. Based on it also is the proposition that McGrew, then owner of these lots, and complainant, his vendee, were misled into the belief that, whatever the result of said litigation, this alley would be reserved for the benefit of these lots. In other words, it is insisted that defendants, in legal effect, represented to complainant, by their pleadings in the McGrew suit, and by their action therein, that this alley would be reserved and kept open for the benefit of said lots, and he was thus induced to purchase; and, this being so, the doctrine of estoppel is involved, to prevent them from closing said alley. It is quite clear from the record that this alley was and is a part of the commons that were the property of the city of Pulaski. It is also settled, under the decision of the supreme court in the McGrew case, that the city had the right to sell these commons, including this alley, unless it was estopped to exercise the right by virtue of some agreement or stipulation in its pleading or appearing in the record in that case. We have found as a fact that what the city authorities said and did in that case in reference to an alley was a proffer to reserve one in the nature of an offer of compromise to avoid litigation with McGrew, and, after it was begun, to settle it. It was not accepted, McGrew preferring to contend for the right to use all the commons as a rear entrance to his lots.

The contention of complainant, predicated

upon the paragraphs of the answer of the mayor and aldermen to the bill of McGrew copied herein, ignores all the other parts of their answer. Taken as a whole, it is clear to our minds that the city authorities asserted a property right in all the commons, including the alley, and that they proposed to reserve an alley for his benefit, as one of their constituents, to avoid litigation with him. The character of the dispute they were in precludes the legal inference, in the absence of a stipulation to that effect, that they, by what they said in their answer, represented to McGrew, and through him to this complainant, that they intended to surrender the ground covered by the alley to the use of these lots as a rear outlet, however the suit might end. If such were their intention at the time, their proposition to put it in operative form, being rejected, is no legal or equitable estoppel forbidding a change of mind on their part. And as a matter of reason and sound legal analogy, a third party, or one cognizant of litigation, and interested in it, though not a party, in which public officials make a proposition which is rejected, is not authorized to assume, nothing more appearing, that the proposition is a continuing one, or that the public officials cannot change their mind or purpose, as implied in the proposition, and recall it. There is no such restriction placed by the law upon public officials invested with the power and duty of holding and disposing of properties for the benefit of the public, whom they serve as agents. Of course, if municipal officials authorized to speak and act for the municipality make representations which induce the citizen to take a certain course of action, or invest his money on the faith of the truth of the representations, the municipalities and the officials making them will be estopped to deny them, or from acting contrary to the representations made, if such action on their part will cause loss or injury to the citizen. *Manufacturing Co. v. Funge*, 109 U. S. 651, 3 Sup. Ct. 436. But the facts of this case do not call for the application of this principle. Here the city of Pulaski, through its officials, proposed to McGrew, if he would consent for it to sell its commons, it would reserve an alley over them for the use of a rear entrance to his lots abutting on these commons. He declined, and insisted that he had a right to use the whole of the commons as an easement. He instituted a suit to enforce his right. The city, answering, said, "These commons are my property, and I have the right to sell them, and in the contemplated sale I had in view it was the understanding between me and my vendee that an alley was to be reserved and kept open for your benefit, and so, if the sale is consummated, you will still have a rear outlet, and hence, stop your suit, and let the sale proceed." "No," replied Mr. McGrew, "I have the right to use all the commons, and you shall not sell and inclose any of

them." The courts decided that the commons were the property of the city, and that it had the right to sell them or inclose them. This complainant, cognizant of that litigation, and, in a sense, a participant in it, contends here that the answer of the city amounted to a representation to him that the alley should be reserved and kept open notwithstanding the refusal of McGrew to accept it, and that upon the faith of it, he bought the lots from McGrew, and hence that the city is estopped. We do not think so. The city made no representations to this complainant in the McGrew suit, and conceding that as the vendee of McGrew he can demand all the benefits that McGrew was entitled to, he can claim no more. McGrew claimed none, but rejected them. If he put a construction on what the city did and said in that case, not warranted by law, or if McGrew did, action by him, based on either, will not furnish a ground for estopping the city from acting contrary to his construction of its course in said suit. This contention, also, it seems to us, overlooks an essential element or fact in the doctrine of estoppel. In *Vin. Abr. tit. "Estoppel,"* the law of estoppel is thus laid down: "Every estoppel ought to be reciprocal,—that is, to bind both parties,—and this is the reason that regularly a stranger shall neither take advantage nor be bound by the estoppel." 10 *Vin. Abr. p. 422, pl. 6*. Lord Coke, in his twenty-first reading on fines, says: "Estoppel is reciprocal, for he that shall not be concluded by the record or other matter of estoppel shall not conclude another by it; except in the case of the king, and that depends upon his prerogative." *Canal Co. v. Hathaway*, 24 *Am. Dec. 51*. There is nothing in the cases from this state cited by the learned counsel of appellant, in conflict with this principle. These cases hold that a party will be precluded from denying his own acts or admissions which were designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter. *Young v. Young*, 12 *Lea, 342*; *Ren v. Driskell*, 11 *Lea, 651*; *Decherd v. Blanton*, 3 *Sneed, 374*; *Seay v. Ferguson*, 1 *Tenn. Ch. 204*. All the cases, however, in which the acts or admissions of the party are adjudged to operate against him in the nature of an estoppel, are generally cases where, in conscience and honest dealing, he ought not to be permitted to gainsay them. 24 *Am. Dec. 51, and note*. *Alexander v. Walter*, 50 *Am. Dec. 688, note*. It follows that the first, second, and third assignments of error are not sustained.

The fourth, fifth, and sixth assignments involve an indirect argument against the soundness of the legal conclusion embodied in the decree of the supreme court in the McGrew case. The eminent counsel of appellant is too familiar with the power and functions of this court to expect it to depart from the rules of law, as defined by that

court, applicable to this case, and governing it. Hence his very forcible argument that the acts of the defendants in that case amounted to a dedication of the alley claimed as an easement appurtenant to the lots of complainant. He cites *Mayor, etc., v. Howard, Thomp. Tenn. Cas. 107-111*. Dedication is "an appropriation of land to some public use, made by the owner of the fee, and accepted for such use by or on behalf of the public." *Ang. & D. Highw. § 132*. It is laid down in the books that there are two classes of dedications,—statutory and common-law dedications. *Elliott, Roads & S. 5225*. There has been no statutory dedication of the alley as an easement way to the public in this case. The *McGrew* case settles this. The insistence, then, must rest upon the fact that there has been a common-law dedication of it to the public. In such a dedication no grant or written conveyance is requisite. It rests or depends, it is said in some authorities, on the doctrine of estoppel. *Washb. Real Prop. 460; Cincinnati v. White's Lessee, 6 Pet. 431*. But the intention to dedicate is essential, and this intention should be clear, and the acts or circumstances relied on to establish such intention should be unequivocal and convincing. *2 Dill. Mun. Corp. § 499; Ang. & D. Highw. § 142; Morrison v. Marquardt, 92 Am. Dec. 444; Town of Manchester v. Hoag, 66 Iowa, 649, 24 N. W. 259; Landis v. Hamilton, 4 Am. & Eng. Corp. Cas. 491; Tucker v. Conrad, 103 Ind. 349, 2 N. E. 803*. It is true that such a dedication may be implied, or arise by operation of law from the acts of the owner. It is not founded on a deed, but is founded on the doctrine of equitable estoppel. *Elliott, Roads & S. 91; Cincinnati v. White's Lessee, 6 Pet. 431*. But the intention and contemplation of law must appear. Dealing with the case under these principles, and the holding of our supreme court in the *McGrew* case as to the right of the town of Pulaski to dispose of the commons embracing the alley claimed, are the acts and conduct of the corporation, as disclosed by the record, sufficient to amount to a dedication of the alley as a highway to the public? We do not think so. We have been able to find no authority supporting the proposition that a municipal corporation selling lots fronting on a designated street, and running back to uninclosed lands owned by it, is bound merely by the fact of selling lots thus bounded to give a rear entrance over its property to the lots so sold by it; and the learned counsel of appellants has pointed out none to us. The contention of appellant that he is entitled to a rear outlet, as a way of necessity over the commons of the corporation, is not tenable, under the facts of this case, and the holding of our supreme court in the *McGrew* case. In addition, an examination of the plat showing the location of his several lots, and their relation to these commons, will show that he can get an outlet over his own land. The re-

sult is that the decree of the chancellor is affirmed, and the complainant and his sureties will be taxed with the costs.

NEIL, J., concurs.

Affirmed orally by supreme court, January 21, 1896.

FINCH v. FRYMIRE et al

(Court of Chancery Appeals of Tennessee. Jan. 18, 1896.)

DIVORCE—SERVICE BY PUBLICATION—PRESUMPTION—CONCLUSIVENESS OF RECORD.

1. In an action to set aside a decree of divorce, plaintiff alleged that he had never been served with process, but that service had been made by publication on the ground that he was a nonresident, and that in fact he was at the time a resident. The papers in the suit had been lost, and neither the record nor the decree showed on what ground service by publication had been made. *Held* that, in the absence of anything to show affirmatively that the service by publication was insufficient, it would be presumed that the court had jurisdiction, and that the decree was regular and valid.

2. Under Code, §§ 5087, 5100, requiring, on service by publication, an entry to be made in the rule docket of the order of publication, and that this entry need not contain any abstract of the facts, the grounds on which the order was made need not be stated, and an entry which purports to state the grounds is not conclusive that upon such, and no other, the order was granted.

Appeal from chancery court, Davidson county; Andrew Allison, Chancellor.

Bill by Ransom Finch against J. B. Frymire and others to set aside a decree of divorce and alimony and for the recovery of certain lands. There was a decree for defendants, and complainant appeals. Affirmed.

Whitman & Gamble, for appellant. W. G. Brien and J. P. Atkinson, for appellees.

BARTON, J. This is a bill filed to set aside a decree and recover a tract of land in Davidson county. On 22d March, 1887, Elizabeth Finch, then a resident of Davidson county, Tenn., filed in the circuit court of said county a bill against her husband, Ransom Finch, the complainant in this cause, for divorce and alimony. He was not served with process, but there was publication for him, a judgment pro confesso, and decree for divorce a mensa et thoro and for alimony; the farm sought to be recovered in this case being decreed to her as alimony. All the papers in the case have been lost or destroyed, but the following is a copy of the decree: Exhibit "C" to Complainant's Bill: "1,448. Elizabeth Finch vs. Ransom Finch. Pro Confesso, etc. This cause came on to be heard this, the 7th day of May, 1887, before the Hon. W. K. McAllister, Jr., judge, etc., upon the original bill and order of publication in the cause, when, it appearing to the satisfaction of the court that said bill was filed in this court on the

twenty-second day of March, 1887, and that publication was duly made in the American, a newspaper published in Nashville, said county and state, for four consecutive weeks, requiring the said defendant to appear on the first Monday in May, 1887, at the May term of said court, and plead answer or demur to said bill, and that said defendant has failed to appear, plead, answer, or demur to said bill as aforesaid: It is therefore ordered and decreed by the court that said bill be taken for confessed against the said defendant, Ransom Finch, and that the same be set for hearing ex parte. Be it remembered that this cause came on further to be heard this, the 7th day of May, 1887, before Hon. W. K. McAllister, Jr., judge, etc., upon the original bill, the injunction and attachment, the pro confesso decree heretofore rendered, and the proof in the cause, when it appeared to the satisfaction of the court that the complainant and defendant intermarried about 14 years ago, and have no children; that complainant was a faithful and dutiful wife to defendant, and has resided in Tennessee more than two years next preceding the filing of her bill in this cause; that the defendant abandoned the complainant in February, 1887, and has removed himself from the state, and refused to provide for complainant; and that the defendant has committed adultery with one Rose Romain, and has eloped from this state with her. It further appeared to the satisfaction of the court that said Ransom Finch carried with him, when he abandoned the complainant, \$1,587.00, being all the money he had, and that he is the owner in fee of the following real estate, which was acquired by the joint labor of himself and complainant, to wit: One tract of land situated in the Second civil district of Davidson county, Tennessee, recorded in register's office of said county in Book No. 72, page 344, containing, by estimation, 16 acres and 116 poles, and bounded as follows: Beginning at a stake in the center of Haynesboro road, opposite a stone, Finch's corner; running thence with his line south, 88° east, 37 $\frac{1}{2}$ /₁₀ poles, his corner in John Harding's west boundary line; thence with it, 2 $\frac{1}{2}$ degrees west, 73 poles, to a stone in said line and corner to Gwynne; thence with his line north, 88 degrees west, 36 poles, to a stake in said line, and also said Haynesboro road; thence with its center north, 1 $\frac{1}{4}$ degrees east, 73 poles, to the beginning. Also another tract of land situated in the same district and county, and bounded as follows: Beginning at a point or stake in John Harding's west boundary line, it being Williamson's N. E. corner, running thence north, 84 $\frac{1}{4}$ degrees west, 37 $\frac{1}{2}$ poles, to the middle of the old Haynesboro road, to a point about four feet west of Pennington's west gate post, with the average center of said road to a stone; thence south, 89 $\frac{1}{2}$ degrees E., 37 $\frac{1}{2}$

poles to a stone; thence in 1" E., 43 poles, to the beginning,—containing ten acres, and particularly described in Book 57, page 157, R. O. D. C.; and said property is attached in this cause. It is therefore ordered, adjudged, and decreed by the court that complainant be divorced a mensa et thoro from the defendant, and that he pay the cost and complainant's counsel fee in this cause, and that injunction heretofore granted against the defendant be made perpetual, and that the clerk of this court take said two tracts, and, after duly advertising the time and place of sale in some newspaper published in Nashville, at the courthouse door thereof sell the same to the highest and best bidder on the following terms, to wit: One-fourth cash, and the balance in equal installments of six, twelve, and eighteen months after date of sale, and upon payment of the purchases; and apply the proceeds first to the payment of complainant's counsel fees, and the balance to complainant. But if the complainant should do so as her alimony in the cause by first paying said costs and counsel fees, and therein that event the title to said tracts of land be, and the same is hereby, divested out of the defendant, and vested in complainant, and the clerk of this court will make her deed in fee to the same. A lien on said land is decreed hereby to Wm. G. Brien and Hadley for their counsel fees in this case." And it is so set aside this decree and recover this land that this bill is filed.

The bill alleges that the complainant is the owner of the tract of land, describing it; that in 1888 he was living in the county of Obion, state of Tennessee; that he had previously lived in Davidson county 18 or 19 years, but in March, 1887, he moved to said Obion county, where he continued to live for about two years; that he then moved to Dyer county, and lived there about one year, and then went to Missouri, where he has since resided; that while he lived in Davidson county he lived on this land; that, after he removed to Obion county, his wife, remaining in Davidson, began divorce proceedings against him in the circuit court of Davidson, which proceedings were instituted and publication made upon the alleged ground that he was a nonresident; that no process was served on him, but publication was made on the ground that he was a nonresident of the state. The bill then recites the decree, and files the copy of same hereinbefore set out. Says that he at no time before the institution or pending the suit was a nonresident of the state, and at no time did he cease to be a resident of the state until the year 1890. Since the institution of the suit for divorce he has allowed his wife to remain on the land, and use the same, but has never admitted her title to it. Says his wife removed to Kentucky, and died there, in 1892, and the land is now in possession of and claimed by

Fannie Frymire, a daughter of his wife by a former marriage, and her husband, who, together with their tenant, are made parties defendant. The bill prays to have the decree aforesaid vacated, and for a recovery of the land. There was a demurrer filed and overruled, and defendants filed an answer, in which they say: Respondents deny complainant is the owner of the land described in the bill; admit the divorce proceedings and the decree; deny the proceedings were instituted on the grounds of non-residence; allege he deserted and abandoned his wife, and eloped with one Rose Romain, and left the state, and took with him about \$1,500,—all the money they had,—the result of the joint labors of the husband and wife; and that the proceedings were had on these and other grounds, and decree procured as stated; admit she is the daughter of Elizabeth Finch, and is in possession of and claiming the land as such; pleads the staleness of the demand, etc.

We find the following facts: The complainant in this case, on or about 22d February, 1887, having previously been a citizen of and living in Davidson county, Tenn., abandoned and deserted his wife, Elizabeth Finch, and eloped with one Rose Romain, the wife of a neighbor, taking with him all the money he had, some \$1,500, which was the result of their joint labor and savings, and never returned to her. Her the record shows to have been a good, hard-working woman, and to have largely contributed to the accumulation of the money on hand and that used in the purchase of the land in litigation. After he had left, as stated above, she, on 22d March, 1887, filed her bill for divorce and alimony in the circuit court, and obtained the decree above set out. The papers have been lost or destroyed, and never supplied, and we have no record evidence thereof except the copy of said decree found in this record. While complainant states in his bill he left Davidson county in March, 1887 (he does not say about what time in March), he states in his deposition that he left 22d February, 1887, and the other witnesses fix this as about the date he left. He swears he went direct to Obion county, and remained there till fall of 1887. He has four witnesses living near where he lived in Obion county,—A. L. Spoelling, William Petrus, M. J. Long, and W. C. Hogan,—who also swear he came there about that time, and lived there till the fall of 1887. Complainant himself is, in our opinion, entitled to little, if any, credence, not only on account of his bad conduct towards his wife, but he is clearly shown to have sworn falsely in this case. He demeaned himself badly in his deposition, and there are positive contradictions between his deposition and bill. After he left, he was seen by other witnesses, and told them of different places he had gone to and been living at. Most of these statements, though, clearly appear to have been false. He told

one he had first gone to Clarksville, then to Dover, then to Chicago, etc. He denies positively that he had been at any of these places, but it is proven by a disinterested witness that he had; that shortly after leaving here he was at Clarksville, with the woman with whom he eloped and another woman, and was run off from there, and stated they were going down near Dover, Tenn. We place no reliance on what the complainant says, and, while we do not think the memory of his four witnesses as to the time he came to Obion county—three depositions being taken some six years after the event—can be implicitly relied on, and feel sure the probabilities are that he did not reach there, as stated, in February, 1887, yet, in the absence of proof by any one that he was seen out of the state in March, 1887, and of any admission by him fixing the date when he was out of the state, we are constrained, in view of their statements, to find that the weight of the evidence is that he was residing in Obion county, this state, in March, 1887, when the bill in this case attacked was filed. If there was evidence that that bill had been filed on fact or admissions, statement, or declaration of his nonresidence at the time, we should be inclined to hold he would be bound and estopped by them; but, so far as the proof in the record before us shows, these declarations were made after the filing of the bill.

As stated, the defendant was not served with process. Unless the court had jurisdiction, this decree is void as claimed. *Ridgeway v. Bank*, 11 Humph. 522; *Ingle v. McCurry*, 1 Helsk. 26; *Bell v. Williams*, 1 Head, 229; *Estis v. Patton*, 3 Yerg. 381; *Carruthers v. Hartsfield*, Id. 366; *Davis v. Reaves*, 7 Lea, 586. Personal service of process on the defendant in the court of chancery is dispensed with in the following cases: (1) When the defendant is a nonresident of the state; (2) when, upon inquiry at his usual place of abode, he cannot be found, so as to be served with process, and there is no just ground to believe that he is gone beyond the limits of the state; (3) when the sheriff shall make return upon any leading process that he is not to be found; (4) when name of defendant is unknown; (5) when the residence of the defendant is unknown, and cannot be found upon diligent inquiry; (6) when judicial and other attachments will lie under the provisions of the Code against the property of the defendant. Code (Mill. & V.) § 5095. "To dispense with process in either of the above cases the facts shall be stated under oath in the bill or by separate affidavit or appear by the return." Id. § 5096. Section 5097 directs in such cases, if defendant does not cause his appearance to be entered, an entry on the rule docket of an order of publication "requiring the defendant to appear at a certain day therein named and defend, otherwise the bill will be taken for confessed"; section 5098, that the

clerk caused this order of publication to be published four consecutive weeks; section 5099, that this order of publication in lieu of personal service may be made at any time after the filing of the bill. Section 5100 provides that "the order of publication should contain the names of the parties, the style of the court in which the proceedings are had and the name of the place where the court is held, without any brief or abstract of facts, unless directed by the court." For attachment proceedings it is provided (section 4259, Mill. & V. Code; section 3518, Old Code), that when an attachment is levied the officer granting the attachment shall direct order of publication made in some newspaper, requiring defendant to appear at time and place to be mentioned; section 4261 (3520), that the order should be entered on the minutes or rule docket in a court of record; section 4262, Mill. & V. Code (3521), clerk to make out memorandum of order once published; section 4263, Mill. & V. Code (3522), that "this memorandum or notice shall contain the names of the parties, the style of the court, the cause alleged for the attachment, and the time and place at which defendant is required to appear and defend." In *Howard v. Jenkins*, 5 Lea, 176, it is held the order entered on the rule docket may be general, and is not required to have recitals required for notice. To the same effect are also *Allen v. Gilliland*, 6 Lea, 533; *Walker v. Cottrell*, 6 Baxt. 274. Mill. & V. Code, § 5008 (4236), provides: "Any suit of an equitable nature brought in the circuit court * * * may be heard and determined by the circuit court upon the principles of a court of equity with power to order and take all proper accounts and otherwise to perform the functions of a chancery court." The proper practice in an equity case is for the judge to transfer it to the chancery court, or to try it according to the principles and practice of that court. *Hall v. Jacobs*, 5 Helsk. 84. Circuit courts are courts of general jurisdiction. Section 4997, Mill. & V. Code (4225). If, as a matter of fact, the defendant (complainant in this case) was a resident of this state, and the suit and proceedings against him were based alone on the false assumption that he was a nonresident, if there arises no estoppel by his conduct and declarations (which, as we think, it is unnecessary to decide), and nothing else appearing, the proceeding would be void. But all intendments and presumptions are in favor of the correctness of the proceedings of a court of general jurisdiction. Error will not be presumed, but must affirmatively appear (*Allen v. Gilliland*, 6 Lea, 533; *Walker v. Cottrell*, 6 Baxt. 274; *Kilcrease v. Blythe*, 6 Humph. 378; *Gilchrist v. Cannon*, 1 Cold. 582); and while we do not say that in this kind of a proceeding one directly a party to the proceeding sought to be vacated may not show that apparent jurisdiction was fraudulently acquired by false recitals, and that he

was wrongfully deprived of his rights to a day in court thereby, yet the error must be made to affirmatively appear, either from the record itself or by other competent allegations and evidence. We only see from the decree attacked that defendant was made a party by publication duly made. On what this publication was based it does not affirmatively appear. From the above-recited sections of the Code it is clear that the proceedings might have been founded on any of the six grounds provided by section 5095, Mill. & V. Code (4352), except the fourth,—that the name of defendant was unknown. If, as stated in the above-cited authorities, every presumption is in favor of such proceedings, it must be presumed that they were founded on some of the grounds provided for which were true; and it is evident from this record that if it is conceded that the defendant was not a nonresident of the state the bill could certainly have truthfully alleged the second, fifth, and sixth grounds for publication, and under the same rule and presumption there is no reason why the third ground should not have been the basis of the procedure. The record being destroyed or lost, and there being no proof of the contents attempted, we feel bound to make this presumption in its favor. The decree recites the defendant in that case was made a party by publication duly made; but on what basis is not stated. We must presume, on the right one. At least we think, when relief is affirmatively sought against such a decree, complainant should, by his allegations and proof, exclude any reasonable hypothesis on which it might stand and be held legal and valid. The decree reciting jurisdiction by publication, it will not do, as we think, to assume that a single ground out of six or more that might have been alleged was selected by the complainant in that suit, and then show the falsity of that. If that could be done in such a case, how much easier would it have been for the complainant in this case to have alleged, and, in the absence of proof have assumed, that these proceedings were based on the fourth ground provided for under section 5095, Mill. & V. Code (4352), viz. that the bill alleges that complainant's (defendant's in that case) name was unknown. Then he could have proven beyond a reasonable doubt that this allegation was false, and a gross fraud perpetrated on the court by thus acquiring jurisdiction. Such assumption would, of course, in this case, have been absurd; but if you can assume one ground you can assume any to have been the basis of jurisdiction. Such a holding would go far to unsettle a large number of titles in this state, where so many records have been lost or destroyed; and it would, it occurs to us, be an absolute abrogation of the rules above cited. It is true, in this case the decree recites that on the trial it appears, among other things, to the satisfaction of the court, that the de-

defendant had removed himself from the state; but this does not state that this was the basis of the pro confesso publication or jurisdiction, and, if it did, this is not an allegation of nonresidence, but it is rather within the terms of the second ground provided for by section 5095 (4352) of the Code: "Where upon inquiry at the usual place of abode of the defendant he can not be found so as to be served with process, and there is just ground to believe that he has gone beyond the limits of the state." It has also not escaped our attention that the clerk of the circuit court in his deposition states that his rule docket shows that publication was made for defendant as a nonresident. Yet, while there was no exception to this statement, there was no attempt to set out the entry on the rule docket, so that one might see what else it showed, if anything, nor whether this was all it showed; and, besides, in view of the above-cited provision of the Code (Mill. & V. § 5100), and the decisions above cited, it will be seen that this entry may be general, and is not required to show the grounds of attachment and jurisdiction, and can, therefore, be no sufficient evidence of what those grounds were, but only evidence that a publication was ordered made. Assuming as true—and in which the writer concurs—the legal conclusion contended for in the very able and thorough brief of complainant's counsel, that in cases where it is made to appear that the court rendering the decree attacked did not have jurisdiction, that the law in this state is the merits need not be shown to entitle complainant to relief, as stated in *Bell v. Williams*, 1 Head, 229, "the injury consisting in the rendition of a judgment against a party without notice and the opportunity of defense," yet we must confess to an indisposition to grant relief in such an inequitable case as here presented, and think that, even beyond the ordinary case, the complainant should be required to show clearly at least that the court did not have jurisdiction, and to exclude, as we have said, every reasonable hypothesis on which the decree may stand, and overcome all the presumptions established by law in its favor. The result is, the decree of the chancellor is affirmed, and complainant's bill dismissed, with costs.

NEIL, J., concurs.

Affirmed orally by supreme court, March 10, 1896.

MECHANICS' SAV. BANK & TRUST CO. v. DUNCAN et al.

(Court of Chancery Appeals of Tennessee. Feb. 1, 1896.)

GAMBLING CONTRACT—NOTES GIVEN FOR GAMBLING DEBT—VALIDITY.

Plaintiff, under an agreement with defendants, who were stock brokers, furnished them with margins with which to pay for stock

to be bought or sold on the New York Stock Exchange, and defendants made the purchases or sales through brokers, residing in New York. Neither plaintiff nor the other customers of defendants dealt in the actual stock, but merely put up the margins required by the rise or fall of the market. Held, that notes given by defendants to plaintiff for the profits shown by their account to have accrued in favor of plaintiff were based on a gambling consideration, and that no recovery could be had thereon.

Appeal from chancery court, Davidson county; Thos. H. Malone, Chancellor.

Action by the Mechanics' Savings Bank & Trust Company against C. B. Duncan and another. Decree for defendants, and complainant appeals. Affirmed.

E. H. East, for appellant. Burch & Waller, for appellees.

BARTON, J. This is a bill filed to collect from the defendants C. B. Duncan and John C. Burch five notes for \$1,500 each and one note for \$948.54, and from defendant John C. Burch one note for \$1,000. The defense is that all of the notes were founded on a gambling consideration. The facts are: The first six notes above mentioned were executed by defendants Duncan & Burch, dated October 24, 1892, payable to order of said Duncan & Burch, and indorsed by them; and defendant John C. Burch executed the last-named note January 14, 1893, payable on demand, to order of John Schardt, and indorsed by him. All these notes were property of complainant when this suit was brought. These notes were given by the defendants to close up and settle an indebtedness to said John Schardt, who was at the time the cashier of complainant bank, which was of the following nature, and grew out of the following transactions: Duncan & Burch were, during the time of the transactions had with Schardt, brokers, located and doing business at Nashville, Tenn., in stocks, grain, and cotton, on the New York market. The firm commenced business in August, 1891. The business was done by them on the New York exchanges through their correspondents in New York, principally through J. S. Backer, Lehman Bros., and Henry Allen & Co., who were members of the New York Stock Exchange. With these parties they had telegraphic communication, and were thus enabled to keep up with the quotations of the market in New York, as it fluctuated from time to time. The above-named John Schardt became a heavy dealer and speculator in stocks with and through Duncan & Burch, the method pursued in this case being the usual one in such dealings and speculations, and which is described by the witness as about as follows: Schardt and their other customers, dealing in like speculations, would give them an order to buy or sell for them, as the case might be, according to their judgment as to the prospective rise or fall of the market, so many shares of a certain stock selected to speculate in. The customer would put up the margin required, which in

these dealings is stated to have been \$300 on each 100 shares of stock traded in. A like order in their own name would be transmitted by Duncan & Burch to the New York broker selected by them, who would execute the same on the New York market; Duncan & Burch charging their customer a commission of one-fourth of 1 per cent., and the New York brokers charging Duncan & Burch a commission. If the order was to buy, the New York brokers would go on the market and buy, and take into their possession the number of shares of the particular stock ordered; charge up against Duncan & Burch, who were required to keep a balance to their credit with them, the required margin; and with their own or borrowed money carry the stock on account of Duncan & Burch, charging interest on balance required to buy and carry stock, usually 6 per cent. If the market declined,—the stock being purchased, of course, with a view to a rise in the market,—Duncan & Burch were required to keep their margin good, and on their failure to do so the stock was sold for their account, and they stood the loss. If the stock advanced, when ordered to do so, the stock was sold and the account closed, Duncan & Burch receiving credit on their account for the profits realized. If the order was to sell, which was given with an expectation of a decline, the New York broker, on receiving the order, would, if he had not the stock, borrow it, and go on the market, and sell at the price fixed in the order, or prevailing price, requiring margin to be put up and protected as before; buying back, if margin was not protected, on an advance, at loss of Duncan & Burch, and on further decline and closing out order crediting Duncan & Burch with profits of transaction. The orders given and received by Duncan & Burch were similar. Schardt and their other customers never handled, nor, indeed, ever expected to actually handle, either in sale or purchase, the actual stock, but simply put up their margins with Duncan & Burch, gave their orders of sale and purchase, kept their accounts, and stood loss or gain, by rise and fall of the market, according as they had given orders to buy or sell. In other words, it was purely a business of stock speculation or gambling on the rise and fall of the market. As above stated, Duncan & Burch had several correspondents or brokers through whom they did business in New York, and they had Schardt and other customers with whom they did business here. With their brokers in New York they simply kept general account with each, on which Duncan & Burch's transactions were all entered. With their several customers here they kept separate accounts. The New York brokers only knew Duncan & Burch, and not Duncan & Burch's customers; and Duncan & Burch's customers, including Schardt, only knew Duncan & Burch, and not the New York brokers. The New York brokers only dealt with and held Duncan & Burch responsible, and Schardt did likewise. All losses on

whatever account in New York simply showed on Duncan & Burch's account, and so with profits. The result of the course of dealing and business was that, if the aggregate losses of Duncan & Burch's customers here exceeded the aggregate of all their customers' gains, their account in New York would show a loss, and, if the aggregate gains of their customers here showed a gain, their account in New York would show a gain. In other words, as stated, Duncan & Burch simply kept in New York a general account with each broker, and all the transactions appeared thereon simply as Duncan & Burch's transactions; no one else being known there. The final result of all Schardt's transactions with Duncan & Burch, when he closed up his business with them on the 24th September, 1892, was that his "short account," or account of the result of sale orders, showed a balance to his credit of \$864.10; his "long account," or the account of the result of his purchase orders, showed a balance to his credit of \$7,584.44. While not expressly stated, it is presumed, and we find, these accounts included both margins put up by him and profits made in the transactions. In settlement of these balances the first six notes above mentioned, aggregating \$8,448.54, were given. To close up a similar transaction with John C. Burch alone, the last-named note was given. They were given, as defendants say, because they did not have the money to pay, because, while Schardt's dealings and account showed a profit, and alone would have placed these balances to their credit in New York with their brokers, yet, as they kept general accounts for themselves in New York with their brokers, and their losses made on orders of other customers, which were charged up on their accounts, used up and overcame these credits, and the failure of other customers to pay certain amounts due the firm of Duncan & Burch rendered them unable to pay Schardt the amount due him. This, we think, is a full statement of all the facts on which the rights of the parties depend. Can a recovery be had on these notes, or is the defense set up effectual?

That a stock speculation of this kind, where the party trading neither has nor expects to get and to pay for the actual stock, is merely gambling, and illegal, and contracts founded thereon void and unenforceable, is beyond dispute. *Act 1883, c. 251, p. 331; McGrew v. Produce Exchange*, 85 Tenn. 572, 4 S. W. 38; *Dunn v. Bell*, 85 Tenn. 581, 4 S. W. 41; *Allen v. Dunham*, 92 Tenn. 257, 21 S. W. 898; *Irwin v. Williar*, 110 U. S. 499, 508, 4 Sup. Ct. 160; *Code*, §§ 2438-2444, inclusive; *Snoddy v. Bank*, 88 Tenn. 573, 13 S. W. 127; *Beadles v. Ownby*, 16 Lea, 424. Indeed, the general principle is not denied, but it is admitted by the able counsel for the complainant. But the insistence and argument is the notes were given in consideration of certain moneys belonging to Schardt in the hands of some one in New York, and

which moneys went to pay the debts of Duncan & Burch, and for which they received credit, and which was done with their knowledge and acquiescence; that the notes were given after the gaming had ended; that the money had been made, and was there in New York, as complainant and defendants had or allowed it to be used on their account, had thus appropriated it, and then given these notes as for money had and received; that complainant is not trying to enforce rights growing out of the gambling transaction, but, the money having been made, and being there in New York as theirs, the defendants cannot, after the transaction is all completed, apply or have it applied to their debts, and then, as agents, use their principal's money, and then say: "It is true we got your money, and it came into our hands or under our control after you had made it, but we will not account to you for it, because you made it by gambling." And it is said, after the money had been made and appropriated to defendants' benefit, the debt was recognized, and the notes given, which are removed from the illegal transaction; that complainant does not have to appeal to that for his rights, nor seek their enforcement through it; that therefore there exists no legal or moral reason why defendants should not be compelled to pay their notes; and that courts will enforce new contracts arising out of an illegal transaction after its consummation,—and we are cited to a number of cases, among others *Planters' Bank v. Union Bank*, 16 Wall. 490, 500, where it is stated: "The plaintiffs do not require the aid of any illegal transaction [the illegality alleged in that case being the placing in circulation, etc., of Confederate notes] to establish their case. It is enough that defendants have in their hands a thing of value that belongs to the complainants. Some of the authorities show that, though an illegal contract will not be executed, yet, when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin." The case of *Dent v. Ferguson*, 132 U. S. 50, 10 Sup. Ct. 13, is also cited. The decision in this case simply holds, when a person had conveyed his property to defraud creditors and impose on the courts, that after it had been acquiesced in for many years, and the fraud had been accomplished, a court of equity would not enable him or his heirs to recover the property, but that he would be repelled. The case of *Armstrong v. Bank*, 10 Sup. Ct. 450, cited, holds that money advanced to pay losses in illegal transactions can be recovered, and that an obligation will be enforced, though indirectly connected with an illegal transaction, if it is supported by an independent consideration, so that the plaintiff does not require the aid

of the illegal transaction to make out the case.

Without further discussion, it may be said the other cases cited and relied on by complainant's counsel are along the same lines, except the case of *Floyd v. Patterson*, 72 Tex. 202, 10 S. W. 526. In this last-named case, which was one of speculation in wheat futures, one J. Leopold and Floyd & Co. were sued by Patterson for money received on margins and profits made in the transaction. It appeared that J. Leopold was in business as a broker, but had received and transmitted the order of Patterson to Floyd & Co. as their agent; the memoranda of the trade being in the name of "J. Leopold, Agent for Floyd & Co." The transaction was closed, and the money put up as margin (some \$6,000 or more) and the profits made (over \$600) were remitted by Floyd & Co. to Leopold, to be paid over to Patterson. He paid only a small part, and a suit was brought for the balance. The court held that, while there was some evidence to show Floyd & Co. were themselves brokers, and dealt through others, yet Patterson's dealing was with them, and there was no evidence to show they had received from others money for him, but the money made and to his credit was by reason of the gambling transactions directly with them, and as to them the decree of the court below was reversed, and it was held, for the reason that it was a gambling transaction, Patterson could not recover of them; but the judgment as to Leopold was sustained, because it was held that Floyd & Co., the real parties to the gambling, had paid their losses and the money over to Leopold for Patterson, and that he could not be heard to say it was money won in gambling, and that it was not necessary to go through the gambling transaction to reach the fund. It was only necessary to say Leopold had been paid money for Patterson by Floyd & Co., and had not turned it over. So we think this decision really sustains the holding of the chancellor in this case. In any event, as we hold, and as is clear from the above-recited facts, Schardt's dealings were with Duncan & Burch in Nashville. Duncan & Burch did not deal in the name of nor as agents for the New York brokers. Who they were was not known to Schardt. The account of Duncan & Burch with the New York brokers was in each case general, and showed the results of all their deals, and was in no case with any particular customer of Duncan & Burch. Not having known Schardt, he could not have recovered of him, because the particular transaction which Duncan & Burch made for him showed a profit, while their others showed a loss. It is clear he looked alone to Duncan & Burch. The settlement shows this. So far as Duncan & Burch and he were concerned, the transaction was not closed, because he had not been paid his profits and his money. He has to go through and show the results of his gambling to arrive at the

amount due him. The fact that this was done, and the amount thus found due included in notes, does not help the matter, nor relieve it from the taint of gambling. Money won in gambling is the consideration, or a part of the consideration, of these notes, and we therefore are of opinion that complainant cannot recover. Whether a suit might be maintained to recover the amount of the margin put up by Schardt with Duncan & Burch it is unnecessary for us to decide. This suit is on the notes, which include in part, as admitted, the profits won in these illegal transactions, and therefore, the notes being founded on a consideration in part illegal, are void, and cannot be enforced. *Bish. Cont.* § 471. A case exactly in accord with our holding in this case, and going even further, is that of *Nave v. Wilson* (Ind. App.) 38 N. E. 876. The decree of the chancellor will be affirmed, with costs, and the bill dismissed.

NEIL and WILSON, JJ., concur.

Affirmed orally by supreme court, March 10, 1896.

DOWNING v. LELLYETT.

(Court of Chancery Appeals of Tennessee.
Feb. 8, 1896.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—RIGHTS OF CREDITOR—TRANSACTION HELD NOT TO CREATE A TRUST.

Plaintiff requested a bank to purchase for him certain stock on margins. The bank purchased it, through brokers, and made a draft on plaintiff for the margins, which was paid. The bank remitted the amount by draft to its correspondent, and sent a check on such correspondent to the brokers, but, by reason of the bank's failure, the brokers did not obtain the money, and resold the stock. The amount remitted was eventually recovered back by defendant, as the bank's assignee. *Held*, that the transaction between plaintiff and the bank did not contemplate the purchase of the stock with plaintiff's own money, but by the bank with its own funds, and created the relation of creditor and debtor between them, and not of principal and agent, and that plaintiff could not recover the amount paid from the defendant assignee as a trust fund, though traced into his hands. *Barton, J.*, dissenting.

Appeal from chancery court, Davidson county; Thomas A. Malone, Chancellor.

Bill by George E. Downing against John T. Lellyett, assignee of the Bank of Commerce, of Nashville. Decree for defendant, and complainant appeals. Affirmed.

Granbery & Marks, for appellant. H. H. Barr, for appellee.

WILSON, J. This bill was filed June 29, 1893, against the defendant, as the assignee of the Bank of Commerce, to recover the sum of \$2,000, charged to be in his hands as assignee, impressed with a trust in favor of complainant. The answer denied the facts and the applicability of the equitable principles upon which the right of recovery was

based. George E. Downing died while the cause was pending in the lower court, and it was revived, by consent, in the name of Mary M. Downing, as his administratrix. Proof was taken, and an agreed state of facts entered into, and the chancellor heard the cause May 13, 1895. He held that the complainant was not entitled to the relief sought, and dismissed the bill, with costs. From this decree, complainant appealed to the supreme court, and has assigned errors.

A brief statement of the facts appearing in the record will present the question in issue between the parties: The Bank of Commerce was doing a banking and brokerage business in the city of Nashville in March, 1893. On or about the 10th of March, 1893, Mr. Downing, a resident of South Pittsburg, Tenn., requested said bank, through its cashier, Mr. Brooks, to purchase for him, on a margin, 200 shares of the capital stock of the Tennessee Iron & Railroad Company, of the par value of \$100 each, at 26 cents or better. On the 15th of the month, Mr. Brooks notified Downing that the shares had been purchased by brokers in New York at 26 cents, and that he had drawn on him, through the Bank of South Pittsburg, for \$2,000, as instructed by him, to cover the margins agreed upon, and requested him to protect the draft. This draft was drawn through the Commercial National Bank of Nashville, and the amount thereof was credited to the general deposit account of the Bank of Commerce with the Commercial National Bank. As soon as the Bank of Commerce, or its cashier, received notice that the draft on Downing had been honored, he purchased from the Commercial National Bank \$2,000 New York exchange, with the check of the Bank of Commerce drawn against its general deposit with said bank. This exchange the Bank of Commerce sent to the Hanover National Bank of New York, its correspondent in the city of New York, to be placed to its credit, and forwarded its check on the Hanover National Bank for \$2,000 to Odil & Co., the New York brokers who had purchased the stock. When this \$2,000 New York exchange was placed to the credit of the Bank of Commerce in the Hanover National Bank, the former's deposit in the latter amounted to \$2,784.21. The check of the Bank of Commerce on the Hanover National Bank was not paid, because creditors of the Bank of Commerce in New York attached its funds in said bank. The Commercial National Bank of Nashville closed its doors, hopelessly in debt, March 24, 1893, and has been totally insolvent since. The Bank of Commerce made a general assignment for the benefit of creditors, March 27, 1893, two days after the suspension of the Commercial National Bank, to defendant, Lellyett, as assignee, who immediately qualified, and has acted as said assignee since said assignment. It was indebted to depositors and other general creditors over \$70,-

000, and its assets will not pay 25 per cent. of its liabilities. As before stated, the creditors of the Bank of Commerce in New York attached its funds, amounting to \$2,784.21, in the Hanover National Bank; but its assignee succeeded in defeating these creditors, and secured said fund, which, after payment of the expenses incident to the litigation over it, was \$2,534.21; and this sum, thus secured, he has in possession. The brokers in New York, immediately after the check of the Bank of Commerce on the Hanover Bank was refused payment, notified the Bank of Commerce; and the latter bank, through its cashier, notified Mr. Downing, Odil & Co., the New York brokers who had purchased the shares of stock, sold the same, March 28, 1893, at 27½. This price, after deducting commissions charged by the New York brokers and the Bank of Commerce, left a profit on the deal of \$228.76; and this sum Odil & Co., under the instructions of the Bank of Commerce, or Mr. Brooks, its cashier, sent to Mr. Downing, at South Pittsburg, Tenn., and it was received and used by him.

It is manifest from the record, and we so find as a fact, that Mr. Downing knew at the time he requested the Bank of Commerce, through its cashier, Mr. Brooks, to purchase the shares of stock which he desired to speculate in on a margin, that the purchase would be made through brokers in New York. He also knew, or must be taken to have known, from the course of dealing in such business, that the bank here would, as to the New York brokers, be considered as the purchaser, and the party responsible for the margins and the final result of the deal, if disastrous, and entitled to the profits, if successful. Under the method pursued in this species of semi-gambling speculation, Mr. Downing was to face the results as between himself and the Bank of Commerce. It may be proper to state as a fact, and we so find, that the Bank of Commerce, at the time it deposited this \$2,000 draft on Mr. Downing in the Commercial National Bank to its credit, had a considerable deposit therein. This draft, with others, was forwarded to the bank at South Pittsburg by the Commercial National Bank, and the amount of the whole was put to the credit of the Commercial National Bank on the books of the South Pittsburg Bank. This credit put the South Pittsburg Bank in debt to the Commercial National Bank in a considerable sum, and, upon the agreed state of facts, the sum collected by the South Pittsburg Bank on the Downing draft was not settled until September, 1893. Mr. Downing paid this draft to the South Pittsburg Bank by a check drawn on his deposit account therein. We further find that the \$2,000 New York exchange purchased by the Bank of Commerce from the Commercial National Bank was so purchased on the basis and credit of the Downing draft, and that this \$2,000 went to make up the deposit of \$2,784.21 of the Bank of Commerce

in the Hanover National Bank of New York; and, this being so, in this sense the Downing draft appears in the \$2,534.21, received by the defendant assignee from the Hanover National Bank. But, as a matter of fact, under the method of conducting such business, Mr. Downing simply agreed to furnish, first, a margin of \$2,000 to the Bank of Commerce to speculate on for him on certain stock, limiting it as to the price to be paid for the stock. He knew that the bank would use its credit or money in effecting the purchase, and that he need not be known in the transaction. He expected to pay this bank a commission for its services, and for the use of its credit or money in effecting the deal. He looked to this bank for the results, if profitable, and to furnish it all calls demanded to save it from loss.

The predicate of the bill is that the bank received the \$2,000 from Mr. Downing as his agent, to invest for him in a certain stock, and that failing to invest it as directed, because of the failure of its check to reach its destination and be honored, it still has, under the facts, in the hands of its voluntary assignee, said sum, and that it is therefore a trust fund recoverable by him. The complainant forcibly states his contention in the following propositions: (1) That the Bank of Commerce became his agent to purchase stock for him as soon as it accepted his order, and this relation of agency was in no wise changed, whether it purchased the stock directly or through another, or disclosed its agency, or acted as buyer. (2) That, when he paid the draft drawn on him, the fund became a trust fund, to be applied as directed by him, and the title thereto remained in him until so applied, and, as it was never so applied, the title is still in him. (3) That the means employed by the Bank of Commerce to get his money is immaterial. (4) That the fact that it was sent to New York does not affect his title, because it was returned to the assignee; nor does the recognition of his right deprive the creditors of the Bank of Commerce of anything, and with respect to them they are, as to that fund, in the same position as if the bank had never undertaken the agency, or as if it had succeeded in getting the money to Odil & Co. in payment for the stock. (5) That if the proceeds of his draft were deposited in the Commercial National Bank to the credit of the Bank of Commerce, and his fund thus became commingled with its other funds and assets, his fund was separated therefrom when the exchange on New York was purchased, and forwarded to its correspondent bank in New York, as a fund to meet its check to Odil & Co. in payment for the margin on the shares of stock purchased for him. (6) That if his trust fund was commingled with the general fund of its agent, or converted into something else, it may be followed and recovered as long as its identity can be traced

or its substitute be found. In support of the contention of the complainant, based upon the aspects of the facts presented by him, his counsel cites the cases of *Bank v. Dowd*, 38 Fed. 172; *Bank v. Insurance Co.*, 104 U. S. 54; *Peters v. Bain*, 133 U. S. 670, 10 Sup. Ct. 354; *Bank v. Hummel* (Colo. Sup.) 23 Pac. 986; *Mechem*, Ag. §§ 780, 781; *Roca v. Byrne* (N. Y. App.) 39 N. E. 812.

We have examined all these cases, and the writer of this gives his unqualified approval to the principles therein announced when applied to a relation and state of facts properly calling for their intervention; and, as we take it, the supreme court of this state will approve them when the transaction before it involves equities and rights depending for practical preservation upon their enforcement. We so held in the case of *Sayles v. Cox*, at Knoxville, and our conclusion in that case received the approval of the supreme court (32 S. W. 626); and such seems to be the import of the opinion of Chief Justice Nicholson in *Brochus v. Morgan* (1875) 5 Cent. Law J. 53. We do not deem it necessary to go into any discussion of the principles announced in the various cases, cited by counsel in their elaborate briefs, or to attempt to reconcile them, or to extract from them what we deem the true rule to be applied in the solution of general questions of the character involved here. The cases of *Bank v. Weems* (Tex. Sup.) 6 S. W. 802, *Bank v. Hummel*, 14 Colo. 259, 23 Pac. 986, and *Roca v. Byrne* (N. Y. App.) 39 N. E. 812, on the one side, and *Wetherell v. O'Brien*, 140 Ill. 146, 29 N. E. 904, and 33 Am. St. Rep. 221, and cases there cited, on the other, present a somewhat conflicting phase of judicial thought on this multiform subject. But, in our opinion, the case of *Akin v. Jones*, 93 Tenn. 353, 27 S. W. 669, in principle, settles this case, and settles it against the contention of the complainant. It is there said: "Any agreement or understanding or course of dealing whereby a bank is not to use the identical money, and is to substitute its own obligation in its stead, destroys all idea of a trust."

Reduced to a single proposition, was the relation of agency or that of creditor and debtor established between Maj. Downing and the Bank of Commerce? This may be determined by what was expressly agreed to between them, or by the known course of dealing in respect to the transaction. Manifestly, Maj. Downing expected the bank to buy the stock in New York, and in its own name, and to use its own money or its equivalent in doing so. This was what was actually done. He expected to pay the bank here what it advanced in New York. When he sent his draft or paid his money to the bank here for that purpose, he did not expect the bank to forward his money to New York, but, on the contrary, expected it to put it in its general funds here, and

send its check, or some substitute of its own procurement, satisfactory to the New York brokers. We have had this case in consultation three times, and have each of us gone over it with anxious care. We feel and believe that the case presents the question in the scales nicely balanced. With some hesitation, we have come to the conclusion that in the course of dealing pursued in the case, under the facts, the simple relation of creditor and debtor was established between Maj. Downing and the bank, and that, therefore, the relief prayed by the complainant cannot be granted. It results that the decree of the chancellor will be affirmed, with costs.

NEIL, J., concura.

BARTON, J. I am compelled to dissent, as I think, for the purposes of this suit, that the relation of principal and agent, or trustee and cestui que trust, is established, and that the funds were kept separated and distinguished, and have been clearly traced, and that complainant is entitled to recover.

On Rehearing.

(March 4, 1896.)

This is a petition to rehear this case, decided at a previous day of the term. We had this case under earnest consideration and consultation a number of times before our previous opinion was handed down, and, after further examination, we believe that the opinion formerly delivered by us fully states the facts as disclosed by the record, and the law applicable thereto. The opinion shows that the court came to the conclusion expressed in it after careful deliberation, but with some hesitancy, and that the court was divided, one member dissenting. The earnest and able petition to rehear insists that our finding of facts is not sustained. The petition states that the court says that Downing intended to engage in gambling speculation, and contends that there is nothing in the record to justify this characterization of the deal he made through the Bank of Commerce or its cashier. The opinion does say: "Under the method pursued in this species of semi-gambling speculation, Mr. Downing was to face the results as between himself and the Bank of Commerce." As learned counsel of petitioner thinks the use of the phrase "semi-gambling speculation" may prejudice his client's cause before the supreme court, we take pleasure in withdrawing it, and substituting therefor the phrase "this species of speculation on margin." We did not intend by the use of the term to say that it was under the ban of the law, but numerous cases and seven text-books class it outright as gambling. The petition says "that the fact that Maj. Downing went to a reputable bank to purchase stock, instead of going to some one of the numerous brokerage concerns, shows that he was not desirous of speculating

simply." While the Bank of Commerce was a bank, it was also a brokerage concern, if the averments of the bill of petitioner are to be believed; for therein it is alleged that March 10, 1893, "said bank was engaged in a general banking business in the city of Nashville, Davidson county, Tennessee, and also acting as broker, as it had the right to do under its charter." It is very true that, so far as is disclosed by the record, this deal is the only transaction that occurred between Maj. Downing and this bank. But the very nature of his order involved knowledge on the part of Maj. Downing as to the method and manner of its execution. The opinion formerly handed down, as we believe, stated the simple plain fact and truth, wherein it said "that Mr. Downing knew at the time he requested the Bank of Commerce, through its cashier, Mr. Brooks, to purchase the shares of stock which he desired to speculate in on a margin, that the purchase would be made through brokers in New York." He also knew, or must be taken to have known, from the course of dealing in such business, that the bank here would, as to the New York brokers, be responsible for the margins. It is equally true that Maj. Downing expected the bank to buy the stock in New York, in its own name, and through brokers there, on a margin, and to use its own money or its equivalent in doing so. This was what was actually done. He expected to pay the bank here what it advanced to the New York brokers. When he honored the draft of the bank here for the margin, he did not expect the bank to forward his money to New York, but, on the contrary, expected the bank here to put it in its general funds, and sent its check, or some substitute of its own procurement, to meet its obligation in connection with the stock in New York. In the main, the petition is an able application to reopen the case for reargument of the law applicable to the facts, phrased and stated in the form desired by the petitioner. We feel constrained to reaffirm our former opinion, except as to the phrase used in it, to wit, "this species of semi-gambling speculation," as hereinbefore indicated, and to dismiss the petition.

NEIL, J., concurs.

Affirmed orally by supreme court, March 12, 1896.

STATE ex rel. WALKER, Atty. Gen., v.
REBENACK.

(Supreme Court of Missouri. July 15, 1896.)

SCHOOL DIRECTOR — ELIGIBILITY — FRAUDULENT
PAYMENT OF SCHOOL TAX.

A candidate for the office of school director in the board of president and directors of the St. Louis public schools, who, to be eligible to the office under the statute, must have paid a school tax in the city for two consecutive years immediately preceding his election, with-

in a few days prior to the election obtained a state merchants' license for the two preceding years for a co-partnership of which he was then a member, and paid the license tax thereon, although the firm had in fact been in existence for only a fraction of the last year, and he had no assessable property subject to tax for the preceding year. *Held*, that such payment, not being of a lawful tax, was fraudulent, and did not render the candidate eligible to the office.

In banc. Proceeding on relation of the attorney general against Hermann H. Rebenack to oust him from the office of school director of the city of St. Louis. Writ of ouster granted.

The Attorney General, for relator. Aug. Rebenack, for respondent.

GANTT, J. This is a proceeding by quo warranto, by the attorney general in his official character, to oust the respondent from the office of school director in the board of president and directors of the St. Louis public schools, into which it is alleged he has intruded himself without authority of law. The respondent, in his return, claims title to said office by virtue of an election held on the 3d day of March, 1896, in the Third school district of the city of St. Louis, under and by virtue of the orders of said board of president and directors of St. Louis public schools, at which said election he received the highest number of votes cast for director in said district. He further avers that at the time he was elected he was possessed of and now possesses all the qualifications required under and by virtue of the laws governing said school board to constitute him eligible to said office of director therein; that is to say, among other qualifications, respondent was at said time a free (white) male citizen over the age of twenty-one years, and had for more than two consecutive years previously resided in said Third district in the city of St. Louis, was a citizen of the United States, had paid a city tax, and "had paid a school tax therein for two consecutive years immediately preceding his election as such director," and was under no disability imposed by law; denied that he had usurped said office. The attorney general replied to this return, and traversed all the material averments thereof, and specifically "denied that respondent had for two consecutive years immediately preceding his election paid a school tax in the city of St. Louis." On the hearing in this court respondent offered in evidence the official returns of the election held for director in the Third school district March 3, 1896, from which it appears that respondent received at said election 863 votes, Dr. Felix Spinzig, 416, and George Blumenberg, 103, giving respondent a clear majority over both of his opponents of 344 votes. Respondent then offered the following documents to prove that he had paid school taxes in said city of St. Louis for two consecutive years immediately preceding his election as such director:

Merchants State License.
State of Missouri.

City Collector's Office.
Mar.
27
1896.
St. Louis, Mo.

To all who shall see these presents—Greeting:

Know ye, that Cuff & Rebenack having on the 2d day of March, in the year of our Lord, eighteen hundred and ninety-four, paid Henry Ziegenhein, Collector, within and for the City of St. Louis, the sum of One 15/100 Dollars, being the annual State tax imposed on them as vendors of Merchandise.

Therefore, the said Cuff & Rebenack is hereby authorized to vend Merchandise at any one place within the said City for the term ending on the first day of July, 1895.

State Tax	\$ 15	In testimony whereof,
State Int.		I, H. J. Pocock, have
Tax	\$ 10	hereunto set my hand
School Tax	\$ 40	and affixed the seal of
Fee	\$ 50/115	said city, this 2d day
		of March, 1896.

H. J. Pocock,
Register.

Countersigned:

Isaac H. Sturgeon,
Comptroller.

Granted this 2d day of March, 1896.

Hey. Ziegenhein, Collector.

No. 4396. Per H. Guenther, Deputy.

Indorsed:

This license was paid on the 2d day of March, 1896, by Herman H. Rebenack personally.

Henry Ziegenhein,
Collector of the Revenue,
Dramand,
Clerk.

Merchants State License.
State of Missouri.

City Collector's Office.
Feb.
27
1896.
St. Louis, Mo.

To all who shall see these presents—Greeting:

Know ye, that Cuff & Rebenack having on the 27 day of Feb. in the year of our Lord, eighteen hundred and ninety-five, paid Henry Ziegenhein, Collector, within and for the City of St. Louis, the sum of Two 45/100 Dollars, being the annual State tax imposed on them as Venders of Merchandise.

Therefore, the said Cuff & Rebenack is hereby authorized to vend merchandise at any one place within said City for term ending on the first day of July, 1896.

State Tax	\$ 15	In testimony whereof, I,
State Int.		H. J. Pocock, Register
Tax	\$ 30	of the City of St. Louis,
School Tax	\$ 120	have hereunto set my
Fee	50	hand and affixed the
	245	seal of the said City,
		this 27 day of Feb. 1896.

H. J. Pocock,
Register.

Countersigned:

Isaac H. Sturgeon,
Comptroller.

Granted this 2d day of Feb., 1895.

Hey. Ziegenhein, Collector,

No. 4440. Per Arnold, Deputy.

Indorsed:

This license was paid on the 27th day of February, 1896, by Herman H. Rebenack, personally.

Henry Ziegenhein,
Collector of the Revenue,
Dramand,
Clerk.

Merchants City License.
City of St. Louis.
1895. 1896.

City Collector's Office.
Feb.
27
1896.
St. Louis, Mo.

To all who shall see these presents—Greeting:

Know ye, that Cuff & Rebenack, having paid to Henry Ziegenhein, Collector of the City of St. Louis, the sum of Five 60/100 Dollars, being the tax and license upon them as a Merchant.

Therefore, the said Cuff & Rebenack is hereby authorized to sell any goods, wares and merchandise of any description, except as otherwise provided by ordinance, at any one store, stand or place of business within the City or at the Merchants' Exchange, for the year ending on the first Monday of July, 1896.

Tax	\$ 60	In testimony whereof, I,
License	\$5.00	Isaac H. Sturgeon,
Total	\$5.60	Comptroller of the City

of St. Louis, have hereunto set my hand, this 27 day of Feb., 1895.

Isaac H. Sturgeon,
Comptroller.

Attest:

H. J. Pocock,
Register.

Delivered this 27 day of Feb., 1895.

Hey. Ziegenhein, Collector.

Per Arnold, Deputy.

Indorsed:

This license was paid on the 27th of February, 1896, by Herman H. Rebenack, personally.

Henry Ziegenhein,
Collector of the Revenue,
Dramand,
Clerk.

Merchants City License.
City of St. Louis.
1894. 1895.

City Collector's Office.
Mar.
22
1896.
St. Louis, Mo.

To all who shall see these presents—Greeting:

Know ye, that Cuff & Rebenack having paid to Henry Ziegenhein, Collector, of the City of St. Louis, the sum of Five 30/100 Dollars, being the tax and license upon them as a Merchant.

Therefore the said Cuff & Rebenack, is hereby authorized to sell any goods, wares and merchandise of any description, except as otherwise provided by ordinance, at any one store, stand or place of business within the City or at the Merchants' Exchange, for the year ending on the first Monday of July, 1895.

Tax	\$ 20	In testimony whereof, I,
License	\$5 00	Isaac H. Sturgeon, Comptroller of the City of St.
Total	\$5 20	Louis, have hereunto set

my hand, this 22d day of March, 1895.

Isaac H. Sturgeon,
Comptroller.

Attest:

H. J. Pocock,
Register.

Delivered this 2d day of March, 1895.

Hey. Ziegenhein, Collector.

No. 4356.

Per A. Guenther, Deputy.

Indorsed:

This License was paid on the 2d of March, 1896, by Herman H. Rebenack personally.

Henry Ziegenhein,
Collector of the Revenue,
Dramand,
Clerk.

"Bring this license when you call to renew."

"This license is not transferable."

"Bring this license when you call to renew."

"This license is not transferable."

"Bring this license when you call to renew."

"This license is not transferable."

"Bring this license when you call to renew."

"This license is not transferable."

The respondent testified in his own behalf that in June, 1895, he formed a partnership with one Frederick Cuff in the manufacture and sale of disinfectants; that he had paid the above taxes and license fees in person. Cuff also testified that the partnership between himself and Rebenack was formed in the latter part of June, 1895, or beginning of July, 1895; that they did business under the name and style of West Disinfectant Company. This company furnished the school board large quantities of disinfectants.

1. The sole question for determination is whether respondent is ineligible for the position of director in said board by reason of his failure to pay school taxes in said city for two consecutive years immediately preceding his said election on March 3, 1896, as required by the laws governing said school board. 2 Rev. St. 1889, p. 2172, § 7; Laws 1887, § 5, p. 273. It will be observed that Exhibit 3 above set out is a state merchant's license, and authorizes "Cuff and Rebenack" to vend merchandise at any one place in the city of St. Louis for a term ending July 1, 1895. It recites that this firm, which was not formed until the latter part of June, 1895, had on March 2, 1894, paid Henry Ziegenhein \$1.15 as the annual tax levied upon them as vendors of merchandise, of which sum 40 cents was a school tax. But Pocock, the register, and Mr. Sturgeon, the comptroller, certify upon this same paper that this license upon which this tax was paid was not granted until March 2, 1896,—the day before the election was held. A more transparent scheme to evade the law requiring the payment of a school tax by a school director for two years immediately preceding his election can hardly be conceived. It not only contradicts itself, but is directly impeached by the respondent's own evidence. It recites the existence of a firm and the obtaining of a license by said firm on March 2, 1894, which both partners swear was not formed until the latter part of June or first of July, 1895. It pretends to authorize them to vend merchandise up to July 1, 1895, when in truth and in fact it was not issued until March 2, 1896, the day prior to the holding of the election on March 3, 1896. Said firm had no right to deal as merchants without having first obtained said license. Rev. St. 1889, § 6895. As Rebenack was not a co-partner of Cuff's until the latter part of June, 1895, and was in no manner liable for a merchant's license tax prior to the formation of the said firm, it is painfully evident that it was a bungling, fraudulent scheme to qualify him for the office of school director by issuing a tax receipt for a year in which he had no assessable property, and upon a business in which he was not engaged. It is very plain that this paper is no evidence of the payment of a school tax by Rebenack for the year 1895, not even the 20 cents which he claims to have paid. Exhibit 4 is also another bald and palpable subterfuge to qualify respondent.

ent. It also is a merchant's license, granted February 27, 1895, by Pocock, the register, and countersigned by Isaac Sturgeon, comptroller. It recites that Cuff & Rebenack, on 27th February, 1895, paid Zeigenhein, collector, \$2.45 annual state tax imposed on them as vendors of merchandise, and authorized them to vend merchandise until July 1, 1896. Upon the paper itself the collector certifies this tax was in fact not paid until February 27, 1896, four days before the election; but the fact remains that, whenever paid, it was an attempt to impose on the board evidence that Rebenack had been, during all the time from February 27, 1895, to February 27, 1896, a member of the firm of Cuff & Rebenack, whereas he was not a member of that firm until July 1, 1895, and had no license as a merchant for the time it purports to cover. The other two exhibits, 5 and 6, are merely city license, and no school tax is paid thereon; so that it is perfectly apparent that there is no evidence before us that respondent was the owner of any property upon which he was liable for a school tax prior to July 1, 1895; that between that date and March 3, 1896, it was neither possible nor lawful to collect from him school taxes for two consecutive years. At most, there could have been collected of and from him and his firm of Cuff & Rebenack the proportional tax from July 1, 1895, to June 1, 1896.

This very clearly appears from section 6921, Rev. St. 1889, which provides that: "When any person shall commence the business of merchandising in any county in this state after the first Monday in June in any year, he shall execute a bond as provided for in section 6897 conditioned that he will on the first day of November next succeeding furnish to the collector of his county a statement verified as herein required of the largest amount of goods, wares or merchandise which he had on hand or subject to his control, whether owned by himself or consigned to him for sale, on the first day of any month between the time when he commenced business as a merchant and the said first day of November next succeeding; upon which statement he shall pay the same rate of tax as other merchants to be estimated as the time from the day on which he commenced business to the first Monday of June, next succeeding shall be to one year." The city ordinances of St. Louis conform to this statutory regulation also as to city licenses. Ordinances St. Louis 1887, "Merchants," §§ 1470-1480, incl. The city of St. Louis having adopted the scheme and charter, from that time forth bore the same relation to the state as any county thereof in the collection of revenue and performing the other functions which had prior to that time devolved upon the county in its relation to the state, and this section applies to the city of St. Louis as much as to any county in the state. Article 9, § 23, Const. Mo. 1875; State v.

Tracy, 94 Mo. 217, 6 S. W. 709. As Cuff & Rebenack commenced business as a firm about the 1st of July, 1895, their tax rate was necessarily estimated in the proportion that the time from July 1, 1895 to June 1, 1896, bore to one year. It is evident that this part of a year covered the whole period for which that firm was assessable, and, instead of two consecutive years, it was only a fraction of one year. It requires no argument to demonstrate that Rebenack was in no manner liable for Cuff's taxes prior to the formation of the co-partnership, or to show that the individual license of Cuff previous to that time would not authorize the firm to deal in merchandise after its formation. It must be borne in mind that no person or co-partnership is authorized to deal as a merchant without having first obtained a license according to law. Section 6895, Rev. St. 1889. For some inscrutable purpose the collector, register, and comptroller have commingled the license and the payment of the tax thereon into one nondescript instrument, and respondent seeks to uphold his title to this office by a claim of payment of a school tax levied on this merchant's license, whereas by the law of the state he was not a merchant, and had no right to deal as such until he obtained his license. The conditions for securing a license are the execution of the bond, to be approved by the collector, conditioned for the payment of the tax that may be due upon such license, and the payment simply of the license fees, which are prescribed by section 6903 to be 50 cents to the clerk and 25 cents each, to the collector, for the bond and statement. Sections 6897, 6901, 6903. In the city of St. Louis it is the duty of the register to perform the duties of the county clerk in relation to the issuing of licenses and extending the school taxes thereon. *State v. Tracy*, 94 Mo. 217, 6 S. W. 709. The city also requires an occupation tax and license fee of its merchants, which are both collected at the same time by the collector. In this case respondent had no license to deal as a merchant until February 27, 1896, when for the first time the firm received its license. But no school tax could be lawfully assessed on that license until the first Monday in June thereafter, when the firm was required to file a statement of the greatest amount of merchandise on hand at any time between first Monday in March and first Monday in June. This school tax being an ad valorem tax, the statement constituted the assessment upon which it was leviable, and the same is true of the other so-called license of March 2, 1896. Upon neither could there have been a statement filed as required by law, and a school tax extended by the register, after the licenses were granted prior to the election on March 3, 1896. It is therefore perfectly clear that the collector had no warrant for the collection of a school tax on either of said licenses; that the said firm was not authorized to do business as mer-

chants prior to February 27, 1896; that the amount of merchandise upon which they should have been taxed could not have been known until after said election.

In conclusion, the evidence of respondent and his partner show that respondent had only been in business about eight months; that his said firm had never procured a license prior to February 27, 1896; that, in order to qualify himself for director, respondent procured one of these receipts on February 27, 1896, and the other on March 2, 1896, prior to the election on March 3, 1896; that their recitals are self-contradictory, and impeached by respondent's own evidence; that they utterly fail to show the payment of lawful school taxes in said city by respondent for two consecutive years next preceding his election; that said receipts were fraudulently contrived to qualify respondent for said office of school director in said board of president and directors of the St. Louis public schools; that he was and is ineligible to said office of director in said board by reason of his failure to pay a school tax for two consecutive years immediately preceding his election. Accordingly it is considered, ordered, and adjudged that a writ of ouster be, and is hereby, awarded, removing said respondent, H. H. Rebenack, from said position and office, as director in the board of president and directors of the St. Louis public schools.

BRACE, O. J., and SHERWOOD, MACFARLANE, BURGESS, and ROBINSON, JJ., concur. BARCLAY, J., absent.

STATE ex rel. HOFFMAN v. WITHROW,
Judge.¹

(Supreme Court of Missouri. July 15, 1896.)

BILL OF EXCEPTIONS—SETTLEMENT—RULE OF COURT.

Rule 31 of the St. Louis circuit court, requiring bills of exceptions to be prepared and served within 10 days after any ruling at a special term which is excepted to, and prohibiting the signing of any bill by the judge unless served within such time, is an abridgment of the rights of litigants under Rev. St. 1889, § 2168, which provides that exceptions taken during a trial may be reduced to writing, and filed during the term at which taken, and it is the duty of a trial judge to settle a bill if properly prepared, served, and presented at any time during the term. Barclay, J., dissenting.

In banc. Application, on relation of Hoffman, for a writ of mandamus to James E. Withrow, judge of the St. Louis circuit court. Peremptory writ awarded.

Julian Laughlin and Jas. P. Maginn, for relator. Jos. S. Laurie and C. P. & J. D. Johnson, for respondent.

BURGESS, J. On petition of plaintiff an alternative writ of mandamus was issued by this court to defendant, Withrow, as judge of the circuit court of the city of St. Louis, commanding him to show cause why

¹ For dissenting opinion, see 36 S. W. 1033.

he should not sign a certain bill of exceptions in an action pending in the special term of the circuit court over which he presides. The facts as stated by defendant, and which are admitted to be substantially correct by relator, are as follows: "The substantial allegations of the alternative writ are to the effect that on the 30th day of October, 1895, a cause was tried in respondent's court, wherein relator was plaintiff and the St. Louis Trust Company, executor, was defendant, and a verdict and judgment was rendered in favor of the defendant; that plaintiff duly filed a motion for a new trial, which was overruled by the court on April 8, 1896; that on May 12, 1896, plaintiff submitted a true and complete bill of exceptions to defendant, who objected to the same for the reason that the same had not been served on defendant within ten days after the overruling of plaintiff's motion for a new trial, as required by rule 31 of the circuit court of the city of St. Louis; that plaintiff thereupon, on May 16th, tendered said bill of exceptions to respondent, and prayed that the same be signed by him; that respondent refused to sign said bill of exceptions, on the ground that plaintiff had failed to comply with the requirements of said rule 31; that plaintiff thereupon procured said bill to be signed by bystanders, and again tendered the same, so signed, to the judge, with the request that he permit the same to be filed, which request was refused by the judge on the ground that plaintiff had failed to comply with the requirements of said rule 31, and that plaintiff thereupon, to wit, on May 23d, took an appeal to this court from the judgment in said cause; that said rule is in direct violation of the statute (Rev. St. § 2168), and is therefore null and void; and, further, that even though said rule 31 be a valid rule, yet said judge might, in the exercise of a judicial discretion, have allowed plaintiff's bill of exceptions to have been filed, had he seen fit to do so." In consideration of the premises, respondent is ordered to show cause why he should not sign said bill of exceptions. By way of return, respondent demurs for several reasons; among others, that it appears on the face of the writ relator is not entitled to the relief sought. Rule 31 of the St. Louis circuit court, as set forth in the alternative writ, is as follows: "Within ten calendar days after any ruling is made at special term to which a party desires to except, the party excepting shall prepare a bill of exceptions, and shall cause the same, or a copy thereof, to be served, as prescribed by law for the service of notices, on the adverse party, who shall, within three calendar days thereafter, make objections (if there be any) thereto, in writing, on a separate piece of paper, pointing out particularly the alterations and additions proposed thereto, and cause the same, or a copy thereof, to be served in like manner on the excepting party. If the excepting party does not agree to such

alterations, then the proposed bill and alterations shall be submitted to and settled by the court. If no objections be thus made to such bill within said three days, all objections shall be considered waived, and the same shall then, at the same term, and at least two days before the adjournment of the term, be presented to the court for signature, if found correct, or for such amendment as may conform the same to the facts. And no bill of exceptions shall be signed by the court or judge thereof, in case the requirements of this rule as above specified shall not have been complied with. This rule is not to apply to cases in which the ruling to which exception is taken is made within fifteen days before the adjournment of the term, nor to cases in which the bill of exceptions should contain only a motion which is on file in the cause and the ruling of the court on the same. No execution shall issue, without special leave of court, within fifteen calendar days after a motion for a new trial or in arrest is overruled." The only question for consideration in this case is whether the rule of court before cited is valid. Relator contends that it is void, because in conflict with section 2168, Rev. St. 1889. That section provides that: "Such exceptions may be written and filed at the time or during the term of the court at which it is taken, or within such time thereafter as the court may by an order entered of record allow, which may be extended by the court or judge in vacation for good cause shown, or within the time the parties to the suit in which such bill of exceptions is proposed to be filed, or their attorneys, may thereafter in writing agree upon, which said agreement shall be filed by the clerk in said suit and copied into the transcript of record when sent to the supreme court or courts of appeals. All exceptions taken during the trial of a cause or issue before the same jury shall be embraced in the same bill of exceptions." The circuit court of the city of St. Louis has the inherent power, irrespective of statutory enactment, to promulgate and enforce rules with respect to proceedings and the order of business in it not in controvention with the constitution and statute; but any rule which operates to deprive a party of a right conferred upon him by statute, or which is in conflict with its provisions, is, to whatever extent that may be, void. While by the statute quoted the filing of bills of exceptions and the extension of the time in which the same may be filed are provided for under the conditions therein named, no power is conferred upon that court to impose conditions upon which such a bill may be filed, nor had the court of St. Louis the inherent power to impose any such prerequisite to the signing of the bill as was done in the case in hand. When relator prepared her bill, and presented it to the respondent for his signature, it was his duty, after having had a reasonable time to ex-

amine the same, to sign it, if true; but, if untrue, and for that reason he refused to sign it, he should have so certified under his hand, as required by section 2169, Rev. St. If he did not have time to examine the bill before the adjournment of the court for the term at which it was presented, then he should have extended the time for its filing by an order of record, in order that an opportunity might be afforded him in which to do so. When, therefore, the court undertook by rule to require the party excepting within 10 calendar days thereafter to prepare a bill of exceptions, and cause the same, or a copy thereof, to be served on the adverse party, a condition precedent to the signing of such bill by the judge before whom the trial was had, it shortened the time which the exceptor is given by statute to present his exceptions, and imposed upon him terms more onerous than authorized by said statute. By the law, relator was only required to prepare and present her bill to the court or judge for his signature within the time prescribed by the statute, that is, during the term; while by the rule, in addition to this, she was required, within 10 calendar days after any ruling was made to which she desired to except, to prepare her bill, and cause the same, or a copy thereof, to be served on the adverse party, and, in case this was not done, the court or judge was prohibited from signing the same. That such a rule, if observed, would relieve the court of much labor, and greatly facilitate business therein, is doubtless true; but it seems quite clear to us that it had no power to adopt such a rule or to enforce its observance. In *Works on Courts and Their Jurisdictions* it is said: "A court cannot make and enforce a rule that will deprive a party of a right given him by law or granting the right upon terms more onerous than those fixed by law." See, also, *People v. McClellan*, 31 Cal. 101; *Krutz v. Howard*, 70 Ind. 174; *Krutz v. Griffith*, 68 Ind. 444; *State v. Gideon*, 119 Mo. 94, 24 S. W. 748; *State v. Withrow* (Mo. Sup.) 36 S. W. 43. But it is insisted by defendant that the rule is authorized by section 11, art. 17, Rev. St. 1889, Append., entitled "The St. Louis Circuit Court," which is as follows: "And in addition to the ordinary power of making rules conferred by the general law, the court may make all rules which its peculiar organization may, in its judgment, require, different from the ordinary course of practice, and necessary to facilitate the transaction of business therein." And that its validity has been sustained by this court in *State v. Smith*, 44 Mo. 112, and by the St. Louis court of appeals in *State v. Boyle*, 3 Mo. App. 604, Append., and in *State v. Wickham*, Id. The rule in the case first cited was upheld upon the ground of the peculiar organization of the St. Louis circuit court at that time, which consisted of three judges, who held special terms for

the ordinary transaction of business, and general terms, composed of all three judges. For the revision of the rulings of the judges holding separate or special terms an appeal might then be taken from the special to the general term, and from the general term to this court. At that time an appeal could not be taken from a special term directly to this court, but since then the law has been changed; no general term is required to be held, and an appeal lies from a special term of the circuit court of said city, as from all other circuit courts in this state, directly to the court of appeals or to the supreme court. No reason for such a rule longer exists, and it cannot be upheld upon the ground of the peculiar organization of the St. Louis circuit court, as was done in that case. We do not, therefore, regard it as an authority in this case. The same may be said with respect to the cases of *State v. Wickham*, supra, and *State v. Boyle*, supra. Besides, we are not impressed with the soundness of the reasoning in the last-named case. The demurrer to the alternative is overruled, and peremptory writ ordered.

MACFARLANE, ROBINSON, GANTT, and SHERWOOD, JJ., concur. BARCLAY, J., dissents. BRACE, C. J., absent.

RECTOR v. COMPTON et al.¹
(Supreme Court of Arkansas. April 18, 1896.)
ATTORNEY—COMPENSATION—CONSTRUCTION OF CONTRACT.

Plaintiffs contracted, in writing, to prosecute for defendant certain suits for the recovery of land, and, if successful therein, were to receive one-fourth of the land recovered, or its equivalent in value. Pending the litigation, the lands were placed in the hands of a receiver, who collected the rents, and the suits were prosecuted to a successful termination, and a deed to one-fourth of the land was executed to plaintiffs. *Held*, that plaintiffs were not entitled to any portion of the rents arising before the final determination of the suits, but only to one-fourth thereof after that time. Riddick, J., dissenting.

Appeal from circuit court, Pulaski county; Wilbur F. Hill, Special Judge.

Action by U. M. Rose and W. A. Compton against Henry M. Rector to recover certain moneys alleged to be due for attorney's fees. There was a judgment for plaintiffs, and defendant appeals. Reversed.

Henry M. Rector, pro se. W. E. Hemingway, for appellees.

BUNN, C. J. Appellant, Rector, employed appellees, as attorneys, to institute and prosecute all the suits he might bring to recover a large number of lots and parcels of land in and near the city of Hot Springs, which had been set apart to others by what are known as the "Hot Springs Commissioners." The

¹ Rehearing denied July 8, 1896.

attorneys were to be paid as set forth in the following contract, to wit: "Agreed between the undersigned, Henry M. Rector, of the first part, and F. W. Compton and U. M. Rose, of the second part, that said Compton and Rose shall attend to all cases to be brought by Rector, claiming any lands in or near Hot Springs as against persons claiming under adjudications recently made by the Hot Springs commissioners; and for their legal services they are to be paid as follows: (1) One thousand dollars to be paid by said Rector within one year from this date. (2) Said Rose and Compton shall receive one-fourth in value of all lands recovered in said suits, or its equivalent in money. If Rector shall desire to pay such value in money, then he and Compton and Rose shall each appoint one appraiser, and the two appraisers thus appointed shall select a third, and the decision of a majority of them shall be binding as to such value, which may be paid by said Rector to Compton and Rose at any time within sixty days after said appraisement shall have been made." The \$1,000 were paid as agreed, and the controversy arises as to what is really the amount of the remaining portion of the fee. The suits were prosecuted to a successful termination for Rector in the United States circuit court for the Eastern district of Arkansas, but the defendants took an appeal to the supreme court of the United States, and, by consent, the property involved was placed in the hands of a receiver, who collected the rents, in part, and reported the same at the final termination of the litigation. It also appears that the defendants in those suits, when they were finally decided, paid to the said attorneys certain of the rents due. It is not stated in the record, except in the most general terms, but the suits, being in the nature of proceedings in ejectment, for the adjudication of the title, carried the accrued rents, as we infer, only the amount being left to be ascertained, and this, perhaps, was done on the evidence in the main case. Of this, however, the record does not speak definitely. The parties, by agreement, and with the approval of the United States court, have so arranged the matter as that the only thing before this court is the proper construction of the contract; and this is made more necessary by the death of Compton.

Unfortunately, we are not aided by any authorities to which we have been cited by either of the parties, and are unable of ourselves to find any directly in point. It is evident that the deferred part of the fee was not only conditioned upon the success of the prosecution of the suits, but was also not due until the final termination of those suits. When that event should occur, Rector was to pay in property specifically, or in cash according to its value, and in either case one-fourth of the land gained. He elected to perform his contract by giving the one-fourth of the land specifically. This, of course,

necessitated his making a deed to that portion to the appellees. Presumably, this deed was in the usual form of deeds of conveyance of lands, for there is nothing in the contract to indicate that it was or should be otherwise. If this be true, the previously accrued rents—that is, the rents which had accrued previous to the final judgment in the suits—belonged to appellant, for without some specific words to that effect in the deed, or in a separate written instrument, we do not think the grantee can claim rents previous to the date of his vestiture of title, either equitable or legal, for a deed in the usual form has no retroactive effect ordinarily, if ever. Again, whatever may have been the effect of ejectment proceedings in the earlier times of our jurisprudence, it has long been a universal rule that in such suits the recovery of the corpus of the estate and the accrued rents involve only one proceeding. This being true, and the general rule being that a suit for the recovery of land and for the recovery of the accrued rents and profits thereof involves only one litigation, if a fee is stipulated in the contract it covers the services in the whole case. See Sand. & H. Dig. § 2583. By the terms of the contract, at the favorable termination of the suits, the parties were to cause the recovered lands to be valued by appraisers; and Rector, if he should so choose, might fulfill the obligation by paying to the attorneys one-fourth of the value of the lands thus ascertained, in money, or he might set apart to them one-fourth of the land in value specifically. It could hardly be contended that, in making this appraisement, these appraisers should take into consideration, as part of the land, the past accrued unpaid rents. The evident meaning of the contract in this respect is that the land, as it should then be, should be valued by the appraisers, and, according to this valuation, the fee could be paid. The case is not without difficulty both as to the proper construction to be given to the contract, and also as to the real equities of the matter; but we are not to judge except upon the meaning of the language of the contract, in the light of the circumstances surrounding, as appears from the record. The appellees are entitled to their one-fourth of the rents and profits since the date of the final termination of the suits, by the decision of the supreme court of the United States, but not those accrued before that time. Reversed and remanded, to be proceeded with in accordance with this opinion.

RIDDICK, J. (dissenting). I am unable to concur in the opinion of the court in this case. The facts are plain. Rose and Compton agreed, as attorneys, to bring and prosecute actions to recover lands claimed by Rector, and Rector agreed to give, in return for such services, \$1,000 in money, and also "one-fourth in value of the lands recovered in said suits, or its equivalent in money." Noth-

ing was said about rents either in the contract or by the parties, but a large portion of the litigation was concerning rents. The question to be determined is whether the appellees are entitled to receive any portion of the rents recovered by them, and which grew out of the land after the litigation commenced. I maintain that a reasonable construction of this contract gives them one-fourth of the rents recovered. If the parties who were in possession of the lands had declined to contest the action, and had surrendered the possession on the day the action was commenced, there would be no doubt that appellees would have been entitled to one-fourth of the land recovered, with the rents arising thereon from the day on which the adverse holders surrendered possession. If possession had been surrendered at the commencement of the action, the appellant would now have no more than is conceded to him, while the appellees would have all they now claim, without the trouble of conducting a long litigation. But the adverse holders did not surrender. An action was brought against them for appellant in the United States circuit court, by the appellees as his attorneys, and a protracted litigation followed, the case going on appeal twice to the supreme court of the United States. After a 10-year legal war, the stubborn resistance of the adverse holders was overcome, their defenses battered down, and the possession of the land recovered for appellant. The appellees expended much time and labor in attending to this litigation, but appellant was not injured by the delay. The energy and skill of appellees protected him against any injurious consequences by reason thereof, for, along with the land, they recovered several thousand dollars, as value of rents or use and occupation of land after commencement of the suit. Appellant now has all that he would have had if the possession of the land had been obtained on the day suit was brought. He has his land, and the rents or value of the use of the land from the commencement of the action. But he claims more. He insists that he is entitled to the rents arising after the commencement of the action out of that portion of the land he had agreed to give appellees for their services in recovering the same. If his construction of the contract be correct, then appellees agreed to receive a smaller fee for attending to a long litigation than for bringing an action when no defense was made. I see nothing in the contract that warrants such a construction, and his contention seems to me without merit. This contract was, in effect, an agreement to convey land in consideration of services to be performed by appellees. The appellees commenced to perform such services at the commencement of the lawsuit. In equity, an interest in the land belonged to them from that time, and they were entitled to the rents upon the portion which Rector had agreed to convey them. *Lysaght*

v. Edwards, 2 Ch. Div. 506; *Rose v. Watson*, 10 H. L. Cas. 678; 3 Pom. Eq. Jur. §§ 1260, 1261; 1 Warv. Vend. 192. As these rents grew out of the land after the commencement of the action, they were, in contemplation of the parties, and within the meaning of the contract, a part of the lands. But if we adopt the opposite theory, and say that the word "lands," used in the contract, did not include the rents growing out of the land after the commencement of the action, then appellees were not required to bring suit for these rents. On that theory, as the proceeding for the recovery of rents was prosecuted by appellees with the knowledge and consent of appellant, and for his benefit, he is responsible to them for the reasonable value of such services, which is shown to be one-fourth of the amount recovered. Take either view of the matter, and it seems to me that the judgment of the circuit court is correct, and should be affirmed.

CARPENTER v. STATE.¹

(Supreme Court of Arkansas. April 18, 1896.)

GRAND JURY—SELECTION—INDORSEMENT OF LIST—WAIVER OF OBJECTIONS—FORMER JEOPARDY—CONTINUANCE—IMPEACHMENT—FOUNDATION—HOMICIDE—INSTRUCTIONS.

1. Though the list of grand jurors selected to serve at the term succeeding their election should have indorsed thereon the term of court during which they were to serve, it was not a prejudicial irregularity for the commissioners appointed at the August term to select such grand jurors to indorse the list as for February term, instead of for January term; there being no February term, and the jurors having been selected and sworn for the January term.

2. Objections to irregularities in the formation of a grand jury are waived by pleading to the indictment.

3. A verdict defective because it failed to state the degree of homicide of which defendant was found guilty, and a judgment rendered thereon which was reversed on appeal, do not constitute a former jeopardy.

4. It was not error to deny a continuance on the ground of absent witnesses, where the facts as to which they would testify were testified to by other witnesses.

5. It was not error to refuse to permit a grand juror to state what decedent's wife said before the grand jury as to the position of defendant at the time of the homicide, where said wife was not asked, when she testified, as to whether she had ever made such statement, and particularly where the court's refusal was not prejudicial.

6. On a trial for murder in the first degree, it was not error to instruct that justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person, or property, against one who manifestly intends or endeavors by violence or surprise to commit a known felony, and that if the jury believed that defendant shot and killed deceased while the latter was standing talking to defendant's brother, and not to save his own life or to protect his person from great bodily harm, nor in defense of his habitation, person, or property, they should find defendant guilty of murder as charged in the indictment.

7. An instruction that a reasonable doubt is not a captious, imaginary, or possible doubt,

¹ Rehearing denied July 8, 1896.

but must be such a doubt as a reasonable man would have in matters of deepest concern to himself, and must arise out of the evidence in the cause, while not so full and complete as it might be, contains no reversible error.

8. On a trial for murder, an instruction that if defendant was present and participated in the killing of deceased, by shooting him in the manner charged in the indictment, and that the shooting was done in furtherance of a previous understanding between defendant and his brother to kill deceased, and that, as a result of such understanding, deceased was killed, the jury should find defendant guilty, though they did not find that the shots fired by defendant, if any were fired by him, actually caused deceased's death, was not improper, when construed in connection with instructions defining justifiable homicide and the degrees of unlawful homicide, and a verdict of guilty of murder in the first degree.

9. On a trial for murder, it is proper to refuse requests to charge which were based on the theory that defendant's brother, being in possession of his field, had a right to resist a trespass upon the same by deceased, to the extent of taking deceased's life, and that defendant could lawfully assist his brother in such resistance.

10. A request to charge as to the effect the jury might give to the bad character of deceased was properly refused. It is not within the province of the court to select one fact, and suggest to the jury what effect they might give to it.

Appeal from circuit court, Drew county; William F. Slemmons, Special Judge.

Ben L. Carpenter was convicted of murder, and appeals. Affirmed.

Geo. W. Norman, Robert E. Cralg, and Wells & Williamson, for appellant. E. B. Kinsworthy, Atty. Gen., for the State.

BATTLE, J. Ben L. Carpenter was indicted in the Ashley circuit court for murder in the first degree; was tried, after a change of venue, in Drew county; and was convicted of the crime of which he was accused. He now brings the record of his trial and conviction to this court, and asks for a reversal of the judgment against him, and for a new trial.

The indictment was filed in open court by the grand jury on the 19th of January, 1892. The defendant was tried and convicted in August, 1893. The judgment of conviction was reversed by this court on appeal (24 S. W. 247), and the cause was remanded for a new trial. After this, on the 24th of September, 1895, the defendant filed a motion to set aside the indictment because the commissioners who selected the grand and alternate grand jurors for the January term, 1892, of the Ashley circuit court (at which term this indictment was filed), stated in their indorsement on the same that the lists were for the February term, 1892, when they should have said that they were for the January term, 1892. The motion was denied.

On the 24th of September, 1895, the defendant filed a plea in which he alleged that, in a former trial of the issues in this prosecution, he had been convicted by a jury of the charge alleged in the indictment, but they failed to specify the degree of homicide of

which they found him guilty in their verdict, and that a judgment was rendered upon this verdict, which judgment was afterwards reversed by this court on appeal, and a new trial was granted, and that, therefore, he had been put in jeopardy for the same offense charged in the indictment, and should be discharged. The trial court held that the plea was insufficient.

On the 26th of September, 1895, he filed a motion for a continuance, in which he alleged that he could not safely go to trial, because of the absence of James Coulter and Lee Turner, and that he expected to prove by Coulter that he was at the place of killing, on the evening it occurred, and saw a pistol lying on the mantel, which pistol Hugh Estelle said Hannibal had when he was killed, and that he expected to prove by Turner that he had examined the gun which the defendant had on the day of the homicide; that it was an old, muzzle-loading gun; that it had been loaded a long time; that he tried and could not "discharge" it, and "drew the load with a gun wiper." The motion was denied.

The court thereupon proceeded with the trial of the defendant for the offense charged against him in the indictment.

The facts, as stated by witnesses in the trial, are substantially as follows: W. O. Carpenter, the brother of appellant, rented a field on Pine prairie, in Ashley county, in this state, for the year 1891, and planted it in peas and corn. H. L. Hannibal lived near this field, and had adjoining it a small cow pen. After the crop of corn had matured and was gathered, W. O. Carpenter saw Hugh Estelle, a boy who was living with Hannibal, bringing some stock out of the field. Carpenter remonstrated with him, and requested him to tell Hannibal not to put his stock in there again. He also discovered that a gap leading from the cow pen into the field had been made by Estelle and Hannibal for stock to pass in and out. He closed the gap, and then put his own mules in the field. This was on Saturday morning, September 26, 1891.

On Sunday morning, following, W. O. Carpenter, going into the field, discovered that the gap had been reopened. One story is that he called Hannibal, who was then sitting on the gallery of the house near by, to him, and remonstrated with him in reference to the gap and putting his stock in the field, and that an angry altercation ensued, and Hannibal, going into the field where Carpenter was, refused to permit him to repair the fence, cursed him, and drove him away. Another story is that Carpenter went to Hannibal's house, and cursed him, and said that he did not want him to put his mules in the field any more; if he did, he would kill him,—and that Hannibal offered to pay damages, and Carpenter refused to accept them, and that Hannibal was sitting on the fence while this conversation continued.

On the same morning, after seeing Hannibal, he visited his brother, Ben L. Carpenter,

and a justice of the peace, and asked the latter what he should do for the protection of his property. The justice informed him that a renter had the right to the possession of the rented land for the full period of his lease, and said, "If it was my field, I would put up the gap, at all hazards." He then went to T. J. Wells, and got a pistol, and then to John Wheat's, and borrowed a breach-loading, double-barreled shotgun, and three or four brass shells, from him. He then returned home, ate his supper, and then returned to his brother Ben's. About 10 o'clock in the night following, some one went to the house of Wilson Hunnicutt, and borrowed of him 18 buck-shot and a headlight, and said he "wanted to go a fire-hunting." Hunnicutt says that he knew him well, and that it was Ben L. Carpenter, but W. O. and Ben L. Carpenter swear that it was W. O. Carpenter.

Jesse George testified as follows: "I saw Ben Carpenter at his house, Sunday morning, after Ol Carpenter (W. O. Carpenter) had been there. He told me that he would rather Ol would get somebody else to go with him down to Hannibal's, for if Hannibal hurt or killed Ol he would have to kill Hannibal; that Ol would be so slow he would have to kill Hannibal."

On Monday morning, following (the 28th of September, 1891), B. L. Carpenter went to W. O. Carpenter's, carrying with him a double-barreled shotgun, and ate breakfast. After breakfast, early in the morning, the two brothers (Ben with his gun, and W. O. with a shotgun and pistol) went to the field on Pine prairie, which W. O. Carpenter had rented, as before stated, and which was near to the residence of W. O. Carpenter. When they entered the field, W. O. went to the gap. About this time, Hannibal came out of the door of his house with a bucket, intending to draw water from a well about 100 yards distant. Seeing W. O. at the gap, he handed the bucket to the boy, Hugh Estelle, and went back into the house. One story was, he came out again with something in his hand which looked like a pistol; that he immediately went to the gap to prevent Carpenter from repairing the fence; that Carpenter expressed a determination to repair it, and, as he did so, Hannibal threatened to kill him, and turned his back, and exhibited a pistol in his hip pocket, and moved his hand as if he would draw it, when W. O. Carpenter shot him; that Hannibal attempted to shoot, and W. O. Carpenter shot again, killing him; and that Ben L. Carpenter was 25 or 30 yards distant from the gap, and took no part in the shooting.

Another story told by the witnesses for the state was that, when the deceased saw W. O. Carpenter at the gap, he went back to the door, and pushed it open, and, without entering, said to his wife that he was going out there and tell Carpenter not to put up the fence, that he would put it up after breakfast; that he went to the gap, but carried with him no weapon,—not even

a pocketknife; that he had a pistol, but left that in the house; that he was standing with his left hand on a little tree by the fence, talking to W. O. Carpenter, when Ben L. Carpenter, who was standing near by, shot him in the left side with a shotgun, when he turned around, and Ben L. shot him the second time with the same gun; that the deceased fell, and W. O. Carpenter then shot him twice in the face with a pistol; and that the Carpenters then ran off, yelling.

Immediately after the killing a pistol was found on the ground near the deceased, but witnesses for the state testified that the pistol was at the time of the shooting on the mantelpiece in the house of the deceased; that when the gun was fired the wife of the deceased ran back, got it, and carried it to where he was, and seeing him lying on the ground, dead, threw it down.

A witness in behalf of the defendant testified that on the Sunday preceding the killing the deceased endeavored to borrow a Winchester rifle, and to procure cartridges, and expressed the purpose to put his stock in Carpenter's field, or kill him.

In the progress of the trial the testimony of Mrs. Sallie Hannibal, the widow of the deceased, taken and reduced to writing before an examining court, was read as evidence in behalf of the state, she being dead at the time of the trial. In that testimony she stated that she did not see Ben L. Carpenter until he shot, when he was about 10 feet above the gap, close to the fence. Afterwards she testified before a grand jury as to the same matter. A member of this jury (Ben Burgess) was introduced as witness in behalf of the defendant, and was asked the following questions: "Were you a member of the grand jury that indicted defendant? If so, did you hear Sallie Hannibal testify before that body? If so, what did she say as to where Ben L. Carpenter stood at the time the shooting was done?" And the court refused to allow him to answer them. But he was permitted to testify that she said on the day of the killing that Ben shot the deceased with a shotgun while he was leaning on the fence at the gap, and that Ben was about 15 feet east of the gap. Another witness was allowed to testify that she said that "she was in bed when the first gun fired, and just as she was putting her dress over her head the second gun fired, and as she went on the gallery the pistol fired," and that she said in this connection that "Ben Carpenter [defendant] hollowed out in the field." And the court gave the defendant permission to read, as evidence, the testimony of Mrs. Hannibal before the grand jury which returned the indictment against the defendant, as written by its clerk, which testimony so written was then in court, and he refused to read it.

To the refusal of the court to permit Burgess to answer the questions propounded to

him, the defendant excepted, and made it one of his causes for a new trial.

The following instructions were given to the jury by the court, on its motion:

"First. The court instructs the jury that murder is the unlawful killing of a human being in the peace of the state, with malice aforethought, either express or implied.

"Second. The manner of the killing is not material, further than it may show the disposition of mind, or the intent, with which the act was committed.

"Third. Express malice is that deliberate intention of mind unlawfully to take away the life of a human being, which is manifested by external circumstances capable of proof.

"Fourth. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing manifest an abandoned and wicked disposition.

"Fifth. You are instructed that justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person, or property, against one who manifestly intends or endeavors by violence or surprise to commit a known felony; and if you believe from the evidence that the defendant shot deceased twice with a shotgun, and that said shots killed deceased, while deceased was standing talking to his brother, and not to save his own life, or to protect his person from receiving great bodily harm, nor in defense of his habitation, person, or property, you will find defendant guilty of murder as charged in the indictment.

"Sixth. All murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate, malicious, and premeditated killing, or which shall be committed in the perpetration of, or in the attempt to perpetrate, arson, rape, robbery, burglary, or larceny, shall be murder in the first degree. All other murder shall be deemed murder in the second degree.

"Seventh. The jury are the sole judges of the evidence and the credibility of the witnesses. In determining as to the weight that should be given to the testimony of any witness, they may take into consideration his manner of testifying, his means of information, his interest, if any, in the cause pending, his prejudices and his motives; and if from these you should believe that any witness has sworn falsely, willfully, to any material fact, you may disregard the whole or any part of the evidence of such witness.

"Eighth. The court instructs the jury that a reasonable doubt is not a captious, imaginary, or possible doubt, but must be such a doubt as a reasonable man would have in matters of deepest concern to himself, and must arise out of the evidence in the cause.

"Ninth. You are instructed that if you believe from the evidence that the defendant

was present and participated in the killing of I. J. Hannibal, by shooting him with a shotgun, as charged in the indictment, and that said shooting was done in furtherance of a previous design and understanding between himself and his brother to kill said Hannibal, and that, as a result of such design and understanding, H. J. Hannibal was killed, you will find him guilty, although it may not be shown that the shot or shots fired by defendant, if any were shot by him, actually caused the death of the deceased.

"Tenth. Manslaughter is the unlawful killing of a human being without malice, expressed or implied, and without deliberation. Manslaughter must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible."

To the giving of the fifth, eighth, and ninth of which the defendant at the time excepted.

And the defendant requested, and the court gave, the following instructions:

"First. The jury are instructed that justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, person, or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony; and, if the killing in this case is shown by the evidence to be justifiable or excusable, the defendant shall be acquitted and discharged.

"Second. A felony is a crime punishable by death, or imprisonment in the state penitentiary; and if the jury believe from the evidence that Hannibal attempted, by force, to drive W. O. Carpenter from his field, and if, in so doing, drew a pistol, with intent to shoot, and attempted to shoot and kill W. O. Carpenter, this was a felony on the part of Hannibal."

"Twelfth. The jury are instructed that it is incumbent on the state to prove every material allegation contained in the indictment, beyond a reasonable doubt, and it is a material allegation that Ben L. Carpenter shot and killed the deceased with a shotgun; and if, from all the evidence, you have a reasonable doubt whether or not Ben L. Carpenter shot and killed Hannibal with a shotgun, or whether he came to his death by shots fired by W. O. Carpenter, then the defendant is entitled to the benefit of such doubt, and you will acquit him.

"Thirteenth. The jury are instructed that if, upon the whole of the evidence in the case, they have a reasonable doubt as to the guilt or innocence of the defendant, they will give the defendant the benefit of the doubt, and acquit him."

And the defendant asked, and the court refused to give, the following:

"Third. If the jury believe from the evidence that W. O. Carpenter had rented the pasture field for the year 1891, then for the whole of that year the field was the prop-

erty of W. O. Carpenter, and for that time he might lawfully protect the same as fully as if he owned it in fee simple.

"Fourth. If the jury believe that W. O. Carpenter, being in the lawful possession of the pasture field, had reasonable grounds to believe that it was necessary to kill Hannibal to protect himself from great bodily harm at the hands of Hannibal, and if, acting under such belief, he shot and killed him, then he was justifiable.

"Fifth. The jury are instructed that a person on his own premises is not bound to retreat, but has the right to use such force as is reasonably necessary to repel a forcible entry thereon.

"Sixth. If the jury believe that W. O. Carpenter was on his own premises, and that Hannibal threatened him, while he was putting up his fence, to kill him if he did so, and that he had at the time reasonable grounds to believe, and did believe, that Hannibal intended to take his life or do him great bodily harm, then he was not obliged to retreat, nor consider whether he could safely retreat, but was entitled to stand his ground and meet any attack made on him with a deadly weapon; and, if under all the circumstances, he at the moment believed, and had reasonable grounds to believe, that it was necessary to save his own life, or to protect himself from great bodily injury, he had the right to kill Hannibal.

"Seventh. If you believe that Hannibal had made slip gaps in W. O. Carpenter's fence, and, on Sunday before the killing, Hannibal, by his manner, threats, and acts, led W. O. Carpenter to believe that he intended forcibly to take, hold, and use his pasture against his will, and forcibly to prevent him from repairing his fence, then he had the right to prepare himself and hold his property against any violence which might be offered; and if you further believe from the evidence that on the morning of the killing W. O. Carpenter armed himself with a shotgun and pistol, and the defendant, Ben L. Carpenter, armed himself with a shotgun and they together went to repair W. O. Carpenter's fence, and Hannibal, seeing W. O. Carpenter repairing his fence, armed himself with a pistol, and went to where Carpenter was repairing the fence, to forcibly prevent him from doing so, and made such overt acts that from his manner, threats, and words, the defendant, Ben L. Carpenter, had reasonable grounds to believe that W. O. Carpenter was in immediate danger of death or great bodily harm at the hands of Hannibal, and W. O. Carpenter, or the defendant, Ben L., one or both, shot and killed Hannibal to avert such impending danger, then defendant was justifiable, and you will acquit him; and, if you have a reasonable doubt on this proposition, you will give the defendant the benefit of the doubt and acquit him.

"Eighth. If the jury believe that W. O.

Carpenter had the right to go to his field for the purpose of putting up a gap in his fence, and that he had a right to arm himself for the purpose of protecting himself from violence at the hands of Hannibal while so repairing it, then you are instructed that defendant, Ben L. Carpenter, also had a legal right to arm himself, and go with his brother to the pasture field, for the purpose of protecting his brother from death or great bodily harm at the hands of Hannibal while so repairing the fence.

"Ninth. The jury are instructed that W. O. Carpenter had the legal right to arm himself, and defend his property against a forcible trespass. The defendant, B. L. Carpenter, had the legal right to arm himself, go with his brother, and, if necessary, assist him against such forcible trespass; and if you believe from the evidence that the two brothers armed themselves, and went to repair W. O. Carpenter's fence, and that he shot and killed Hannibal in resisting a forcible trespass made by Hannibal, then defendant, Ben L. Carpenter, is no wise responsible for said killing; and, if you have a reasonable doubt upon this question, you will give the defendant the benefit of such doubt, and acquit him.

"Tenth. If the jury believe that Hannibal was a violent and dangerous man, then, in considering the guilt or innocence of defendant, they may take such bad character as a circumstance tending to show who was the aggressor in the encounter which resulted in the death of Hannibal.

"Eleventh. If the jury have a reasonable doubt, from all the evidence in the whole case, whether or not W. O. Carpenter, at the time of the killing (if you believe from the evidence that W. O. Carpenter did all the shooting), had reasonable grounds to believe, and did believe, that he was in danger of death or great bodily harm at the hands of Hannibal, then the defendant, Ben L. Carpenter, is entitled to the benefit of the doubt, and you will acquit him."

In addition to what we have stated, other grounds for setting aside the verdict were stated in a motion for a new trial, which do not appear elsewhere in the record, and consequently will not be noticed in this opinion.

1. The trial court committed no error in refusing to set aside the indictment against appellant on account of the formation of the grand jury which found it.

The statutes of this state require circuit courts to appoint three commissioners, at every term, to select grand jurors to serve at the term next succeeding their selection, and make it their duty to inclose and seal a list of the jurors so selected, and indorse it "List of Grand Jurors," designating for what term of the court they are to serve, and deliver the same to the judge in open court. The judge is then required to place it in the custody of the clerk, after administering to him and his deputies certain oaths,

whose duty it is then made to keep the same inclosed and sealed until 30 days before the next term, and then make out a fair copy of it, and deliver it (the copy) to the sheriff, or his deputy, who is then required to summon the persons named therein to attend on the first day of said term for the purpose of serving as grand jurors. In compliance with these statutes, three commissioners were appointed by the Ashley circuit court, at its August term in 1891, to select grand jurors to serve at its next term, which was to commence on the third Monday in January, following. They selected them, and made a list of their names, and indorsed it as the list of grand jurors selected for the February term, 1892, when there was no such term. The persons selected were summoned to attend the court on the first day of its January term, and were present on that day, and 16 of them were selected, impaneled, and sworn as grand jurors for that term. There was no error in this proceeding. They were unquestionably selected to serve at the term succeeding their selection. The designating that term as the February, instead of the January, term, was an obvious mistake. The intention was apparent and unmistakable.

If there had been any error in the impaneling the grand jury, the appellant was too late in taking advantage of it. He had waived it by pleading to the indictment. *Dixon v. State*, 29 Ark. 165; *Wright v. State*, 42 Ark. 94; *Straughan v. State*, 16 Ark. 41; *Miller v. State*, 40 Ark. 488.

2. The plea of former jeopardy was properly overruled. The jury found the appellant guilty as charged in the indictment. There was no intention to acquit. But the verdict of the jury was defective because it failed to state the degree of unlawful homicide of which the appellant was found guilty. No legal judgment could be rendered upon it. Neither party sought to have the jury to so amend it as to make it specify the degree of homicide. A judgment of death was rendered on it against the defendant, and he appealed, and the judgment was reversed, and the cause was remanded for a new trial. Under these circumstances, the former trial and conviction are no bar to a second trial on the same indictment. *Johnson v. State*, 29 Ark. 31; *Allen v. State*, 26 Ark. 333; *State v. Redman*, 17 Iowa, 329; *Turner v. State*, 40 Ala. 21; *Waller v. State*, Id. 325; *Kendall v. State*, 65 Ala. 492; 1 Bish. New Or. Law, § 998, and cases cited.

3. The denial of the continuance that was asked for by appellant was not prejudicial. What he expected to prove by James Coulter was sworn to by as many as two witnesses in behalf of the state, and three witnesses testified to what he expected to prove by Lee Turner, which was not contradicted.

4. We do not think the court erred in refusing to allow Ben Burgess to testify as to what Mrs. Hannibal said in her testimony be-

fore the grand jury as to the place where appellant "stood at the time the shooting was done." No foundation was laid for it by asking Mrs. Hannibal, when she testified, as to whether she had ever made such statements. *Griffith v. State*, 37 Ark. 324; *Ayers v. Watson*, 132 U. S. 394, 10 Sup. Ct. 116; *Mattox v. U. S.*, 156 U. S. 237, 15 Sup. Ct. 337. If the evidence was competent, no prejudicial error was committed in the refusal to admit it. She was contradicted in that respect by her own statements to different persons, as shown by the testimony of the witnesses; and the court gave appellant permission to read her testimony before the grand jury, as taken down by its clerk, for the purpose of impeachment, and, without giving any reason for refusing to accept the offer, he failed or refused to read it as evidence. We do not see that he has any room to complain of the refusal of the court to admit the testimony of Burgess.

5. The determination of the questions presented by the instructions given and refused by the court involves, to some extent, a consideration of the following sections of *Sandels & Hill's Digest*:

"Sec. 1670. Justifiable homicide is the killing of a human being in necessary self defense; or in defense of habitation, person or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony.

"Sec. 1671. If the homicide with which any person shall be charged shall appear upon the trial to be justifiable or excusable, such person shall be fully acquitted and discharged.

"Sec. 1672. An attempt to commit murder, rape, robbery, burglary, or any other aggravated felony, although not herein specifically named, upon either the person or property of any person shall be justification of homicide."

"Sec. 1676. In ordinary cases of one person killing another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily injury, the killing of the other was necessary, and it must appear also that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further contest before the mortal blow or injury was given."

These statutes, so far as they extend, are a re-enactment of the common law. They make homicides in self-defense excusable, and justify those committed by the slayer in defense of "person, habitation or property, against one who manifestly intends and endeavors by violence or surprise, to commit a known felony, such as murder, robbery, arson, burglary, and the like, upon either," as at common law. As construed by this court, they uphold, protect, and enforce the right to slay an assailant in self-defense, to the same extent it existed at the time of their enactment. To construe them properly, it is

necessary to ascertain what the common law upon the same subject was at the time they took effect.

At common law, and under the statutes of this state, no one, in resisting an assault made upon him in the course of a sudden brawl or quarrel, or upon a sudden rencounter, or in a combat on a sudden quarrel, or from anger suddenly aroused at the time it is made, or in a mutual combat, is justified or excused in taking the life of the assailant, unless he is so endangered by such assault as to make it necessary to kill the assailant to save his own life, or to prevent a great bodily injury, and he employed all the means in his power, consistent with his safety, to avoid the danger and avert the necessity of killing. He cannot provoke an attack, bring on the combat, and then slay his assailant, and claim exemption from the consequences of killing his adversary, on the ground of self-defense. He cannot invite or voluntarily bring upon himself an attack, with the view of resisting it, and, when he has done so, slay his assailant, and then shield himself on the assumption that he was defending himself. He cannot take advantage of a necessity produced by his own unlawful or wrongful act. After having provoked or invited the attack, or brought on the combat, he cannot be excused or justified in killing his assailant for the purpose of saving his own life, or preventing a great bodily injury, until he has, in good faith, withdrawn from the combat, as far as he can, and done all in his power to avoid the danger and avert the necessity of killing. If he has done so, and the other pursues him, and the taking of life becomes necessary to save life or prevent a great bodily injury, he is excusable. *Palmore v. State*, 29 Ark. 248; *McPherson v. State*, 29 Ark. 225; *Levells v. State*, 32 Ark. 585; *Stanton v. State*, 13 Ark. 317; *Dolan v. State*, 40 Ark. 454; *Fitzpatrick v. State*, 37 Ark. 239; *Duncan v. State*, 49 Ark. 543, 6 S. W. 164; *Johnson v. State*, 58 Ark. 57, 23 S. W. 7; *Smith v. State*, 59 Ark. 132, 26 S. W. 712.

But the rule is different where a man is assaulted with a murderous intent. He is then under no obligation to retreat, but may stand his ground, and, if need be, kill his adversary.

In *East's Pleas of the Crown*, the author says: "A man may repel force by force, in defense of his person, habitation, or property against one who manifestly intends and endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, arson, burglary, and the like, upon either. In these cases he is not obliged to retreat but may pursue his adversary until he has secured himself from all danger, and if he killed him in so doing it is called 'justifiable self-defense,' as, on the other hand, the killing by such felon of any person so lawfully defending himself will be murder. But a bare fear of any of these offenses, however well grounded, as that another lies

in wait to take away the party's life, unaccompanied with any overt act indicative of such an intention, will not warrant him in killing that other by way of prevention. There must be an actual danger at the time." 1 *East*, P. C. p. 271. See, to the same effect, 4 *Bl. Comm.* p. 180; *Foster's Crown Law*, 273; and 1 *Bish. New Cr. Law*, § 850.

According to the common law, it is the duty of every one, seeing any felony attempted, by force to prevent it,—if need be, by the extinguishment of the felon's existence. This is a public duty, and the discharge of it is regarded as promotive of justice. Any one who fails to discharge it is guilty of an indictable misdemeanor, called "misprision of felony." And, as a result of this doctrine, Mr. Bishop says, "If a man murderously attacked by another flies instead of resisting, he commits, substantially, this offense of misprision of felony even though we should admit that in strict law he will be excused, because acting from the commendable motive of saving life." 1 *Bish. New Cr. Law*, §§ 851, 849; *Pond v. People*, 8 *Mich.* 150. See, also, *Bostic v. State*, 94 *Ala.* 45, 10 *South.* 602; *Weaver v. State*, 53 *Am. Rep.* 339; *Gray v. Combs*, 7 *J. J. Marsh.* 478; 4 *Bl. Comm.* 180; 1 *Hale*, P. C. 480; *Clark, Cr. Law*, 137; 1 *Whart. Cr. Law* (10th Ed.) § 495.

It is evident, therefore, that sections 1670 and 1672 of *Sandels & Hill's Digest* are enactments of no new laws, but are an affirmation of the common law then in force. They declare no new right or duty, and provide only that homicides committed in the exercise or discharge of the common-law right or duty to defend the habitation, person, or property against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, or to prevent attempted felonies, such as murder, rape, robbery, burglary, or other aggravated felony, shall be justifiable, and leave the common law, as to the extent, the circumstances, and the manner in or under which the right or duty may be exercised or discharged, still in force.

It follows, then, that any one, under the laws of this state, may repel force by force, in defense of person, habitation, or property against any one who manifestly intends and endeavors by violence or surprise to commit a known felony upon either, and that he need not retreat, in such cases, but may stand his ground, and, if need be, kill his adversary. It is also true that any person, for the prevention of murder, rape, robbery, burglary, or any other aggravated felony, may, under our statutes, if necessary, kill another attempting to perpetrate such felonies. But these rights are not without limitations. "A bare fear," says the statute, "of those offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under their

influence, and not in a spirit of revenge." Section 1675. The circumstances must be such as to impress the mind of the slayer, without fault or carelessness on his part, with the reasonable belief that the necessity for killing to prevent the felony was immediate and impending, and the danger imminent. Knowing the other's design, the slayer had no right to seek a conflict, but must wait until the other does something at the time indicating a present intention of carrying his design into effect. While the slayer can stand his ground, and refuse to retreat, he should do what he can to avoid the necessity of killing, and at the same time exercise this right, and prevent the threatened felony. In no case will he be justified in taking the life of the aggressor, when, by arresting or disabling him, or otherwise, he can prevent the felony, or when the danger, in the reasonable belief of the assailed, has ceased to be immediate and impending. There must be an immediate necessity for the killing, for the statute says, "Every person who shall unnecessarily kill another while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, or after such attempt has failed, shall be guilty of murder or manslaughter, according to circumstances." Section 1649. See *Pond v. People*, 8 Mich. 150; 1 East, P. C. 272; 1 Whart. Cr. Law (9th Ed.) §§ 495-501, and cases cited; 1 Bish. New Cr. Law, §§ 843, 846, 869, and cases cited.

But the right to defend property against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, to the extent of slaying the aggressor, does not include the right to defend it, to the same extent, where there is no intention to commit a felony. A man may use force to defend his real or personal property in his actual possession against one who endeavors to dispossess him without right, taking care that the force used does not exceed what reasonably appears to be necessary for the purpose of defense and prevention. But, in the absence of an attempt to commit a felony, he cannot defend his property, except his habitation, to the extent of killing the aggressor, for the purpose of preventing a trespass, and if he should do so he would be guilty of a felonious homicide. Life is too valuable to be sacrificed solely for the protection of property. Rather than slay the aggressor to prevent a mere trespass, when no felony is attempted, he should yield, and appeal to the courts for redress. Ordinarily the killing allowed in the defense of property is solely for the prevention of a felony. "If," as Clark on Criminal Law says, "a man attacks me, and tries to take my property by force, he attempts a robbery, and I may kill him to prevent the felony. The justification does not rest on my right to defend my property. If a man attempts to set fire to my dwelling house by surprise, and I can only prevent it by killing him, I may do so; but

the reason is because I may and must prevent the felony, and not because, if I do not kill him, I will lose my property. If the house were uninhabited, and therefore not the subject of arson (at common law), I would have no right to kill him, though my loss of property would be as great." *People v. Flanagan*, 60 Cal. 2; *State v. Vance*, 17 Iowa, 138; *Davison v. People*, 90 Ill. 221; 1 Bish. New Cr. Law, §§ 857, 861, 875; *Clark, Cr. Law*, p. 144.

Tested by what we have stated the law to be, did the trial court commit any reversible error in giving or refusing instructions to the jury?

There is no reversible error in the instruction given by the court on its own motion, numbered fifth, and objected to by the appellant. The jury could not have found him guilty, under that instruction, except upon a state of facts, which if true, proved him guilty of a deliberate murder. If they convicted him under it, they found him guilty of deliberately killing the deceased while he was standing talking to the brother of appellant, and making no effort to do violence to any one.

The eighth instruction given by the court on its own motion, and objected to by the appellant, was a definition of a reasonable doubt, and, while it is not as full and complete as it might be, contains no reversible error.

The ninth instruction given by the court on its own motion, and objected to by the appellant, was obviously given to modify the instruction given at the request of the appellant, and numbered twelfth, in which the court told the jury that if they had "a reasonable doubt whether or not Ben. L. Carpenter shot and killed Hannibal with a shotgun, or whether he came to his death by shots fired by W. O. Carpenter," then the defendant was entitled to the benefit of such doubt, and to acquit him. In the ninth they were told that if "defendant was present and participated in the killing of H. J. Hannibal, by shooting him with a shotgun, as charged in the indictment, and that said shooting was done in furtherance of a previous design and understanding between himself and his brother to kill said Hannibal, and that, as a result of such design and understanding, H. J. Hannibal was killed, you will find him guilty, although it may not be shown that the shot or shots fired by defendant, if any were shot by him, actually caused the death of the deceased." Taking this in connection with the instructions defining justifiable homicide and the different degrees of unlawful homicide, and the verdict of the jury finding him guilty of murder in the first degree, we see no reason to conclude that it was misleading or prejudicial.

So much of the instructions asked by the appellant and refused by the court, and numbered third, fourth, fifth, sixth, seventh,

eighth and ninth, as is applicable to appellant, was based on the theory that W. O. Carpenter, being in the possession of his field, had the right to resist a trespass upon the same by Hannibal, to the extent of taking his life, and that his brother, the appellant, could lawfully assist him in such resistance, and was properly refused.

The instruction numbered tenth, which the appellant asked and the court refused to give, was as to the effect the jury might give to the bad character of the deceased. It was not within the province of the court to select one fact, and tell or suggest to the jury what effect they might give to it. The jury should consider all the evidence, and base their verdict upon their conclusions from it as a whole. The prayer was properly denied.

The first half of the other instruction which was refused was covered by instructions given, and the other half, as to self-defense, was incorrect.

6. There was sufficient evidence to sustain the verdict of the jury. While the conviction of murder in the first degree is not entirely satisfactory, we are without authority to interfere with it.

Judgment affirmed.

WOOD, J., did not sit in this case.

AETNA INS. CO. et al. v. ROSENBERG et al.
(Supreme Court of Arkansas. July 8, 1896.)

INSURANCE — POWER TO CANCEL POLICY — EXERCISE OF.

An insurance agent, having the power, under the policy, and from the company issuing it, to cancel the policy on five days' notice to the insured, and tendering repayment of the unearned premium, wrote the insured, asking them to return the policy to him for cancellation, and promising to insure the property in another good company. The insured returned the policy as requested, but the agent did not in fact cancel it, nor did he issue any other policy to the insured. They were never served with the notice, nor tendered the return premium required in the exercise of the power of cancellation reserved in the policy. *Held*, that the policy remained in force.

Appeal from circuit court, Hempstead county; Rufus D. Hearn, Judge.

Action by Rosenberg & Goldsmith against the Aetna Insurance Company and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

W. M. Greene, for appellants. R. B. Williams, for appellees.

BUNN, C. J. On the 6th of March, 1894, appellees, the plaintiffs in the court below, filed their complaint against the appellants in the Hempstead circuit court, and on the 10th of April, 1894, defendants filed their answer. Judgment for plaintiffs, and defendants moved for a new hearing. The same was overruled, and they tendered their bill of exceptions, and

take an appeal. This is an action on a policy of fire insurance issued to plaintiffs by the Aetna Insurance Company. The Union Guaranty Company executed the bond to the state of Arkansas for the benefit of holders of policies in said insurance company; and, as such bondsman, was made defendant in the suit. The policy contained a stipulation to the effect that on giving five days' notice to the holders, and tendering the payment of the unearned premiums, said insurance company had a right to cancel said policy; and it was shown that Knighton, the agent of the company with whom the dealings were had, was authorized to cancel the policy according to its terms. The property insured (a storehouse and goods in the town of Fulton, Hempstead county, Ark.) was destroyed by fire. Previous to the fire the agent, Knighton, wrote to appellees to return the policy for cancellation, coupling the request with the promise (as testified by Rosenberg, one of the appellees) that, if appellees would return the policy for cancellation, he would insure the property in another good company. There was evidence tending to show that while the company, through its said agent, had the right to cancel the policy on giving the five days' notice, yet this notice was not given, and the agent really intended to exercise the power of cancellation, not according to the strict letter of the policy, but rather in conformity to the voluntary surrender of it for that purpose by the holders. Indeed, it does not appear that the agent ever actually canceled the policy, nor did anything to that effect; even failing to open letters of appellees to him, which accompanied the returned policy. It thus appears in evidence that not only may the appellees have reasonably expected that the policy would not be canceled until their property should be insured in another company, and thus been at all times covered by insurance, but that the insurance in the other company was the condition upon which the cancellation should be made. Furthermore, if such was the condition upon which alone the cancellation could have been made by the company's agent, under the particular circumstances, it was also the only condition upon which the five days' notice could have been legitimately considered as waived, if it was waived at all. There was evidence supporting the findings of the court to the foregoing effect, and the judgment is therefore affirmed.

JOYCE v. STATE.

(Supreme Court of Arkansas. July 8, 1896.)

CRIMINAL LAW—OPINION EVIDENCE—STATEMENT OF DEFENDANT.

In a criminal case a witness was asked on cross-examination, "In the conversation you had with defendant, did he not cross himself?" to which the witness answered, "Yes." *Held*, that the testimony was improperly admitted, as being the opinion of the witness.

Appeal from circuit court, Independence county; Richard H. Powell, Judge.

S. H. Joyce was convicted of a crime, and appeals. Reversed.

This is an indictment in the Independence circuit court for the crime of incest. Trial and verdict against defendant, and he appeals to this court. The errors assigned in the motion for new trial are: (1) The verdict is contrary to the evidence. (2) The verdict is contrary to law. (3) The verdict is contrary to both the law and the evidence. (3½) The instructions 1, 2, 3, and 4, given by the court, were erroneous. (4) The court erred in permitting witness Wiley to testify, over the objection of defendant, that defendant had crossed himself when he was talking to him. (5) Because the court refused a new trial, on the ground of newly-discovered evidence.

Yancey & Fulkerson, for appellant. E. B. Kinsworthy, Atty. Gen., for the State.

BUNN, C. J. (after stating the facts). The verdict was based solely on the testimony of one Andy Lovell, in so far as relates to the identification of defendant with the act charged, and upon the contradictory statements of defendant, as shown in the testimony of Wiley, a witness for defendant, on cross-examination, admitted over the objection of defendant. Wiley's testimony was to the effect that he had been on a church committee to investigate this charge against the defendant; that in August last he went to Andy Lovell (the state's witness), and informed him that he had been put on such committee by the church of which he (Wiley) and defendant were members, to investigate the charge, and desired him (Lovell) to tell him what he knew about it,—that is, as to whether or not defendant had had sexual intercourse with his daughter; that Lovell told him, in answer to his request, that defendant had had intercourse with his daughter, but said also, "However, a man might be mistaken as to that." On cross-examination the following question was asked witness: "In the conversation you had with Joyce, didn't he cross himself?" The question was objected to by the defendant, on the ground of incompetency and irrelevancy; objection overruled by the court; and the witness permitted to answer it. Witness then answered "Yes" to the question, and his answer was also duly objected to. The objection to the question and answer should have been sustained. It was but the opinion of the witness to the effect of the statement of defendant made in private conversation with him, and, being admitted, may have been exceedingly prejudicial to the defendant on the trial.

The error complained of in the refusal of the court to grant a new trial because of newly-discovered evidence cannot be the ground of complaint in a new trial of the case, and therefore need not be discussed now. Other

grounds named in the motion for new trial seem to have been abandoned. For the error named, the judgment is reversed, and the cause remanded.

MOORE v. STONE et al.

(Court of Civil Appeals of Texas. July 3, 1896.)

TRESPASS TO TRY TITLE—PREPONDERANCE OF EVIDENCE—INSTRUCTIONS.

In trespass to try title, a charge that "the burden of proof is on plaintiff to establish by a preponderance of proof to your reasonable satisfaction that each of the deeds under which he claims are genuine, and not forgeries, and a failure to do so would entitle the defendants to your verdict," was erroneous, as requiring more than a preponderance of evidence.

Appeal from district court, Eastland county; T. H. Conner, Judge.

Action by Olin T. Moore against Heber Stone and another. Judgment for defendants, and plaintiff appeals. Reversed.

D. G. Hunt, for appellant. Moore & Mack, for appellees.

HUNTER, J. This suit was brought by appellant in the form of an action of trespass to try title, to recover his mother's one-half community interest in a league and labor of land lying in Eastland county, located by virtue of headright certificate granted to John F. Sapp on the 15th day of January, 1838, and patented to John F. Sapp on the 4th day of October, 1860. The defendants plead the general issue. Plaintiff relied on a certified copy of a transfer of the certificate, purporting to be made by John F. Sapp to Elisha Clapp, dated May 1, 1839, recorded in Houston county in 1839, where grantor and grantee then resided, and recorded in Eastland county on the 23d of December, 1876; original transfer of same certificate from Elisha Clapp to John L. Ryan, dated July 24, 1846, duly acknowledged, and recorded in Eastland county on the 23d of December, 1876; original deed from John L. Ryan to G. W. Moore, father of appellant, dated June 24, 1864, duly recorded in Eastland county on the 23d of December, 1876. The appellees filed in the court below an affidavit attacking all of said instruments as forgeries, and relied on a chain of title coming down from the heirs of John F. Sapp to themselves. Upon proof being made that appellant had received his deeds and transfers from his father, George W. Moore, more than 20 years ago, showing proper custody, and also proof of the same by the father, George W. Moore, and of the genuineness of the handwriting by two witnesses, and other facts tending to establish the transactions in fact, the court below admitted the instruments in evidence to the jury as ancient deeds. The evidence before the jury on the genuineness of the instruments was conflicting. The court gave the jury the following charge: "You are instructed that in this case the burden of

proof is on plaintiff to establish by a preponderance of proof to your reasonable satisfaction that each of the deeds under which he claims are genuine and not forgeries, and a failure to do so would entitle the defendants to your verdict." The jury under this charge found a verdict for the defendants. This charge was erroneous, in that it required the jury to be reasonably satisfied of the genuineness of the deeds before they could find for the plaintiff. This required of plaintiff more than a preponderance of the evidence to entitle him to recover. In *Baines v. Ullmann*, 71 Tex. 529, 9 S. W. 545, a charge requiring the jury to be satisfied of a given fact was condemned. The court there said: "It was not necessary that the evidence should have been sufficient to satisfy the jury of the facts in order to entitle appellant to a verdict, for he could have been entitled to this if, upon a consideration of all the evidence, the jury had been of the opinion that the facts necessary to a recovery by him were established by a preponderance of the evidence. Evidence is said to satisfy the mind when it is such as frees the mind from doubt, suspense, or uncertainty." The jury might have believed that the evidence preponderated in favor of the genuineness of these deeds, yet under this charge they would have felt bound to render a verdict against appellant if their minds were not reasonably free from doubt as to the genuineness of said deeds. In Mr. Greenleaf's work on Evidence, he states the definition of satisfactory evidence as follows: "By satisfactory evidence, which is sometimes called 'sufficient evidence,' is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond reasonable doubt." 1 Greenl. Ev. § 2. This charge has been condemned by a long line of decisions of our supreme court: *Torrey v. Cameron*, 73 Tex. 583, 11 S. W. 840; *Fordyce v. Chancey*, 2 Tex. Civ. App. 24, 21 S. W. 181; *Railway Co. v. Matula*, 79 Tex. 577, 15 S. W. 573; *McBride v. Banguss*, 65 Tex. 174; *Wylie v. Posey*, 71 Tex. 34, 9 S. W. 87; *Railway Co. v. Brazzil*, 72 Tex. 237, 10 S. W. 403; *Railway Co. v. Bartlett*, 81 Tex. 42, 16 S. W. 638. For the error in the charge of the court, as above noted, we order that the judgment herein be reversed, and the cause remanded.

GOBER et ux. v. SMITH et al.

(Court of Civil Appeals of Texas. June 26, 1896.)

DEED BY HUSBAND AND WIFE—CONTRACT OF HUSBAND AFFECTING HOMESTEAD—RIGHTS OF WIFE.

A husband and wife conveyed an undivided half interest in land belonging to them to one who sold such interest to a third person, and the note given by such third person, through mistake or otherwise, recited that it was given as part of the price of the whole tract, and reserved a vendor's lien thereon. On such note the husband signed as surety, but the wife took no part in the contract. *Held*, that the home-

stead right of the wife in the undivided interest not conveyed was not affected.

Appeal from district court, Jones county; Ed. J. Hamner, Judge.

Action by E. B. Gober and wife against Temple D. Smith and another. From an order sustaining a demurrer to the complaint, plaintiffs appeal. Reversed.

Leggett & Cunningham and Craig & Allen, for appellants. H. L. Bentley, for appellees.

TARLTON, C. J. The appellants, E. B. Gober and his wife, S. E. Gober, brought this suit against the appellees, Temple D. Smith and Ed M. Tyson. A general demurrer was sustained to their petition. We hence state briefly and substantially the facts therein alleged, as follows: On March 7, 1892, the plaintiffs were the owners of lot No. 11 in block No. 3 in the town of Anson, Jones county. On that day, E. B. Gober, joined by his wife, S. E. Gober, conveyed to M. E. Campbell an undivided one-half interest in the lot referred to. On January 17, 1893, M. E. Campbell conveyed, by her deed, this undivided half to Ed Northrup and Mrs. J. G. Northrup. As part of the purchase money in this transaction, the Northrups executed to M. E. Campbell their promissory note for \$383.55. This note, "through mistake or otherwise," recites on its face that it is given as part of the purchase money for lot No. 11 in block No. 3, situated in Anson, Jones county, on which real estate the vendor's lien is expressly retained. It was signed by Mrs. J. G. Northrup, Ed Northrup, and E. B. Gober, all as principal obligors. E. B. Gober was, however, in fact, but a surety. The deed executed by Mrs. Campbell to the Northrups conveyed but an undivided one-half interest in the lot, reserving a vendor's lien only to that extent. It was not recorded. The note, in course of trade, came into the possession of the defendant Temple D. Smith. On February 8, 1894, he sued upon it in the district court of Jones county, and recovered judgment against the defendants in that suit, viz. M. E. Campbell, R. M. Campbell, Ed Northrup, Mrs. J. G. Northrup, E. B. Gober, and Frank M. Smith. The judgment decreed a foreclosure of the vendor's lien on the entire lot, instead of on a one-half interest therein. An order of sale was accordingly issued, and placed in the hands of Ed M. Tyson, the sheriff of Jones county, who, through his deputy, J. C. McJilton, on October 2, 1894, sold the entire lot at public outcry to the defendant Temple D. Smith, for the sum of \$70, and executed to him a deed therefor. At the time of the institution of this suit, and for five years prior thereto, the plaintiffs owned an undivided one-half interest in the lot, which was not included in the land conveyed by Campbell to the Northrups, and is, in reality, no part of the land for the purchase money of which the above-described note was given. During all this time, the plaintiff E. B. Gober was, and has since re-

mained, the head of a family, and the land involved in this suit has been, and so remains, his business homestead. As such, he has continuously used and occupied it, save and except during the time between October 3, 1894, and October 9, 1894, when he was ousted as below stated. He conducted the business of a blacksmith, his shop being upon the lot in question. The sale by the defendant Tyson, through his deputy, to the defendant Temple D. Smith, casts a cloud on the title of the plaintiffs to the half interest in question. At and before the sale, the defendants had full knowledge of the facts above stated. By virtue of the sale aforesaid, the defendant Tyson, at the instance of his co-defendant, Smith, ousted the plaintiffs from the possession of the property, which they held until October 9, 1894, when the plaintiffs regained such possession. The defendants again threaten the plaintiffs with ouster. Among other matters, the plaintiffs pray for a decree cancelling the sheriff's deed conveying to the appellee Smith the one-half interest in controversy, removing the cloud from their title thereto, and perpetually enjoining the defendants from hereafter selling this one-half interest as long as they shall use it for homestead purposes, and that they be enjoined from dispossessing plaintiffs.

We are of opinion that the court erroneously sustained a general demurrer to the petition averring the foregoing facts. The fallacy involved in the court's action consists in overlooking the homestead character impressed upon the plaintiffs' interest in the lot involved,—in ignoring the rule that the wife is a beneficiary in the homestead exemption, and that she cannot be divested of her interest therein by any act of her husband (short of abandonment of the homestead) to which she is not a party. It will be noted that she was not a privy, in any sense, to the conduct of her husband in signing the note which went into the hands of the appellee, or to the judgment which foreclosed the purported lien recited in that note. Had the husband, without joinder by her, executed an absolute deed to the defendant conveying this exempt interest in the property, and had suit for possession by virtue of that conveyance been brought by the appellee Smith against the husband, and a recovery of the title been adjudged to Smith, the decree in that case could not in the remotest way affect the wife, Mrs. S. E. Gober, when she was not a party thereto, the property being exempt as homestead. *Freeman v. Hamblin*, 1 Tex. Civ. App. 161, 21 S. W. 1019. So, the signature of the husband attached to the note above described, whether as principal or surety, whether by mistake or otherwise, could not operate to the detriment of the wife's claim to this property, exempt as it was and is, under the averments of the petition. The conduct of the husband could not operate as an estoppel against the wife,

a stranger to such conduct; nor could the decree founded thereon be pleaded as *res adjudicata* against the wife, a stranger to the judgment. The plaintiffs, under their allegations, are entitled to the writ of injunction, for two reasons: (1) To prevent the unwarranted invasion of their possession and enjoyment of their business homestead; and (2) because, to remove the cloud upon their title, consisting in the sheriff's deed to the appellee Smith, it is necessary to resort to evidence dehors the record,—evidence which shows the homestead character of the property involved. *Huggins v. White*, 7 Tex. Civ. App. 568, 27 S. W. 1066; *Roe v. Dalley*, 1 Posey, Unrep. Cas. 247.

We abstain from considering propositions challenging the correctness of the court's action in sustaining certain special exceptions. As far as a disposition of the questions therein presented may not be involved in the preceding remarks, it is apprehended that they will probably not arise on another trial. If, however, counsel on either side deem it necessary that we dispose of them more definitely, we will consider any suggestion to that effect which may be made upon a motion for rehearing. For the reasons indicated, the judgment is reversed, and the cause is remanded.

SOUTHERN NAT. BANK OF NEW YORK v. CURTIS et al.

(Court of Civil Appeals of Texas. June 27, 1896.)

JUDGMENT BY CONFESSION—AGREEMENT TO ACCEPT—DELAY OF ENTRY—EFFECT—ATTORNEY—COMPENSATION.

1. A creditor who agreed to accept a judgment by confession for a less sum than due may refuse to be bound by the agreement, where the cause was continued without such confession, though court had not adjourned when the agreement was made.

2. An attorney who contracted to prosecute a cause for a fixed retainer and a certain percentage of the amount to be collected, but subsequently refused to proceed with the case until he was paid an additional amount, cannot recover for services rendered in preparing for the defense of a cross action, the bringing of which he anticipated, where his client afterwards compromised the cause without his knowledge.

Appeal from district court, Wilbarger county; G. A. Brown, Judge.

Action by the Southern National Bank of New York against W. G. Curtis and others. From the judgment rendered, plaintiff appeals. Reversed.

Conclusions of fact found by the trial court, and adopted by the court of civil appeals in its opinion:

"January 20, 1893, the defendants W. G. Curtis and A. U. Thomas executed and delivered to the plaintiff, the Southern National Bank of New York, their promissory note for \$15,000, payable four months after date, at the office of said bank, in the city of New

York, and at the same time deposited with said bank, as collateral security for said note, 180 shares of stock of \$100 each, of the State National Bank of Vernon, Tex., and which stock was then estimated and agreed to be of value \$18,000. The written contract between plaintiff and Curtis and Thomas stipulated, among other things, that, if said note was not paid at maturity, the said plaintiff bank should have the right to sell said bank stock at any broker's board, or at public or private sale, at any time after such default of payment without advertisement or notice to the said Curtis and Thomas, and with the right of said plaintiff bank to purchase said shares of stock free from any equity of redemption, and, after deducting legal costs of sale, the proceeds of said shares of stock were to be applied on said \$15,000 debt, etc. Said \$15,000 note was not paid, and, after the same became due, plaintiff bank offered to extend time of balance if Curtis and Thomas would pay \$5,000; and by telegram of June 2d, and by letter of June 7th, both addressed to W. G. Curtis, at Vernon, defendants were informed that, unless plaintiff's proposition was complied with by June 20th, said bank stock would be sold at public auction in New York, and legal proceedings instituted for any deficiency. Defendants Curtis and Thomas failed to comply with the above mentioned proposition, or to make any other arrangements relative to said note, and on 8th August, 1893, plaintiff caused said shares of stock to be sold at public auction in New York City, when plaintiff became the purchaser at \$20, paid the auctioneer \$8 cost of sale, and credited defendants' note with \$12, and on the 10th day of August, 1893, brought this suit to recover of the said Curtis and Thomas the balance due on said \$15,000 note. At the February term, 1894, of this court, the defendants Curtis and Thomas answered said suit, charging an illegal sale of said bank stock, and a conversion thereof by plaintiff, to the damage of the said Curtis and Thomas \$18,000. August 9, 1894, while suit was still pending on the issues made by the answer of Curtis and Thomas above stated, and for the purpose of settlement of this suit between them, plaintiff bank and Curtis and Thomas, through said Thomas, who was acting for both defendants, entered into an agreement that plaintiff would allow Curtis and Thomas 60 cents on the dollar for said bank stock, and they (Curtis and Thomas) were to confess judgment in plaintiff's suit on said note. This court was in session during the entire months of August and September, 1894, but was temporarily adjourned at the date of said compromise agreement, and for about one week thereafter; and said agreement was not carried into judgment because of said temporary adjournment, and because, after reconvening of said court, plaintiff had no attorney until after it abandoned said contract. Plaintiff afterwards refused to carry out said agreement, and seeks to recover the full amount of

said \$15,000 note, having tendered said bank stock into court for defendants Curtis and Thomas upon the payment of said note. Sixty cents on the dollar of said bank stock is, in the aggregate, \$10,800. On the 8th of August, 1893, when said bank stock was sold, the State National Bank of Vernon was in the hands of the United States comptroller, having suspended business and closed its doors for want of funds to pay depositors, and at said date said bank stock had no value in the city of New York or in Vernon, Tex.

"On the issues between the plaintiff, the Southern National Bank, and H. C. Thompson, I find the following facts, viz.: On the 1st day of August, 1893, plaintiff employed the said H. C. Thompson, an attorney residing in Vernon, to institute and prosecute this suit against W. G. Curtis and A. U. Thomas, for the recovery of such balance as might remain unsatisfied after applying the proceeds from sale of the \$18,000 bank stock, which sale it was understood should be made before the filing of said suit. The fee to be paid by plaintiff was agreed on at the time of said employment, viz. \$100 cash and 10 per cent. on such sum as he should finally collect on said claim, exclusive of the amount which should be realized from the sale of said bank stock by plaintiff in New York. Thompson knew at the time of his employment that Curtis and Thomas would have the right to reconvene in said suit for any damages, real or imaginary, arising from the sale of said bank stock, and in fact, when Thompson accepted said employment, he anticipated that Curtis and Thomas would plead in reconvention damages by reason of the sale of said bank stock. After the defendants Curtis and Thomas filed in said cause their plea in reconvention for damages, Thompson demanded an additional fee of plaintiff, which plaintiff declined to pay. Thompson threatened to abandon the case if an additional fee was not paid, and did actually quit the case the 10th day of August, 1894, which was the next day after the agreement of compromise between plaintiff and defendants Curtis and Thomas. The compromise agreement above mentioned was effected through negotiations directly between plaintiff bank and Curtis and Thomas, and the attorney, Thompson, had no knowledge of such negotiations or agreement until after his abandonment of plaintiff's case. Before Thompson quit plaintiff's case, he prepared the necessary pleadings controverting and replying to said plea in reconvention, and prepared several sets of interrogatories, and caused depositions to be taken relative to said plea. The services rendered by Thompson for plaintiff prior to his withdrawal from the case, and before the compromise thereof, were reasonably worth \$1,000, none of which has ever been paid."

R. P. Elliott and J. A. Lucky, for appellant.
Stephens & Huff, Basham & Hall, and H. C. Thompson, for appellees.

STEPHENS, J. This suit was originally instituted in the summer of 1893 by appellant, a national bank, doing business in New York City, against A. U. Thomas and W. G. Curtis, of Vernon, Tex., on the promissory note of the latter in the sum of \$15,000. The execution and delivery of this note to appellant was attended with a collateral delivery of 180 shares of the capital stock of the State National Bank of Vernon, then valued at \$18,000, belonging to Thomas and Curtis. In accordance with the terms of the contract pledging this stock, appellant caused the same to be publicly sold on the stock market in New York, and became the purchaser thereof for \$20, just prior to the bringing of the suit. Appellee H. C. Thompson, an attorney of the Vernon bar, instituted the suit for appellant under a contract of employment which definitely fixed his compensation at \$100 retainer, then paid, and 10 per cent. of what he might collect from Thomas and Curtis. In February, 1894, a plea in reconvention was filed by Thomas and Curtis, alleging a conversion of their bank stock by appellant. Thereupon appellee Thompson began to demand an additional fee, and, upon appellant's refusal to accede to this demand, endeavored to extort it from appellant, notwithstanding the fact, as found by the trial court, that, when he accepted the employment, he "anticipated that Curtis and Thomas would plead in reconvention damages by reason of the sale of said bank stock." After appellant had refused to honor one or more unauthorized drafts drawn on it by appellee Thompson, it received the following letter from him:

"Vernon, Texas, June 27, 1894. The Southern National Bank, New York—Gentlemen: In view of the fact that you have failed and refused to pay me for services in the defense of the cross action for damages in the case of your bank vs. Thomas & Curtis, I have concluded to appear in this case no further; and all papers, correspondence, and the note now in my possession will be turned over to any duly-appointed attorney representing you, on payment for my services rendered thus far in defending and preparing the defense to the cross action for damages up to this time. Yours, respectfully, H. C. Thompson."

In a letter dated July 9, 1894, he made two propositions to appellant for his further continuance in the case upon the acceptance of either, but stating: "Otherwise I have made up my mind, finally, to withdraw." Both propositions were rejected.

The declaration quoted above was followed by conduct that was wholly irreconcilable with the confidential relation of attorney and client, as will appear from the following letters:

"Vernon, Texas, August 10, 1894. The Southern National Bank, New York City—Gentlemen: I telegraphed you on the 8th inst. as follows: 'I will sell Curtis & Thomas

note in Vernon, at public auction, for my fee, Saturday, August 18, 1894,'—which I now confirm. I have also notified Thomas and Curtis of said sale. Respectfully, H. C. Thompson."

"Vernon, Texas, August 20, 1894. Southern National Bank, N. Y.—Gentlemen: Your case is set for next week. No attorney looking after same. State National Bank busted on August 18, and will no doubt go into the hands of a receiver. The Curtis & Thomas note was sold last Saturday, 18th August, by me, and bought in by me for twenty-five dollars. On payment of my services up to date, am willing to turn you back note; otherwise, I shall proceed to sue on same in my own name. Respectfully, H. C. Thompson."

Thereupon appellant made Thompson a party defendant, and obtained an order of court requiring him to surrender the note declared on. Thompson reconvened for the value of his services as attorney in the case, and, strange to say, recovered \$1,000, notwithstanding the court held, and properly so, that he had, without cause, refused to comply with his contract of employment, and abandoned his client's case. This recovery was had below, and is sought to be sustained here, upon the ground that Thompson did not abandon the case till August 10, 1894, the date of a letter from him stating, "You can now come here, and look after your own interests, if you desire, in person;" and that appellant had the day before, without the knowledge of Thompson, entered into an agreement with Thomas and Curtis for a compromise of the suit, thereby preventing Thompson from doing what he had already in the most emphatic manner declared, both by word and deed, he would not do. The bare statement of such a proposition ought to be sufficient to overturn it. The equitable principle which allows reasonable compensation for services already rendered, where the act of the client, without fault of the attorney, prevents the latter from earning his fee under the contract, cannot be applied to a case where the attorney is in fault from beginning to end, without a manifest perversion of that principle. Indeed, in this case it seems reasonably clear that the persistence of the attorney in the effort to extort a fee to which he was not entitled from a nonresident client was not without its influence in inducing such client to accept the proposition of compromise. It is, however, due said attorney to state that he appears to have acted upon a mistaken view of the scope and obligation of his contract; but against such mistake of law the courts do not relieve.

But did the compromise agreement prevent the further prosecution of the suit? Its terms were quite brief. August 7, 1894, one M. J. Tompkins, of Vernon, wired appellant: "Thomas says will confess judgment if you will allow sixty cents for stock,"—to which appellant replied by letter and telegram on

August 9, 1894, among other things, requesting Tompkins to say to Thomas that his proposition would be accepted. Nine days thereafter the State National Bank of Vernon failed. Then it was that appellant, soon after learning of the failure, declined to stand to the agreement, and, through other counsel employed about that time, sought to avoid it. When the agreement was made, the court at Vernon, though not in open session, had not adjourned for the term, and the cause was continued to the next term, without any confession of judgment. When it finally came to trial, the court held appellant to the agreement, and, upon the offer of Thomas and Curtis to comply with its terms, rendered judgment accordingly, deducting \$10,800 from the sum due on the note, and giving judgment for the rest. It is clear that there had been no conversion of the stock, as alleged by Thomas and Curtis. The sale thereof was regular, and in accordance with the terms of the contract of hypothecation, and the court so held. Besides, appellant tendered the stock in court for Thomas and Curtis, thereby waiving its right as purchaser thereof. We, then, have the case of an agreement on the part of a creditor to accept a judgment by confession for a less sum than is due, which agreement the creditor withdraws, and takes steps to avoid, before it has been in any respect performed or acted on by the debtor. Upon the sole ground of such agreement on the part of the creditor, and the tender of performance by the debtor, judgment for the full amount due is denied.

We cannot distinguish this from an ordinary case of accord without satisfaction. Tender of performance in such case will not defeat the recovery claimed. It is manifest that the agreement was not intended to be taken in lieu of the note sued on, or any part thereof. It was the confession of judgment thereon that was to entitle Thomas and Curtis to the reduction, and not their agreement to confess judgment. It is not the case of a compromise entered into by which a pending suit is to go off the docket, and the parties look to the terms of the compromise as a substitute for the original contract and pre-existing status. For a succinct statement of the principle involved, see the quotation from *Chitty on Contracts* made by Justice Gaines in *Railway Co. v. Harriett*, 80 Tex. 73, 15 S. W. 556, where its application, also, is illustrated. See, also, the opinion of Chief Justice Tarlton in *Jennings v. City of Ft. Worth*, 7 Tex. Civ. App. 329, 26 S. W. 927. For this additional reason, the judgment in favor of Thompson, as well as that allowing Thomas and Curtis the \$10,800 credit, cannot stand. We therefore adopt the trial court's conclusions of fact in so far as they are not in conflict with the conclusions stated above, and reverse, and here render judgment in favor of appellant against Thomas and Curtis for the full amount claimed, decreeing the bank

stock to them as tendered, and in its favor, against Thompson, upon his intervention; adjudging the costs accordingly.

BLAND v. STATE.

(Court of Civil Appeals of Texas. June 27, 1896.)

PLEADING—AMENDMENT—VERIFICATION.

Where the statute requires a pleading to be sworn to, an amendment which becomes a substitute for the original must be sworn to.

Appeal from district court, Jones county; Ed. J. Hamner, Judge.

Petition by the state for removal of Theodore Bland and others from office. From a judgment removing Bland, he appeals. Reversed.

Craig & Allen, Leggett & Cunningham, C. P. Woodruff, and B. Frank Bule, for appellant. C. H. Steel, for the State.

STEPHENS, J. This appeal is from a judgment removing appellant from the office of county treasurer of Jones county, to which office he had been duly elected at the last general election. The petition upon which the case went to trial, which was an amended petition setting out new and different grounds of removal, was not sworn to, and was specially excepted to on that ground. This exception should have been sustained. The statute emphatically declares that the petition shall, "in every instance," be verified by affidavit. It seems that the original petition had been thus verified, but when the amended petition was filed it took the place, under our system of pleading, of the original, which thence disappeared from the record. Where the statute requires a pleading to be sworn to, the amendment, which becomes a substitute for the original, comes clearly within the terms and meaning of such statute. The contrary ruling of the trial court will require the judgment to be reversed, if that judgment was final and the cause appealable. Included in the petition for removal was not only the county treasurer, but also the county judge and two of the county commissioners, against whom separate charges of official misconduct were made. No objection was interposed to so obvious a misjoinder both of parties and causes of action. The jury returned a verdict against appellant, but failed to agree as to the other parties, as to whom a mistrial was entered, and the suit continued. Judgment, however, was entered, removing appellant from office, but expressly reserving the determination of the question of costs till after the trial of the other parties. The writer is very much inclined to the opinion that the appeal from this judgment is premature, and ought to be dismissed. If the failure to dispose of all the parties be obviated on the ground of misjoinder and severance practically effected by the judgment entered, the diffi-

culty arising from the postponement of the disposition of the costs still remains. Whether the plaintiff or defendant shall recover the costs is a question for decision that inheres in every lawsuit. True, our statute lays down a general rule to guide the court in determining such question, but it recognizes exceptions to the rule, and expressly empowers the court, for good cause stated on the record, to depart from the rule. Sayles' Civ. St. arts. 1421, 1434. It is quite generally held that a judgment is not final until the issue as to the costs, though it be but an incidental one, has been decided. 2 Enc. Pl. & Prac. p. 52 et seq., and cases cited in footnotes. Especially is this the case when the question of costs is reserved for further adjudication. Williams v. Field, 2 Wis. 421. In section 42, vol. 1, of Black on Judgments, the rule is laid down that "a reservation of the question of costs, in a decree which in other respects disposes of the subject-matter of the suit, renders such decree interlocutory"; citing, in footnote, Dickenson v. Codwise, 11 Paige, 189, but inviting a comparison with McFarland v. Hall, 17 Tex. 691. The case last quoted is the only one I have been able to find in conflict, apparently, with the prevailing rule. But that was a partition suit, and the question was whether the court could set aside the decree for partition at a subsequent term without good cause shown. No mention was made in the decree of the costs. In the case there cited by Justice Wheeler, of Cannon v. Hemphill, 7 Tex. 184, the costs had been adjudged; and Chief Justice Hemphill seems to recognize a distinction between the question as to the effect of a judgment when thus raised, and when raised on appeal, as will appear from the following excerpt from his opinion: "And whatever may be the character of such decrees, when considered with reference to the question solely of their susceptibility of appeal, yet, if they be not further acted upon, and no appeal is taken, they must be considered, for the purpose of putting an end to litigation, as sufficient to secure the parties in their rights as adjudicated, and would in this aspect be final and conclusive; and this is especially the case in our practice, in which equity causes may be submitted to a jury, and judgments such as the one under discussion may be entered on their finding." The reason given for the ruling in McFarland v. Hall seems far from satisfactory. Our statute declares that there can be but one final judgment, except where it is otherwise specially provided, and, to be final, it must dispose of all the issues, as well as the parties. Sayles' Civ. St. art. 1337. As already seen, the question of costs is always one of the issues to be decided. It is only from a final judgment,—one disposing of all the issues involved,—with a few exceptions not here in point, that an appeal lies. Rev. St. 1895, art. 1383. The very terms and conditions of the appeal bond, upon the execution of which the right itself depends, make it plain that appeals are contemplated only

from judgments in which the disposition of the question of costs is included. Rev. St. 1895, art. 1400. The condition of the bond includes the payment of "the costs which have accrued in the court below," and the appellate court is authorized to enter judgment thereon against the sureties, which seemingly contemplates that the question has been first decided in the court of original jurisdiction. However, as the result would be practically the same, in this case, whether the judgment is reversed, or the appeal dismissed because prematurely brought, and as McFarland v. Hall seems to be authority for holding the judgment final, we have concluded to reverse the judgment for the error indicated, but without expressing any opinion on the other questions raised, which may not recur upon another trial.

COOPER v. HINER et al.

(Court of Civil Appeals of Texas. June 27, 1896.)

TROVER—TITLE—PLEADING AND PROOF.

In trover against a sheriff for seizing goods under attachment, evidence of a conveyance to plaintiff in trust for creditors, with possession and an acceptance of the trust by creditors whose claims exceed the value of the property, is sufficient to support an averment of "ownership" in the complaint.

Appeal from Hood county court; George W. Riddle, Judge.

Action by H. H. Cooper against T. H. Hiner and others. There was a judgment for defendants, and plaintiff appeals. Reversed.

M. L. Cooper, for appellant. Estes & Keith and J. J. Hiner, for appellees.

TARLTON, C. J. The appellant, as plaintiff, brought this suit to recover the sum of \$159.87 from T. H. Hiner, sheriff of Hood county, and the remaining appellees, sureties upon his official bond. The amount sued for is the alleged value of certain merchandise held by the plaintiff, and seized under attachment process, and converted, by the defendant Hiner. The plaintiff was in possession of the goods at the time of their seizure, as trustee under an instrument executed by I. M. Steele & Son for the benefit of certain named beneficiaries, several of whom had accepted in amounts exceeding the sum sued for. The court denied the plaintiff a recovery, on the ground that he sued under an allegation of ownership, and that his pleadings failed to disclose that he held as trustee. In this the court erred. "As against the attaching creditor, the conveyance to the plaintiff, with possession and right to possession, was sufficient to sustain his averment of ownership." Schmick v. Bateman, 77 Tex. 330, 14 S. W. 22; Sanger v. Henderson, 1 Tex. Civ. App. 413, 21 S. W. 114; Bank v. Barker, 8 Tex. Civ. App. 332, 28 S. W. 698. Reversed and remanded.

HOUSE et ux. v. JOHNSON.

(Court of Civil Appeals of Texas. July 3, 1896.)

DEED—WARRANTY—PAROL EVIDENCE.

In an action on a note for the price of land, where defendant set up breach of warranty of title, it appeared that the deed conveyed "all our right, title, and interest in and to" a certain lot, without stating the nature of such interest, and provided that the grantees warranted the title to "the said premises." *Held*, that parol evidence was admissible to show that the amount conveyed was only a half interest in the land, and that the warranty covered merely that interest.

Error from district court, Tarrant county; W. D. Harris, Judge.

Action by J. W. House and wife against Robert G. Johnson. Judgment for defendant, and plaintiffs bring error. Reversed.

Byron G. Johnson, Wynne & McCart, and A. J. Booty, for plaintiffs in error. Pruit & Smith, for defendant in error.

STEPHENS, J. This suit was brought by J. W. House and wife against Robert G. Johnson to recover the balance due on the promissory note of the latter, and to foreclose the vendor's lien retained in the face of the note. The consideration of this note, which bore date December 22, 1890, and was payable to the order of Mrs. E. J. House, 12 months after date, in the sum of \$1,250, is thus recited therein: "This note is given for part of the purchase money for a certain lot of land situated in Tarrant county, Texas, city of Fort Worth, the same being lot No. 13 of block A2, Daggett's addition to Fort Worth." The deed of same date, executed by House and wife, after reciting the consideration of \$3,000, including this note as a part thereof, contains the following granting, habendum, and warranty clauses: "Have granted, sold, and conveyed, and by these presents do grant, sell, and convey, unto the said Robert G. Johnson, of the county of Tarrant, in the state of Texas, all of our right, title, and interest in and to lot 13 in block A2 of Daggett's addition to the city of Fort Worth, Tarrant county, state of Texas; the lot of land herein conveyed being 25x100 feet in size, and the lot on which the north half of our hotel is situated, known as the 'Caddo House,' and our homestead. This conveyance includes the part of the hotel property situated on the lot herein conveyed. To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in any wise belonging, unto the said Robert G. Johnson, and his heirs and assigns, forever. And we do hereby bind ourselves, and our heirs, executors, and administrators, to warrant and forever defend all and singular the said premises unto the said Robert G. Johnson, and his heirs and assigns, against every person whomsoever lawfully claiming or to claim the same, or any part thereof." At the same time a further writing was signed by J. W. House, as a part

of the same transaction, reciting that J. W. House and wife had sold and conveyed to R. G. Johnson "their interest" in said lot 13, and containing the following, among other, provisions: "Out of the proceeds of said first note, said House shall pay up all unpaid taxes to this date; and, if the lot of land has been sold for taxes, he shall clear up such sale, provided any such sale took place for taxes unpaid." The defense interposed was that of failure of consideration and reconvention for breach of warranty, in that one George Foster had recovered a judgment against Johnson for an undivided half of the lot. We quote from the brief of plaintiffs in error the following condensed statement of the substance of their reply to this defense: "Plaintiffs further say that they conveyed to defendant 'all of their right, title, and interest in and to said lot thirteen,' said interest being only one-half, as defendant well knew; that they did not own or claim any greater interest than one-half, and that said deed was only intended to convey and warrant title to said one-half; that, at the time of the sale of said one-half interest to defendant, said half was by plaintiffs and defendant estimated at three thousand dollars, and the whole of said lot at six thousand dollars; that said deed was drawn up under the direction of defendant, and was signed by plaintiffs under a mistake of law as to its legal effect; that said deed was prepared by J. C. Scott, the attorney and agent of plaintiffs for the sale of said half interest in said lot; that the defendant Johnson assured plaintiffs that the covenants of warranty in said deed contained did not bind them as warrantors, save and except as to the half interest then being sold by them, and purchased by him; that said assurances were concurred in by their own attorney, J. C. Scott; that said Scott, if wrong in his opinion as to the legal effect of said deed, was in a measure misled by the assurances of defendant as to the legal effect of said deed; that defendant was and is a lawyer learned in the law; that plaintiffs are ignorant of the laws, as was then well known to defendant; that, if said assurances were false, then they were made fraudulently to deceive them, and that plaintiffs believed and relied on same, and that said assurances also apply to the contract signed by plaintiffs, and attached to their petition, which was only designed to bind them to pay taxes on the half interest in said lot so sold by them; that, if the meaning of said deed is to bind plaintiffs as warrantors of the title to the whole of said lot, then they pray that said deed be so reformed as to give effect to the intention of the parties, as herein shown, and that plaintiffs be held as warrantors of the half interest by them sold." The court sustained exceptions to this pleading, holding that it was no answer to the plea of failure of consideration and in reconvention for breach of the warranty, and instructed a verdict for defendant.

If it was competent to show by parol that plaintiffs owned and claimed only a half in-

terest in the lot at the date of the sale, and that only that quantum of interest was bargained for, this ruling was erroneous, and will require the judgment to be reversed. Upon the question thus raised, the authorities seem to be in conflict, the cases usually turning upon the meaning given to the word "premises" as used in the warranty clause of the particular deed construed. Among those tending to support the ruling below, that of *Bayley v. McCoy*, 8 Or. 259, as quoted in *Dev'l. Deeds*, § 950, holding that the "premises" warranted referred to the land itself, and not merely to the right, title, and interest conveyed, seems most in point; but it will be noted that in that case the chief justice dissented. On the other hand, there is a long line of decisions in Massachusetts to the contrary, holding that the warranty is of the premises which were conveyed by the deed, rather than of the land described therein. *Sweet v. Brown*, 12 Metc. (Mass.) 175, 45 Am. Dec. 243, and cases cited in opinion and notes. "Premises," when used in a conveyance, has been defined "to be the thing demised or granted by the deed." *And. Law Dict.*; *New Jersey Zinc Co. v. New Jersey Franklinite Co.*, 13 N. J. Eq. 331; *Black v. Shreve*, Id. 462. The Massachusetts rule may merit the criticism it has received where the grantor in the deed really has no interest in the land, and in terms conveys only his right, title, and interest, with general warranty of the premises, etc.; *Lull v. Stone*, 37 Ill. 224. To so construe the deed in such case seems to render the warranty meaningless. But where the grantor owns and undertakes to convey an undivided interest, as was alleged in this case, describing it as all his right, title, and interest, the rule limiting the clause of general warranty to the estate conveyed, and permitting proof of the circumstances under which the deed was made, seems to us to be the reasonable and just one. It accords with the usual course of dealing, and carries out the intention of the parties, which is the prime object of all canons of construction. "Indeed," as was said by Judge Parker in *Sumner v. Williams*, 8 Mass. 162, "nothing can be more equitable than that the situation of the parties, the subject-matter of their transactions, and the whole language of their instruments, should have operation in settling the legal effect of their contract; and it would be a disgrace to any system of jurisprudence to permit one party to catch another, contrary to the spirit of their contract, by a form of words, which perhaps neither party understood, but which were introduced by the scrivener more in conformity to some general scheme of conveyancing of his own than by the direction or in conformity to the wishes of those for whom he was acting." In determining whether a deed is merely a quitclaim, or conveys an estate in lands, the rule has been recognized in

this state that, where the wording is such as to raise a question in that respect, the circumstances under which, and the purposes for which, it was made, may be considered. *Harrison v. Boren*, 44 Tex. 255; *Threadgill v. Bickerstaff*, 87 Tex. 523, 29 S. W. 757.

On the face of the deed in question, the granting clause seems rather at variance with the habendum and warranty clauses. Eliminate the latter from the deed, and in terms nothing would pass but the right, title, and interest of the grantors. That which immediately follows the granting clause is but matter of description, not of the estate conveyed, but of the lot itself to which the conveyance related. The recital quoted above from the collateral agreement corroborates the view that the interest of the grantors in the lot, rather than the lot itself, was the subject-matter of the conveyance. Insert the succeeding clauses, and the inquiry naturally suggests itself: What was meant by "all of our right, title, and interest in and to lot 13," in the preceding clause? Had the deed anywhere recited the fact that the interest of the grantors was an undivided half, its meaning would have been plain. Proof of this fact, therefore, does not vary or contradict the deed, but only explains what would otherwise be left in uncertainty. It may be that, if the grantors had no title or interest in the lot, they should not be permitted to show that fact, in order to defeat their conveyance with all its covenants; and that, on its face, the deed should be construed as conveying some estate or title, rather than the mere chance of title. *Finch v. Trent*, 3 Tex. Civ. App. 568, 22 S. W. 132, and 24 S. W. 679, and cases there cited. Still, the very general and indefinite terms employed, "all our right, title, and interest," should not exclude proof of what that "right, title, and interest" really was, since it is only that which the deed purports to convey,—a fact alleged to have been within the contemplation of all parties when the conveyance was made. That is certain which may be rendered certain. When read in the light of this fact, the meaning of the entire instrument is plain. Besides, the measure of damages for breach of warranty in this state is the purchase money (with interest where there has been eviction), and it is competent to prove by parol the real consideration of a deed. As, under the allegations made by plaintiffs, the purchase money covered only a half interest in the lot, it would seem that the recovery for breach of warranty should be measured by the amount so paid; and, as nothing was paid for the half interest recovered from defendant, he should recover nothing for the loss of what he paid nothing for. If plaintiffs' allegations be true, a palpable injustice will be avoided by the construction we have adopted. The judgment is therefore reversed, and the cause remanded for a new trial.

RINDSKOPF et al. v. VANLEER et al.
(DAVIS et al., Interveners).

(Court of Civil Appeals of Texas. July 8, 1896.)

**ASSIGNMENT FOR THE BENEFIT OF CREDITORS—
WHAT CONSTITUTES.**

A conveyance of all of an insolvent's property by an instrument empowering the grantee to sell it, and apply the proceeds in payment of the grantor's debts, the balance, if any, to be returned to the grantor, is a mortgage, and not an assignment. *Confectionery Co. v. Ullman* (Tex. Sup.) 35 S. W. 469, followed.

Error from district court, Greer county; G. A. Brown, Judge.

Action by M. L. Vanleer against Rindskopf, Stern, Lauer & Co., S. H. Tittle, sheriff, J. C. Settles, and others, sureties on the sheriff's bond, and others, for the conversion of certain property claimed by plaintiff under an alleged deed of trust to him by the Duke & Dodson Company, a co-partnership, and levied on and sold by defendant sheriff under a writ of attachment against the grantors in an action against them by defendants Rindskopf, Stern, Lauer & Co. By leave of court, Samuel C. Davis & Co. and others, beneficiaries named in the trust deed, intervened. There was a judgment for plaintiff, and defendants bring error. Reversed.

Armstrong & Flournoy and H. W. Martin, for plaintiffs in error. J. A. Powers, A. R. Garrett, A. G. Walker, and B. P. Eubank, for defendants in error.

STEPHENS, J. Since this case was submitted, it has been decided by the supreme court of the United States that Greer county, from which the writ of error comes, was no part of Texas. 16 Sup. Ct. 725. But inasmuch as the jurisdiction of this court had already attached under the laws of Texas when that decision was made, and inasmuch as congress has passed a law giving effect in Oklahoma Territory to the judgments of this court in such cases, we proceed now to dispose of the case. And, to do so, we have but to announce the disposition made by the supreme court of this state of the appeal in the companion case of *Tittle v. Vanleer*, 29 S. W. 1065, 34 S. W. 715, where the conveyance upon which that contention was founded was construed to be a deed of trust in the nature of a mortgage, and not an assignment,—thereby overruling a contrary decision both of the trial court and of this court. For an expression of the views of this court, as then constituted, upon the question, see *Adams v. Bateman*, 29 S. W. 1124. We find no material difference between the instrument construed in the *Tittle-Vanleer* Case and that here considered. Indeed, the instrument seems to be the same in both cases, but, as copied in this record, there is an omission of the clause upon which stress was laid in the original opinion of the supreme court in the former case, that empowering the trustee to sell and make deeds in the names of the grantors. But in view of

the still more recent decision of our supreme court in *Confectionery Co. v. Ullman*, 35 S. W. 469, 1073, and the inherent weakness of the circumstance itself, its absence from the conveyance in question should not produce a different result. We therefore reverse the judgment of the district court of Greer county, and direct the clerk of this court to furnish either party a certified copy of this judgment, upon payment of the costs of this court, and order the case dropped from the docket.

BROWN et al. v. BROWN et al.

(Court of Civil Appeals of Texas. June 27, 1896.)

LAND CERTIFICATE—IDENTITY OF PERSONS—EVIDENCE.

1. On an issue as to which of two deceased persons of the same name was issued a certificate under which the land in controversy was located, it was proper to admit evidence that one of said persons told witness that he was in the war of 1836, though the certificate in question was for military services rendered from 1837 to 1838.

2. Evidence that the administrator of one of said persons claimed said certificate, and that land was located thereunder partly in the county where such person formerly resided, and of the securing of a patent for the unlocated balance, constituting the patent and land in controversy, was admissible on the question of identity.

Appeal from district court, Baylor county; W. R. McGill, Judge.

Trespass to try title by Elmira Brown and others against C. L. Brown and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

W. D. Isenberg, for appellants.

Statement of the Case, with Conclusions of Fact.

TARLTON, C. J. This is an action of trespass to try title, involving the 640-acre Thomas Brown survey, located in Baylor county. The question upon which turns the proper disposition of the controversy depends upon whether the certificate by virtue of which the land was located was issued to one Thomas Brown, under whom the appellants claim, or to one Love T. Brown, also known as Thomas Brown. In other words, the question is one of identity as to the genuine grantee of the certificate. His honor determined the question against the contention of the appellants, and in favor of the latter-named Brown. We adopt, in all things, the conclusions of fact found by the trial judge, which we find to be amply sustained by the evidence.

Conclusions of fact found by the trial court in the case of *Brown v. Brown*, and adopted by the court of civil appeals in its opinion: "One Thomas Brown emigrated from Bibb County, Alabama, to Texas, about the year 1832, where he remained until about the year 1839, when he returned to Alabama on a visit to his father's family. While in Texas he

wrote to his family that he was in the Texas army, and on his visit to his family in 1830 he told them that he had been in the Texas war for independence. From this evidence, and from common repute in Texas, I conclude that he was a soldier in the Texas revolution, and served in the Texas army. About the year 1848 or 1849, en route from Alabama to Texas, he married in New Orleans, Louisiana, Elmira Brown, one of the defendants, and returned to Texas, settling in Colorado county, where he had formerly lived. The persons joining Elmira Brown in her pleadings in this suit, and therein described as children of Thomas Brown, are the children of said Thomas Brown and said Elmira Brown. On January 20, 1838, a bounty land warrant for 960 acres (No. 1,984) was issued by Barnard E. Bee, secretary of war of the republic of Texas, to Thomas Brown; and on the 11th of October, 1850, a certificate (No. 1,641-1,742) was issued by the chief clerk of the general land office of Texas to Thomas Brown for six hundred and forty acres, the unlocated balance of said bounty warrant No. 1,984. The said bounty warrant was issued for nine months' service,—from April 17, 1837, to January 17, 1838. In 1846 there lived in Cherokee county, Texas, one Love T. Brown, who was also known as Thomas Brown. He served as a soldier in the Texas army in the war of independence in 1836. In 1848 or 1849 he died, leaving surviving him his widow and three children,—Jefferson Green Brown, Columbus Brown, and Mrs. Kirby. His widow afterwards was known as Mrs. Thomberg, and, by repute, was married to one Thomberg, and became his widow. She was sometimes called Mrs. Brown, and sometime Mrs. Thomberg, and was known as the widow of both Brown and Thomberg. When the Colorado Thomas Brown returned to Alabama, in 1839, he had some sort of certificate or warrant for land obtained for his services in the army of Texas, the amount of land called for being somewhere near 1,000 acres; but whether it was a bounty warrant, or headright certificate, the evidence does not render certain. He told his wife, before or about the time of her marriage, that he had a certificate or warrant for land for his services in the Texas wars. He died in 1865 or 1866. There is no evidence that he ever tried to locate said bounty warrant, or any portion thereof, nor does it appear that he has been in possession of that particular warrant, or of the certificate for the unlocated balance. On the other hand, the said Love T. or Thomas Brown, of Cherokee county, died about the year 1848 or 1849; and an attempt was made in February, 1849, to institute administration upon his estate, and J. G. Brown was appointed his administrator. The administration proceedings were void, among other reasons, because no necessity for administration was shown. An appraisement of his estate was filed on January 20, 1850, in which was entered and returned, 'One soldier war-

rant for 960 acres,' which was appraised at \$105. Three hundred and twenty acres of land in Cherokee county was located by virtue of said bounty warrant, and patented February 2, 1850, and the certificate for the unlocated balance of 640 acres was located in Baylor county and patented in 1857; said 640 acres being the land in controversy herein. On October 2, 1850, J. G. Brown, as administrator of Thomas Brown, deceased, wrote to the commissioner of the general land office, requesting him to send him a duplicate of 640 acres, being the balance of 960 acres, a soldier claim of Thomas Brown, deceased. He further says in his letter that 320 acres have been patented to the heirs of Thomas Brown, deceased, that Mr. Ancil R. Watson left the certificate last winter, and that he had sold the balance, 640 acres, to Mr. N. Waggoner, and wanted the duplicate sent by Mr. Hatchell. I conclude from these facts that the bounty warrant in question was in the possession of Thomas Brown, whose full name was Love Thomas Brown, at the time of his death, in 1848 or 1849, and passed into the possession of J. G. Brown (Jefferson Green Brown), who was attempting to administer upon the estate of said Love T. Brown; and there being no sufficient evidence of any transfer of said warrant, or of the said certificate for the unlocated balance, or of the said patented 640 acres of land, I conclude that the same, from the evidence, is shown to belong now to the heirs of said Love T. Brown, otherwise also known as Thomas Brown, and that he (the said Love T. or Thomas Brown) was the Thomas Brown to whom said bounty warrant was issued. The plaintiffs introduced no evidence in support of their claim."

Additional findings of fact by trial court. "(1) There is no evidence sufficient to enable me to find that the Thomas Brown of Colorado county (husband of Elmira Brown) served in the Texas army from April, 1837, to January, 1838, nor that Love T. Brown served in the army of Texas during that period, or any part thereof, save from the fact that the warrant was issued for service for nine months from April 17, 1837, to January 17, 1838, and from the fact that, as I have heretofore found that said warrant was issued to said Love T. Brown, I conclude that he served during said time. (2) The certificate for the unlocated balance of the bounty warrant does not state for what period of service the bounty warrant was issued. The bounty warrant itself was not in evidence, but, from the testimony of the commissioner of the general land office, it appears that it was issued for nine months' service,—from April 17, 1837, to January 17, 1838,—and from this I conclude that the Thomas Brown to whom the warrant was issued served during said period. The war for Texas independence closed in the spring of 1836. The only wars that Texas was engaged in in 1837 and 1838, I believe, were Indian wars. (3) There is no evidence by which I am able to deter-

mine how long either of said Browns served in said war of independence, nor how long either served as soldiers during 1837 and 1838, save, as above stated, that the said bounty warrant having been issued to the Cherokee county Thomas Brown, known also as Love T. Brown, I conclude that he served at least nine months during said years, to wit, from April 17, 1837, to January 17, 1838. (4) The evidence is of such a character that I am unable to find and conclude that Thomas Brown of Colorado county ever claimed to his wife or to his son that he had served nine months in the war of 1837 and 1838, or that he had received a bounty warrant for 960 acres of land for said service. I do find and believe from the evidence that he told his wife and son that he had served in the Texas army, and had received a land certificate or warrant for his services, but do not find from the evidence that he told them what particular time he served in the army, or what character of land certificate he received, or for how much land."

Conclusions of Law.

1. It is urged that error was committed in permitting one John Middleton to testify, over the objection of appellants, that he knew Thomas Brown (Love Thomas Brown) in 1846, and that Brown told the witness that he was in the war of 1836. The certificate in question was issued for nine months' service,—from April 17, 1837, to January 17, 1838. It is insisted that the declaration of Brown was hearsay, incompetent, and irrelevant, because made to a stranger, and because it in no way bears upon the question whether the declarant rendered the service referred to in the certificate. This is not a question of pedigree, but of identity; and the account which one gives of himself ante motam litem, though to a stranger, has been held to be one of the multitude of marks or indexes by which identity may be ascertained. *Mullery v. Hamilton*, 71 Ga. 720. The fact of service in the war of 1836 might be regarded as one of a series of relevant facts indicating the presence of Thomas Brown, or Love Thomas Brown, in Texas, and the probability of the rendition by him of the services at the date referred to in the certificate. If, however, the testimony objected to should be regarded as irrelevant, and hence immaterial, other facts enumerated by his honor, and to be found in the record, amply sustain his conclusion on this issue of identity; and, as the cause was tried without a jury, we would, for the reason thus indicated, decline to reverse the judgment. *Andrews v. Key*, 77 Tex. 35, 13 S. W. 640.

2. The purported administration proceedings taken out by J. G. Brown in 1849 upon the estate of his father, Love T. Brown (elsewhere shown to be also Thomas Brown), followed as they were by an assertion of claim and control, as such administrator, over the certificate in question, the location

of 320 acres thereof in Cherokee county, the former place of residence of Love T. Brown, with the securing of the patent for the unlocated balance of 640 acres, and its location in Baylor county, constituting the patent and the land directly here involved, were admissible on the issue of identity. *Byers v. Wallace* (Tex. Sup.) 29 S. W. 760.

3. A careful inspection of the evidence leads us to the conclusion that no judgment other than such as was entered could reasonably have been rendered. We hence order an affirmance.

FRISTOE v. LATHAM et al.

(Court of Appeals of Kentucky. May 12, 1896.)

VENDOR AND PURCHASER—FRAUD—MARKETABLE TITLE—CONSTRUCTION OF DEVISE.

1. Where actual fraud is shown on the part of a vendor in making representations as to title, the purchaser is entitled to rescission, though in undisputed possession under a conveyance with covenants of general warranty.

2. A devise of land to a testator's children for life, with power to dispose of it at their death, though not before, vests them with the full title, and the restriction on their power of alienation is ineffectual.

Appeal from circuit court, Mason county.

"Not to be officially reported."

Action by Franklin Latham and another against Silas F. Fristoe. Judgment for plaintiffs, and defendant appeals. Affirmed.

G. B. Gill and E. L. Worthington, for appellant. T. C. Campbell, for appellees.

GUFFY, J. This action was instituted in the Mason circuit court, by Franklin Latham, etc., against the appellant, Silas F. Fristoe, to recover judgment on a note executed for balance due on purchase money for a tract of land sold and conveyed by said Latham and wife to said Fristoe, and also seeking to enforce a lien on the land given to secure the payment of the purchase money. The appellant resisted the recovery, and sought a rescission of the contract, upon the ground that the appellee did not have a good and sufficient title to the land so sold and conveyed to Fristoe. The court below sustained a demurrer to the answer, and, appellant failing to amend, judgment was rendered for the amount claimed, and also for a sale of enough of the land to pay same, and the land has been sold; and, to reverse the judgment aforesaid, this appeal is prosecuted.

The answer of appellant sufficiently charges that the vendors were guilty of knowingly and fraudulently misrepresenting the title to the property conveyed, and it is also averred in the answer that appellant relied upon the false representations, and, but for the representations and statements of vendors that they had and could convey a clear and unincumbered title, appellant would not have made the purchase. It was incumbent upon appellant to point out the defects in the title, and this he has attempted to do, and the principal question for decision

is whether or not the facts stated in the answer show that appellees did not have a good title to the land sold.

It is alleged, in substance, in the answer, that the vendor, Latham, obtained such title as he had by virtue of a sale made under judgment of the Mason circuit court in the suit of Joel Latham v. McElvain; that Walter E. Neal had sold the land to one Hum-long, and he to McElvain, and, to satisfy the purchase-money notes of McElvain, the land was bought as before stated; that Walter E. Neal derived his title solely under the will of his father, Elias Neal; and that, under said will, he only owned a life estate in his father's land, and such other life estates of his brothers and sisters as he could purchase, or as might come to his hands through inheritance by the death of a brother or sister, and could own no more, and could convey no other estate than that which he held under the will or by inheritance, and such purchase would be subject to the conditions and limitations of the will. It is further alleged in the answer that Walter E. Neal attempted to buy out, and did buy out, a number of the heirs of Elias Neal, and to rent their respective life estates from them, but all of such vendors of Walter E. Neal made the distinct reservations, made in Elias Neal's will, and specially declare that, should Walter E. Neal violate the same in any way, the title to the land conveyed to him shall revert to the respective vendors' legal heirs; that some of Elias Neal's children are living, and many grandchildren; that between 30 and 40 acres of the land so sold is covered by the will of Elias Neal, and includes all of the improvements, orchard, and two springs, dwelling house, barn, and garden; that it is worth in the proportion of three acres to one of the other part; that the balance of the land would be of comparatively little value without the said 30 or 40 acres. Elias Neal devised all of his property to his wife during her life, and, after her death, all his land is bequeathed to his children, Thomas, Martha, Hollis, George, and Tabitha, to each an equal quantity, as exhibited in a plat accompanying the will. He then describes each parcel by numbers, each containing $16\frac{1}{2}$ acres. Then follow the following clauses in the will, viz.: "It being expressly understood that I give and bequeath the above-described parcels of land to my said several named children for and during the term of their natural lives, without the power to sell or convey any right to the same during said period, and with the further condition that they are not to rent to, nor allow to be occupied by, any person or persons, except a brother or sister or their families, any part or parcel of said lands during the time for which it is bequeathed to them severally. Further than that I choose to exercise no control, but leave them at liberty to dispose of the same at the expiration of their several lives as they may think proper." Appellees'

contention is that, inasmuch as the answer failed to allege that the vendor is insolvent or a nonresident, it was for that reason insufficient; also, that Elias Neal's children took a life estate under the will, as devisees, and took the fee as heirs at law of Elias Neal, and that the restriction on their power of alienation is absolutely void.

This court has often held that, where actual fraud was shown on the part of the vendor, the vendee was entitled to relief, although he was in the undisputed possession under a conveyance with covenants of general warranty. Hence the contention of appellees in that respect cannot avail; but it seems to us that inasmuch as the children of Elias Neal took under his will a life estate, with full power to dispose of the land at their death, they became invested with a complete and perfect title. It will be seen that no provision is made in the will respecting the land in the event the power given should not be exercised. It is true that the will forbids the sale during life, also forbids the occupancy or use of the land by any person except some of the devisees or their families; but these provisions were manifestly intended for the benefit of the several devisees, and it is not claimed that any of the devisees are complaining or seeking to interfere with appellant's enjoyment or possession of the land. Hence it seems to us that the answer failed to show a solid defense. The judgment of the court below is therefore affirmed.

TRUSTEES OF KENTUCKY FEMALE ORPHAN SCHOOL v. CITY OF LOUISVILLE.

SAME v. BELL, Sheriff.

(Court of Appeals of Kentucky. May 23, 1896.)

CONSTITUTIONAL LAW—EXEMPTION FROM TAXATION—INSTITUTIONS OF PURELY PUBLIC CHARITY.

Under Const. § 170, providing that "institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education," shall be exempt from taxation, the Kentucky Female Orphan School, a corporation, the beneficiaries of which, as designated by its charter, are female orphan children, is an institution of purely public charity, though pay pupils may also be received, the amount received therefrom being devoted solely to the maintenance of the school; and, in view of the long-settled legislative policy of the state, the word "institution," as used in the provision, must be construed to include the corporation, and all of its property, wherever situated, and whether used in connection with the school, or the income from which is devoted to its support, is exempt from taxation. Guffy and Du Relle, JJ., dissenting.

Appeals from chancery court, Jefferson county.

"To be officially reported."

Petitions of the trustees of Kentucky Female Orphan School against the city of Louis-

ville and Henry A. Bell, as sheriff, to enjoin the collection of taxes on complainant's property. Judgments for defendants, and plaintiff appeals. Reversed.

Stone & Sudduth, for appellant. Laf. Joseph, for appellees.

HAZELRIGG, J. The question involved in this appeal is whether or not certain real estate, situated in the city of Louisville, and belonging to the Kentucky Female Orphan School, located at Midway, in Woodford county, is exempt from state, county, and municipal taxation, under the provisions of the constitution on that subject. The petitions of the trustees, seeking to enjoin the collection of the taxes, were dismissed on demurrer, and the facts to be considered are therefore undisputed. It appears that the appellant was incorporated by the Kentucky legislature in 1847, and its trustees were given the ordinary powers, rights, and privileges of trustees of any other seminary of learning or academy in the state, with power to acquire by purchase, donation, etc., lands and other property to the extent of not exceeding \$50,000. This limit has been increased to \$400,000 by subsequent legislative enactment. Section 7 of the charter provides "that the beneficiaries of the institution shall be female orphan children; and the board of trustees shall have power to determine the number that shall, at any time, be admitted into the institution; and out of any number of applicants, they shall decide which shall be admitted; and shall also prescribe the time for which each beneficiary shall remain in the institution; and shall admit no one under nine years of age; and shall permit no one to remain longer than four years." Section 8 is as follows: "That the board of trustees shall be the guardian of each beneficiary of the institution until she shall arrive at the age of eighteen years; and shall have all such power to control the conduct and actions of each beneficiary, as guardians now have by law to control the conduct and actions of their wards." Section 9: "That pay pupils may be admitted into the institution, the number and terms of admission being decided by a majority of the board of trustees." A charter amendment of March, 1862, provides "that the property owned by the Kentucky Female Orphan School, at Midway, Woodford county, shall be exempt from all taxes whatever so long as it exists as a school of charity." And by further amendment (March 3, 1876) it is provided that the trustees shall fill vacancies in their board with "persons who are members in good standing of some congregation of the Church of Christ in the state of Kentucky." It is alleged in the petition that the real estate sought to be sold for taxes was acquired by devise many years ago, and had been continuously rented out, and the annual income used solely for the purpose of educating female orphans at its institution of learn-

ing at Midway; that its property, both real and personal, from which it derives any income, including that in Louisville, constitutes an endowment fund for the purpose of carrying on its school of charity; that the pupils received are boarded and educated, and, when they are indigent, and not otherwise provided for, are also clothed, wholly or in part, by the appellant, while attending its institution; and that no part or parcel of its property has ever been used for gain by it or any person, and its income has always been devoted solely to the cause of education. The provisions of the constitution upon which the claim to exemption is based are as follows: "Sec. 170. There shall be exempt from taxation public property used for public purposes; places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country; places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education; public libraries, their endowments, and the income of such property as is used exclusively for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home and for no other purpose by the minister of any religion, with not exceeding one-half acre of ground in towns and cities, and two acres of ground in the country appurtenant thereto; household goods, etc.; and all laws exempting or commuting property from taxation other than the property above mentioned shall be void. The general assembly may authorize any incorporated city or town to exempt manufacturing establishments from municipal taxation, for a period not exceeding five years as an inducement to their location."

Upon the admitted facts, and they are attested in the current history of this beneficent institution, we are of opinion that the appellant is an institution of "purely public charity," within the meaning of the foregoing constitutional provision, as well as an institution of education "not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education." The name of the appellant is a significant index to its character, and the provisions of its charter sufficiently indicate its aims and purposes. It is true that "pay pupils may be admitted into the institution," but manifestly this is merely that the "pay" may be devoted to the general and main purpose of educating and supporting those who are unable to provide for their own support and education. It is an exception, as is clearly inferable from the insertion of the provision, and not the rule, that pay pupils are admitted. An instructive definition of a "purely public charity" is found in *Episcopal Academy v. Philadelphia*, 150 Pa. St. 565, 25

Atl. 55, and is thus stated: "(1) Whatever is done or given gratuitously in relief of the public burdens or for the advancement of the public good is a public charity. When the public is the beneficiary, the charity is public; and when no private or pecuniary return is reserved to the giver, or to any particular person, but all the benefit resulting from the gift or act goes to the public, it is a purely public charity, the word 'purely' being equivalent to 'wholly.' (2) A denominational school property, vested in trustees, for the purpose of affording encouragement to the education of youth, is a purely public charity, although the school is not open in the same way to the general public as to persons connected with the religious denomination, but the general public are admitted as vacancies occur, and, when admitted, upon the same terms with all other pupils. (3) An institution founded and endowed as a purely public charity does not lose its character as such, under the tax laws, if it receives a revenue from the recipients of its bounty sufficient to keep it in operation." A most satisfactory discussion of this question is found in the case of *Burd Orphan Asylum v. School Dist. of Upper Darby*, 90 Pa. St. 21, where a testatrix, by her will, provided for the establishment of an asylum whose object should be the maintenance and education of (1) white female orphan children who shall have been baptized in the Protestant Episcopal Church in the city of Philadelphia, or in the state of Pennsylvania, and (2) all other white female orphan children, without respect to any other qualification, except that the orphan children of clergymen of that church should have the preference. The discussion of the right to tax the property of the asylum takes a wider range than is needed for the purposes of this case, but it is pertinent particularly to cases being considered in connection with the present one, and we therefore quote liberally from it. The reasoning of the court in that case is as follows: "It is conceded that the devise in question has created a charity which is public in the strict sense of that expression. But it is urged that it is not purely public, and hence that to apply the language of the act to this particular case would be a violation of the constitutional provision. Now, it must be conceded, and it has been decided, here and elsewhere, that the word 'purely' is not to have its largest and broadest significance when used in this connection. In the opposing line of thought it is admitted that the word is to have a limited meaning. It is not contended that a charity, to be purely public, must be open to the whole public, nor to any considerable portion of the public. Without doubt an asylum for the support of fifty blind men, or an equal number of paupers, would not be obnoxious to the objection that it was not purely 'public.' A charity for the maintenance of disabled seamen, or of aged and infirm stonemasons, resident in the city of Philadelphia, would undoubtedly be

a purely public charity; and so, also, would a charity for the education and maintenance of the children of such persons. And if such a charity should be limited to the white female orphan children of such persons between the ages of four and eight years, such limitations, though they would very greatly restrict the class and the number of the beneficiaries, would constitute no valid objection to the purely public character of the charity. But seamen and stonemasons are only designated classes of persons, distinguished by their occupations. A charity for the support of poor widows, or indigent old men, or the insane poor, of a city, county, borough, or township, would be equally a purely charity, no matter how small would be the number of the beneficiaries or how limited the class. Why, then, would not a charity for the support of poor Episcopalians, Catholics, Jews, or Presbyterians of a state or city be purely public, or a charity for the education and maintenance of the orphan children of such persons? No private gain or profit is subserved, the objects of such a charity are certain and definite, and the persons benefited are indefinite within the specified class. The circumstance that the beneficiaries are to be of a particular religious faith is only of importance as designating the class. It indicates a certain portion of the whole community who are to be recipients of the charity. It has the same effect in this respect as the words seamen, stonemasons, blind persons, poor widows, etc., in the cases already mentioned, for the purpose of defining the class of persons who, as distinguished from all other persons in the community, are to enjoy the benefit of the donor's bounty. The legal effect is the same whether the words used be seamen, Episcopalians, blind persons, Catholics, poor widows, Jews, stonemasons, or Presbyterians. The argument that to sustain, as purely public, a charity in favor of persons of a particular religious faith, would be to maintain sectarianism is of no weight. It is not discrimination in favor of a sect, for it is treating all sects alike. It is not even extending a preference to sectarians. It is merely recognizing them as a class of persons. We see no reason why that community which ranges persons into classes, so far as this subject is concerned, may not be a community of religious faith, as well as of occupation, condition in life, sex, color, age, disability, physical or mental, or nationality. As to the meaning of the word 'purely,' when used in this connection, we concur in the construction which was given by the supreme court of Ohio in the case of *Gerke v. Purcell*, 25 Ohio St. 229, that, 'when the charity is public, the exclusion of all idea of private gain or profit is equivalent in effect to the force of "purely," as applied to public charity in the constitution.' " See, also, *Donohugh's Appeal*, 86 Pa. St. 306, and *Philadelphia v. Women's Christian Ass'n*, 125 Pa. St. 572, 17 Atl. 475. In the latter case the court (page 579, 125 Pa. St.

and page 475, 17 Atl.) said: "It will be seen from the foregoing that the object of the association is to improve the temporal, moral, and religious welfare of young females who are obliged to earn their own support, and that, as a means to this end, it furnishes them with food and lodging, not as paupers, but for a compensation which, while it does not compensate, aids in defraying the expenses, and thus preserves the self-respect of the recipients, while to others who are unable to pay temporary shelter is furnished free, and aid extended to them in the way of procuring employment. All this and much more is done by a band of devoted women who labor unselfishly, in season and out of season, giving their time and labor freely, and supplying the annual deficit in the treasury by contributions from themselves and their friends. There is no element of gain in the object or operations of this association. It is a public charity, and I regard it as a shortsighted policy in the city of Philadelphia to seek to burden such an institution with taxation." Again the court observes (page 581, 125 Pa. St., and page 470, 17 Atl.): "In the case in hand the stamp of charity is indelibly fixed upon the association. It appears in its charter, and is developed at every stage of its proceedings. Does the mere fact that it charges a small sum to a portion of those who feed at its table and enjoy the shelter of its roof destroy its character as a purely public charity? * * * This whole subject was carefully considered in Donohugh's Appeal, 86 Pa. St. 306. That was the case of the Philadelphia Library, an institution maintained by the annual contributions of members, from the income derived from such property as has been given to it, and from fees paid for the use of the books. The test in that case was the object of the corporation. That was found to be the general public good, and not private gain."

Regarding as settled that the appellant is such an institution as is entitled to the exemption under the terms of the constitution, the question remains: What is meant by the word "institution" in the instrument? The chancellor seems to have conceded that appellant was an institution of purely public charity, and an institution of education, such as is contemplated by the constitution, but argues that, if the different educational or charitable institutions of the state see fit to invest their endowment funds in real estate in the city, then to grant the appellant's contention might secure substantially the exemption of all the realty in the city. He therefore limited the meaning of the word "institution," and held it to embrace only local property, buildings, grounds, etc., so situated as to constitute a part of the institution itself. While the imaginary case put is altogether improbable, and can afford but slight clue to the meaning of the language used, it must be admitted the word "institution" is often used in the sense pointed out by the chancellor. Thus, in Ap-

peal Tax Ct. of Baltimore City v. St. Peter's Academy, 50 Md. 345, in discussing the use of this word in the exemption statute, the court said: "The term 'institution' is sometimes used as descriptive of the building, establishment, or place where the business or operations of a society or association are carried on, and at other times it is used to designate the organized body." The words under discussion there were "hospitals or asylums, charitable or benevolent institutions, so far as used for the benefit of the indigent and afflicted, and the ground which the buildings used as hospitals, asylums, charitable or benevolent institutions actually cover." It was held that the language was appropriately descriptive of a building, establishment, or place where the operations of an association or corporation are conducted, but wholly inappropriate as the designation of organized corporate bodies or associations. In the case of Gerke v. Purcell, 25 Ohio St. 240, the constitutional provision was: "But burying grounds, public school-houses, houses used exclusively for public worship, institutions of purely public charity, public property used exclusively for any public purpose * * * may be exempt," etc. It was held that, in a statute providing for the exemption of "all lands connected with public institutions of learning not used with a view to profit," the word "institution" was used as descriptive of the establishment or place where the business or operations of a society or association is carried on; but, in another section of the statute, where the property referred to is described as belonging to the institution, the word was used to designate the organized body. This case is instructive, also, in considering the feature first discussed, the court saying that the word "charity," in its legal sense, "includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art"; and it was held that schools established by private donations, and which are carried on for the benefit of the public, and not with a view to profit, are institutions of purely public charity, within the meaning of the constitution which authorizes such institutions to be exempt from taxation. The court further said: "The maintenance of a school is a charity. Gifts for the following purposes have been declared to be charities: Free schools and scholars of universities (2 Story, Eq. Jur. § 1160); to establish new scholarships in a college (Attorney General v. Andrew, 3 Ves. 633); to found and endow a college (Attorney General v. Bowyer, 3 Ves. 714); etc." In the case of Nobles Co. v. Hamline University, 46 Minn. 316, 48 N. W. 1119, the act considered provided that "all corporate property belonging to the institution, both real and personal, is and shall be free from taxation"; and to the claim that "only the university itself and the necessary ground for its use" was exempt, the court replied as follows: "The proposition is

based upon an untenable attempted distinction between the 'institution' and the 'corporation.' The term 'institution,' although sometimes used as descriptive of the establishment or place where a business is carried on, properly means an association or society organized or established for promoting some specific purpose. The 'institution,' as distinguished from the 'corporation,' has no being, and is incapable of owning property. Had it been intended to limit the exemption to property directly used and occupied by the university, different language would have been used." Many other cases are cited by counsel, falling upon the one side or the other in the definition and use of this term, according to the language of the statute to be construed; and upon the whole it would seem that, when the statute exempts the "institution" from taxation, and no qualifying words are used showing or tending to show that only the property "used" by the institution, or "connected" with the institution, is to be exempt, then the associated entity—the corporate being—with its estate as an entirety, is embraced by the word "institution." The exemption of the institution would thus embrace its endowment fund and property, in whatever form these assets might be found. This is precisely what we find in the section under consideration, so far as reference is made to "institutions of purely public charity." Thus, "there shall be exempt from taxation * * * institutions of purely public charity," and there is to be found no qualifying clause or expression anywhere in the entire section. There is no allusion to "buildings," or "grounds" used by or connected with "institutions of purely public charity," as is the case in many of the authorities referred to by counsel.

Finding no exception to the rule indicated, that when an "institution" of the character named is exempted, the charitable being, including necessarily the whole of its estate, is to be exempted, and having determined the Kentucky Female Orphan School to be an institution of purely public charity, we might rest here with our investigation. But it is proper in this case, and necessary in some of the others connected with it, to consider the succeeding clause of the section: "And institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education." Here it may be said, and with a show of technical accuracy, that, whatever is meant by the words "institutions of education," something is meant which may be used or employed by a person or corporation. And this can more fitly be said of the buildings and appurtenant grounds than of the corporate being. For example: We may appropriately say that the building, establishment, or place where the business of the corporation is carried on shall not be "used or employed for gain by any person or corporation," while it would be rather inappropriate to say that the organized corporate

body shall not be used or employed by any person or corporation. On the other hand, the clause "and the income of which is devoted," etc., could hardly mean income from the buildings, grounds, etc., but rather the income of the corporate body. Besides, we may notice that the attention of the framers of the section was called directly to the question of exempting the grounds attached to and appurtenant to certain places and houses used for certain purposes, but failed to provide any such limitation with respect to charitable and educational institutions. Perhaps a brief reference to the origin of these provisions in our constitution may be of assistance here. As originally proposed, the section on the point involved only included the clause "institutions of purely public charity." There was no reference to institutions of education *eo nomine*; and, upon a suggestion that institutions of this character ought to be provided for, it was argued at length by a distinguished delegate that the language already in the proposed section fully covered the question. In support of this position, that "institutions of purely public charity" embraced institutions of education not operated for private gain, a distinguished delegate read on the floor of the convention copious extracts from the Pennsylvania cases cited. While not controverting this position, the particular friends of education argued that the Kentucky courts might not adopt the Pennsylvania construction, and secured the insertion of the clause as it now appears in the section, in order to make it certain that educational institutions not controlled for private gain, and the income of which was devoted to that cause, should be exempt. And while the endowments of some of the more prominent institutions of learning in the state were referred to during the discussion as fit subjects for exemption, if there was any obstruction raised or difference of opinion suggested as to the propriety of the proposed exemptions, there seems to have been no record of it. We are aware that the weight to be given the declarations of members of the convention is not to be taken as controlling. Mr. Endlich says of these declarations: "They give us no light as to the views of the large majority who did not talk, much less of the mass of our fellow citizens whose votes at the polls give that instrument the force of fundamental law." End. Interp. St. 510. Yet, confessedly, it must be a source of satisfaction to those who are called on to ascertain the intention of doubtful provisions to find the conclusions aimed at to be in accord with, and not in opposition to, the views of the framers of the law so far as expressed. We think, therefore, a proper construction of the language used in the section requires the exemption of the entire property of this institution, wherever situated, and in whatever form its investments may be found.

This construction of the language of the

constitution is in accord with the long-settled policy of the state. By the Kentucky act of December 17, 1825 (2 Moreh. & B. St. p. 1080), it was provided: "Hereafter the trustees or managers of such schools or seminaries of learning within this commonwealth shall not be bound to list such lands for taxation or to pay any taxes on the same. Nor shall any taxes be demanded by the state for any such lands, so long as the same shall absolutely and bona fide belong to a seminary or school of learning." This statute, and the public policy it recognized and enforced, was continued in Rev. St. 1852, c. 58, art. 1, § 1, as follows: "Be it enacted by the general assembly of the commonwealth of Kentucky, that lands held by a school or seminary shall not be subject to taxation, or forfeiture, for any cause whatsoever." And the same policy, exempting all the property of institutions of learning, was continued in the General Statutes as follows: "The real estate and investments devoted to public schools, seminaries, universities, colleges, courthouses, clerks' offices, jails, public graveyards, lunatic, orphan, and deaf and dumb asylums, hospitals, infirmaries, widows and orphans' asylums, foundling asylums." Gen. St. (Orig. Ed. 1872) pp. 709-710, c. 92, art. 1, § 3. And the Hewitt revenue law of 1886 provided: "The following property shall be exempt from taxation: Public schools, churches and all property of seminaries, asylums, hospitals, infirmaries, and colleges and all other funds devoted to charitable purposes, * * * except those owned by joint stock companies or associations which declared dividends; provided that nothing herein shall be construed as exempting any property which is used or employed for gain of any person, nor any property of which the products, rents, or uses are not devoted solely to the objects of the institution, as distinguished from personal gain of the individuals connected with the institution." Under these statutes we are not aware that endowments of asylums, colleges, etc., not operated for the personal gain of individuals connected with the institution have ever been taxed; and it is inconceivable that an intention to reverse the policy of the state in this respect should have been declared in language so poorly expressive of such intention. As said by the supreme court in *U. S. v. Ryder*, 110 U. S. 729, 4 Sup. Ct. 201: "The revisors would not have proposed nor would congress have made such a fundamental change in the law * * * without employing more appropriate terms for that purpose than those which the section contains. It will not be inferred that the legislature, in revising and consolidating the laws, intended to change their policy, unless such intention be clearly expressed. Except for the constitutional enactment, the contention of the appellees that such exemptions would be subversive of the principles announced in the

bill of rights might be of some force; but the constitution must be held to be consistent with itself, and the policy adopted must be carried out. But, even before the present constitution was adopted, this policy was recognized and enforced in the courts. In *Higgins v. Prater*, 91 Ky. 18, 14 S. W. 912, in sustaining a tax for the agricultural and mechanical college, this court said: "Other institutions of an educational character and which do not constitute a part of our common-school system have for years been supported by general taxation. * * * The framers of our constitution and the people adopting it were not moved by a fear of too much education, but of too little." In *Zable v. Orphans' Home*, 92 Ky. 91, 17 S. W. 212, it is said: "It is the duty of the state to care for its indigent orphans, and, if done by another, he renders what is a public service; and the legislature may therefore, without regard to the extent of it, exempt the property devoted to such use from taxation."

We have already considered, perhaps sufficiently, the nature of this institution, but, in view of the appellee's appeal to the bill of rights, it is not improper to note from the yearbook of the institution (1892) the objects it has in view. "The primary object of this institution is to educate such orphan girls as cannot obtain an education in any other way, and to qualify them for teaching. * * * We receive three classes of girls, as follows: (1) Destitute orphans, who have no relatives or friends to aid them; (2) orphans destitute of means and of relatives able to aid them, but whom churches or benevolent societies are willing to sustain at the school; (3) orphans who have some means, but not enough to support them in other schools. Precedence is given to the first class, and as many of them are received as the proceeds of the endowment will justify." If this be not an institution of "purely public charity," and entitled to the aid of the state, one can hardly be found in the state. Other reasons for the exemption are urged by the appellant, but it is deemed unnecessary to consider them. For the reason given, the judgments are reversed for proceedings consistent with this opinion.

DU RELLE and GUFFY, JJ. We dissent from the opinion of the majority in these cases, and will state briefly the grounds of dissent. The question for decision is whether real estate in the city of Louisville, owned by the appellant, is exempt from state, county, and city taxation, under the provisions of section 170 of the constitution of Kentucky. The other questions made in argument were not passed on in the opinion of the court, and need not be considered here.

The exemption is claimed under section 170 of the present constitution, which, so far as applicable to the question in this suit, is as follows: "Sec. 170. Property Exempt—Cities may Exempt Manufactories. There shall be

exempt from taxation public property used for public purposes; places actually used for religious worship, with the grounds attached thereto and used and appurtenant to the house of worship, not exceeding one-half acre in cities or towns, and not exceeding two acres in the country, places of burial not held for private or corporate profit, institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education; public libraries, their endowments, and the income of such property as is used exclusively for their maintenance; all parsonages or residences owned by any religious society, and occupied as a home, and for no other purpose, by the minister of any religion, with not exceeding one-half acre of ground in towns and cities and two acres of ground in the country appurtenant thereto." In connection with this section we must consider certain other sections of the constitution, in so far as they indicate the purpose of the instrument, and shed light upon the section under consideration. It should be remembered that there is nothing corresponding to this section in the constitution of 1850. The same may be said of the provisions of section 3, which is as follows: "Sec. 3. All men, when they form a social compact are equal; and no grant of exclusive, separate public emoluments or privileges shall be made to any man or set of men, except in consideration of public services; but no property shall be exempt from taxation, except as provided in this constitution; and every grant of a franchise, privilege or exemption, shall remain subject to revocation, alteration or amendment." Section 5 contains this provision: "No preference shall ever be given by law to any religious sect, society or denomination; nor to any particular creed, mode of worship or system of ecclesiastical polity; nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion; nor shall any man be compelled to send his child to any school to which he may be conscientiously opposed." In this connection we quote the corresponding provision of the old constitution (section 5, art. 13, of the bill of rights of the constitution of 1850), as follows: "Sec. 5. That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man shall be compelled to attend, erect or support any place of worship, or to maintain any ministry against his consent; that no human authority ought, in any case whatever, to control or interfere with the rights of conscience; and that no preference shall ever be given by law to any religious societies, or modes of worship." Section 171 of the present constitution provides: " * * * Taxes shall be levied and collected for public pur-

poses only. They shall be uniform upon all property subject to taxation, within the territorial limits of the authority levying the tax." And section 174 contains the following: "All property, whether owned by natural persons or corporations, shall be taxed in proportion to its value, unless exempted by the constitution."

It is evident from the provisions quoted that the policy of the new instrument was intended to be different from that of the old in the matter of exemptions from taxation. The change is significant, when, in connection with section 5, we consider the provision in section 3 that "no property shall be exempt from taxation except as provided in this constitution," the provision in section 171 that taxes shall be levied and collected for public purposes only and shall be uniform upon all property subject to taxation, and the provision of section 174 as to uniformity of taxation of corporate property with that of individuals. The policy of the new constitution was to do away with exemptions. Out of deference to the supposed views of the religious element of the community, certain specific exemptions were made, and, while we do not contend that these should necessarily be strictly construed, they should certainly not be extended by implication to any property not fairly within the meaning of the constitution. Except in so far as the constitution provides, nothing can be exempted from taxation which might not be supported by taxation. Undoubtedly the exemption of any property works an increase of the burden on property which is not exempted, and the placing of a burden upon property, by taxing it to a greater extent in order to exempt other property, is to that extent a taking of property without just compensation. With these principles in mind, the construction of section 170 is simple. First, public property is exempted; next, places actually used for religious worship, with the ground attached, with a limitation upon the extent of the ground; next, places of burial not held for private or corporate profit; next, institutions of purely public charity; and then, in the same clause, institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the support of education. The case in which the main opinion of the majority was rendered turned upon the construction of this phrase, "institutions of purely public charity and institutions of education not used or employed for gain." And the first question is, what is meant by "institutions"? Undoubtedly, in the latter part of the clause, the word "institution" is used to denote the physical, corporeal property employed for the purpose of education; and it is a cardinal canon of construction that where, in one part of a clause of a statute, a word having two meanings is undoubtedly used in one sense, it will be construed to be used in the same sense in

the other parts of the section, unless such construction is forbidden by the context. It is practically admitted in the opinion that the words "used or employed for gain" apply, and can apply, only to the tangible property employed for the purpose of education. We can conceive of no reason for attributing to the phrase a different meaning when used as to institutions of purely public charity. If it had been intended to exempt the endowment of institutions of public charity and institutions of education, it may fairly be argued that the same phrase would have bene used which is used in the succeeding clause as to public libraries, whose endowments are exempted, together with the income of such property as is used exclusively for their maintenance, and this is done as to libraries in express terms. So, in the next succeeding clause, as to any parsonage or residence owned by a religious society, and occupied as a home, and for no other purpose, by the minister of any religion. Further, the lands attached to places used for religious worship, and the lands appurtenant to parsonages, are limited in extent. But, in this case, institutions of purely public charity are construed to mean the corporations which conduct such institutions, and all property belonging to such corporations is exempted from taxation. We cannot assent to such a construction. Such a conclusion would lead not only to manifest injustice in the matter of placing burdens upon the other property in a community, but would lead corporations conducting such institutions to select for the purpose of investment those cities and towns which had the highest tax rate, in order to benefit by the advantage thereby given in competition for tenants. For, just in proportion as the surrounding property is subjected to a greater tax, is a greater bonus given to the corporation which owns the exempted property, a part of which bonus it can afford to give in the shape of a reduction of rent whereby to entice tenants away from the owners of the surrounding property. Just in proportion to the increase of exempted property held by such corporations in a city or town, must the tax rate become higher, and the inducement greater to such corporations to invest their surplus there. And this leads to further injustice. The tenants of such a corporation, induced to become such by a reduction of rent, are thereby enabled to undersell their neighbors, who are compelled to contribute their just proportion towards bearing the burden of taxation placed upon the property they occupy. Is it conceivable that the constitution was intended to work such injustice?

It is matter of state history, which this court can and ought to take knowledge of, that the present constitution was proclaimed to the people as putting a limit upon exemptions. Legislatures no longer were to work their will by exemptions in favor of the par-

ticular sect which the majority happened to favor, or to pool their issues in favor of a number of sects, whose adherents might constitute a majority. Specific exemptions were made in favor of property devoted to certain uses, which were supposed to furnish an excuse, if not a reason, for relief from the common burden. With great ingenuity, limitations more apparent than real were placed upon these exemptions, and the finished instrument was spread before the people as an enduring check upon the power of future legislatures to tax one man's property for the purpose of exempting another's. Moved by these and similar representations, the people voted by a majority of some 140,000 that this instrument should be their fundamental law. And with what result? To fasten upon their necks a burden of constitutional exemptions which can only be removed by a new constitutional convention or a constitutional amendment; to place limitations, not upon the legislative power to grant exemptions, but upon their own power to refuse, control, or repeal them. It is to no purpose to cite the language of the debates. Endlich says, of the declarations of members of a convention: "They give us no light as to the views of the large majority who did not talk, much less of the mass of our fellow citizens whose votes at the polls give that instrument the force of fundamental law." Endl. Interp. St. p. 510. And everyone who knows anything of conventions and legislatures knows that the declarations of the speakers not only do not represent the convictions of those who do not speak, but frequently do not give the real views of the speakers themselves. Speeches in such bodies are not even supposed to be made for the mere purpose of declaring the views of the speakers, but for the purpose of influencing the votes of the listener. Hence, another than the real reason for the advocacy of a provision is often given, and another than the true interpretation of the language of a section is too often suggested in argument. Members who are in the minority strive for the substitution of less definite language than that proposed by the majority, with the purpose of taking their chances in the courts. But it is not by the declarations, more or less sincere, of the individual members of the convention, nor the understanding of the majority, that the instrument obtains validity or its meaning is to be ascertained. It is the votes of the plain people which give it force and effect, and from this fact flows the wise rule of constitutional construction, universally acknowledged by the courts since the foundation of the government, though too often disregarded in practice, that the language of such an instrument is to be construed according to its ordinary and common meaning, and that sense is to be given its provisions which was understood by the people whose ballots made it organic law.

Applying this test to the provision in question, we find a sectarian charity school, op-

erated by a corporation created by special act which provided "that the institution shall be located in the town of Midway, in the county of Woodford." It comes to this court claiming exemption from taxation upon property situated in Louisville which is leased to tenants for various purposes, and the rents from which are applied to carrying on the institution at Midway. Waiving the question whether the charity thus provided for is purely public, about which there is grave doubt, the question arises, how many Kentucky voters had an idea that they were authorizing the exemption of houses in Louisville, the rents of which were used to carry on an institution at Midway? That the word "institution," in this section, was understood by the people to denote the physical property used for the charitable or educational object, there can be little doubt. Not one voter in a thousand would imagine that, in speaking of an institution not used or employed for gain by a person or corporation, the word "institution" was used to mean a corporation. It would instantly occur to the average man that the words used could not have been intended to provide for the case of a corporation not used for gain by a corporation, and that the thing meant by "institution" was the land and house and appurtenances used for the conduct of the charity, or for the educational purpose. If it was not so meant by the framers of the instrument, it must have been intended to deceive the people. So the income of an institution of education must be limited to the income which is derived from tuition fees. Authority is abundant in favor of the construction here stated. "Property from which a revenue is derived is not exempt. Property used exclusively as a general dispensary is exempted; but lots and buildings thereon, when an investment, the income of which is to be applied to the purposes of the dispensary, and stocks and public securities held by it, are subjects of taxation. The fact that the rents and revenues of a property owned by a charitable corporation are devoted to the charitable purposes for which the corporation was organized will not exempt such property from taxation. It is only when the property itself is actually and directly used for charitable purposes that the law exempts it from taxation." 1 Desty, Tax'n, 119. And again: "A building of a benevolent society is liable to taxation to the extent of the value of the rental received. The building of a benevolent society leased for pecuniary profit is taxable, although built with funds that were exempt, and into which the rents are paid. Where the property of a benevolent society was leased for business purposes, and an income derived therefrom, its status as taxable property is thereby fixed." 1 Desty, Tax'n, 120. "Where a statute exempts from taxation property devoted to religious, educational, or other purposes, or exempts the property of a corporation, the exemption will be confined in the former case to property used exclusive-

ly for such purposes; in the latter, to property necessary to the objects of the company's corporation." 25 Am. & Eng. Enc. Law, 162. "Unless the terms of the statute are explicit to the contrary, a general exemption of the property of the educational institution will be confined to property actually and exclusively used by the institution for its legitimate purposes. If the property is used for other purposes, the fact that the proceeds of such use are devoted to carrying out objects of the institution is immaterial." Id. pp. 165-167. And see *Washburn College v. Shawnee Co. Com'rs*, 8 Kan. 350, and *County Com'rs v. Colorado Seminary*, 12 Colo. 497, 21 Pac. 490. An exemption to one is a tax upon others, and the language of the constitution should not be strained to authorize such an act of injustice. This court has said: "As a general rule, the test of the right to exempt property is the existence of the right to levy a tax to foster such property. The levy of a direct tax upon the whole people of the state, to be paid to this corporation to forward the objects stated in their charter, would be declared at first blush unconstitutional, and yet that is what is indirectly done by the exemption. If the same power exercised by this corporation had been conferred upon a designated individual, it would strike any one as palpably beyond legislative authority. But there is no difference in principle between the corporation and an individual. If there is the power to exempt the one, there is unquestionably the power to exempt the other." *Barbour v. Board*, 82 Ky. 654.

It would be unprofitable to discuss the many collateral questions which have been urged or suggested. The claim of contract exemption seems to us to have little merit, and is not relied on in the opinion of the majority. The question whether a corporation would be exempt, under section 170, which was created for the purpose of education, to be imparted by the corporators, with a provision devoting the surplus revenue to charity, after providing a liberal salary for the corporators, does not properly arise in this case. It may be mentioned that the reasoning of the opinion in *Burd Orphan Asylum v. School Dist. of Upper Darby*, 90 Pa. St. 21, much relied on in support of the opinion of the majority upon the question of what is a purely public charity, has been questioned by the same court in *Philadelphia v. Masonic Home of Pennsylvania*, 160 Pa. St. 572, 28 Atl. 954; the reasoning of the latter case being in direct conflict with that of the former. The importance of the main question in this case can scarcely be overestimated. It is not a mere question of the taxes sought to be collected upon Louisville property belonging to the female orphan school, as the most casual glance at the statistics given in the census reports will show. Behind the little Midway school stalk great sectarian corporations, "rich beyond the dreams of avarice," directed, no doubt, by honest and devoted

men, but, as corporations, demanding, as of right, from the state and the municipality privileges which no good citizen ought to ask for himself. The result is to be deplored, not only as it works an increase of the burden of taxation, already sufficiently onerous, upon the masses of the people, but in the inevitable reaction against corporations, formed for worthy objects, but which seek to profit by injustice.

RYAN v. STATE.

(Supreme Court of Tennessee. July 22, 1896.)

APPEAL—REVIEW OF RULING ON MOTION FOR NEW TRIAL—CRIMINAL LAW—CONDUCT OF JURY—EVIDENCE TO IMPEACH DEFENDANT.

1. Where a trial court makes written findings on the controverted questions of fact arising on a motion for new trial in a criminal case, its ruling upon the motion becomes a matter of law, subject to review.

2. A statement by a juror, to his fellow jurors, that he was a member of a grand jury which indicted the defendant for another crime, which he described, will vitiate the verdict.

3. It is not error to ask a defendant, when on the stand, for the purpose of discrediting his testimony, if he has not been indicted for other crimes.

4. The records of indictments against a defendant are inadmissible in cases where there have been acquittals, or a nolle prosequi has been entered.

Error to criminal court, Shelby county; L. P. Cooper, Judge.

Ed Ryan was convicted of murder, and brings error. Reversed.

E. E. Wright, for plaintiff in error. Atty. Gen. Pickle, for the State.

McALISTER, J. The prisoner was convicted in the criminal court of Shelby county of murder in the second degree, and sentenced to the penitentiary for a term of 10 years. Since the judgment of the lower court must be reversed for errors committed in the conduct of the trial, we premit any discussion of the facts.

The first assignment of error we will notice is based upon the misconduct of the jurors. It was shown upon the motion for a new trial that one Reasonover, one of the jurors that tried the case, had stated at some time during the progress of the trial, in the presence of several other jurors, that he (Reasonover) was a member of the grand jury when the defendant, Ryan, had been indicted for an attempt to commit murder upon one Kehoe, and the facts of that case were that Ed Ryan, the defendant, went up behind Kehoe, who was stooping over a water pipe, and hit him with a heavy wrench, and that case was still pending in the criminal court. It was also shown that at another time Reasonover had stated to some of the jury that Ed Ryan was a bad man, or a dangerous man to the community, or words to that effect,—the exact language not being remembered. The court, it appears, had permitted the attorney general to ask the

defendant, on cross-examination, if he had not been indicted for an assault on one Kehoe. Counsel for defendant objected to this question. The objection was overruled by the court. Thereupon counsel for defendant demanded the best evidence of this charge, whereupon the attorney general introduced the original indictment, which charged that Ryan had premeditatedly, willfully, maliciously, and feloniously made an assault upon the body of Kehoe, with intent to commit murder in the first degree. The circuit judge, in his disposition of the question of the misconduct of the juror, stated that there was no material difference between the language used in the indictment, which was properly in evidence, and the language used by the juror, which is made the subject of criticism and the basis of a new trial. The circuit judge also found that the remark of Reasonover in respect of the assault of Ryan upon Kehoe was not made after the jury retired to consider their verdict, but was casually made sometime during the progress of the trial, and was not heard by all the jury, and was not made when they were discussing the question of the guilt or innocence of the defendant, but was made by Reasonover when he was reciting to his fellow jurors his reasons for not wishing to serve upon the jury. The circuit judge also stated in his opinion that all the other jurors who tried the case were examined before the court, and, without exception, testified that the statement casually made by Reasonover as to the assault made by the defendant upon Kehoe did not in the least affect their opinion as to the innocence or guilt of the defendant. The court also found that the evidence that Reasonover stated to some of the jury that Ryan was a dangerous man to the community, or words to that effect, is very indefinite and unsatisfactory. Says the court: "The affidavit [of Monteith, one of the jurors] does not fix the time when this language was used by Reasonover, and Monteith fails to state, when a witness on the stand, that Reasonover used this language, but, on the contrary, says that, while the question as to the admissibility of the evidence of other indictments against Ryan was being argued before the court, he drew the conclusion, from what Reasonover said, that Ryan was a bad man. Some of the other jurors, in an indefinite way, did say that they heard some such language as that used, without fixing the time, but none of them said that it was used while they were considering the evidence in the case as to the guilt or innocence of the defendant. Reasonover himself denies using such language," etc. The court continues: "The evidence of Reasonover upon this point is not contradicted by any other evidence in the case, nor is there any evidence in the case showing that any such language was used, if used at all, except at the time fixed by Mr. Reasonover, to wit, when the question as to the admissibility of these indictments against Ryan for other crimes was being argued before the court. There is no evi-

dence that any such language was used in the jury room after the case had been closed, and was given to the jury, under the charge of the court, to consider of their verdict upon the guilt or innocence of the defendant," etc. "Upon all the evidence the court is of opinion that while there was some irregularity, and perhaps improper talk, on the part of Reasonover, before the case was finally submitted to the jury for their consideration as to the guilt or innocence of the defendant, yet the court is of opinion that nothing occurred that was calculated improperly to influence the verdict of the jury, or that was calculated to prejudice the jury against the defendant, in rendering their verdict upon the law and evidence in the case." While the rule is well settled that the finding of a circuit judge upon controverted questions of fact arising upon a motion for a new trial is equivalent to the verdict of a jury, and will not be disturbed if supported by any material evidence, the rule is inapplicable where the written findings of the circuit judge upon the motion are set out in the record, and show affirmatively that a new trial should have been granted. *T. J. Reasonover*, the juror charged with the misconduct, admitted in his examination on the motion for a new trial that he stated in the presence of several jurors, during the progress of the trial, that he was a member of the grand jury that indicted defendant, *Ryan*, for the assault upon *Kehoe*, and the proof before the grand jury was that *Kehoe* was stooping, with his head down, and *Ryan* struck him with a monkey wrench. Several jurors testified that *Reasonover* used this language in their presence. We think such statements must have been highly prejudicial to the defendant, and nothing is better settled than that they invalidate the verdict of a jury. Proof of such a collateral issue would have been wholly inadmissible if the witness had been offered before the court, under the sanction of an oath, and with an opportunity given the defendant for cross-examination. The circuit judge was of opinion that because these statements were made before the defendant had introduced any evidence, and not after the jury had been charged and had retired to consider their verdict. They were innocuous. It is wholly immaterial at what stage of the trial the statements were made. It was testimony that *Reasonover* had no right to give, and the other jurors no right to hear, and vitiated the verdict, no matter when given. As stated by Judge *McKinney* in *Sam v. State*, 1 Swan, 63: "The verdict of the jury must be founded upon the evidence delivered to them in court in the presence of the judge and of the parties. And, as a consequence necessarily flowing from this doctrine, the rule was established at an early day that, if a juror possessed any knowledge in respect to the matter in issue, as to which he might testify, he must be sworn as a witness, and give his testimony openly in court, as other witnesses. Such is the long-established and in-

flexible rule, to which no exceptions can be admitted, either in civil or criminal cases. In criminal cases, more emphatically, there can be no exceptions, under our law, because among other rights absolutely secured by the constitution to the accused, in all criminal prosecutions, is the right 'to meet the witnesses face to face.'" Again, the circuit judge, in his finding, lays stress upon the fact that all the other jurors were examined, and, without exception, testified that the statement made casually by *Reasonover* as to the assault made on *Kehoe* by the defendant, *Ryan*, did not in the least affect their opinions as to the guilt or innocence of the defendant. On this subject Judge *McKinney*, in the case last cited, said, viz.: "The statement of the juror that the fact disclosed in the jury room produced no effect upon his mind, and, he thought, none upon the minds of the other jurors, is to be taken with great allowance. * * * But, to vitiate the verdict in this case, the proof is not upon the prisoner to show affirmatively that he was prejudiced by the improper evidence received by the jury. It is enough that he may have been prejudiced, and the law will so presume." *Morton v. State*, 1 Lea, 490; *Whitmore v. Ball*, 9 Lea, 35; *Donston v. State*, 6 Humph. 275; *Booby v. State*, 4 Yerg. 111; *Wade v. Ordway*, 1 Baxt. 229; *Nile v. State*, 11 Lea, 694; *Crawford v. State*, 2 Yerg. 60.

The second assignment is based upon the action of the trial judge in admitting in evidence indictments against the defendant for other and distinct crimes. The court admitted this evidence as affecting the credibility of the defendant in his capacity as a witness, and instructed the jury that it could not be considered on the subject of his guilt or innocence of the charge for which he was on trial. It is insisted, however, by counsel for defendant, that the evidence was not admissible for any purpose. The attorney general, on cross-examination, asked the defendant how often he had been indicted in that court. Defendant's counsel objected on the grounds that the question did not tend legitimately to impair the credibility of the witness, and that a defendant in a criminal case cannot be compelled to answer, in cross-examination, whether he has been indicted for an offense other than that for which he is on trial. The court overruled the objection, but stated to the jury that the testimony offered was only admissible as affecting the credibility of the witness. Defendant's counsel then interposed the further objections to the testimony that it was not the best evidence, but that said indictments should be proved by the records. And thereupon the records were read, showing several indictments against the defendant, including both felonies and misdemeanors. In the case of *Braswell v. State*, 3 Tenn. Leg. Rep. 283, it was ruled by this court that when the answer to a question does not render the witness liable to penalties or a criminal prosecution, and does not directly and certainly show his in-

famy, but will only tend to disgrace him, or to expose his unreliability as a witness, he may be compelled to answer, and that under this rule it was competent to ask the witness if he had not been indicted for counterfeiting. This rule was reaffirmed by this court in *Hill v. State*, 91 Tenn. 521, 19 S. W. 674. There was no error in asking the witness, on cross-examination, if he had not been indicted for other felonies and misdemeanors; and, upon objection from defendant's counsel that the best evidence should be offered, it was competent to offer the record of the indictments. The court then permitted defendant to say whether he was innocent or guilty of those charges, and whether he had been tried or acquitted, but refused to allow him to go into an explanation or rehearsal of the details of each particular offense. In this we think there was no error. Such a practice would involve interminable investigations of collateral issues, confuse the minds of the jury, and result in extravagant consumption of the public time and revenues. We think, however, that the court was in error in permitting the jury to consider, for any purpose, records of indictments in cases in which the defendant had been acquitted, or a nolle prosequi had been entered by the attorney general. When it was developed by the records that the defendant had been acquitted of some of the charges, and that other indictments against him had been dismissed, the court should have withdrawn the evidence, and instructed the jury to disregard it. It was ruled in *Hill v. State*, 91 Tenn. 521, 19 S. W. 674, that the defendant's denial of the truthfulness of the independent charge against him should have ended the matter, to all intents and purposes. "The jury should not have been allowed to consider the collateral charge in any way,—as affecting his credibility or otherwise." So we think, in this case, for a stronger reason, that when it was shown that the defendant had been acquitted or discharged from custody on particular charges, the jury should have been instructed that such indictments were not to be considered by the jury for any purpose. For the errors indicated the judgment is reversed, and the cause remanded for a new trial.

WOOTEN et ux. v. HOUSE et al.

(Court of Chancery Appeals of Tennessee.
Dec. 21, 1895.)

LIMITED ESTATE—WIDOWHOOD—CONSTRUCTION OF WILL—MAINTENANCE AND EDUCATION OF CHILDREN—EXPENDITURES FROM CORPUS OF ESTATE—ALLOWANCES—HOMESTEAD.

1. Under provisions by a testator bequeathing to his wife "all my estate, real and personal, for and during her natural life or widowhood. Upon the death of my wife, or marriage, I give all my property to my three children,"—the widow takes an interest or estate in the property limited to widowhood, and determinable on marriage.

2. The tenant of an estate during life or

widowhood cannot encroach upon the corpus, but may use and enjoy the income therefrom as she pleases, without liability to account to the remainder-men.

3. Where the testator's children are the remainder-men, and their means and those of their mother, tenant for widowhood, are insufficient to support them in reasonable comfort, and educate them in a manner befitting their social position, the widow may use the corpus of the estate for that purpose.

4. The fact that the widow did not hold the estate left by her husband as guardian of her children, but as executrix, and during widowhood, does not place her without the rule that on an accounting a guardian will be allowed such necessary and proper expenditures, if clearly made out, as a court of chancery would have ordered if applied to in the first instance.

5. Taxes assessed during the lifetime of a testator are payable out of his estate.

6. Where it appears that a third person paid the funeral expenses of a testator, the executrix can show that she repaid him afterwards with money of the estate.

7. Where a tenant for life or widowhood makes disbursements from the corpus of the estate for a daughter, one of the remainder-men, with no thought of their repayment, but in the belief that she has a right to so use a portion of the estate, she will be allowed credit for the same in her accounts, if the money was expended reasonably and judiciously.

8. Where a tenant of an estate for widowhood has been allowed credits for disbursements out of the corpus of the estate, upon the theory that the income therefrom was insufficient for the support of her children, and such disbursements were out of both principal and income, she must be charged with all sums received, whether principal or interest.

9. Where a part of an estate for widowhood consists of notes made to the husband before his death, the widow, on the termination of the estate by a second marriage, is not chargeable with accumulated interest on the notes which had not been received or collected by her.

10. Under a bequest to a wife of "all my estate, real and personal, for and during her natural life or widowhood. Upon the death of my wife, or marriage, I give all my property * * * to my three children,"—the widow is entitled to homestead in the real estate of her deceased husband, without dissenting from the will.

11. A devise to a wife during widowhood is not void as in restraint of marriage.

Appeal from chancery court, Sumner county; J. S. Gribble, Chancellor.

Bill by W. B. Wooten and wife against Mrs. M. C. House and others for the construction of a will and an accounting. From the decree rendered therein, both parties appeal. Modified.

Turner & Wilson, for complainants. J. W. Blackmore, for defendants.

BRADFORD, Special Judge. In the year 1865 Mrs. House (then Mattie C. Moore) intermarried with M. S. Elkins. At the time of her marriage she was living with Mr. W. B. Conn and his wife, as a member of their family. She was a niece of Mrs. Conn, who had taken her at the age of three years, and raised and educated her as a daughter. Mr. Conn was a gentleman of ample estate, and, being childless, treated her with the affection and tenderness of a father. The girl was

given all the advantages, in the way of education and culture, that wealth and the best associations could afford. Mr. Conn and his wife lived in Kentucky at the time they took her to live with them, but moved to Gallatin during, or about the close of, the late war. He purchased a comfortable home in that city, furnished it with taste and judgment, and was living there at the time of her marriage with Mr. Elkins. The latter was a young man, without means. After marriage, he read law, and qualified himself to practice. His professional career was successful, and he attained high rank at the Gallatin bar, which has always been distinguished by the ability of its members. After their marriage, Mr. Elkins and his wife lived with Mr. Conn, in his house, for a number of years, and until the latter returned with his wife to the state of Kentucky to live. While bestowing upon Mrs. Elkins the care and affection of a father, Mr. Conn appears, also, to have entertained for Mr. Elkins a very great esteem. With paternal care, he provided them with a home and means of support. He conveyed to them the residence in which he lived, and three other houses in the city of Gallatin. The conveyances were made to them jointly. The marriage was blessed with four children, viz.: Willie Conn, born September 21, 1866; Lucy, born February 17, 1869; May, born August 5, 1871; and Milton, born May 12, 1884. All the children were girls, except the last. Mr. Elkins practiced his profession with success until his death, which occurred December 27, 1884. During his lifetime his family lived in affluent circumstances, and moved in the best and most cultured society. Their means of support were abundant. Besides Mr. Elkins' professional earnings, and the rents derived from the property, other than the residence, conveyed to him and his wife by Mr. Conn, this kind-hearted and benevolent old gentleman was constantly contributing to their support from his own means. At his death, Mr. Elkins left a will, which was duly probated in the county court of Sumner county. It was as follows: "I, M. S. Elkins, do make and publish this my last will. 1st. I direct that all my just debts be paid, if I should owe any. 2nd. I will and bequeath to my beloved wife, Mattie C. Elkins, all my estate, real and personal, for and during her natural life or widowhood. 3d. Upon the death of my wife, or marriage, I give all my property, real and personal, mentioned in clause two, to my three children, Lucy, Mary, and Milton O. Elkins, to be divided between them equally. 4th. Should I not do so while I live, then I desire my executrix to give my daughter Willie Conn Elkins a diamond ring, or gold watch, as she prefers. If Mr. W. B. Conn does not make her (Willie) a legatee and devisee, or either, under and in his will, then I give Willie an equal share in my estate with Lucy, Mary, and Milton P. Elkins, upon the death or marriage of my wife, Mattie. I ap-

point my wife executrix of this my will, and excuse her from giving bond or making inventory. This August 25th, 1884." The widow qualified as executrix of the will, and took charge of the estate of the testator. During the lifetime of Mr. Elkins, one of the three houses and lots, other than the residence, conveyed to him and his wife by Mr. Conn, was sold. The other two, and the residence in which he and his family lived, went to his widow, by survivorship. So that she was seised and possessed, after his death, of the family residence, and two houses, the latter yielding her a small rental. Mr. Elkins left a small estate, consisting of real and personal property. He had \$5,000 of insurance on his life, which went to his two daughters Lucy and May, equally. At his death, which occurred subsequently to that of Mr. Elkins, Mr. Conn left, by his will, to each of the children, a legacy of \$1,000. Mrs. House qualified as guardian of her two daughters Lucy and May. She received the insurance money on their father's life, going to them, on the 28th day of April 1885, and afterwards invested it in Sumner county bonds, purchasing for each ward \$2,800 of said bonds. She also invested the legacies given them by the will of Mr. Conn. She received the income from these investments until she finally settled with her wards. She rented out the real estate of her deceased husband, and received the rents. The legacy of \$1,000 left Milton, her son, and youngest child, was invested by his guardian, and the interest thereon was paid over by him to his mother. Among the items of personal property left by Mr. Elkins was \$3,000 of Sumner county bonds. These bonds came into the possession of his widow, and after holding them for several years, and collecting the interest thereon, she bought them herself, in a manner to be hereafter more fully explained, and invested the proceeds in stock in the Farmers' Savings & Building & Loan Association. Lucy married W. B. Wooten on the 29th day of January, 1889; Willie Conn married I. W. P. Buchanan in July, 1892; and May married Hardin Taylor in November of the same year. Upon the marriage of her two wards, she paid over to them their several estates in her hands as guardian. It will be remembered that one clause of Mr. Elkins' will declared that if a provision was not made for his daughter Willie Conn by her uncle, W. B. Conn, she should have an equal share in his estate. This contingency did not arise, because Mr. Conn did provide for her. She took, therefore, no interest in her father's estate. During their minority, from the death of their father until their marriage, Mrs. House's daughters lived with her. She resided in the home given her by her uncle, Mr. Conn. It appears that she was a tender and affectionate mother, and trained and educated her daughters with care and judgment. They were sent to the best schools, and given opportunities for education and culture. Aft-

er they had grown into young ladyhood, they entered society, and were dressed as became their social position and surroundings. Their mother seems to have allowed them the privileges for social enjoyment and pleasure that young women of their class and position usually have. After Lucy's marriage to Wooten, she and her husband lived for about a year in Kentucky with the latter's father. Upon the invitation of her mother, they returned to Gallatin, and lived with her for eight or nine months or a year, during which time Wooten had no steady employment. After making a number of efforts to establish himself in business at different places, he settled at Gallatin, and went into the family grocery business. He and his wife then left the maternal roof, and set up housekeeping by themselves. Mrs. Elkins intermarried with her co-defendant James House in November, 1893.

On the 24th of November, 1893, Wooten and wife filed their original bill against Mrs. House and her husband, James House, her brother Milton and his guardian, and her sister Mary and her husband, Hardin Taylor. In their bill they seek a construction of Mr. Elkins' will, and insist that, by her marriage with her present husband, Mrs. House had forfeited all rights and benefits in the property and estate of her first husband. They allege that Mrs. House never made any inventory of the estate, and they ask for an account with her to ascertain what property she received, what disposition she made of it, and finally for a decree against her for such amount as, upon investigation, it should be ascertained was owing by her. Mrs. House first demurred to, and then answered, the bill. She insisted that she took, under the will, an absolute title to all the personal property of her deceased husband; that the will, so far as it limited her rights in the property to widowhood, was void, because in restraint of marriage. She alleged that she had made no inventory of the estate, because she was excused from doing so by the will. She also alleges that her two daughters Lucy and May lived with her from the death of their father until their marriage; that she supported, maintained, and educated them; that the income from their estates was not sufficient for that purpose; and that she had spent the entire personal property left her by her deceased husband, after paying taxes, in supporting, dressing, and educating them and their brother, Milton. An amended and supplemental bill was subsequently filed, which set forth in detail the different items of the estate left by Mr. Elkins. The bill undertakes to show that she had wasted the estate; had wrongfully appropriated a large part of it to herself, and claimed credits for excessive and unwarranted expenditures on behalf of her children. The answer to the amended bill undertakes to show that her expenditures were lawful and proper, that she

had not wrongfully appropriated any of the assets, and that she was not liable in any amount. A great deal of proof was taken, and the accounting before the master involves a large number of items, and is somewhat intricate and involved.

We are met on the threshold of the case with a purely legal question. The question is whether the widow of the testator took, under the will, an interest or estate in the personal property limited to widowhood, and determinable on marriage. It is insisted that those clauses in the will which thus limit her rights are void, because in restraint of marriage. The contention of counsel on her behalf is thus succinctly stated in the brief: "By this will a life estate is first given, and then this is attempted to be conditionally cut down, in the same sentence, by the alternative words, 'or widowhood.' Having first given her a life estate, the testator cannot cut it down by a condition in restraint of marriage." The effect of this argument, if correct, would be that the widow was invested by the will with an estate for life. In either case the real question for us to determine is whether she had the right to use or spend the entire corpus of the estate in the support of herself, the first taker, and her three children, the remainder-men. In this view, it would seem to be immaterial whether her interest terminated on marriage, or continued for life, because, if she had the right in one case to exhaust the property in the support and maintenance of herself and children, she had it in the other. But we think the provision of the will divesting the estate out of her, and giving it to her children, in the event of her marriage, is valid. We deem it unnecessary to go into an extended consideration of the refined and subtle distinction between devises upon condition and those upon limitation, so ably presented and argued in the brief of counsel for Mrs. House. There is no doubt that conditions in wills in general restraint of marriage have been generally esteemed and held to be void. The cases are not harmonious, however, in the application of the general rule. While provisions in wills and deeds unduly embarrassing and hindering marriage are looked upon with disfavor by the courts, they will, on the other hand, be slow to trammel the free control and disposition of one's own property. As was said by Judge Caruthers in *Hughes v. Boyd*, 2 Sneed, 512, 517: "A man's free control and untrammelled dominion over his own property is equally favored. He should be allowed to prescribe such reasonable conditions to his bounty as his own sense of propriety may dictate." In that case it was further said, in that connection, that the privilege conferred on widows, of dissenting from their husbands' wills, very much weakens the necessity of the rule for protection against the injustice of their husbands. The provisions of the will before

the court in that case were similar to those of Mr. Elkins' will, and the learned judge, in stating the conclusion of the court, remarked, with a touch of humorous sarcasm, that they could not be regarded as "a condition in terrorem, in the legal sense, the sole condition of which is to deter the lady from the free exercise of her natural right to regain her lost happiness by another matrimonial alliance." The conclusion reached by us upon this question is sustained by the cases of *Hawkins v. Skeggs' Adm'r*, 10 Humph. 31; *Duncan v. Phillips*, 3 Head, 415; and *Wills of John D. and Joseph Miller*, 2 Lea, 57. The rule is firmly established that the tenant or owner of an estate during life or widowhood cannot waste or encroach upon the corpus, but is limited to the enjoyment of the income and profits. The rents and use of the land, the accessions, crops, young animals, and the entire fruits of the life estate, belong to the tenant for life absolutely, and he is not accountable therefor. *Forsey v. Luton*, 2 Head, 183; *Vancil v. Evans*, 4 Cold. 346; *Woods v. Sullivan*, 1 Swan, 507.

Under the provisions of the will the widow of the testator (now Mrs. House) took the corpus of the estate for life or widowhood, with the right to use and enjoy the income therefrom as she pleased, and without liability to account to the remainder-men. She has not only consumed the income and profits, but used a large part of the corpus. The question is whether, under the circumstances developed in the record, she was warranted in doing so. Under ordinary circumstances, she would have no right to trench on the corpus. It was her duty to preserve it unimpaired for her children, the remainder-men named in the will. Her excuse for doing so is that the income from her own property, and from that of her deceased husband, devised and bequeathed in the will, and from the estates of her children, was insufficient to support and educate them. Under these circumstances, she claims, it was allowable for her to trench upon, and even consume, the corpus of the estate left by her husband. There is no doubt that she occupied a position of exceptional difficulty and responsibility. At the date of her husband's death the ages of her three children, who were interested in his estate, were as follows: Lucy, 16 years; May, 13 years; and Milton, about 7 months. Their raising and education devolved upon her. She and her husband were people of prominence, and moved in the best society of Sumner county. The proper education of their children was therefore as much a necessity as their clothing and food. After the daughters had grown to an age to enter society, it was, no doubt, their own desire to be supported in a manner becoming their social position. Their mother seems to have believed that it was her duty to maintain them in that manner, and she ac-

cordingly did so. The small income derived from the several estates of her children were evidently insufficient for their education, maintenance, and support; and we think the proof abundantly shows that, without encroaching to some extent, at least, upon the corpus of the estate of their father, it would have been impossible to have clothed, fed, and educated them decently. The old rule, undoubtedly, was that the parent should support his children, and could not, as guardian, claim an allowance for their board and clothing. *Hughes v. Hughes*, 1 Brown, Ch. 387. But this rule has long since been relaxed. If the father be without the necessary means to maintain his children according to their future expectations, or if he have the means, but the income of the children is larger than his own, the modern usage is to make the allowance to the parent for maintenance. *Roach v. Garvan*, 1 Ves. Sr. 160; *In re Bostwick*, 4 Johns. Ch. 104; *McKnight's Ex'rs v. Walsh*, 23 N. J. Eq. 136; *Myers v. Myers*, 2 McCord, Eq. 225; *In re Burke*, 4 Sandf. Ch. 617. The old rule, too, was to make no allowance for past maintenance. But this, too, has been relaxed. *Collis v. Blackburn*, 9 Ves. 471; *Maberly v. Turton*, 14 Ves. 500; *Wilkes v. Rogers*, 6 Johns. 566. In this state the rule in regard to past maintenance, as laid down by the supreme court, is "that, while the guardian had no power to break in on the corpus of the fund, yet when he was called on to account in a court of chancery he would be allowed such necessary and proper expenditures, if clearly made out, as a court of chancery would have ordered if applied to in the first instance." *Roseborough v. Roseborough*, 3 Baxt. 314; *Mitchell v. Webb*, 2 Lea, 150. Mrs. House did not hold the estate left by her husband as guardian of her children, but as executrix, and during widowhood; but this fact does not, in our opinion, affect the question. She was their mother, and had charge of their maintenance and education, as well as of the property. If, as guardian, she could, upon being called to account by a court of equity, be allowed for necessary expenditures, we see no reason why she should not, in the present instance, have her expenditures allowed, if she clearly shows that they were necessary. The necessity in both cases is the same. It has been held that an administrator who had advanced money to minors, for their support, before their guardian was appointed, would be reimbursed. *Ingram v. Ingram*, 5 Helsk. 541. A case reported in 2 Hayw. (N. C.) 128 (*Jones v. Jones*), cited in the brief of counsel, seems to be peculiarly pertinent to the present controversy. The case was this: Jones, the testator, provides, by special legacies, for his children, and then gives the use of some negroes to his wife for life, and it is stated and admitted that she sold

a descendant of one of these negroes. But it is stated in the answer that she was under the necessity of selling this negro for the support of her family. The court, per Johnson, J., said: "And I am of the opinion that a court of equity will validate a sale under such circumstances. A devise to her use means to the use of herself and children, or for the support of herself and family. Therefore I direct that one of the inquiries to be made by the jury shall be whether or not this negro was sold for the necessary support of herself and family."

Before Mrs. House could be allowed expenditures made out of the corpus, she would be required to show most clearly and satisfactorily that they were necessary. What will be deemed necessary expenditures depends upon the circumstances of each particular case. What would be so in one instance would be extravagance in another. An important, but not always controlling, circumstance, is, of course, the size of the estate. Another circumstance, of equal, if not more, weight and importance, is the social position of the parties. Of course, the reasonableness of expenditures in such cases must be determined by the application of good judgment and common sense. The proper application of the rule will find ready illustrations in the experience of almost every man. Take the case of a boy of the best social position, and sprightly mind, with a small estate of \$5,000 or \$6,000. It will be admitted that the very best use that his guardian could make of his means would be to apply it to his education, so as to fit him for a career in some honorable station and position in life. So, in the case before us, if the means of the children and their mother were insufficient to support them in reasonable comfort, and educate them in a proper manner, the defendant Mrs. House had the right to use the corpus of the estate for that purpose. We have no doubt that the testator himself had in view the probable necessity of the use of his estate, in whole or in part, for those purposes, for in his will he excuses his wife and testatrix from making and filing an inventory of his estate. The cause was heard by the chancellor, and he decreed that the provision in the will of Mr. Elkins giving his estate to his wife during widowhood was a valid limitation, and that upon her marriage with Mr. House the property went to his children. He referred the cause to the clerk and master for an account. The principles upon which the account was ordered to be taken were as follows: (1) Ascertain what property and assets came to the hands of the testatrix, and what disposition she made of the same. (2) Charge her with one-third of all the property and assets, except real estate, or the proceeds, that was received or collected by her, together with interest accrued thereon to her

marriage. Credit her with one-third of all the debts, including funeral expenses of the testator, paid by her. (3) Disallow all credits for money used by her for her own maintenance. (4) Disallow board for her daughter Lucy, the complainant. (5) Disallow all taxes paid and improvements made during widowhood. There were numerous other directions in the decree, for taking the account, which it is not necessary to notice. The chancellor further decreed that Mrs. House was entitled to homestead in the lands of her deceased husband.

The master reported: First. That there came to the hands of the executrix personal property to the value of \$7,969. This property consisted of \$3,000 Sumner county bonds, notes, accounts, a law library, an office desk, and one barouche. Mr. Elkins also left at his death a small farm, comprising about 50 acres. Second. That she had disbursed on account of the estate \$801.05, and that notes received by her, and which were a lien on certain real estate sold by Mr. Elkins during his lifetime, amounting to \$2,017.80, had not been collected, and were still in her hands. After deducting the two above credits, aggregating \$2,818.85, from the amount with which she was charged, to wit, \$7,969.98, there remained \$5,151.13. This last constituted the estate of the testator to be distributed among his devisees. He found that Mrs. Wooten's share was \$1,717.04, being one-third. Third. The master allowed the executrix credits for expenditures on account of Mrs. Wooten during her minority amounting to \$617. Fourth. He reported that the amount due Mrs. Wooten as of November 24, 1893, was \$1,099.52, to which he added interest to date of the report, \$100. Fifth. The master reported that Mrs. House, as guardian of Mrs. Wooten, had made settlements with the county court clerk, and was allowed the interest from her ward's estate for the support of said ward. This report was excepted to by both parties. Some of the exceptions were sustained, and some were overruled. The result was that the chancellor found that Mrs. House was indebted to her daughter in the sum of \$1,381.96.

The first exception of complainants is that the item of \$3,000 Sumner county bonds, charged to Mrs. House, is erroneous. It appears that in September, 1892, Mrs. House sold said bonds in Nashville, through Landis & Co., for 91 cents on the dollar, which was the market price, and invested the proceeds in stock of the Farmers' Savings & Building & Loan Association, in her own name. The point of the exception is that she had no right to sell them, and ought to have preserved them as she received them, in specie, as part of the corpus of the estate. The exception predicated upon this ground raises the question we have already decided, viz. her right to use any part of the corpus for

the support of her wards. The truth of the matter seems to be that Mrs. House sold a parcel of real estate of her own, and used the proceeds—quite equal in amount to the value of the bonds—in the support of her family, and she reimbursed herself these expenditures by taking these bonds. The complainant seeks, in her amended bill, to follow the proceeds of these bonds, as a trust fund, into the stock of the building association, and she has impounded it by enjoining Mrs. House and her husband from disposing of the same. Undoubtedly the purchase by a trustee of trust property from himself will be strictly scrutinized. Such a transaction will not ordinarily be allowed to stand. But in this instance it is shown that Mrs. House charged herself with the full value of the bonds, and, if her expenditures of her own means for the maintenance of the complainant and her sister and brother were reasonable and proper, there is no good reason why she should not reimburse herself with the bonds, as well as with money. But, however that may be, the master, in his report, has charged her with the par value of the bonds, and the complainant has been given the benefit of them.

The master allowed Mrs. House credit for \$179.90, paid on taxes for the year 1884. These taxes were assessed during the lifetime of Mr. Elkins, and it was proper that they should be paid by his executrix. The exception was therefore not well taken.

There are certain items of funeral expenses, etc., for which she has been allowed credit. They are as follows:

Cash paid C. S. Alexander, nurse....	\$ 25 00
Cash paid professional nurse from Nashville	60 00
Cash paid W. C. Blue & Son for casket	165 00
Cash paid W. T. Wells for digging grave	5 00
Cash paid Hitchcock for masonry in grave	20 00
Cash paid for funeral notices.....	4 00
Cash paid for carriages at burial.....	22 00
Cash paid for medical attendance....	22 00
Cash paid for burial clothes.....	42 85
And several other small items, aggregating	48 30

The grounds of the exception to them are that they were in fact paid by Mr. W. B. Conn, the good uncle, and that there is no proof to show that she ever repaid him, except her own testimony, which is incompetent. The proof shows that Mr. Conn paid these bills after Mr. Elkins' death, and Mrs. House swears that she repaid him afterwards with money of the estate. It was competent for her to prove that fact. The credits were, we think, properly allowed.

The next exception is that the executrix ought to have been charged with \$117 said to have been in bank to the credit of Mr. Elkins at the time of his death. The proof does not sustain the exception. It is shown that that amount was to Elkins' credit December 1, 1884. He died December 27, 1884.

There is no proof that it was not drawn out between those dates. It is probable it was. The exception was properly overruled.

The master reported the following disbursements made on account of Mrs. Wooten by her mother:

Tuition	\$ 60 00
Tuition, music	4 00
For diamond ring.....	135 00
For watch and chain.....	100 00
Kitchen outfit and furniture.....	100 00
Cash given her when married.....	40 00
For baby buggy.....	20 00
Cash paid for taxes on bonds and notes	108 00
Set of jewelry	20 00
Cash paid for trunk.....	15 00
For trip to Mammoth Cave.....	15 00
Total	\$617 00

These amounts, except \$20 for baby carriage, were expended before Mrs. Wooten's marriage.

All these items are excepted to on the grounds—First, that in her settlements as guardian Mrs. House was allowed \$905; and, second, that they were gifts or donations from the mother to the daughter, and intended as such. The county court clerk shows that in her settlements as guardian Mrs. House was charged with \$905, income derived from her ward's estate, and that she was allowed the same for the necessary support and maintenance of said ward. It is most clearly shown, however, that the expenditures excepted to were not included in her settlements with the county court clerk, and were in addition thereto. The proof further shows that they were necessary for the education, maintenance, and comfort of Mrs. Wooten. Mrs. Wooten states that they were all donations, and intended as such by her mother; and Mrs. House says that they were made to her daughter from the funds of her deceased husband's estate, with no thought of their repayment, but in the belief that she had the right to use or dispose of the assets in her hands as she pleased.

These items cannot be regarded as pure donations, and to hold them to be such would be very unjust to Mrs. House. They were in the nature of advancements to Mrs. Wooten out of her share of the estate. It is very true that Mrs. House had no clear, definite notion of her legal rights, or those of her children. She believed that she had the right to use the assets of the estate for the support and education of her children, and, when she made those disbursements to and on account of her daughter, she did so in the belief that the money was hers to give in that way. If, as we have seen, the money really came from the estate, and was expended reasonably and judiciously for her daughter, she ought to be allowed credit for the same in her accounts. The credits were properly allowed in the master's report. The chancellor sustained the exception in part. We think it ought to have been overruled.

Having considered all the exceptions of the

complainant to the master's report, we proceed now to pass upon those of the defendant Mrs. House. She excepts to two items of interest on notes of the estate charged to her. The ground of the exception is that she was entitled to interest to the date of her marriage, and there is no proof that she received any of the principal or interest since that date. There is no question that she collected both principal and interest. As she claimed, and has been allowed, credits for disbursements out of the corpus of the estate, upon the theory that the income therefrom was insufficient for the support of her children, she ought to account for interest as well as principal. Her disbursements were out of both principal and income, and she has claimed and received credits therefor. She must therefore be charged with all sums received, whether principal or interest.

Another exception is that she has not received proper credit for \$1,666.51 which she claims to have expended on account of her daughter. The proof shows that this amount, which is an aggregate of various and sundry items, covers and includes the credits allowed her in the master's report, in her settlements with the county court clerk. The chancellor properly overruled the exception.

The chancellor decreed that Mrs. Wooten be allowed interest on the amount found to be due her from November 24, 1893, the date of her mother's marriage with her present husband. In this he was in error. It is shown in the master's report that Mrs. House received, as assets of the estate of her first husband, three vendor's lien notes of one J. A. Stratton, for \$570 each, which, with interest accumulated at the date of his death, amounted to \$2,017.08. These notes were not paid to her, and it is not shown anywhere that she has received any interest thereon since Mr. Elkins' death. It would be unjust to charge her with interest she never received. These notes now constitute a part of Mr. Elkins' estate, to be distributed. She is chargeable with interest, from the date mentioned, on the other funds received by her.

The chancellor, in the decree ordering the account, denied Mrs. House any allowance for board of her daughter from the date of her father's death to the date of her marriage. It appears that during that period Mrs. House received, as guardian, the income of her daughter's estate, amounting to \$905. She advanced for her, out of the corpus of the estate, before her marriage, \$357. Of this amount, \$108 were for taxes on her estate. The total amount expended for Mrs. Wooten before her marriage, exclusive of taxes, was \$1,154. This sum was used in paying for her tuition and clothing, and for some articles of jewelry, and a pleasure trip to the Mammoth Cave. The jewelry and the trip to the cave amounted to \$250. The yearly expenditure for education and clothing, if we exclude the jewelry and the trip to Mammoth Cave, was \$226. That amount was certainly not

more than sufficient, if, indeed, it was enough. It would seem that, in view of the social position of the family, it was a scant allowance. The expenditure for jewelry was, under the circumstances, not an extravagance. The articles had a permanent value, and were, as the world goes, a necessity. Women, and especially young ladies in society, require these things for their proper and necessary ornamentation. Mrs. House's income was small. She owned two houses which yielded her an annual rental of \$30 per month. She received the interest on three Sumner county bonds, amounting to \$180 per annum. From other sources she received \$163 per annum. Out of this she was obliged to pay taxes, repairs, and insurance, the precise amount of which is not shown. It is reasonable to presume that her net income did not greatly exceed \$400. She owned her residence, and lived in it. She says that necessarily, from time to time, she was obliged to replenish the furnishings of the house. Having young lady daughters, who were receiving and entertaining more or less, she felt that the home ought to be neat and attractive. She had three daughters and one son living with her. One daughter, Willie Conn, through the generosity of her uncle, was able to pay her board and other expenses. Several witnesses are examined to prove the cost of living, for a family of that size, in Gallatin. The average cost for food, fuel, and servants' hire is between \$800 and \$1,000. If she had had an income sufficiently large to have done so, it would have been her duty to have furnished them with a home free of cost. But, having an income too scant to defray actual household expenses, she was not under that obligation. If the children had means of their own, it was no more than right that they should contribute. To pay the household expenses, Mrs. House was obliged to draw upon the corpus of the estate, and, under the rule announced in another part of this opinion, her reasonable expenditures on that account will be approved. The chancellor was therefore in error in denying her credit for the board of her daughter Mrs. Wooten during the time she lived with her, viz. from the death of her father until her marriage, in January, 1889.

The chancellor decreed that Mrs. House was entitled to homestead in the real estate left by her husband at his death. The conclusion we have reached on this question is not free from doubt. The widow's claim of homestead is inconsistent with the provisions of the will, and, upon reason, it would seem that having the right to dissent from the will, and having failed to exercise it, she cannot now claim homestead. This view is sustained by the supreme court of Vermont in the case of *Meech v. Meech*, 37 Vt. 419. In that case the testator devised by will to his wife, for life, four acres of land, which included the family mansion and grounds. Then a larger tract, com-

prising the four acres within its boundaries, was devised in fee to his son, Ezra, with this clause appended to the description: "Excepting from the lands herein devised to Ezra the life estate which I have given to my wife, in about four acres thereof, and the lands and buildings standing on the four acres." The house on the four acres was the homestead, from which the widow's homestead must have been taken, if she had any. The will stated that the provision for the widow was to be in lieu of dower, but nothing was said of homestead. The court, in its opinion, affirmed the generally recognized doctrine that, if the terms of the will do not express a clear intention that the bequests are made in lieu of homestead, then she will take the bequests in the will, and also her estate of homestead under the will. But it was further stated that, if the terms of the will express a clear intention that the bequests are made in lieu of homestead, then the widow will be put to her election whether she will have her homestead, or take the bequests of the will. If the question was altogether an original one in this state, our inclination would be to follow the decision of the Vermont court; but there are several cases which, while they have not squarely considered the precise question presented in this case, do indicate a leaning of our supreme court to the right of the widow to homestead, notwithstanding it may appear antagonistic to the will. In *Jarman v. Jarman's Heirs*, 4 Lea, 672, the testator, by his will, gave to his wife a large real and personal estate. The widow did not formally dissent. The estate proved to be indebted greatly beyond its value. After the year within which the widow could dissent had elapsed, she claimed both dower and homestead in the real estate of the testator. The court (Justice Turney delivering the opinion) said: "By our law the homestead vests in the husband and wife jointly, and is a life estate. Upon the death of either it vests in the survivor. Neither has the right to dispose of it, except with the consent of the other, by will or otherwise, and then only in the mode prescribed by statute. The right of the wife is fixed during coverture, and is only lost by her voluntary alienation, or by abandonment, or by death." This case was cited with approval by the court in *Wilson v. Morris*, 94 Tenn. 547, 561, 29 S. W. 966. In this latter case the testator, after dividing his personal property between his widow and daughter, his only child, as the laws of the state of Tennessee direct, devised his real estate as follows: "My real estate, situated in Hamilton county, Tennessee, near the city of Chattanooga, is increasing in value, and I advise that it be retained by the family. My wife will be entitled to a portion of this tract of land as dower, during her life." It will be observed that the language of the will does not, in

terms, exclude homestead, and it seems to us that such a construction is not necessarily implied. The suggestion that the land be retained in the family might, on the other hand, be very well held to be a reservation of the rights in the property to the members of the family, whatever they might be. There was no attempt in the opinion of the court to interpret the language of the will so as to determine whether the testator intended to exclude or preserve homestead. Without discussing the question, it was simply held that the widow was entitled to homestead as well as dower, and the case of *Jarman v. Jarman* was cited in support. After a careful examination of the opinion of the court, we are constrained to believe that the precise question before us was not considered by the court; and we are of the further opinion that the conclusion reached was more the result of the reasoning of the court on the other question in the case, than agreement with *Jarman v. Jarman*. As before stated, one of the clauses of the will divided the testator's personal property between his wife and daughter, his only child, as the laws of the state of Tennessee direct. The widow claimed that she was entitled to the articles exempt to the widow under the statute, and to a year's allowance. It was held that it was the intention of the testator to dispose of his property between his widow and daughter, precisely as it would have gone under the laws of the state if no will had been made, and she was accordingly allowed both exemptions and year's allowance. There being nothing in the will directly or impliedly depriving her of either, it was deemed to be entirely in harmony with the testator's intention to give her whatever the law, in the absence of the will, would have given her. So, there being no words of exclusion in the will as to homestead, and the disposition of the real estate being consistent with its preservation, it was held that the widow was entitled to it. Standing alone, the case of *Wilson v. Morris* would not sustain the right of the widow to homestead, in a case where it was apparent that the testator had intended to make provision in lieu of homestead. The only value of that case as an authority on this question is its approval of *Jarman v. Jarman*. The dictum of Judge Turney touching the nature or character of the widow's estate in the homestead was criticised in the case of *Creath v. Creath*, 86 Tenn. 659-661, 8 S. W. 847. In *Jarman v. Jarman*, it was said that a homestead vests in the husband and wife jointly, as a life estate, and, upon the death of either, vests in the survivor. In *Creath v. Creath*, Judge Fowkes, delivering the opinion of the court, said that the wife had no such estate as that described; that she had a mere right of occupancy, or the right to have the same exempt from her husband's debts, and a negative upon his power of

alienation. In the course of the opinion it was said that the dictum of Judge Turney was merely arguendo, and not necessary to the decision of the question. So that it will be seen that in *Creath v. Creath* the judgment of the court upon the question was approved, although the language of the judge delivering the opinion was criticised. If, upon grounds of public policy, the widow's right of homestead is inalienable, except by her consent, in the manner prescribed by the statute, it would seem to be of no consequence whether the nature of her estate was such as it was held to be in *Jarman v. Jarman*, but was a mere right of occupancy, as was indicated in the case of *Creath v. Creath*. The policy of the law preserving to the widow homestead in the real property of her deceased husband would apply in the one case as much as in the other. And it is upon this ground that the rulings of the court in *Jarman v. Jarman* must stand. This view would be entirely consistent with the policy of our law and the decisions of our courts, which have been careful to guard and uphold the widow's right of homestead, as a necessary provision for her and her children. Upon what appears to be the leaning of the supreme court of this state, rather than what it has expressly decided, we are constrained to hold that in this case the chancellor was correct in allowing Mrs. House homestead in the real estate of her deceased husband.

The decree of the chancellor will be modified in the respects herein indicated, and in all others affirmed. The case will be remanded to the chancery court of Sumner county, with directions to restate the account between the parties in accordance with this opinion. The costs of the court below will be paid as adjudged by the chancellor. The costs of appeal will be borne equally by complainants and by the defendant Mrs. House.

BARTON and NEIL, JJ., concur.

Affirmed orally by supreme court, March 7, 1896.

STARCHMAN v. STATE.

(Supreme Court of Arkansas. July 8, 1896.)

BURGLARY—GOODS IN DEFENDANT'S POSSESSION—SUFFICIENCY OF EVIDENCE.

1. On trial for burglary, where it appeared that the safe in the county treasurer's office had been drilled and blown open with dynamite, evidence showing that, under a search warrant, drills fitting the holes in the safe, and dynamite, had been found in defendant's house, was properly admitted.

2. An indictment for burglary charged that defendant had broken into the county treasurer's office with intent to steal 2,500 two-cent United States stamps, of the value of \$50. The treasurer testified that he swore out a search warrant to search defendant's house for stamps stolen by the man that opened the safe, but no stamps were found in defendant's house. There

was no other evidence relating to the stamps in any way. It was not shown that there were any stamps in the safe or in the treasurer's office. Held, that the evidence was not sufficient to support a verdict of conviction.

Appeal from circuit court, Lawrence county; Richard H. Powell, Judge.

R. D. Starchman was convicted of burglary, and appeals. Reversed.

The defendant, Starchman, was indicted by the grand jury of Lawrence county for the crime of burglary. The indictment alleged that Starchman, "on the 15th day of March, 1895, in the county, district, and state aforesaid, and during the nighttime of said day, the courthouse in the town of Powhatan, then and there situate, and owned and possessed by the county of Lawrence, then and there willfully, maliciously, feloniously, and burglariously, did break and enter, with the felonious and burglarious intent twenty-five hundred two-cent United States postage stamps, of the value of fifty dollars, of the property of the United States, then and there being in the possession and under the control of one Geo. Wells, he being the postmaster of the post office in the town of Powhatan, which said stamps were by him deposited and kept in the safe of the treasurer of said county, which safe was in the room or office of the said treasurer in said courthouse, then and there feloniously and burglariously to steal, take, and carry away, against the peace and dignity of the state of Arkansas." On the trial, the state was allowed to introduce in evidence certain instruments found in defendant's house by officers while searching for postage stamps alleged to have been stolen. The other facts sufficiently appear in the opinion. Defendant was convicted, and judgment of imprisonment for a term of three years in the state penitentiary was rendered against him, from which he appealed.

Jos. W. Phillips, for appellant. E. B. Kinsworthy, Atty. Gen., for the State.

RIDDICK, J. (after stating the facts). It was not error to allow witnesses on the part of state to exhibit to the jury certain drills and punches found by them in the house of appellant, Starchman. It having been shown that the safe which was entered was opened by means of similar instruments in connection with an explosive substance, such evidence was proper, as tending more or less to connect Starchman with the offense. People v. Hope, 62 Cal. 291; Rap. Lar. & Kin. Off. § 358. It was held in *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, cited by counsel for appellant, that a defendant cannot be compelled to produce his private papers in order that they may be read in evidence against him upon a criminal prosecution, for the reason that to do so would, in effect, be compelling him to testify against himself. But that case has no application here, and rests on principles different from those controlling the admission of this evidence. No private papers of the de-

defendant were introduced, and he was not compelled to produce the instruments offered in evidence in this case. These instruments were found by the officers while searching for stolen property, and it was proper for such officers to testify concerning any material fact discovered by them while making such search. This case is similar to the case of *State v. Flynn*, 36 N. H. 64, where it was held that "evidence obtained by means of a search warrant is not inadmissible either upon ground that it is in the nature of admissions made under duress, or that it is evidence which the defendant has been compelled to furnish against himself, or on the ground that the evidence has been unfairly or illegally obtained, even if it appears that the search warrant was illegally issued." If the drills introduced in evidence in this case were taken by the officers without authority, they may be forced to respond in damages for such wrongful act; but that question, not being before the court, could not be considered, and furnished no reason to exclude such evidence from the jury. *State v. Flynn*, 36 N. H. 64; *Com. v. Dana*, 2 Metc. (Mass.) 329; *Bish. New Cr. Proc.* § 246.

While the court did not err in the admission of evidence, the contention that the verdict is without evidence to support it must be sustained. The indictment alleged that the defendant broke and entered the courthouse with the intent to steal "twenty-five hundred two-cent United States postage stamps, of the value of fifty dollars, and the property of the United States." The evidence connecting defendant with the breaking and entering the house was altogether circumstantial, and to us not very convincing; but there is an entire absence of proof tending to show that such breaking and entering was with an intent to steal two-cent United States postage stamps. The only witness who refers to stamps in any way testified as follows: "I went before Wayland, justice of the peace, and swore out a search warrant to search Starchman's house for one hundred dollars' worth of stamps stolen by the man or men who opened the safe. I went with Mr. Childers, the deputy sheriff. He summoned me to assist him. We made a full search. Found no stamps." It will be noticed that the witness does not mention two-cent postage stamps, or postage stamps of any kind. If we overlook this deficiency, and assume that by the word "stamps" the witness meant two-cent United States stamps, there is still nothing to show that such postage stamps were stolen from the safe or courthouse when the burglary was committed. The witness says the stamps were stolen by the man or men who opened the safe, but where were the stamps at the time they were stolen? The witness does not say that they were stolen from the safe or courthouse, or that they were even kept in such safe or courthouse, nor was there any fact shown from which it can be inferred that the breaking and entering of the house was with

the intention to steal stamps of any kind. There is no evidence to show that the stamps stolen were owned by the United States, or that the United States had at any time kept postage stamps in said safe or courthouse, and nothing to show that either the defendant or any one else had any reason to believe that such stamps were kept in that place. There is therefore nothing to sustain the allegation that the breaking and entering the courthouse was with an intent to steal postage stamps. While the intent to commit a felony is a material part of the crime of burglary, and the indictment should set out the felony intended, yet it was probably unnecessary to describe the property which the burglar intended to steal with the particularity shown in the indictment. But, having made allegations descriptive of the property and of the offense, there must, in order to convict, be some proof tending to support them. *Dudney v. State*, 22 Ark. 251; *Bish. New Cr. Proc.* §§ 486, 488, and cases cited; *Neubrandt v. State*, 53 Wis. 89, 9 N. W. 824; *Rap. Lar. & Kin. Off.* § 355.

The evidence to support the allegation that the breaking and entering took place in the nighttime, so far as it appears in the transcript, is very weak, but we deem it unnecessary to discuss it further. We know that this apparent defect in the proof may have been the result of haste or oversight in preparing the bill of exceptions; but, as no effort has been made to amend it, we must assume that it reflects the facts.

For the reasons given above, the judgment is reversed, and the cause remanded for a new trial.

CASTLEMAN v. NORWOOD.

(Court of Civil Appeals of Texas. May 16, 1896.)

JUDGMENT—ACTION TO SET ASIDE—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

1. A judgment by default against a garnishee who was served will not be set aside on the ground that the garnishee told the judgment creditor that he did not owe the judgment debtor anything; that their relations were friendly, and he did not believe such creditor would take judgment against him after knowing he was not owing the debtor; that the court was in session more than 60 days after the judgment against the garnishee was rendered, and the creditor refrained from issuing execution on it in order to deceive the garnishee, and prevent him from filing a motion for new trial; and that he had no knowledge of the judgment until after court adjourned.

2. A new trial for newly-discovered evidence is properly denied where, by proper diligence, the party could have known of such evidence before the trial.

Appeal from district court, Johnson county; J. M. Hall, Judge.

Bill by B. F. Castleman against P. J. Norwood to set aside a judgment by default against plaintiff, as garnishee. From a judgment for defendant, plaintiff appeals. Affirmed.

O. T. Plummer, for appellant. Davis & McKoy, for appellee.

RAINEY, J. The appellee, P. J. Norwood, recovered judgment by default against B. F. Castleman, appellant, for the sum of \$1,132, with 6 per cent. interest and costs of suit. Subsequently, and after the adjournment of the court at which said judgment was rendered, appellant instituted this suit, to set aside said judgment, alleging that said Norwood had fraudulently obtained said judgment against him, and that he was not served with the writ of garnishment. Upon hearing of the cause, judgment was rendered for appellee.

Appellant complains of the action of the court for sustaining various special exceptions to his first amended original petition. The charging part of said petition, to which said exceptions were sustained, is as follows: "Plaintiff would also show that on or about December 1, 1893, defendant came to his place of business, and asked plaintiff if he had been served with said writ; and that he informed defendant he had, and defendant then asked him if he was owing said Schoolfield [said Schoolfield being the judgment debtor to appellee, Norwood] any amount; and that he stated to defendant he was not owing said Schoolfield any amount, and had none of his effects in his hands; and that he then exhibited a receipt from Schoolfield showing a settlement in full with him; and that defendant then asked plaintiff if he knew any person owing said Schoolfield; and that plaintiff informed defendant that one Brannon was owing Schoolfield; and that defendant replied, 'I have garnished him.' Plaintiff avers that his relationship with defendant was friendly, and that defendant knew that plaintiff confided in his honesty, and believed defendant would not take any advantage of or injure him. And plaintiff avers that he did confide in defendant, and believed that defendant would not prosecute said suit against him, and ask for judgment against him, after informing him that he was not indebted to said Schoolfield, or had any of said Schoolfield's effects in his hands; and that, from the conduct of defendant before and after said writ was served on him at the time mentioned, plaintiff was induced to believe, and did believe, that defendant would no longer prosecute said suit against him. Plaintiff avers that the conduct of defendant, at the time referred to as above stated, towards plaintiff, was calculated to produce on the mind of any reasonable person the belief that said suit would be abandoned, and that no judgment would be asked when defendant knew that he was not indebted to said Schoolfield. And plaintiff would show that, being misled by the conduct of defendant in the manner aforesaid, and believing that defendant would not prosecute said suit, he filed no answer in said garnishment proceedings. Plaintiff would show that said court remained in

session more than sixty days after said judgment was rendered against him, and that defendant, in order to deceive plaintiff, and to obtain an additional advantage over him, purposely kept an execution from issuing on said judgment until after said court adjourned, to prevent plaintiff from filing a motion for new trial in said case. Plaintiff would also show that he had no knowledge that said judgment had been rendered against him until after said court adjourned. Plaintiff avers that, by the conduct of defendant mentioned as aforesaid, defendant has obtained an unconscionable advantage over him, and done him an irreparable injury, and is now attempting to collect said judgment, and to force plaintiff to pay the same, to his great damage," etc. We think the action of the court in this respect was correct. There is no fact alleged which would in the least authorize appellant to conclude that the defendant would not prosecute his suit; nor is there any act alleged which was calculated in the least to justify or warrant plaintiff in abstaining from defending the suit.

On the issue as to whether or not appellant was served with writ of garnishment the evidence is conflicting, but it fully warrants the court in finding that he was duly served with said writ.

There was no error on the part of the court in overruling appellant's motion for new trial, on the ground of newly-discovered evidence. The proof fully shows that, by proper diligence, appellant could have known of the evidence before the trial that he claims to have been newly discovered. The judgment is affirmed.

SOUTHERN SODA WORKS v. VINES.

(Court of Civil Appeals of Texas. May 23, 1896.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—ATTACHMENT.

Property in the hands of a trustee under a deed of trust for the benefit of creditors is not liable to attachment at the suit of one of the grantor's creditors.

Error from district court, Marion county; John L. Sheppard, Judge.

Action by the Southern Soda Works against John M. Vines, trustee. There was judgment for defendant, and plaintiff brings error. Affirmed.

Todd & Todd, for plaintiff in error.

RAINEY, J. This is an action for the trial of the right of property. D. C. Wise & Co. transferred their stock of goods, in trust, to John M. Vines, for the benefit of certain creditors. Plaintiff in error attached a part of said goods, and the same were claimed by Vines under such deed of trust. When said instrument was executed, said Vines took possession of said goods, and was in possession thereof at the time of the levy of

the writ of attachment. The only question raised by appellant is whether or not said instrument was a deed of trust, or a deed of assignment. The court below held that it was a deed of trust, and that the trustee was entitled to recover. As far as this suit is concerned, we deem it immaterial whether the instrument was a deed of trust, or an assignment. In either case the trustee was entitled to the possession of the goods, and the same were not subject to the writ of attachment. The judgment of the court below is therefore affirmed.

UNITED STATES INS. CO. v. MORIARTY.
(Court of Civil Appeals of Texas. May 23, 1896.)

INSURANCE—NOTICE OF INCUMBRANCE—ESTOPPEL BY WAIVER.

1. The fact that a mortgage executed on insured property is recorded does not constitute notice thereof to the insurer. To bind the company, it must have actual notice, or notice of such facts as to put it on inquiry.

2. The fact that the agent of an insurance company waived certain breaches of the conditions of a policy after a loss will not estop the company to insist on other breaches, not then known to it or its agent, as a defense to liability thereon.

Appeal from district court, Johnson county; J. M. Hall, Judge.

Action by T. Moriarty against the United States Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

Morgan & Thompson, for appellant. Poin-dexter & Padelford, for appellee.

RAINEY, J. This suit was instituted by defendant in error, T. Moriarty, against plaintiff in error, the United States Insurance Company, to recover on a policy of insurance issued to him, and covering bar furniture, fixtures, etc., the property belonging to Moriarty & O'Keefe, but, at the time the policy was issued, the company's agent knew of O'Keefe's interest therein. The policy provides: "To be void if, without the knowledge or consent of the company indorsed upon the policy in writing, any change takes place in the title, interest, or possession of the subject of insurance." After the policy was issued, O'Keefe sold his interest to one McCoulsky. Said property was also mortgaged by said parties to Casey & Swasey, which was contrary to the terms of the policy. The assured rented out a part of the insured building for the purpose of conducting a gambling room therein, which plaintiff in error claimed increased the hazard. The matters here stated were set up by the insurance company in its answer, claiming that there was a forfeiture of the policy thereby, and that it was not, therefore, liable. These matters were set up by the company, and established as true, and were not known to said company until

after the loss. A few days after the fire, however, the company's special agent and adjuster for Texas caused the assured, under the provisions of the policy, to be examined touching the matters pertaining to the insurance and the loss thereunder. In that examination it was disclosed that the sale had been made by O'Keefe to McCoulsky; that a part of the insured building had been rented out for the purpose of conducting a gambling house; but the testimony does not show that the company or its agent had any notice that said property had been mortgaged. After said examination, said agent stated to the defendant in error: "All you will have to do to get your money is to get up your proofs of loss, and send them right in." Said proofs were made in accordance with the agent's instructions, and sent to the company.

There are various errors assigned. The main contention, however, is (by defendant in error) that the company, through its agent, having demanded proofs of loss, waived all forfeitures of the policy. In the case of Insurance Co. v. Moriarty (this day decided by us),¹ we held that where the insurance company, after the loss, knowing that the policy had been breached, required proofs of loss, it thereby waived forfeitures. See authorities there cited. The evidence in that case is the same as in this, except the question of forfeiture by reason of a mortgage on the property was not raised in that case. The testimony in reference to the mortgage is that two mortgages were executed, which mortgages were duly recorded in the county records of Johnson county. The plaintiff stated that he thought the company's agent knew of said mortgages. The agent testified that he had no knowledge whatever of the existence of the mortgages.

The defendant in error contends (1) that the evidence shows notice of the mortgages by reason of the circumstances surrounding the case, as well as the registration of said mortgages in the records of the county; and (2) further, that having waived other breaches of the policy, of which the company had knowledge, it as well waived all breaches of which it had no knowledge.

As to the first contention, we think that the circumstances surrounding the case did not put the company on notice, nor was the registration of the mortgages notice to the company or its agents of the existence of the same. To bind the company in such cases, it is necessary that it have actual notice, or notice of such facts as will put it upon inquiry. Insurance Co. v. Holcomb (Tex. Sup.) 34 S. W. 915.

We think the second contention of defendant in error not tenable. In order to create a waiver or estoppel, it is essential that the parties should be cognizant of all the facts in the case. The insurance company might be willing to waive some of the

¹ Application for writ of error pending.

breaches, but not others. The company was not cognizant of all the facts in this case when the proofs of loss were demanded, and we are of opinion that it was not estopped from setting up the breach of the policy by reason of the mortgages. *Insurance Co. v. Waters* (Tex. Civ. App.) 30 S. W. 576.

For this reason, the judgment of the court below is reversed, and the cause remanded.

CITY OF LOUISVILLE v. WILSON. SAME v. NEVIN. SAME v. HOERTZ. SAME v. MARTIN. SAME v. O'CONNELL.

(Court of Appeals of Kentucky. June 24, 1896.)

OFFICERS—SALARY—REDUCTION—CONSTITUTIONAL LAW.

1. St. §§ 2824, 2861, providing that each member of the boards of public safety and public works shall receive a salary not less than \$2,500, does not fix the salary of such members at that amount; and therefore an ordinance fixing the salary of such members after their appointment at \$3,000 does not violate Const. § 161, in that it increases the salaries of such members.

2. Members of the boards of public safety and public works and the secretaries of such boards are municipal "officers" (Const. § 161), and an ordinance reducing their salaries during their term of office is therefore unconstitutional.

3. The assistant bailiff of the police court, performing the duties of a peace officer and authorized to serve process, is also such an "officer."

4. So, also, is the stenographer of the city court, whose official acts, under the statute authorizing the appointment of an official stenographer, have the same degree of verity as do those of the clerk of the police court.

Guffy and Du Relle, JJ., dissenting.

Appeal from circuit court, Jefferson county. "To be officially reported."

Cases submitted without action by Charles A. Wilson, by Joseph Nevin, by J. Henry Hoertz, by J. P. Martin, and by J. J. O'Connell, against the city of Louisville. There were judgments for the plaintiffs, and defendant appeals. Affirmed.

W. S. Barker, Fairleigh & Straus, and John W. Barr, Jr., for appellant. Dodd & Dodd, Humphrey & Davie, Carroll & Hagan, and D. W. Baird, for appellees.

LEWIS, J. It is agreed, in these five cases, submitted and decided without action, as follows: Appellees Wilson and Nevin were appointed by the mayor, for the term of four years, December 14, 1893, confirmed by the board of aldermen of Louisville, and immediately qualified as members, respectively, of the board of public safety and board of public works. January 9, 1894, by ordinance of the general council, the salary of each member of the two boards was fixed at \$3,000 per annum. By ordinance approved January 26, 1894, it was provided there should be one secretary of the board of public works, his compensation being fixed at \$2,000 per annum; and January 31, 1896, appellee Hoertz was by the board of public works appointed sec-

retary for the term of four years. By ordinance approved May 21, 1894, it was provided the compensation of deputies of the police court should be \$1,500 each, payable monthly; and in January, 1895, appellee J. J. O'Connell was by J. N. Vetter, bailiff of said court, appointed one of his assistants or deputies. January 9, 1894, by ordinance the compensation of official stenographer of the city court was fixed at \$1,000 per annum; and February 24, 1894, appellee John P. Martin was by the judge of the court appointed to the office. December 26, 1895, the general council, composed of newly-elected members, passed an ordinance, duly approved by the mayor, changing salaries of members of the boards of public safety and public works to \$2,500 each, per annum, that of secretary of board of public works to \$1,200 per annum, that of deputy bailiff to \$1,200 per annum, and that of official stenographer to \$900 per annum.

The main question in this case is whether the ordinance of December, 1895, violates section 161 of the constitution, as follows: "The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office, nor shall the term of any such office be extended beyond the period for which he may have been elected or appointed." And proper determination of it involves inquiry whether the various ordinances referred to which first fixed the compensation of these officers were valid and effectual for that purpose. If any of them be invalid at all, it is only because they were passed after the officers affected by them had qualified and commenced discharge of their duties; for all appear to have been regularly passed and approved, under authority conferred by section 2756, St. Ky., applicable to Louisville, a city of the first class, as follows: "Except as otherwise herein provided the general council may by ordinance prescribe the duties, define the terms of office, fix the compensation and the bonds, and time of election of all officers and agents of the city." But as none of those ordinances, except the particular one fixing salaries of members of the board of public health and of the board of public works, were passed subsequent to appointment and qualification of the several officers mentioned, there is no reason for calling in question the validity of any, except it may be that one.

The purpose of section 161 was to prevent as well reduction of compensation of officers, sometimes the result of prejudice and false economy, as increase of it, sometimes brought about by importunity and under influence on their part. So there cannot be any change at all of an officer's compensation during his term. But there is an essential difference, which we are satisfied the framers of the constitution had in mind, between fixing the amount of compensation an officer shall receive, not hitherto ascertained and settled, and changing it after it has been fixed. It is the obvious and uniform policy of government,

state and municipal, as well as just to each officer, to fix his compensation definitely and certainly as to amount, except when he is paid by fees of office. And section 161 does not in terms, nor was it intended to, forbid or at all relate to any statute or ordinance that for the first time does fix the salary of an officer. But it is equally necessary, for protection of both the government and officer, that his salary, when once fixed, should not be changed during his term; and for no other purpose than to prevent that evil was section 161 made part of the constitution.

It is, however, contended, that section 2824 and section 2861 had the effect to fix and secure to members, respectively, of the board of public safety and board of public works a definite amount of compensation; the two sections being alike, and as follows: "Each member shall receive a salary of not less than twenty-five hundred dollars." But it is plain the legislature did not intend thereby any more than to prescribe a minimum of the compensation which the general council had been by section 2756 already empowered to definitely and authoritatively fix. And it is to us equally plain that, until the ordinance of January 9, 1894, was passed and approved, the members of the two boards did not have legal right to demand, nor the city treasurer legal authority to pay, them any compensation whatever. In our opinion the last-named ordinance is valid, and consequently the one of December 26, 1895, must be held invalid.

There can be no question of appellees Wilson and Nevin being officers, in the meaning of section 161, and the remaining inquiry is whether the other appellees are. There are various tests by which to determine who are officers, in the meaning of the law; but at last, in case of uncertainty, the intention of the lawmakers controls. To constitute an officer, it does not seem to be material whether his term be for a period fixed by law, or endure at the will of the creating power. But, if an individual be invested with some portion of the function of the government, to be exercised for the benefit of the public, he is a public officer. Mechem, Pub. Off. § 1. The board of public works is by statute vested, conjointly with the mayor, with executive power, and, as its name indicates, has control and supervision of public places and public improvements, with authority to make contracts in regard thereto. By section 2803 it has power to prescribe rules, not inconsistent with any statute or ordinance, regulating its own proceedings and the conduct of its officers, clerks, and employes, distribution and performance of its business, and preservation of the books, records, papers, and property under its control; and, while it does not appear, from the agreed statement of facts, what particular duties are assigned to the secretary of the board, it is manifest he was intended to be and is more than a mere employé; for he is required to execute a bond for proper discharge of his duties, and, being next in authority to mem-

bers of the board, is the proper person to keep the required journal of its proceedings, and preserve books, papers, and records affecting the public. In our opinion, he should be held an officer, in the meaning of section 161. As to appellee O'Connell, performing, as assistant bailiff, the duties of a peace officer, and having authority to serve process and make arrests, there can be no question of his being an officer. Besides, the statute expressly provides for appointment of assistant bailiff, as it does for the appointment of official stenographer, whose official acts have, in degree, the same verity and force as do those of the clerk of the police court. We think appellees are all officers, in the meaning of section 161. Judgment affirmed.

GUFFY and DU RELLE, JJ., dissent.

GUFFY, J. (dissenting). The principal question involved in these five appeals is the power of the council of Louisville to regulate or change the salary or compensation of the officers named. The majority opinion of the court holds that the appellees are included within the provision of section 161 of the constitution, which is as follows: "The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office; nor shall the term of any such officer be extended beyond the period for which he may have been elected or appointed." We cannot assent to that conclusion. Section 160 of the constitution creates the offices of mayor (or chief executive), police judge, and members of the legislative boards (or councils), and fixes their terms of office, and the manner of their selection. It seems to us that section 161, *supra*, only refers to the officers named in the preceding section, and to such other officers as are named in other sections of the constitution. Various offices were created by the constitution, and we think that, upon reason as well as authority, when that instrument speaks of officers, it means only those theretofore named. The fact that section 161 follows section 160, which authorized the legislature to create other offices, does not at all sustain the contention of appellees. For it will be observed that section 161 mentioned county officers, and no mention is made of county officers in section 160. But in other parts of the constitution county officers were created, and the manifest object and purpose of section 161 was to protect, as well as to provide against the undue influence of, such officers. It is true that section 160 authorizes the legislature to provide for the election or appointment of other officers, and, when such officers are elected by the voters of a town or city, their term shall be four years. No limit is fixed to the term if the officer be appointed. Hence, if section 161 includes officers not named in the constitution, an

officer might be appointed for a term of ten years at a fixed salary, which must continue during ten years, although the duties of the officer might become merely nominal.

The majority opinion in these cases holds that the reason for the insertion of section 161 was twofold, viz. to make the officer secure in his compensation and free him from danger of injustice from an unfriendly power that was authorized to fix salaries and fees, and also to prevent the officer from procuring an increase of compensation by undue influence. We heartily assent to that view, and we think that it sustains our views as to the true meaning of section 161. We can readily see that the mayor, police judge, and legislative authorities of towns should be restrained as provided in the section *supra*. The police judge, being a judicial officer, ought to be free and independent of the other departments; and the same may be truly said of the mayor and legislative authorities. But is it possible that the framers of our organic law intended that the salary or fees of the thousands of subordinate officers of cities, towns, and counties should be beyond the power of change during their term? We think not. There can be no reason for such intent that such officers should be somewhat dependent upon higher authority. Such dependence would be likely to insure a faithful and efficient discharge of their duties. We know that a subordinate officer may be inefficient and negligent, yet not be liable to impeachment and removal; and it seems, from the opinion of the majority of the court in the case of *Todd v. Tilford* (Ky.) 36 S. W. 541, that but few if any of the municipal officers can be removed in any other way. It is the well-settled rule of law that the power that creates an office can abolish the same at any time, and thus leave the incumbent without either employment or compensation; and yet, if the majority opinion is correct, we have this strange condition of affairs, viz. a large number of officers whose compensation cannot be increased nor diminished during their terms, but the office can be abolished, and the incumbent left without office or compensation. Surely the framers of the constitution did not intend any such thing.

Our interpretation of section 161 is in harmony with the manifest intent of the provisions, while the attempt to extend its provisions to officers not named in the constitution involves inconsistencies, if not absurdities. Section 107 of the constitution provides "that the general assembly may provide for the election or appointment for a term not exceeding four years, of such other county or district ministerial, and executive officers as may, from time to time be necessary." Section 235 provides: "The salaries of public officers shall not be changed during the terms for which they were elected." If the majority opinion is to be

the rule of law, then all the subordinate officers appointed or created by virtue of section 107 come within the provisions of section 161, and their compensation cannot be changed during their terms. Whether it be a fixed salary, or fees, or per diem, such a construction is unreasonable, and not in accord with business principles. Subordinate officers may for one year require about all the time of the incumbent, but the next year the duties might not require one-fourth of his time, and yet there could be no reduction of compensation under the majority opinion, and the only relief, if any, to the public, would be the entire abolition of the office, although the incumbent might be glad to hold it at a reduced salary. It is fair to assume that such, to some extent, was the case in regard to the appellees, especially Nevin and Wilson. The legislature evidently had an idea that \$2,500 per annum was probably fair compensation; hence, required that they should have that much. The incumbents accepted the offices, and could not have known that they would get more. A short time afterwards the council reached the conclusion that the compensation should be \$3,000 per annum, and the then mayor (Tyler) approved the ordinance. After the incumbents had been in office perhaps a year or more, the council fixed the compensation at \$2,500, and the ordinance was approved by the same mayor (Tyler). In our opinion, each ordinance was and is valid, because these officers are not embraced by section 161; but, if they are embraced by the section *supra*, then their compensation was fixed at \$2,500 at the time they were appointed and qualified, and could not be raised to \$3,000. The act provided that the compensation should not be less than \$2,500, and the most that can be claimed is that the legislature authorized the council to raise their compensation, which it failed to do for a month or two after the qualification of the appellees Nevin and Wilson. Suppose the act of the assembly had provided that the salary should be \$2,500, but the same might be increased by the council? Would any one contend that the salary had not been fixed? It seems to us that the provision made is substantially the same, in fact and in law.

It seems clear to us that the business interests of the towns, cities, and counties, as well as the genius of our institutions, demand that the compensation of all officers not mentioned in the constitution should be at all times subject to the control of the legislative power that creates the offices and fixes the compensation. The taxpayers need protection as well as officers. The lawmaking power of the towns and cities is by the constitution required to be elected biennially; but, according to the opinion of the majority of the court they can effect any reform or change in respect to a large and very important matter of public policy only

once in four years. We cannot assent to any such doctrine. We think that the ordinances complained of should be held to be valid.

BENNETT v. STATE.

(Supreme Court of Arkansas. July 8, 1896.)

FORGERY OF DEED—WHAT CONSTITUTES—INDICTMENT—DUPLICITY—VARIANCE—IDEM SONANS—PRESUMPTION OF FRAUD—PRESENCE OF STRANGER IN JURY ROOM—EVIDENCE—DECLARATION OF CONSPIRATOR—ARGUMENT OF COUNSEL.

1. An indictment charging that defendant did "unlawfully, etc., forge a certain deed," etc., necessarily imports that it was done without authority.

2. It is not necessary to set out the particular acts in which the forgery consisted.

3. An indictment charging the forgery of a deed and acknowledgment thereof charges but one offense.

4. Forgery may be committed by making an instrument, purporting to be the warranty deed of a person deceased, conveying the land to one who was on trial for taking wood from the land of another, and made for the purpose of being used on such trial.

5. "Watkins" and "Wadkins" are idem sonans, so that there was no variance between an indictment for forging a deed to one, and the deed itself, purporting to convey the premises to the other.

6. There is a fatal variance between an indictment for forgery of a deed which described the land as "north half," etc., and in which the word "sum" was crossed out, in the clause reciting the consideration for release of dower, and concluding, "Witness my hands and seals," and an indictment purporting to set out the deed in hæc verba, but which described the land as "the north half," in which the word "sum" was not crossed, and which concluded with, "Witness my hand and seal," etc.

7. On a trial for forgery of a deed, if the jury find that the deed was made to be used as good, and that there was a possibility of another's being injured thereby, a presumption of fraud would necessarily arise.

8. Though Sand. & H. Dig. § 2058, provides that "no person except the prosecuting attorney and the witnesses under examination are permitted to be present, while the grand jury are examining a charge and no person whatever shall be present while the grand jury are deliberating or voting," it was not cause for quashing the indictment that a certain person examined the witnesses in the grand jury room, with the prosecuting attorney's consent, and acting in his place, where he was not present when the grand jury was deliberating or voting, and especially where it was not shown that anything was said to influence the finding of the grand jury.

9. On a trial for forgery of a deed, evidence that the person for whose benefit the deed was forged asked another to obtain for him two blank deeds, being the act of a co-conspirator in furtherance of the common design, was admissible.

10. But such person's declaration, in defendant's absence, that defendant promised to make him a deed which would clear him, not being in furtherance of the common design, was not admissible.

11. Remarks to the jury by the prosecuting attorney to the effect that defendant had committed other crimes, may be prejudicial.

Appeal from circuit court, Clay county; Felix G. Taylor, Judge.

J. P. Bennett was convicted of forgery, and appeals. Reversed.

Cate, Hughes & Cate and Block & Sullivan, for appellant. N. F. Lamb and E. B. Kinsworthy, Atty. Gen., for the State.

HUGHES, J. There was no error in the judgment of the circuit court in overruling the demurrer to the indictment. It sufficiently charges the crime of forgery. It is not necessary to allege the mode in which the offense was committed, further than it is stated in this indictment; and it is not essential that the indictment should state that the forgery was committed by signing the name of another without his authority, in so many words. The charge that the defendant "did unlawfully, willfully, knowingly, and feloniously and fraudulently make, write, forge, and counterfeit a certain deed and acknowledgment thereof, in words and figures as follows, to wit [setting out a copy of the deed alleged to have been forged], necessarily imports that it was done without authority, and sufficiently states the manner of its execution.

2 Bish. Cr. Proc. § 437. It is not necessary to set out the particular acts in which the forgery consisted. *State v. Maas*, 37 La. Ann. 292; *People v. Van Alstine*, 57 Mich. 69, 23 N. W. 594; *People v. Marion*, 28 Mich. 255. And this is according to the weight of authority. But it is said in *People v. Marion*, 28 Mich. 255, that the omitting to do so is a practice not to be commended, as an instrument may be forged in various ways, and fairness to the accused would seem to require it. The case of *Com. v. Williams*, 13 Bush, 267, holds that it is necessary to do it. But this seems to be against the weight of authority. Where the prosecutor undertakes to set out in what the forgery consisted, he is bound to state it truly, so as not to mislead the defendant, and to prove it as stated. *People v. Marion*, 28 Mich. 255. We are of the opinion that the acknowledgment was only a part of the deed, and that the indictment, in charging forgery of the deed and of the indictment, charges but one offense.

One of the errors assigned in the motion for a new trial is "that the court's charge on the question of intent was erroneous, and there was no evidence to support the intent alleged in the indictment," which is that Bennett made the deed with the intent to defraud Burns, his heirs and estate. The counsel for the defendant contend, with much earnestness and plausibility, that inasmuch as the evidence was to the effect that Bennett forged the deed for the sole purpose of use as evidence for the defendant on the trial of Watkins, charged with taking timber from the land of another, the presumption of intent to defraud Burns, his estate and heirs, was fully rebutted, and that the defendant was not guilty of forgery, within the meaning of the law. Bishop, in his *New Criminal Law* (volume 2, § 597), says: "We have seen that forgery is an attempt to cheat. And an attempt, within the ordinary doctrine, exists only where the wrongdoer's

intention is specific,—to do the particular criminal act. Whence it might be inferred that there can be forgery only where there is a specific intent to effect the particular fraud which the false writing is adapted to accomplish. But we are about to see that the adjudged law is not exactly so." "In the ordinary language of the books, there must be in the mind of the wrongdoer an intent to defraud a particular person or persons, though no one need in fact be cheated. Yet the intent is not necessarily, in truth, exactly this. It is rather that the instrument forged shall be used as good." Section 598. Consequently: "(2) If the forger means, for instance, to take up the bill of exchange or promissory note when it becomes due, or even if he does take it up, so as to prevent any injury falling upon any person, * * * or if a party forges a deposition to be used in court, stating merely what is true, to enforce a just claim, he commits the offense, the law inferring conclusively the intent to defraud; and (3) from the intent to pass as good, the law draws the conclusion of the intent to defraud whatever person may be defrauded. (4) Ordinarily there are two persons who may legally be defrauded,—the one whose name is forged, and the one to whom the forged instrument is to be passed. Therefore the indictment may lay the intent to be to defraud either, and it will be sustained by proof of an intent to pass as good, though there is shown no intent to defraud the particular person." See the authorities cited to support the doctrine of these sections. They are numerous. There must be a possibility of fraud, but that is sufficient. The making alone of the false writing, with the evil intent, is sufficient. No fraud need be actually perpetrated. 2 Bish. New Cr. Law, §§ 599, 602; Com. v. Henry, 118 Mass. 460; State v. Kimball, 50 Me. 409. "Where the intent alleged is to defraud the person whose name is forged, it should be presumed from the forgery, without further proof." 2 Bish. Cr. Proc. § 427; Henderson v. State, 14 Tex. 503; Rounds v. State, 78 Me. 48, 2 Atl. 673. The deed in this case, as appears from the evidence, was forged with an evil intent; was designed and intended to be used as good and as material evidence on the trial of Watkins upon a criminal charge; and was so used, and procured the acquittal of Watkins. It purports to be the warranty deed of John T. Burns, and it requires no argument to show that, had it been genuine, it might have made the estate or heirs of Burns liable, if the warranty should be broken, or assets descend to the heirs. It is shown that he left an estate, and a brother him surviving. We make no question that the proof of these facts is sufficient to sustain the charge of forgery. 1 Whart. Cr. Law, § 743; 3 Greenl. Ev. §§ 18, 103; Billings v. State, 107 Ind. 54, 6 N. E. 914, and 7 N. E. 763; West v. State, 22 N. J. Law, 212; U. S. v. Shellmire,

Baldw. 370, Fed. Cas. No. 16,271. "The courts are not entirely agreed as to how far the law will presume, in criminal cases, that a man intends to accomplish results which are the natural and probable consequences of acts which he does knowingly and intentionally. On the one hand, some courts have laid down the rule broadly that the law will presume such intention, and have acted upon the rule so laid down, with no intimation that there might be exceptional cases in which the rule would not apply." Note to People v. Flack (N. Y. App.) 11 Lawy. Rep. Ann. 810, 811 (26 N. E. 267), under head "Presumption as to Natural Consequences of Acts." "The New York court holds that the rule that a party intends the ordinary and probable consequences of his act is only a presumption, which may be rebutted by competent evidence, and is for the jury." Id. 11 Lawy. Rep. Ann. 811. "But even in that state it has been stated that, whether it be denominated a presumption of law or a presumption of fact, an intent to kill would be necessarily inferred from a voluntary and willful act which has a direct tendency to destroy another's life, and which in fact does so." People v. Majone, 1 N. Y. Cr. R. 89. An intent to defraud must be necessarily inferred by the jury, in a prosecution for forgery, where the evidence shows it to have been committed with the design that the instrument forged should be used as good, and it is also shown that there was a possibility that some person might be injured thereby, or that person's estate might be thereby injured or made liable. An estate is a person, in contemplation of law.

The second ground of the motion for a new trial is "that there was a variance between the deed offered in evidence, and the deed set out in the indictment." The deed admitted in evidence, in setting out the consideration, has it thus: "The sum of five hundred and fifty dollars \$550.00 dollars, to us paid by J. N. Wadkins." The deed set out in the indictment has it thus: "Five hundred and fifty dollars (\$50.00) to us paid by J. N. Watkins." In describing the lands, as to one piece, the deed offered in evidence has it, "north half," while the deed set out in the indictment has it, "the north half," adding the word "the" before "north half." In the blank form for relinquishment of dower in the deed offered in evidence, in setting out the consideration the word "sum" is crossed as indicated, while in the deed set out in the indictment it is not, but appears without the cross marks, thus, "sum." Again, the deed offered in evidence concludes, "Witness my hands and seals this 22 day of August 1892," while the deed set out in the indictment concludes, "Witness my hand and seal this 22nd day of August 1892."

It is the opinion of the court that "Wadkins" and "Watkins" are idem sonans, and that there is no material variance in the using of "d" in one deed, and "t" in the other, in

setting out the name of the grantee; and we deem it unnecessary to cite authorities as to this.

It is the opinion of a majority of the court that, as the indictment professes to set out an exact copy of the deed charged to have been forged, the other numerous variances between it and the deed offered in evidence, taken altogether, are material, and that, in contemplation of law, the two deeds are not the same. The words and figures which are a part of the deed set out in the indictment are said to be descriptive of the deed charged to have been forged, and a defendant could not have been convicted on such a charge by producing in evidence a deed not having these words and figures in it. *McDonnell v. State*, 58 Ark. 442, 24 S. W. 105, and cases cited. If the deed had been set out according to its purport, it might have been proven by the one offered in evidence; but, as the indictment professes to set it out in words and figures, it was necessary to prove it by an exact copy. *Com. v. Parmenter*, 5 Pick. 279; *State v. Morton*, 27 Vt. 310; *Rex v. Powell*, 2 W. Bl. 787, 2 East, P. C. 976.

We do not deem it important to discuss the instructions given or refused, as the opinion sufficiently, we think, states the court's views of the question of law involved. We will state, however, that, while the instructions for the state probably contain no reversible error, we think they should have embodied the idea that if the jury found from the evidence that the deed was made to be used as good, and that there was possibility of another's being made liable or injured thereby, a presumption of fraud necessarily arose from the proof of these facts.

The third ground of the motion for new trial is "that N. F. Lamb was present in the grand-jury room while they were examining this charge." The evidence shows that Mr. Lamb was neither prosecuting attorney nor deputy prosecuting attorney, and that he was not requested by the prosecuting attorney to be present in the grand-jury room, but that he consulted the prosecuting attorney before going into the room, and it seems that he went by the consent of the prosecuting attorney. He testified that he examined the witnesses, and that he said nothing to influence the grand jury in their determination. It is not contended that he was present while the grand jury were deliberating or voting on the charge. Section 2058 of *Sandel's & Hill's Digest* provides that "no person except the prosecuting attorney and the witnesses under examination are permitted to be present, while the grand jury are examining a charge, and no person whatever shall be present while the grand jury are deliberating or voting on a charge." The importance of this provision cannot be overestimated, when we consider that "secrecy of the grand-jury room, and the privacy and impartiality of that inquest," may prevent the presentment of any one "through envy, hatred, or malice."

Rothschild v. State, 7 Tex. App. 519. But Mr. Lamb, while present in the grand-jury room, examining the witnesses, by the consent of the prosecuting attorney, was acting in his stead; and we are of the opinion that, as he was not present when the grand jury were deliberating or voting on the charge, his presence, in the capacity in which he was acting, is not cause for quashing the indictment, especially as it is shown that nothing was said by him to influence the finding of the grand jury.

The seventh ground of the motion for a new trial is "that the court erred in permitting Weaver and Blalock to testify as to acts and declarations of Watkins in appellant's absence, the same not being in furtherance of any common design." That "Watkins procured Weaver to obtain for him two blank forms for a deed" was competent evidence, being the act of a co-conspirator in furtherance of the common design; having occurred after the conspiracy was formed, and before it was ended. But what Watkins told Weaver later in the same day (i. e. that the appellant "had promised to make a deed which would clear him") was incompetent; the appellant not being present when the conversation occurred, and it not being in the furtherance of the common design. The conversation between Watkins and Blalock, in the absence of the defendant, in which the former told the latter that appellant had proposed to make a deed which would arrange the timber trouble, was inadmissible, not having been something done or said in furtherance of the common design to forge the deed. 1 *Greenl. Ev.* 111; 3 *Greenl. Ev.* 94.

The tenth ground of the motion for a new trial is, in substance, that in his argument before the jury the counsel for the state made improper and prejudicial remarks. The remarks of Mr. Lamb, of counsel for the state, in making his argument to the jury, were as follows: "The only relief this county can get from men who will commit forgery, who will go to Harrisburg and commit perjury, and who will commit subornation of perjury, is to send such men as Polk Bennett to the penitentiary. The defendant knows he has committed forgery, and that he committed perjury in swearing that Burns had signed the deed, and that he has committed subornation of perjury." To which remarks the defendant at the time objected, whereupon Attorney Lamb said, "I will say, then, he swore a falsehood at Harrisburg." To which the defendant objected. His objections were overruled, and he excepted. The defendant was not on trial for perjury, or subornation of perjury; and we think the remarks were improper, and might have been prejudicial to the defendant. Whether they are grounds for reversal in this case, we need not decide. *Vaughan v. State*, 58 Ark. 353, 24 S. W. 885; *Holder v. State*, 58 Ark. 473, 25 S. W. 279.

The eleventh ground of the motion for a new trial is "that the taking of a part of the

testimony during the appellant's necessary absence entitled him to a new trial." The record shows that appellant, by the permission of the court, retired to the water closet for about 15 minutes; that he was suffering with flux at the time, which made his retirement and absence for the time necessary; that there was no refusal upon his part to be confronted with the witnesses, as in *Gore v. State*, 52 Ark. 285, 12 S. W. 564; that his retirement and absence were made necessary by his physical condition, and were voluntary only because necessary. In a prosecution for felony, the accused must be present, in person, whenever any substantive step is taken in his case. It is a constitutional right of his to be confronted with the witnesses. In this case, while the defendant was absent, several witnesses (at least three) were examined. The examination of witnesses is an important and substantive step in a criminal prosecution, and it is not required that defendant should show prejudice on account of his absence. *Sneed v. State*, 5 Ark. 432; *Cole v. State*, 10 Ark. 318; *Bearden v. State*, 44 Ark. 331; *Mabry v. State*, 50 Ark. 492, 8 S. W. 823. It was error in this case to proceed, as the court did in the trial of this case, while the defendant was necessarily absent by permission of the court.

We have found it unnecessary to refer to the grounds for new trial, in appellant's motion, which are based on the court's refusal to grant the motion for postponement of the trial, or those tending to that end. For the errors indicated the judgment is reversed, and the cause is remanded for a new trial.

DOXEY v. ROYAL INS. CO.

(Court of Chancery Appeals of Tennessee.
Jan. 28, 1896.)

INSURANCE — PLEADING — REAL AND PERSONAL
PROPERTY — SUIT ON POLICY — AWARD —
CONDITION PRECEDENT.

1. The defense that a suit on an insurance policy is prematurely brought, because there has not been a compliance with certain of its provisions, insisted on as a condition precedent, is properly raised by answer.

2. A policy provided that, if the building insured should be damaged by fire, the assured, if called on, should furnish plans of the building, and that the company reserved the right to repair or rebuild; that, "when personal or other movable property herein described is damaged as the result of fire," an inventory should be made, and the damage determined by mutual agreement, or, in case of disagreement, the same should be "ascertained by a detailed appraisement"; that no suit should be sustainable "until after an award shall have been obtained fixing the amount of such claim in the manner above provided." *Held*, that the provision making an award a condition precedent to a suit did not apply to a building totally destroyed, but only to personal property damaged or destroyed.

Appeal from chancery court, Davidson county; Andrew Allison, Chancellor.

Suit by W. W. Doxey against the Royal Insurance Company, on a policy of fire insur-

ance. From a judgment in favor of defendant, plaintiff appeals. Reversed.

J. J. Turner, for appellant. Baxter & Hutcheson, for appellee.

BARTON, J. This is a suit on an insurance policy, and the question involved is as to the construction, force, and effect of an arbitration clause in the policy. The defendant company insured the complainant in the sum of \$1,000 against loss or damage by fire to his dwelling house, located on his farm in Davidson county, Tenn., by a policy good for three years, issued March 8, 1889. The house insured was totally destroyed by fire in February, 1892, during the life of the policy. The defendant admits its liability, and expresses its willingness to pay the true amount of the damage if the same can be agreed on or properly ascertained; but denies complainant's right to recover in this suit. In the answer of defendant, several clauses of the policy, relating to proof of loss, etc., were insisted on, but not now necessary to mention or discuss, as defendant's counsel frankly, and, as we think, properly, admit these conditions were waived and forfeited by the defendant, and state the only defense now relied on is the failure and refusal of complainant to comply with the terms of the contract between the parties as to an arbitration and award. The clauses which contain the conditions or shed light on those relied on are as follows:

"And the said Royal Insurance Company hereby agree, out of their capital stock and funds, to indemnify and make good unto the said assured, his heirs or assigns, all such immediate loss or damage (not exceeding in amount the sum or sums insured, as above specified, nor the interest of the assured in the property herein described) as shall happen by fire to the property so specified, from the 8th day of March, one thousand eight hundred and eighty-nine, at 12 o'clock noon, to the 8th day of March, one thousand eight hundred and ninety-two, at twelve o'clock noon; the amount of loss or damage to be estimated according to the actual cash value of the property (a suitable allowance being made for depreciation from location, use or otherwise), not exceeding what it could have actually been sold for in cash, nor exceeding the amount for which the assured could replace the same at the time of said loss or damage; such amount to be paid after the loss shall have been ascertained in accordance with the terms and conditions of this policy, and satisfactory proof of the same shall have been made by the assured, and received at the office of the company; provided always, and it is hereby agreed and declared, that the capital stock and funds of the said company shall alone be liable to answer and make good all demands against the said company under or by virtue of this policy, and that no shareholder, proprietor, or member of the said company shall be liable to any such demand,

nor be in any wise charged or chargeable by reason of this policy, beyond the amount unpaid on his or her shares in the said company."

(13) "When personal or other movable property herein described is damaged as the result of fire, the assured shall forthwith cause it to be put in order, assorting and arranging the various articles according to their kinds, separating the damaged from the undamaged, and shall cause an inventory to be made of the whole, and furnish the same to the company, naming the quantity, quality, and cost of each article. The assured shall, if required, remove all worthless debris or remains. The amount of sound value and of the damage shall then be determined by mutual agreement between the company and the assured; or, failing thus to agree, the same shall then be immediately ascertained by a detailed appraisal by competent persons, not interested in the loss as creditors or otherwise, nor related to the assured, one to be appointed by the assured, and one by the company, which two persons shall, in case of disagreement, appoint a third; and their report, rendered in detail in writing, and made under oath, shall be binding on the company and the assured as to the amount of such loss or damage, but shall not decide the legal liability of the company under this policy. One-half of the appraiser's fees shall be paid by the assured."

(17) "The insurance under this policy is made subject to the foregoing conditions, limitations, and requirements, which are hereby made a part hereof; and it is hereby expressly provided that no suit or action against this company for the recovery of any claim under or by virtue of this policy shall be sustainable in any court of law or equity until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the fire shall have occurred; and, should any suit or action have been commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim; any statute of limitation or other law to the contrary notwithstanding."

The proof shows the defendant insisted on the arbitration of the loss under these clauses, and the complainant refused. The defendant now insists that the fixing of the amount of loss in the case is a positive right therein provided for in this policy, and that no suit can be maintained until these provisions are complied with, and that this suit is therefore prematurely brought. On this point the complainant's first insistence is that this defense can only be raised by plea, and is waived by answer. In this we do not concur, but think it properly raised by answer. See *Pigue v. Young*, 85 Tenn. 263, 1 S. W. 889; *Robinson v. Grubb*, 8 Baxt. 19; *Manufacturing Co. v.*

Collier, 91 Tenn. 525, 19 S. W. 672; *Ligon's Adm'r's v. Insurance Co.*, 87 Tenn. 341, 10 S. W. 768.

The question being open for consideration, the plaintiff says the arbitration clause contained in this policy only applies to personal property, and not to buildings, as the property here insured and destroyed was. In this view we concur. It is true the seventeenth clause or provision of the policy provides that "no suit or action against the company for the recovery of any claim under the policy shall be sustainable in any court of law or equity until after an award shall have been made fixing the amount of such claim in the manner above provided"; but this must mean that no suit shall be brought in cases where the arbitration is provided for, and we are therefore driven back to an analysis and study of the thirteenth provision, taken in connection with the other provisions. In the fourteenth provision it is provided that, if the building be destroyed or damaged by fire, the assured, if called on, shall furnish plans and specifications of the building, and that the company reserves the right to repair or rebuild, or replace the property lost or destroyed. But the thirteenth provision (the one insisted on) has no reference in it, by any word or intimation, to real estate or buildings. The beginning of the provision, it will be seen, refers to personal property in these words: "When personal or other movable property herein described is damaged as the result of fire." Following right along after this, every word and clause in the provision seems to refer alone to the case of the destruction of personal property. In the first place, it is made the duty of the assured to assort and arrange the articles of personal property according to their kinds, separating the damaged from the undamaged, and to cause an inventory to be made of the whole, and furnish the same to the company, naming their quantity, quality, and cost of each article. Then the assured is to remove all the useless debris. Then the amount of sound value, evidently referring to the articles of personal property, such as goods, wares, and merchandise, produce, or whatever it may be, shall be ascertained. And then the damage shall be determined, first, by mutual agreement, and, if this cannot be done, the arbitration contended for is to ascertain the damage by a detailed appraisal; and the arbitration committee is to make its report in detail in writing. Now, taken in connection with the inventory, setting aside each article, the making of a detailed appraisal, and a detailed report, could not, as we think, refer to a building which has been totally destroyed; and we think it was clear that it was only intended for the case expressly provided for in the opening words of the section, "when personal property has been damaged or destroyed." So, we are of opinion that the clause insisted on constitutes no defense, and there being no other, the complainant is entitled to recover. While

there is some slight contention as to the value of the property, we are satisfied from the weight of the evidence that the value of the property at the time of its destruction was, at least, \$1,000, if not more, which was the amount of the policy or the amount sued for. The decree of the chancellor will therefore be reversed, and decree will be entered in favor of complainant, against the defendant, for \$1,000, interest and costs.

WILSON, J., concurs.

Affirmed orally by supreme court, March 17, 1896.

STATE ex rel. SYCAMORE MANUF'G CO.
v. TOMLIN et al.

(Court of Chancery Appeals of Tennessee.
March 7, 1896.)

OFFICIAL BONDS—COMPROMISE.

In an action on the bond of a defaulting county trustee, it appeared that the deficit was \$3,800, but that the trustee was entitled to credit for certain warrants issued by his predecessor, and which he had paid under orders of the county court; that by this credit the shortage was reduced to less than \$1,100; that thereupon the county court, by a majority of its members, accepted an offer of the sureties to pay \$1,600 in full settlement of all claims against them. Held that, it being evident that the sureties, under the compromise, paid all legitimate demands against them, it was sufficient to bar any future action.

Appeal from chancery court, Cheatham county; J. S. Gribble, Chancellor.

Bill by the state of Tennessee, on the relation of the Sycamore Manufacturing Company, against M. Tomlin and others. There was a decree dismissing the bill, and complainant appeals. Affirmed.

J. P. Helms, for appellant. R. S. Turner, J. J. Lenox, and A. E. Garner, for appellees.

WILSON, J. The original bill in this case was filed August 11, 1891, in form, by the state of Tennessee, on the relation of the Sycamore Manufacturing Company, in its own right, and for the protection of the rights of the school children and taxpayers of Cheatham county, and also for the protection of Cheatham county, against M. Tomlin and the sureties on his various bonds as trustee of Cheatham county from 1882 to 1888, to recover for his defaults in respect to county and school revenues collected by him in his official capacity, which, it is averred, he failed to account for. The bill sets out the fact of Tomlin's election for four consecutive terms, and the bonds he gave, with the sureties thereon, and then states the amount of county taxes for county and school purposes collected by him, and the sums for each of his terms for which he was a defaulter. It then avers that Tomlin absconded soon after his induction into office under his fourth term, and that the county of Cheatham, through the chairman of its county court, has

filed two bills against him and his bondsmen, for some of his terms, to enforce payment of his defaults. It avers, without going into details, that, pending the litigation of the county against said bondsmen, a compromise was effected or offered, under which the sureties on his bonds were permitted to pay \$1,600 in full satisfaction, and in discharge of all further liability on their part as sureties of said Tomlin. It is alleged in the bill that this compromise was accepted by the county court of Cheatham county, after a full discussion before the justices of the county; the attorneys for the county filing the bills insisting that the county court had no authority to make a compromise, and the bondsmen insisting that it had such authority. It is alleged that the proposition of compromise carried by one majority, and that among the magistrates voting for the compromise were one or more who were on the bonds of said Tomlin. The predicate of the bill is that said compromise was unauthorized, because the county court, being a court of limited and statutory jurisdiction, had no power to make it, and that, as to the school fund, it was a trust fund for the scholastic population of the county, and hence could not be diverted, under the guise of a compromise, from the beneficiaries, to wit, the children of the county. The defendants to this bill filed a demurrer thereto, embracing 17 grounds. It is needless to specify them all in this opinion, and, in the view we take of the facts of the case, it is needless to specify any of them. We may be permitted to say, however, that the demurrer raised, in various forms, the right of this corporation to constitute itself the protector of the county of Cheatham and the rights of the school children, assuming taxes levied for school purposes to be a trust fund for their benefit. The question thus raised is a very grave one, and, were we to take a different view of the facts, would receive our serious consideration. It is sufficient to say that the demurrer was sustained as to the bondsmen of Tomlin for his first and second term, and the demurrer to the effect that Cheatham county was a necessary party was sustained, with leave to complainant to file an amended bill bringing the county before the court. All the other grounds of demurrer were overruled. Thereupon the Sycamore Manufacturing Company filed an amended bill bringing the county before the court, adopting therein the allegations of its original bill. The defendants answered. Therein they set out the compromise entered into between the county and the bondsmen, under the two bills filed by the county to recover in respect to the defaults of the trustee. They averred that said compromise was open and fair, and that thereunder the bondsmen had paid more than the defaulting trustee really owed. The bondsmen go into a full explanation of their connection with Tomlin as his bondsmen, and the action of the county court in accepting said compromise. They state that, pending the litigation of the county

against them, it appointed a committee to investigate the books of Tomlin and ascertain the amount of his defaults, and that said committee reported that said defaults, in respect to the county and school taxes, amounted to \$3,853.04. Defendants say: This report charged M. Tomlin with all his aggregates, and credited him only with school warrants which issued under Tomlin's administration, when, in point of fact, Tomlin succeeded R. Weakley, as trustee, who was a defaulter. That the county court ordered Tomlin, at the January term, 1883, to pay off all outstanding school warrants, and that Tomlin did pay off \$2,478.48 of A. Weakley's warrants by June 19, 1883, and one or two other small school expenses contracted under Weakley's administration; and, if the defendant bondsmen of Tomlin were given credit for the warrants issued under Weakley's administration, paid by Tomlin, the real balance due from Tomlin would be only \$1,065.56. They aver that, before the bills were filed by the county, they saw the chairman of the county court, and told him that they were ready to investigate the books of Tomlin, in connection with him, and pay every dollar owed by Tomlin, and that the chairman referred them to his attorney; that when they saw the attorney, he said he had good bonds, and would follow the law; that when the report of the committee of the county court was made to the county court, or to the justices in quarterly session, they appeared and stated that they were willing to pay every dollar without further litigation, and presented the fact of these Weakley warrants paid by Tomlin, and that thereupon the oldest magistrate in the county moved, or made a motion, that if the sureties would pay \$1,600 in full settlement of all demands against them, it should be accepted by the county; that his motion prevailed, and the sureties did pay the \$1,600 to the chairman of the county court, and took his receipt therefor, in full of all claims against them as bondsmen of said Tomlin; that thereafter amended answers were filed by them to the bills of the county, pending in the chancery court, setting up the fact of said compromise, and their payment of the \$1,600; and thereupon the chancellor, reciting said compromise, dismissed the bills, and under the terms of the compromise they had paid all the costs of that litigation. It should have been stated that the county demurred to the bill, when it was brought before the court under the amended bill of complainant, which demurrer was overruled, and thereupon it answered, setting out all the facts, and stating that the compromise made with the county court was a fair and honest one; that the county court had the power and authority to make it; that it was made without fraud, misrepresentation, or concealment of any material fact; and that the chancery court had no right to review it or set it aside. Proof was adduced under the issues made by the pleadings, and the cause was heard by Chan-

cellor Gribble September 11, 1894. He held that all the equities of the bill were met by the answers of the defendants, and were not sustained by the proof, and thereupon dismissed the bill, with costs. Complainant appealed, and has assigned various errors.

It is needless, under our view of the case, to set out in detail these assignments. As before stated, were it necessary, under our view of the facts, it would be a grave question whether the complainant corporation could maintain this bill at all in the form in which it is presented. It is also a grave question whether or not the county court, under the facts of this case, did not have the authority and power to make the compromise it did with the bondsmen of Tomlin. But, pretermittting all discussion of these legal questions, it is sufficient to say that, in our view of the evidence, these defendants in said compromise made a fair and just settlement of all their liabilities as bondsmen of said Tomlin. It is true the deposition of Mr. Cain, an expert, was taken in the cause. He seems to be an accomplished accountant, and to have gone over the papers, books, and other data indicating the defaults of Tomlin during his various terms. The results reached by him are predicated upon dealing with taxes, aggregates, and tax collections, upon the basis of fiscal years, running from June 30th to the 1st of July in consecutive years. We are not satisfied that such a method reached the truth in this case. We are satisfied, from the evidence in this record, that these defendants, in their settlement and compromise with the county court, substantially and fully satisfied all legitimate demands against them as bondsmen of said trustee. This controlling fact, independently of questions of law, settles the controversy. Thus holding, the decree of the chancellor in its results is absolutely correct, and therefore it is affirmed, with costs.

NEIL, J., concurs.

Affirmed orally by supreme court, March 13, 1896.

HERNDON v. LEWIS et al.

(Court of Chancery Appeals of Tennessee.
Jan 7, 1896.)

VENDOR AND PURCHASER—FRAUDULENT CONCEALMENT OF DEFECTS IN TITLE—LIMITATIONS.

1. A fraudulent concealment of the cause of action on the part of a defendant will prevent the running of limitations in his favor, in equity.

2. A knowingly false representation by a vendor, reputed to be a man of veracity, that he has absolute title to land which lies in another county, is a fraudulent concealment that will prevent him from pleading limitations to an equitable suit by the vendee after discovering the fraud, though the latter, had he searched the records of the county in which the property was located, could have ascertained that his vendor held only a life interest.

Appeal from chancery court, Montgomery county; Charles W. Tyler, Chancellor.

Bill by Thomas Herndon against Thomas W. Lewis and others for breach of covenants in a deed. A demurrer to the bill was sustained as to J. M. Lewis, one of the defendants, and from a decree for complainant against the other defendants they appeal. Affirmed.

R. H. Burney, for appellants. W. M. Daniel and John F. House, for appellee.

WILSON, J. The bill in this cause was filed in September, 1893, against Thomas W. and J. M. Lewis, citizens of Stewart county, and A. R. Gholson, a citizen of Montgomery county. T. W. Lewis made a general assignment for the benefit of his creditors in 1892, and Mr. Gholson is made a party as his assignee. The facts averred in the bill, constituting the gravamen of the suit, are these: In 1886 T. W. Lewis, for the consideration of \$8,000, sold complainant a tract of 400 acres of land in Stewart county. By his deed he covenanted to convey title in fee simple. This land was devised to T. W. and J. M. Lewis by their father for life. Previous to his sale of the land to complainant, T. W. Lewis purchased from his brother, J. M. Lewis, the interest of the latter in the land, taking from him a deed conveying an absolute title. More than six years having elapsed from the execution of the deed by T. W. Lewis, the bill avers that said Lewis represented that he had a perfect title, and that he had perpetrated a fraud upon the complainant by the suppression of the truth, and that he had not discovered the fraud until a short time before this suit was commenced. The object of the bill was to rescind the contract of purchase, and recover back the purchase money, by having a decree therefor, and its satisfaction by a sale of the life estate of T. W. Lewis in the land, and by a decree sharing in the distribution of the fund arising under the assignment to Gholson. There was a demurrer to the bill, which was sustained as to J. M. Lewis. T. W. Lewis and his assignee answer, interposing the plea of the statute of limitations, and denying that any fraud was perpetrated upon the complainant, or that his vendor had concealed the state of the title to the land. The suit is therefore for a breach of the covenants of the deed of Lewis to the complainant. The defense is the statute of limitations of six years. The reply thereto, by anticipation, in the bill, is defect in the title, fraudulently concealed, in contemplation of equity, and the prompt bringing of this suit upon its discovery. Evidence was adduced bearing upon the essential issue, by both parties. The chancellor heard the cause June 11, 1895, and decreed, in substance: First. That the defendant Lewis sold the land in question to complainant, representing that he had an absolute title, and by deed with covenants of seisin and warranty, when, as a matter of fact, he had only a life estate. Second. That the defendant knew at the time he

made the sale that he had only a life estate. Third. That the complainant had the right to rely upon the representations of the defendant with respect to his title. Fourth. That the complainant is not chargeable with such negligence or carelessness as deprives him of his right to relief in equity because he failed to go to another county and examine the records to ascertain the state of his vendor's title before closing the trade, inasmuch as he brought suit in a month after discovering that the representations of the defendant as to his title were untrue. Fifth. That the statute of limitations did not begin to run until the fraud perpetrated was discovered by the complainant. Sixth. He gave a decree for the difference between the value of the life estate owned by the defendant, and the absolute estate he sold, to wit, \$3,500, that being the difference agreed upon by the parties. To reverse this decree the defendants carried the case to the supreme court.

Two errors are assigned: First. "The chancellor was in error in holding that the cause of action was fraudulently concealed, within the sense of the law, in this case." Second. "As a matter of law, a concealment of a cause of action in a case of this kind does not prevent the running of the statute, and the holding of the chancellor to the contrary was erroneous." The court has had the benefit of able and exhaustive briefs and arguments from counsel of the contestants. They have collated the evidence, and arrayed the authorities, in support of their respective contentions. If we go amiss in reaching a correct conclusion it will not be the result of inattention of counsel in presenting the facts or the authorities; nor, in our opinion, will it result from any uncertainty as to the law. The difficulty in the case, as we see it, is in the application of well-established principles and rules of courts of equity to its facts.

We find the following facts: (1) Defendant sold complainant a tract of land situated in Stewart county, representing that his title thereto was absolute, when he had only a life estate in it. (2) He knew before and at the time he made the sale and executed the deed with covenants of seisin and warranty, conveying an estate in fee simple, that he held only a life estate in the land. (3) His title to the land passed to him under the will of his father, and this will, limiting his estate in the land to one for life, was a matter of record in Stewart county when the sale was made to complainant, and had been for some years. (4) Complainant lived in Montgomery county, but was occasionally at Dover, the county seat of Stewart county, where this will was of record. (5) He never examined the records of Stewart county to ascertain the character or extent of the title of his vendor, but relied upon the clear representations made by him that he had an indefeasible title. (6) If he had examined the records of Stewart county, and read the will, it would have disclosed to him the limitation of the estate in

his vendor to be one for life. (7) Lewis, at and before the sale, was reputed to be a man of means, and stood well in the community for integrity and veracity. (8) The sale was made to Herndon, and the deed executed in Clarksville, Montgomery county. (9) Complainant never suspected that his title obtained by the deed of defendant was defective, nor discovered, as a matter of fact, that the covenants in the deed executed to him had been breached, until about a month before he brought this suit.

It is conceded that the covenants of this deed were broken as soon as it was executed, and that a right of action then existed for the breach. It is also conceded that more than six years had elapsed before suit brought. This being so, it is conceded that the statute of limitations of six years, pleaded in the answer, constitutes a perfect defense, unless there is in the cause some legal obstacle to its operation. The insistence of the complainant is that the defense of the statute interposed is inoperative, because there was a fraudulent concealment of his right of action, or the defect necessitating its enforcement in the courts. The reply to this, on the part of defendant, is twofold. First, that there was no fraudulent concealment, in the sense of the law in respect to the title to the land sold; second, that, if there was, it does not, in this character of case, stop the operation of the statute.

In support of his second contention just stated, counsel for defendant cites numerous authorities. We have examined all of them to which we have had access. We cannot accede to the proposition that, if there was a fraudulent concealment of the cause of action in this case, the statute of limitations would nevertheless operate as a bar to this suit. The Tennessee cases cited do not, as we understand them, sustain it. Most of them are arrayed in the able opinions of Judge Lurton in *Hughes v. Brown*, 88 Tenn. 578, 13 S. W. 286, and in *Alvis v. Oglesby*, 87 Tenn. 172, 10 S. W. 313. The writer of this was of counsel for Oglesby in the case *supra*, in which the statute of limitations was applied in his favor. The learned judge, in the opinion, held it to be a well-settled rule in courts of equity that the statutes of limitation are applicable in every case in equity, when the trust is not a technical one, of which courts of equity alone take cognizance. Upon this premise, the conclusion reached by him was logical and irresistible,—that a suit in equity by a distributee against the personal representative, for an accounting, or a devastavit, or distributive share, whether brought technically on his bond or otherwise, is barred, under section 2776, Code 1858, within 10 years after the cause of action has accrued, unless the distributee was within the saving clause of the section, inasmuch as our legislation had conferred jurisdiction upon our county and circuit courts, concurrent with that of the chancery court, to entertain such a suit.

This holding, in principle, was not in conflict with previous decisions; for although, at an early date, our court held that our statute of limitations prescribing that certain forms of action shall be brought within the specified time did not, in terms, apply to courts of equity, they nevertheless held that courts of equity were bound equally with courts of law where there was a remedy at law. *Hickman's Lessee v. Galther*, 2 Yerg. 200; *Armstrong's Heirs v. Campbell*, 3 Yerg. 232; *Haynie v. Hall's Ex'r*, 5 Humph. 291; and other cases. So this holding, also, involved, or carried in its scope, the statement or proposition that our legislation embodied in the Code changed our statutes of limitation so that they operated upon the cause, and not upon the form of action. But we do not understand that Judge Lurton, in either of these cases, advanced the proposition or announced the principle that this legislation had overthrown the doctrine that a court of equity would repel the operation of the statute, where it was interposed in a case in which the cause of action had been fraudulently concealed until it was completed. This question was not before him, but he nevertheless did say, by implication, that delay superinduced by fraud and concealment would furnish an excuse, in reason, for not bringing the suit. *Alvis v. Oglesby*, 87 Tenn. 181, 10 S. W. 313. There is no conflict in the authorities, that a fraudulent concealment of the cause of action on the part of a defendant will prevent the operation of the statute of limitations in his favor, when sued in a court of equity. As said by the supreme court of the United States at an early day, "In a case of actual fraud, we believe no case can be found in the books in which a court of equity has refused to give relief in the lifetime of either of the parties upon whom the fraud is proved." *Michoud v. Girod*, 4 How. 503. The rule is that, in a case of concealed fraud, time will not run in favor of the defendant until the discovery of the fraud, or until, with reasonable diligence, it might have been discovered. *Peck v. Bullard*, 2 Humph. 41; *Kirby v. Railroad Co.*, 120 U. S. 130, 7 Sup. Ct. 430; *Bailey v. Glover*, 21 Wall. 342; *Haywood v. Marsh*, 6 Yerg. 69; *Vance v. Mottley*, 92 Tenn. 310, 21 S. W. 593. Numerous additional cases might be cited from this and other states. As said by a learned federal judge, "This principle is too well settled to require the citation of authorities." *Johnston v. Roe*, 1 Fed. 692. But a statement of the principle, and a pretty full collation of the authorities, will be found in 13 Am. & Eng. Enc. Law, pp. 680, 682, and notes. The conflict in the courts has not been over the rule that in courts of equity a fraudulent concealment of the cause of action will prevent the operation of the statute, but whether the rule should be enforced by courts of law. A number of cases illustrating this conflict are collated in a note to the leading case of *Snodgrass v. Bank*, 25 Ala. 161, 60 Am. Dec. 505

et seq. The numerical weight of authority, if not the weight of reason, sustains the application of the rule in courts of law. The supreme court of Tennessee, however, at an early day, when the remedies and relief, as well as the forms of procedure, in operation and enforced in courts of equity and in courts of law, were more sharply defined than now, announced that the rule was applicable alone in equity. *Cocke v. McGinnis*, Mart. & Y. 361; *Reeves v. Dougherty*, 7 Yerg. 233; *Armstrong's Heirs v. Campbell*, 3 Yerg. 202; *Peak v. Buck*, 3 Baxt. 71. And it was held by an eminent jurist that, where courts of law and equity had concurrent jurisdiction of a subject, equity would give relief when fraud concealed the cause of action. *Sherwood v. Sutton*, 5 Mason, 143, Fed. Cas. No. 12,782. The courts are in apparent conflict as to what conduct, representations, or silent omissions to speak out, will make out such a cause of fraudulent concealment of the cause of action as the court will accept as an excuse for the delay in bringing suit. And the difficulty in this case is found at this point. The concealment that will repel the plea of the statute cannot be compressed in a categorical definition. Like "fraud," "negligence," "care," and other general terms used in the generalization of jurisprudence, its operative effect in deceiving and lulling the party affected by it must be determined by the particular facts and circumstances appearing in each case. General rules can be established, and it is for the courts to apply them to the particular facts of the case before them, so that substantial and practical justice will be enforced. These general rules, thus applied, imply that cognizance will be taken of the relations of the parties dealing with each other, and of the customs and habits of the people, and the ordinary course of business prevailing among them, in reference to the subject-matter of the contract. While courts have refused to lay down an iron rule as to what is or what is not fraud, in every case, they have said that certain conduct or representations amounted, or did not amount, to fraud, under the facts of the cases before them. An examination of these cases will aid us in reaching a correct conclusion in this case.

Our court, as early as 1815, at Carthage, laid down the principle that, "in all cases of contract, any representation of a falsehood, or concealment of a truth, which, if correctly known, would probably be a reason for making the terms of the contract different, will be a good ground for rescinding the agreement in a court of equity." "Equity," says this pioneer of our jurisprudence, "delights in doing justice. It delights in compelling men, by means of an appeal to the conscience, to do those things which ought to be done. To effect so desirable an object, strict regard must be had, that no one is permitted to enjoy property which has been procured through means of an unreal appearance of things, more particularly if that appearance is the re-

sult of the fraudulent machinations of the person who seeks to be availed of it." *White v. Flora*, 2 Overt, 426. This principle has been repeatedly approved since in this state. *Donelson v. Weakley*, 3 Yerg. 196; *State v. Jefferson Turnpike Co.*, 3 Humph. 305; *Mullins v. Jones*, 1 Head, 517; *Phillips v. Hollister*, 2 Cold. 269; *Lewis v. McLemore*, 10 Yerg. 206, 209; *Merriwether v. Larmon*, 3 Sneed, 448. So, also, it is settled law in this state that if a misrepresentation be made as to a material fact, and the other party is induced to act upon it to his injury, equity will afford relief, although the party, in making the representation, was laboring under a mistake in regard to the matter. Authorities supra. In *Galloway v. Bradshaw* it was held that where the vendor represented that his title to a whole tract was good, with a knowledge that his representation was untrue, such representation would constitute fraud, and, on that ground, vitiate the sale. 5 Sneed, 70, 72. And in such case the party had his election to annul the trade, or to have a deduction in the price agreed to be given, to the extent the title failed. 5 Sneed, 70, supra; *Wood v. Mason*, 2 Cold. 253; *Mullins v. Aiken*, 2 Helsk. 543; *McClure v. Harris*, 7 Helsk. 385. So it seems to have been held in the early case of *Napier v. Elam*, 6 Yerg. 108, that where a purchaser of land is induced to make the purchase by fraud, and takes title with or without covenants of seisin, he is entitled to a rescission, and that the concealment of prior incumbrances on the land would be a fraud, although the incumbrances were registered. The principle has been announced in numerous cases in this state that the confidence between vendor and vendee, where there are serious defects in the title of the vendor, and he knows it, requires that the defects should be stated by the vendor to the vendee, and that the suppression of them amounts to fraud. *Ingram v. Morgan*, 4 Humph. 66, 67. This case is somewhat analogous in its main features to this. In accord with, and citing it, are the following cases: *Woods v. North*, 6 Humph. 312; *Goodloe v. White's Adm'r*, 9 Humph. 533; *Barnett v. Clark*, 5 Sneed, 437; *Young v. Butler*, 1 Head, 649; *Baird v. Goodrich*, 5 Helsk. 24. The opinion in the case of *Woods v. North*, supra, was delivered by that master in our equity law, Judge Green. The facts of the case are similar in many respects to those appearing in this. In that case, North, one of the executors of the will of his father, at a sale of other property belonging to the estate, offered for sale the tract of land in controversy; representing that, as executor, he had a right to sell and convey the same. The complainant became the purchaser, and North, as executor, executed to him a deed with covenants that he was seised, and had a good right, as executor, to convey. The will of his father conferred no power upon the executors to sell, and hence his deed vested no title in the complainant. The pur-

chaser filed a bill to set aside his contract of purchase. Before the cause was heard, there was a decree for the sale of the land of the testator of North for partition among heirs. At the sale thereof under this proceeding, North, the defendant, became the purchaser, and, in the pending case, offered, in his individual capacity, to make a good title to the complainant. The chancellor decreed a rescission of the contract, and North appealed. Judge Green held that there was no error in the decree for rescission, saying: "The very proposition to sell the land as executor was a species of fraud. Persons who go to a public sale of a deceased person's estate are not in the habit of scrutinizing the provisions of the will to judge of the extent of the executor's power. They take it for granted he has a good right to sell all the property he offers to the bidders. When he thus offers the property for sale, it is a representation that he has a right to sell; and by reason of his situation he gains the confidence of bidders, who are deceived thereby, if he have no power to make the sale. Whether he intends corruptly to defraud the purchaser or not, the effect is the same. The bidder is deceived by the false representation, and ought to be relieved."

In this case the simple, plain facts are that the defendant Lewis, at the time he sold this land to complainant, was reputed to be in good circumstances. He had the standing of a gentleman, and was regarded as a gentleman of veracity and integrity by his neighbors and by complainant. He and complainant had, on one or more occasions before the sale, talked about this land; and complainant had expressed a desire to buy it, as it adjoined a tract of land he already owned, and he wanted it to attach it to the land he owned, and make a stock farm out of them. Defendant Lewis met complainant in the Tobacco Exchange in Clarksville, and mentioned the land; telling him that another party wanted it, and that he had better buy it if he desired to get it. Defendant was asked his price, and he said \$8,000, telling the complainant that he had a good and indefeasible title. Complainant promptly accepted his terms, and the trade was consummated and the deed executed. That complainant relied upon the assurances of the defendant that he had a perfect title is beyond dispute, in the light of this record. That defendant did not have such a title, and knew it at the time he made the representation, is equally clear to our minds from the record. Under this state of facts, the able counsel for appellant insists that complainant had no right to rely upon the representation of Lewis, and that business prudence would have dictated to him to examine the records of Stewart county, where the land was, and if he had the extent of the title of Lewis would have been revealed to him. In this connection, the insistence of counsel for Lewis is that mere silence, or the mere misrepresentation of facts, is not sufficient, but there must be some

suppression of evidence, fraudulently made, by a trick, artifice, or contrivance, intended to allay suspicion and prevent inquiry, in order to avoid the operation of the statute, especially where there is no fiduciary relation. In support of this position he cites *Wood v. Carpenter*, 101 U. S. 135; *Bailey v. Glover*, 21 Wall. 347; *Upton v. McLaughlin*, 105 U. S. 640; *Norris v. Haggin*, 136 U. S. 386, 10 Sup. Ct. 942; *McKown v. Whitmore*, 31 Me. 448; *Rouse v. Southard*, 39 Me. 404; *Peck v. Bullard*, 2 Humph. 41; *Haynie v. Hall's Ex'r*, 5 Humph. 290; *McLain v. Ferrell*, 1 Swan, 48. We have examined all these cases. The language of the opinions delivered in them must be read in reference to the facts appearing in them. Upon their facts, they are not determinative of this case, one way or the other. Underlying all these cases holding that the statute was operative, it was held either that there was no concealment of the cause of action, or that the party seeking to avoid the statute was guilty of some negligence, or failure to investigate, when the circumstances surrounding the transaction should have excited his suspicion. We have seen no better or clearer statement of what constitutes a fraudulent concealment than is found in the text of an eminent author. "Whenever," says he, "the vendor occupies an established fiduciary relation towards the buyer, independent of the contract, a full disclosure is demanded. Any suppression or silence as to material facts which would in any degree tend to prevent the sale is clearly a fraudulent concealment. The utmost good faith and openness is required of vendors occupying such relations. Equity and law will go further than this. Not only where the vendor thus occupies a fiduciary position towards the purchaser, independently of the sale, but also where, in the very contract of sale itself, or in the negotiations preliminary to it, the purchaser expressly reposes a trust and confidence in the vendor, and where, from the very circumstances of that transaction, or from the acts or relations of the parties in connection with it, such a trust and confidence reposed by the purchaser is necessarily implied in the contract of sale, it is the duty of the vendor to make a like disclosure, and his failure to do so is a fraudulent concealment." 2 Pom. Eq. Jur. § 904. See note 2 for cases illustrating the principle when the confidence or trust reposed must be inferred from the trade itself, and its circumstances. This case does not rest upon a mere failure to disclose. The vendor asserted his title to be perfect, when he knew it was not. Under our authorities, this was fraud. The question is, was his fraud concealed, in the sense of the law? The argument of counsel of appellant is that his client must have resorted to some trick or device to prevent investigation on the part of his vendee. In other words, it is insisted that it was the duty of the purchaser, notwithstanding the positive and clear assertion of

the possession of a good title by the vendor, to use some affirmative means to discover the falsehood of the vendor, and that if he does not he is negligent, and there is no fraudulent concealment. We cannot assent to this proposition, in the unqualified sense in which it is stated. We do not dispute the rule, in its proper application, that the means of knowledge is equivalent to knowledge. But all fraud might be discovered, if all means of knowledge were used. If a purchaser of land, after a positive assertion by his vendor, reputed and believed to be a gentleman of integrity and veracity, that his title is good and indefeasible, institutes an inquiry for himself, and the means of obtaining the truth are open to him, he must pursue his inquiry with proper diligence, and in such case he is properly chargeable with what he could have discovered. But we deny the soundness of the doctrine that one gentleman is guilty of censurable negligence or laches in believing in the truth of an assertion made by another, with whom he is trading, relative to the title of property he is purchasing. Nor will his belief in its truth, acted on and relied on without investigation, relieve the other from all the consequences of his fraud, if his assertion as to his title be knowingly false. 2 Pom. Eq. Jur. § 918, and note. Unless there is something, or some circumstance or incident connected with the trade, calculated to arouse a suspicion and put one on inquiry, gentlemen dealing with each other have the right to rely upon the clear assertions of fact made the one to the other relative to the subject-matter of their trade. To hold otherwise would be a reproach to our jurisprudence, and the rule involved in such holding would be destructive of that confidence between man and man which a sound equity ought to delight to protect with all available safeguards. We see no error in the decree of the chancellor, and it is affirmed, with costs.

NEIL and BARTON, JJ., concur.

Affirmed orally by supreme court, March 5, 1896.

HARDING et al. v. MONTAGUE et al.

(Court of Chancery Appeals of Tennessee.
Feb. 1, 1896.)

ESTOPPEL—TITLE TO REAL ESTATE—INNOCENT PURCHASER.

A conveyance of property was made to a man and his "wife, Anna." At the time, he was a widower, his deceased wife's name having been Anna. A few days after the conveyance, he again married, the name of his second wife also being Anna, and from that time they occupied the property together. In litigation growing out of the conveyance, the wife was made a party, and treated by all parties, including her husband, as being one of the grantees, was supposed to be such by their attorney, and by the final decree was adjudged to be a joint owner of the property. *Held*, that, as

against her grantee, who bought after the death of her husband, in reliance upon the title shown by an abstract, and the opinion of the attorney, the heirs of her husband were estopped to claim title to the property.

Appeal from chancery court, Davidsou county; A. J. Cartwright. Special Chancellor.

Bill filed by Harry Harding and others against Frank Montague and others. Decree for complainants, and a number of the defendants, heirs of Caroline Jacobus, appeal. Reversed.

John P. Helms, for appellants. A. G. Merritt and John D. Brien, for appellees.

NEIL, J. This is a suit brought by the heirs at law of one Jordan Bransford, to recover a lot in the city of Nashville. A portion of this lot was, at the beginning of the litigation, in the possession of the defendants Frank Montague and Eliza Montague, claiming as heirs at law of Anna Bransford, the wife of Jordan Bransford. Against these defendants there was a decree below, and they have not appealed. Another portion of the lot was, at the beginning of the suit, in the possession of Caroline Jacobus, and is now in possession of her heirs at law, she having died pending the litigation. They claim under a conveyance made by said Anna Bransford to the said Caroline Jacobus. There was also a decree rendered below against these defendants, and they have appealed, and assigned errors upon the action of the chancellor.

The facts are as follows: February 24, 1874, Jordan Bransford intermarried with Anna White, and they lived together as husband and wife until her death, on the 23d day of December, 1880. On the 24th day of November, 1881, Jordan Bransford married another woman of the name of Anna,—one Anna Hughes. All the litigation has arisen from this fact, that Jordan Bransford had two wives, each of the name Anna. Between the date of the death of the wife Anna White, and the marriage with the wife Anna Hughes,—that is to say, on the 3d day of November, 1881,—a deed to the lot in controversy was executed to "Jordan Bransford and his wife, Anna," by the trustees of the Mount Zion Baptist Church. From the date of Jordan Bransford's marriage with his last wife, until his death, on the — day of January, 1890, they occupied the property together; and, after the death of said Jordan, his widow occupied the lot, as an entirety, until September 16, 1890, when she conveyed to Caroline Jacobus the portion of said lot which is now sought to be recovered from her children. She continued to live on the remaining portion of said original lot until her death, on the 3d of April, 1893. The bill was filed June 27, 1893. Mrs. Jacobus paid Anna Bransford \$175 for the portion of the lot which she purchased, and all but \$60 of this

money was used by said Anna in paying taxes upon the property and counsel fees incurred by her and her husband in defense of the property, a subject which will be hereafter more particularly referred to. Mrs. Jacobus, shortly after her purchase, caused to be erected upon her lot a nice brick cottage, at an expense of \$1,300 to \$1,400.

Complainants base their claims to this property upon the strict technical ground that at the time the deed was made to "Jordan Bransford and his wife, Anna," there was no "wife Anna," and hence the deed was merely to Jordan Bransford, and that, he having died, they are entitled to it as heirs at law; they being in fact the only heirs at law of Jordan Bransford. The defendants rely upon the defense of innocent purchaser and estoppel. The facts applicable to this particular aspect of the case are as follows: As before stated, the deed was made November 3, 1881, to Jordan Bransford and wife, Anna; and Jordan Bransford and the woman Anna who became his wife November 24, 1881, began to occupy the land together immediately upon the marriage, and continued to occupy it for the length of time before stated. February 14, 1888, a bill was filed in the chancery court of Davidson county against said Jordan Bransford and his wife, Anna, concerning said property; the style of the case being "J. W. Boyd et al. v. Jordan Bransford and Wife." The purpose of this suit was to declare the deed to the property now in controversy, which had been made to Jordan Bransford and wife, Anna, void, because of the want of authority in the trustees and officers of Mount Zion Baptist Church to make the deed. The deed was declared invalid by the chancery court, but, upon appeal to the supreme court, this decree was reversed, and the defendants to that suit, Jordan Bransford and his wife, Anna, were decreed to be the owners of the property; the said wife so decreed to be the owner along with said Jordan being his last wife, formerly Anna Hughes, and who subsequently became the vendor of the defendant Jacobus. The said Jordan Bransford died the day after this decree was pronounced by the supreme court, and it was actually entered upon the minutes the day after his death. The said Anna was made a defendant to the bill, and proceeded against as a party in interest, and so treated by her husband during the litigation. Upon this subject, we quote from the deposition of Mr. Helm, who was the solicitor of Jordan Bransford and wife in that case. He says: "They were both impleaded as owners of said property in said suit of J. W. Boyd and others, aforesaid; and the supreme court, by its decree, affirmed their claims of ownership; and I had never heard a whisper of the state of facts now claimed to have existed, that there was another Anna Bransford, who had died before the making of said deed of the

church to Bransford and wife, Anna. Jordan Bransford and wife, Anna, who were both at my office frequently, consulting about their defense to said Boyd suit aforesaid, never even as much as intimated such a thing." After Jordan Bransford died, and negotiations for a sale of the property arose between Anna Bransford and Mrs. Jacobus, or the husband of Mrs. Jacobus acting for her, Mr. Jacobus procured from an abstract company in the city of Nashville a regular abstract of the title. In this abstract appeared proper references to the decrees in the Boyd suit, and particularly the decree of the supreme court, which contained the following language, as shown by said abstract: "* * * That, in the decree of the court below, there is error, and the same is reversed, and complainant's bill dismissed, at their costs both in this court and the court below; and the cause will be remanded to the chancery court, to the end that the receiver may pass his accounts, and be discharged, and the defendants may have a writ of possession if desired, to place them in possession of their said property in question in this cause." Mr. Helm, speaking of this abstract, says: "Jacobus brought to me an abstract to the title of said property, which I examined, and found the title clear and unincumbered, and so reported to Mr. Jacobus, and upon this opinion Jacobus closed the trade; and I wrote the deed, which Anna Bransford duly executed October 23, 1890 (same Exhibit A to answer herein), and Jacobus then paid over the purchase money all in cash, \$175. * * * The said Anna Bransford claimed to be seised in fee of said property at the time she sold to Jacobus; and I, as the attorney for her and her husband in said suit aforesaid, was clearly of the opinion that she was so seised, and that her title was perfect to said property, and that she had a perfect right to sell and convey same; and I so advised Mr. Jacobus, defendant in this case, and he relied upon my opinion as to the title exclusively in making the purchase." From this recital of facts by Mr. Helm, which we adopt as true, there can be no doubt that Jacobus bought in the full belief that the last wife of Jordan Bransford (Anna Hughes) was the wife "Anna" intended in the deed, and that she was so held out to the public by Jordan Bransford. There can be no doubt that the Boyd litigation was conducted all through upon that idea, and as little doubt that this was done with the sanction and active participation of Jordan Bransford himself. Under such circumstances, he would be estopped to assert the contrary as against any one dealing in the property on the assumption of the truth of the fact. He being estopped, his heirs would also be estopped. This case falls within the principle of the following cases: *Howard v. Massengale*, 13 Lea, 577; *Kerbough v. Vance*, 6 Baxt. 110, 114; *Nelson v. Claybrooke*, 4 Lea, 637. The

result is, the chancellor's decree is reversed, and complainant's bill, as to the Jacobus defendants, dismissed, with costs.

BARTON and WILSON, JJ. concur.

Affirmed orally by supreme court, March 7, 1896.

AMERICAN NAT. BANK v. NASHVILLE WAREHOUSE & ELEVATOR CO.

(Court of Chancery Appeals of Tennessee.
March 4, 1896.)

CORPORATIONS—TRANSFER OF STOCK—TITLE TO DIVIDENDS—SET-OFF—PARTNERSHIP DEBTS—EQU. TABLE SET-OFF.

1. Where the by-laws of a corporation provided that the stock should be transferable only on the books of the company, such provision was for the protection of the company only, in payment of dividends, etc., and did not entitle the corporation to set off the dividends due a stockholder in payment of a debt due the corporation where it had actual notice of the transfer of the stock.

2. A corporation may not apply the dividends due to an individual stockholder to the payment of a debt due to the corporation from a partnership of which the stockholder is a member.

3. Equitable set-off cannot be pleaded by way of answer, but the relief must be invoked by original bill or by cross bill.

Appeal from chancery court, Davidson county; Thomas H. Malone, Chancellor.

Bill by the American National Bank against the Nashville Warehouse & Elevator Company. There was a decree for complainant, and defendant appeals. Affirmed.

Vertrees & Vertrees, for appellant. J. M. Gant and J. S. Pilcher, for appellee.

NEIL, J. This bill is filed by the complainant to collect a dividend declared by the defendant company upon certain stock standing in the name of L. H. Lanier, Jr., at the date of the declaration of the dividend, on the books of the company, while the certificates had been in fact transferred by indorsement and delivery thereof to the complainant. The defense is set-off for a debt alleged to be due from a firm of which said Lanier was a member to the defendant company. The firm from which this indebtedness is claimed was the firm of Lanier & Burnett. The chancellor decreed in favor of the complainant, and the defendant has filed the record for error, and assigned errors.

The facts are as follows: L. H. Lanier was the holder and owner of 63 shares of \$100 each (\$6,300) in the Nashville Warehouse & Elevator Company. These shares had been owned by him, and had stood in his name on the books of the company from 1882 until the 5th day of July, 1892. On that day he borrowed from the complainant \$8,200, executing his note therefor, payable on demand. At the same time, and in consideration of such loan, he indorsed said stock certificates to the

complainant bank as security upon said loan, and delivered the said certificates, so indorsed, to the complainant at the time. No transfer, however, was made upon the books of the defendant company until the 14th day of November, 1893. On that day the complainant bank presented the certificates, duly indorsed, and the shares were then transferred to it. The by-laws of the company provide that the stock of the company shall be divided into shares of \$100 each, and that they shall be assignable and transferable only on the books of the company. The defendant company had no knowledge of the transfer of the stock certificates to the complainant until November 14, 1893, nor did the complainant company have any knowledge of the before-mentioned by-law. The dividend in question was declared July 8, 1893, and amounted to \$441, and was payable in 90 days from July 8, 1893; and, according to the declaration of said dividend, notes were to be given therefor to all the shareholders, payable in 90 days. When this dividend was declared,—that is, on July 8, 1893,—the said firm of Lanier & Burnett owed the defendant more than \$600, money which they had contracted to pay to the defendant on the lease of certain property; and on the 14th day of November, 1893, this indebtedness had grown to \$1,382. On the date last mentioned the complainant presented to the defendant an order for said dividend, addressed to the defendant's superintendent, Mr. McCarthy, as follows: "Dear Sir: You will please pay to the American National Bank div. on stock standing in my name on the books of your company. The bank will call on you to transfer the stock to it, which please do, as it has been held by them as collateral for a long time, and is properly indorsed by me. Yours, truly, L. H. Lanier, Jr." The only dividend then standing in Lanier's name on the books of the company was the one declared July 8, 1893. No note had been given to Mr. Lanier for this dividend, although notes for their respective dividends had been issued to all the other stockholders. The facts attending this failure to issue a note to Mr. Lanier are that at the monthly meeting of the directors of the defendant company on August 15, 1893, Mr. McCarthy, its superintendent, reported that all the notes for the dividend of July 8, 1893, had been delivered, except the note to Mr. Lanier, and that this had been held back on account of the indebtedness of Lanier & Burnett to the company. The following action was taken upon this matter by the board of directors as shown from the minutes of the board: "On motion the superintendent was instructed to again call on Messrs. Lanier & Burnett, and procure from them a written request or authority for us to re-rent the Merchants' Warehouse, and an order from Mr. Lanier authorizing the company to place his dividend on the stock in the company to the credit of Lanier & Burnett's account. Carried." It appears that Mr. McCarthy did call upon Mr.

Lanier, and talked with him upon this subject, but the testimony as to what happened at this interview is so hopelessly in conflict that the court is unable to make any definite statement as to it further than that it is not proven that Mr. Lanier made any agreement about the application of this dividend upon the indebtedness of Lanier & Burnett to the defendant company. The next occurrence in connection with this dividend is the presentation of the order for the dividend by the complainant company to Mr. McCarthy on November 14, 1893, already stated. When Mr. Berry, the complainant's president, presented this order to Mr. McCarthy, the latter stated to Mr. Berry that Lanier & Burnett were indebted to the Nashville Warehouse & Elevator Company, and he thought it was the intention of the board of directors to appropriate Lanier's dividend to Lanier & Burnett's debt. He said, however, that the board of directors of the Nashville Warehouse & Elevator Company would meet that night or the next, and he would advise the complainant company what their determination was. After this the defendant notified the complainant that it declined to pay the dividend.

The bill in this case was filed November 28, 1893, and on November 30, 1893, the defendant company entered a credit to the account of Lanier & Burnett, as follows: "1893. Nov. 30. By L. H. Lanier, dividend note, \$441.00." There is a minute of the defendant company copied into the transcript, of date November 23, 1893, which reads as follows: "The superintendent and treasurer reported that Mr. Lanier had given the American National Bank an order on our company for the dividend on his stock. This dividend had been placed to the credit of Lanier & Burnett's account." As seen, however, from the actual entry on the account, the credit was not entered until after this, on November 30th. It is also apparent from what passed between Mr. Berry and Mr. McCarthy that on November 14th there had been, up till that time, no actual decision on the part of the company to apply this dividend to the indebtedness of Lanier & Burnett. The minute last quoted does not undertake, of itself, to make an application of the dividend, but recites historically that the dividend had been placed to the credit of Lanier & Burnett's account; but there is no evidence of this upon the books of the company, or in its prior minutes, as far as disclosed in the proof, nor is there any support for this historical statement in the surrounding facts and circumstances appearing in evidence. We must find that the actual application was not made until November 30th. There is some testimony given by the officers of the company to the effect that the dividend note was withheld on account of the indebtedness of Lanier & Burnett to the company, and, as others state it, for the debt of Lanier & Burnett; but it is manifest that all of these witnesses are merely giving their construction

of the minute of August 15, 1893, and that minute shows for itself precisely what was done at that time. The debt for which Lanier deposited the shares of stock in the defendant company with the complainant company is much larger in amount than the value of the shares of stock so deposited and transferred. Both Lanier and Burnett became wholly insolvent on the 8th day of February, 1893, and have remained so till this time. The complainant had no knowledge of the claim of the defendant company against Lanier & Burnett prior to November 14, 1893. Lanier & Burnett was a partnership composed of said L. H. Lanier, Jr., and one Burnett, and they were engaged in the mill and grain business. Burnett had no interest in the stock or dividend in controversy in this case. It will be perceived that the facts stated do not raise the question of the right of a corporation having the "transfer rule"—that is, that stock shall be transferred only on the books of the company—to apply the dividends accrued upon stock the certificates to which have been transferred, but not upon the books of the company, upon an indebtedness due from a person appearing upon the company's books to be the owner, and the actual application thereof before suit brought by the assignee, and so treating the same as a payment to such apparent owner.

Leaving out of view for the present the fact that the indebtedness sought to be used in defense is a partnership debt while the dividend is individual, the case stated raises a pure question of set-off under the transfer rule. Where a corporation has a by-law adopting the transfer rule, and there is no lien upon shares of stock by the charter, by-laws, or otherwise for debts due from stockholders to the corporation, and where shares have been transferred by indorsement and delivery of the certificates, but not upon the books of the corporation, and after such transfer a dividend is declared, and at that time the apparent owner upon the corporation books owes the corporation a sum of money, can the corporation, when sued for the dividend by the assignee of the stock set up and successfully rely by way of set-off upon such indebtedness due it from such apparent owner? It is the settled law of this state that the title of the purchaser upon the assignment of the certificate is complete without registration. It is said in *Smith v. Railroad*, 91 Tenn. 221, 238, 18 S. W. 549: "The rule requiring transfer on the books of the company, by the well-settled line of decisions in this state and by the great weight of authority in the courts of America, is a rule made solely for the benefit of the company. By it the company is enabled to know who are entitled to vote and to whom it may pay dividends." And see *Cornick v. Richards*, 3 Lea, 1; *Cherry v. Frost*, 7 Lea, 1; *Bank v. Farrington*, 13 Lea, 333; *West Nashville Planing-Mill Co. v. Nashville Sav. Bank*, 86 Tenn. 252, 6 S. W. 840; *Caulkins v. Gas Co.*,

85 Tenn. 683, 4 S. W. 287. The subject is fully discussed in *Cornick v. Richards*, and it is immaterial whether the stock be so transferred as collateral security on a debt or by way of absolute sale. *Cornick v. Richards*, 3 Lea, 1; *Bank v. Farrington*, 13 Lea, 333; *Cherry v. Frost*, 7 Lea, 1. And see on the general subject, 2 *Thomp. Corp.* § 2391, and cases cited; *McNeill v. Bank*, 46 N. Y. 331; *Gemmell v. Davis*, 75 Md. 546, 23 Atl. 1032. The general rule is that a dividend belongs to the one who is the owner of the stock at the time when the dividend is actually declared. *Thomp. Corp.* § 2172. It would seem to follow from these two principles that the dividend declared upon the stock in question in this case belonged to the complainant, and was not liable to the defendant's claim of set-off, unless the right to such set-off be found in the existence of the aforesaid transfer rule. It is to be observed that the transfer rule is ineffectual to prevent the passing of the title and the perfect control over the stock by the assignee, with respect to the conveyance thereof. It is conceded in the authorities that the effect of a failure to have the stock transferred upon the books of the company will be at least to authorize the company to treat the apparent owner, as shown on the books of the company, as the real owner, so far as voting is concerned, and so far as the payment of dividends is concerned, where such payment is made without knowledge of the transfer. Does the rule operate further than this with regard to dividends? We have been unable to find any authority directly upon the point. We have been cited to *Gemmell v. Davis*, above referred to. The substance of that case is thus stated in *Thomp. Corp.* § 2133: "As a dividend, when declared, becomes so much money owing by the corporation to the shareholder, if the shareholder is at the time indebted to the corporation, the latter has, on principle, the right to apply the dividend in liquidation of the debt; in other words, it has the same right of set-off that any other creditor has. But this right of the assignee rests upon a mutuality of indebtedness; and hence, where the shares have been assigned, although not on the books of the company, prior to the declaration of the dividend, the corporation has no right to set off as against the assignee, who becomes the equitable owner, provided it has knowledge of the assignment prior to the declaration of the dividend." This last clause, if it be treated as a purposed limitation of the rule,—that is, the clause, "provided it has knowledge of the assignment prior to the declaration of the dividend,"—renders the authority of no particular value in the case we have in hand. The case is an authority for all of the above excerpt from *Thompson on Corporations* except the last clause. That portion of the opinion was dictum. In that case, however, it did appear that all parties in interest knew of the rights of the assignee prior to the declaration of the

dividend. In the case we have under consideration it appears that the corporation was not aware of the rights of the complainant at the time the dividend was declared. Is this a material circumstance or proper ground for a distinction as to whether the company would have the right to set off in the one case rather than the other? In *Gemmell v. Davis*, *supra*, the materiality of this fact seems to be based upon the idea that, where the company had no knowledge of the existence of the transfer, it must be supposed to have dealt with the apparent stockholder on the faith of his owning the stock, and hence of his right to the dividend. But, as pointed out by counsel upon both sides, this theory is without any substantial foundation. As well said in the brief of one of the counsel: "No company can be presumed to have given credit to one of its stockholders on the faith of the dividends it might thereafter declare, because it is obliged to know that, after having obtained the credit, the stockholder would, notwithstanding his indebtedness, have the unobstructed right to immediately transfer his stock on the books, and thus alien, not only the stock, but all future dividends." We do not think the question can be determined upon any such considerations as these. It must be settled upon the abstract question as to the force of the rule itself. This rule has a foundation in sound reason, when it is held to protect the company in the payment of dividends, and in the settlement of the question as to who has the right to vote, because, as to the latter point, it is essential to the orderly management of the company's affairs, and, as to the matter of dividends, protects the company from contests that might be embarrassing, and, if much extended, even ruinous. Thus far we have a reasonable limitation or qualification of the rights of the owner of the stock, grounded upon the well-being of the company, and from which the owner of the stock can at any time relieve himself by bringing forward the shares of stock, and having the proper entries made upon the books of the company. On the other hand, in view of the rapidity with which shares of stock may and do pass from hand to hand, it is practically impossible for the company at any given time to know who is the owner of such shares. The enforcement of the rule for these two purposes cannot be said to in any just sense impair the value of the owner's property in the stock, because by leaving it standing in the name of the former owner upon the books of the company, he clothes such person, so far as the company is concerned, with the apparent ownership of the property, and it must be held with his consent, inasmuch as he is presumed to know the rule of law applicable to the matter. To be sure, when one who is not in fact the owner of the stock, votes it in a corporate meeting, or when he draws a dividend upon such stock, he thereby exercises attributes belonging to the real owner,

and he thereby, to that extent, controls the owner's property, even if he does not impair it. That he does not in fact impair it, is shown by the rule that, although the company is protected in making the payment to such apparent stockholder, yet, as between him and the real owner, he can be compelled to refund the dividend so collected by him; so that at last it resolves itself into the necessity of protecting the corporation. The person so appearing upon the books of the company to be the stockholder is not in fact the stockholder. He may exercise in the particulars mentioned the attributes of a stockholder, but he does so, in a sense, as the agent of the real owner. The corporation must know always that any of the persons who appear upon its books as stockholders are not such in fact, but, so long as these persons appear to exercise the attributes of stockholders in voting and in the collection of dividends, it is immaterial to the company as to where the real ownership exists. These reasons appear to us to fully justify the existence of the rule. Can it be said in any sense that the right of set-off to the company for any debt it may hold against the apparent stockholder against the dividend is necessary for the company's protection? We think not. The principle is as laid down and fully discussed in *Cornick v. Richards*, 3 Lea, 1, that the shares of stock represent property, the interest of the stockholder in the corporation; the corporation is one person, its stockholders are different persons. The corporation has no right to control its stockholders in the management of their property, or to say to whom it shall be transferred. The dividend is an incident of the property attached to it, arising out of it. A rule which would authorize the company to appropriate to its own use a dividend belonging to the owner, without his consent, to pay a debt due from another, would be, in effect, placing a restriction upon the right of transfer; that is to say, this would be the effect of a rule that, in the absence of an entry upon the books of the company, the dividends should be open to be set off against an indebtedness an apparent stockholder might owe to the company. Dividends necessarily go with the stock. They can be no more controlled or appropriated by the company than the stock itself, except in so far as may be necessary for the protection of the company within the principle hereinbefore stated; and, as we have held, the right of set-off is not an incident to the right of protection.

It is proper to say, with reference to the statement of facts with which this opinion is prefaced, that it does not affirmatively appear in the proof that the transfer of the shares of stock was accompanied with a blank power of attorney, signed, as is usual in this class of cases, and which appears in all statements of the rule as to the communication of title. We take it, however, that the transfer was in the usual form in this re-

gard, and that the failure to make it distinctly appear in the proof was an oversight; and as counsel upon both sides have treated the case as if this item of proof were in, we have also treated it in the same way. However, the case must be decided for the complainant, at all events, upon another ground. The defense, as stated, is set-off, but the debts are not mutual; the debt held by the company being against Lanier & Burnett, and the dividend against which the set-off is claimed being to Lanier alone, treating him, for the purposes of this question, as the owner. *Flint v. Tillman*, 2 Helsk. 202. And see *Turbeville v. Broach*, 5 Cold. 270; *Blanks v. Smith, Peck* (Tenn.) 186; *Robertson v. Talbot*, 2 Yerg. 258; *Henry v. Walker*, 11 Helsk. 194. But it is insisted that the defendant is entitled to this relief by way of equitable set-off. The defendant has filed only an answer, no cross bill. The point, so far as we are aware, has not been made a distinct subject of adjudication, but all of the cases in our Reports where equitable set-offs were allowed were cases in which there was either an original bill asking for this relief, or a cross bill; and some of the cases recognize this incidentally as the proper way in which this relief can be obtained. In the *Bank Cases* (*Bank v. Kendrick* and *Dority v. Bank*) 92 Tenn. 437, 442, 21 S. W. 1071, an answer and cross bill were filed; and, speaking upon this subject, the court used the following language: "An indorser for an insolvent maker, being indebted to that maker by reason of a deposit or otherwise, may bring the holder of the paper indorsed and the maker before a court of equity, and have the indorser's debt to the maker applied for the debt of the holder. This is practically what the bank has done in this case." In *Parker v. Britt*, 4 Helsk. 243, 249, this character of relief is spoken of as being presented by answer and cross bill, or by cross bill alone. It is distinctly an affirmative relief, not dependent upon the statutes of set-off, and, in our opinion, this relief should be invoked by way of original bill or by a cross bill. In the case of *Nashville Trust Co. v. Fourth Nat. Bank*, 91 Tenn. 336, 18 S. W. 822, there was no cross bill, but it was an agreed case; and it was finally decided that that case was one of legal set-off, although the doctrine of equitable set-off was extensively discussed. However, under the agreement, both parties were actors in that case. But, this question aside, the court of chancery does not grant equitable set-off as a matter of course, even in cases of insolvency where relief is sought against the assignee, and the insolvency in question is that of the assignor of a chose in action. *Catron v. Cross*, 3 Helsk. 584. We think the complainant in this case falls clearly within the protection of the principles laid down in the case last cited. The complainant advanced a large amount of money upon the faith of this stock, and at the time the stock was transferred, and in the due

course of business. The stock and dividends together were of less value than the amount of the indebtedness. We do not think that under such circumstances, the court, even if a cross bill had been filed, would have been authorized to have actively interfered in order to sustain a set-off against such an indebtedness, the set-off consisting of a debt against the insolvent assignor of the complainant. The result is, the decree of the chancellor will be affirmed.

WILSON and BARTON, JJ., concur.

Affirmed orally by supreme court, March 11, 1896.

**CAPITAL CITY BANK v. ANDERSON
TRANSFER CO. et al. (PHILLIPS &
BUTTORFF MANUFACTURING CO., Gar-
nishee).**

(Court of Chancery Appeals of Tennessee.
Feb. 8, 1896.)

GARNISHMENT—LIABILITY OF GARNISHEE.

Under Code, § 3803, providing that all property, debts, or effects in the possession of the garnishee shall be liable from the service of notice, or from the time they came to his hands, if acquired subsequent to such service, and before judgment; and section 3810, defining "property debts and effects" as including "chooses in action, whether due or not,"—it is error to enter judgment against a garnishee whose answer shows that the debtor, who was its traveling salesman, with authority to retain collections and to overdraw his accounts, a settlement being had every five or six months, was overdrawn when the garnishment was served, and that on the return day of the writ, after crediting him with his salary, he was still indebted; it not appearing that there had been at any time during that period any balance in the employe's favor. *Van Vleet v. Stratton*, 19 S. W. 428, 91 Tenn. 474, followed.

Appeal from chancery court, Davidson county; Thomas H. Malone, Chancellor.

Garnishment proceedings by the Capital City Bank against the Anderson Transfer Company and others, principal defendants, and the Phillips & Buttorff Manufacturing Company, garnishee. From a decree for complainant, said garnishee appeals. Reversed.

M. B. Howell, for appellant. Champion, Head & Brown, for appellee.

BARTON, J. The question in this case is as to the liability of the garnishee on the facts presented in the answer. The facts are: The Capital City Bank obtained a judgment in the chancery court of Davidson county in the above-styled cause, for \$6,000, against the Anderson Transfer Company, W. M. Bennett, and others. Execution was issued on said judgment, and returned "No property found." A garnishment notice was served by the sheriff on the 4th day of November, 1894, returnable to the first Monday of May, 1895, upon the Phillips & Buttorff Manufacturing Company, which last-named company answered, and upon its answer a judgment was

rendered against it for \$279.84, from which it has appealed, and assigns errors. The facts set out in the answer, in substance, are: That W. M. Bennett, the judgment debtor, was at the date of the service of the garnishment, and at the date of the return day of the garnishment, and had been during all the meantime, an employe of the garnishee company, at a salary of \$100 per month. That, at the time of the service of said garnishment, said Bennett was indebted to the said company (the Phillips & Buttorff Manufacturing Company) in the sum of \$220.16. That he was employed as a traveling salesman; and that it was a part of his business, and he was authorized, to collect, and it was his duty to account for moneys due the company from their customers; and that these collections were made by him as an agent and employe of the company by whom he was authorized to make such collections. That on the 1st of November 1894, as stated, when the garnishment was served, Bennett's account was overdrawn, and he was indebted to the company in the sum of \$220.16. That on the 1st of April, the day when the garnishment was returnable, his account stood as follows: Overdrawn November 1, 1894, \$220.16; collected from debts due the company since then, \$687.25; remitted of the above collections, \$211.61; short on collections from November 4th to April 1st, \$475.64,—making balance of charges on April 1st, \$695.80. That his account was credited by five months' salary, at \$100 per month, \$500; leaving him short April 1, 1895, \$195.80. It is further stated that he was authorized to make these collections, and that the amounts retained by him were retained with the consent and acquiescence of the company; that it was customary to have a settlement with him every five or six months; that the bookkeeper who made the answer for the company settled with him on the 1st of January, and had not had a settlement with him from that day until April 1, 1895; that, but for the amounts collected and retained by him, he would have been indebted to the company in the sum of \$279.84, or the difference between the amount overdrawn February 1st and the salary during the five months; but that the amounts paid said Bennett, or which he had retained out of the collections, left him short and indebted to the company on April 1, 1895, in the sum of \$195.80. It is on these facts that the question of liability arises.

Code, §§ 3801, 4221, embody the requirements of the garnishment process, and are as follows:

"Sec. 3801. The garnishee may be required to answer on oath: (1) Whether he is, or was at the time of the garnishment, indebted to the defendant; if so, how and to what amount. (2) Whether he had in his possession or under his control any property, debts or effects belonging to the defendant at the time of serving the notice, or has at the time of answering, or has had at any time between

the date of service and the time of answering; and if so, the kind and amount. (3) Whether there are, to his knowledge and belief, any and what, property, debts, and effects in the possession or under the control of any other, and what, person."

"Sec. 4221. The notice should also require the defendant not to pay any debt due by him, or thereafter to become due, and to retain possession of all property of the defendant, then and thereafter in his custody, or under his control, to answer the garnishment."

Section 3803 provides: "All property, debts or effects of the defendant, in the possession of the garnishee or under his control, shall be liable to satisfy the plaintiff's judgment, from the service of the notice or from the time they came to his hands, if acquired subsequent to the service of notice, and before judgment."

Section 3810 defines what is meant by "property, debts, and effects," as follows: "The words 'property, debts, and effects,' include real estate, and choses in action, whether due or not, and judgments before a justice of the peace; also money, stocks and any interest in an incorporated company."

We cannot concur with the decree of the chancellor holding the garnishee liable on the facts of this case, under the foregoing provisions. "The liability of the garnishee is not to be arrived at by surmises and inferences, but from direct conclusions or admissions necessarily following therefrom." *Moses v. McMullen*, 4 Cold. 245; *Mayor, etc., v. Potomac Ins. Co.*, 2 Baxt. 302. "If it be doubtful whether the garnishee owes the debtor, there can be no judgment." Same case. "If the answer does not contain admissions sufficient to charge him, the garnishee will be discharged." *Pickler v. Rainey*, 4 Heisk. 339. Now, it does not affirmatively appear from the answer in this case that the garnishee was at any time indebted to Bennett, the judgment debtor. On the contrary, it is fairly inferable that he was not. At the date of the service of the garnishment, Bennett owed the garnishee \$220.16. At the return day, he owed \$195. It appears that it was a part of his business to make collections for his firm. He was allowed to retain and overdraw, and had done so at the date of garnishment to the amount of \$220.16. Between date of service of garnishment and return day, he had made additional collections of \$687.25, while his salary was only \$500 during that time. There is no positive statement when he made these collections, nor when he made payments, nor anything that we can see, from which an inference can be drawn as to dates. If the collections are averaged by the day or month, it will affirmatively appear that at no time did the garnishee, after the service, become indebted to Bennett, but that he was always indebted to the garnishee.

But the contention is that the garnishees became, after service of process, indebted to

Bennett by the amount of his salary, \$500, and that, deducting from that Bennett's indebtedness of \$220.16 at date of service, there is left \$279.84, for which the company is liable, because, it is agreed, Bennett's indebtedness to the company accruing by his retention of collections cannot be considered or allowed to offset his salary; and we are referred to an unreported case, said to have been decided by our supreme court at Jackson, which is said to have been as follows: *Harvey & Keith* had obtained judgment in the chancery court at Paris, before Chancellor Somers, against John M. Rushing, a merchant of Manlyville, Henry county, who had failed, and was then clerking with Coulter, a merchant in Paris. Soon after the adjournment of a term of court, an execution was issued, returned "No property," and immediately garnishment was issued and served upon J. T. Coulter, to answer at the next term, as required by statute. At the time of service, Coulter was not indebted to Rushing. During the six months intervening between the terms of court, a debt of \$300 had accumulated, Rushing being employed at \$50 a month; but, notwithstanding this injunction, Coulter had paid the money to Rushing monthly. Two points were made: First, whether a clerk was entitled to exemption as a laboring man; second, whether future wages could be garnished. And Judge Somers, before whom the case was tried below, held that Rushing was not a laborer, in the sense of the law, not entitled to exemption, and that future wages to accrue between service and return of the process were subject to garnishment. The cause was carried by Coulter and Rushing to the supreme court, and the judgment below affirmed, in an oral opinion pronounced by Chief Justice Deaderick. The decision was put upon the ground that the garnishment process operated as an injunction, and that the answer was made as of the date of the return, and not the date of the service. The case being unreported, we could hardly, in face of other decisions, base the decision of this case on it, though we do not question counsel's statement about it. But a clear distinction even between that case and this will be observed. There it would appear, or it is inferable, that there were monthly periods when an indebtedness occurred and existed between the garnishee and debtor, which was paid. In this case it does not appear that there was even a moment of time when the garnishee was indebted to Bennett, or when Bennett could have sued the company and obtained judgment for a cent.

But we think the precise points and principles arising in this case were settled by our supreme court in the case of *Van Vleet v. Stratton*, 91 Tenn. 474, 19 S. W. 428, a thoroughly considered case. That case, as we think, was, in its facts, more unfavorable to the garnishee than this, because it clearly appeared there that the garnishee designedly paid the employé in advance, so as to keep

his services, and avoid the effect of the garnishment. That does not appear in this case, but it would seem, rather, that the payment or retention occurred along in the regular and accustomed methods of business, as the book-keeper, who answered, testified that it was customary to have a settlement with him every five or six months. In the case last referred to, the facts disclosed by the answer and on examination of the garnishee were that after the service of garnishment, in order to keep their employé, and enable him to support his family, his salary (being \$100 per month) was regularly paid him in advance, and treated as a loan; and Judge Henderson, special judge, says: "Upon this answer, his honor, the circuit judge, rendered judgment against the garnishees. This was erroneous. To authorize such a judgment, it must clearly and obviously appear that the garnishees were indebted to the debtor, or that a debt had existed, which had been seized and impounded by the garnishment. Obviously, the garnishees were not then indebted, nor, so far as this record shows, had they ever been. *Mayor, etc., v. Potomac Ins. Co.*, 2 Baxt. 296; *Pickler v. Rainey*, 4 Helsk. 339. The judgment is defended before us on a charge of fraud against the parties. It is ingeniously and ably argued that the debtor was under obligation to pay this debt, and that, in order to hinder and delay the collection of it, a covinous arrangement was entered into, by which the garnishees agreed with the debtor to pay him in advance for his labor, instead as had theretofore been done. We are not persuaded that this was fraud. It is true, the debtor was under obligation to pay the debt, but he was under higher legal and moral obligation to support his family. *Leslie v. Joyner*, 2 Head, 515; *Hamilton v. Zimmerman*, 5 Sneed, 39. To comply with this obligation, there is nothing illegal or immoral in demanding pay for one's services in advance. As to the plaintiffs in error, they were under no obligation whatever to the defendants in error. What right has a creditor to say to an employer, 'You must not pay your employé in advance, but allow his wages to accumulate; so that a fund may arise in your hands from which I may realize my debt'? One question remains. Of course, if, at the time of the service of the garnishment, a debt was in esse, due or undue (questions as to negotiable and assignable paper being out of the way), the same may be seized and impounded; but if nothing whatever is due, nor any debt exists not yet due, may you summon an employer before a justice month by month, or before a court term by term, and thus prevent any payment of wages to him, as was attempted in this case? Can this writ place the defendants in error on higher grounds than the debtor with reference to his employer? *Drake, Attachm.* 458. The execution of a writ at law cannot seize a thing that has no existence. An after-born thing—for instance, a debt—cannot be born into a levy that had

previously been made, unless it be controlled by a statute, clear and unambiguous in its terms. This principle is conceded in this case, but it is insisted that our statutes go to that extent. Mr. Drake commends such laws for the convenience of collecting debts, and quotes *Alabama and Missouri* as having passed such acts. We do not so construe our statutes. In Code, §§ 3800, 3801, great latitude is very properly given to the creditor as to what questions he may ask the garnishee, like a bill of discovery, which may help him in his search for assets; yet in the subsequent section, where it speaks, among other things, of 'debts' as being held liable under the writ, it does not mean an intangible expectancy, depending on the will of the debtor, but a chose in action, in existence at the moment of the levy. *Drake, Attachm.* 559; [*Potter v. Cain*] 117 Mass. 238; [*Coburn v. City of Hartford*] 38 Conn. 290; 1 *Freem. Ex'rs*, § 164; [*Webber v. Bolte*] 51 Mich. 115, 16 N. W. 257."

This, it seems to us, both in the exact points decided and in the reasoning advanced, entirely covers and closes the contention raised in this case. If it were an open question, we could not avoid the same conclusion. We are not contending, of course, that we should feel free to disregard any positively plain and express legislative enactment to which there was no constitutional objection, simply because it presented what we conceived to be a hard rule; but the results of such a rule as contended for strike us as so harsh, inhumane, and so contrary to public policy that only the most plain and unmistakable terms could convince a court that such was the legislative intent. With such a law, it would be within the power of the unrelenting creditor to drive the poor and helpless debtor and his dependents to the poor house or vagrancy. Such a construction would completely stop all commerce in labor or materials between a judgment debtor and all others who could be reached by garnishment process. It would be of no aid, when the law was fully understood, to the creditor, and would ruin the debtor. It would be worse than chattel slavery. We do not think such a rule was in the contemplation of the legislature, nor that it is the necessary construction of the statutory provisions on the subject of garnishment. In the provision (section 3803), which provides what shall be liable to the judgment, it says: "All property, debts, or effects of the defendant in the possession of the garnishee or under his control shall be liable to satisfy the judgment from the service of the garnishment, or from the time they came to his hands, if acquired subsequent to the service of notice and before judgment." This does not say all business between garnishee and debtor must stop; that the garnishee cannot employ the debtor and pay him in advance; that garnishee cannot sell or exchange goods, material, or labor with debtor without being made liable, because he will be charged with what goes from him to debtor, and can be allowed no credit for

what is coming from the debtor to him, though the debtor may at all times be in his debt. The very most, as we think, that can be said, is that if there is at any time after service and before answer a balance existing in favor of the debtor, which (the garnishment aside) the debtor could sue the garnishee for and recover, such balance must be held subject to the garnishment. But, without further elaboration or discussion, we think the case of *Van Vleet v. Stratton* is decisive of this case; and in accord with that is also *Mayor, etc., v. Potomac Ins. Co.*, 2 Baxt. 302. The decree of the chancellor will be reversed, with costs, and decree entered here discharging the garnishee.

NEIL and WILSON, JJ., concur.

Affirmed orally by supreme court, March 7, 1896.

STATE BLDG. & SAV. ASS'N v. MECHANICS' SAVINGS BANK & TRUST CO.
et al.

(Court of Chancery Appeals of Tennessee.
Feb. 29, 1896.)

BANKS AND BANKING—DEPOSITS—SPECIAL DEPOSITS—PREFERENCES.

1. Plaintiff, a corporation, a depositor in defendant bank, agreed, on the request of the defendant, to keep a sum on deposit sufficient to protect certain shares of its stock deposited as collateral to secure loans made to certain of its stockholders. Held that, in the absence of evidence showing a specific agreement to that effect, the deposit could not be regarded as a change from a general to a special deposit, in trust to pay the notes secured by plaintiff's stock.

2. Where a corporation, being a depositor in the defendant bank, agreed to keep on deposit a sum sufficient to protect certain shares of its stock deposited as collateral to secure loans made to its stockholders, such deposit was not a trust, for the repayment of which the corporation was entitled to a preference over other creditors of the bank.

Appeal from chancery court, Davidson county; Andrew Allison, Chancellor.

Bill by the State Building & Savings Association against the Mechanics' Savings Bank & Trust Company and others. From a decree for complainant, both parties appeal. Reversed.

Chambers & Zarecor and T. A. Street, for complainant. E. H. East, for defendants.

WILSON, J. The complainant filed this bill September 26, 1893, against the defendant corporation and its assignee, to enjoin the latter from collecting certain notes from the makers thereof, to have a deposit of complainant in the defendant bank, made before its assignment, applied to the discharge of said notes, to have said notes and the collaterals hypothecated to secure them turned over to complainant, and to have the balance of its deposit preferentially paid. The bill proceeds on the theory that the de-

posit of complainant in the defendant bank was in the nature of a special deposit, and was impressed with a trust to secure the payment of certain notes given to the bank by certain parties for money borrowed, who were stockholders in the complainant company, and who had deposited their stocks in the complainant company to secure their notes. The bank and its assignee answered, denying the main grounds of relief stated in the bill, and asking for a dissolution of the injunction restraining the assignee from collecting the notes in question. Proof was adduced, and the chancellor heard the cause November 12, 1895. He decreed that the complainant had the right to have its deposit in the bank applied, so far as was necessary, to the payment of six notes, aggregating \$760, and to the possession of said notes, and the collaterals deposited with the bank to secure them. He made the injunction perpetual against the collection of these notes from their makers. His decree says nothing in respect to the balance of the deposit of complainant in the bank. This deposit in the bank, at the time of its final suspension, amounted to \$1,165.48, and so, after discharging the six notes aforesaid, there remained of the deposit of complainant the sum of \$405.48. Both parties appealed, and have assigned errors.

The grievance of the complainant is that it was not made a preferred creditor as to the balance of its deposit after paying therefrom the six notes aforesaid. The error assigned by the defendants raises the question that the deposit of complainant simply made the defendant bank its debtor; that it was not a special deposit, nor was it impressed with any trust which entitled the complainant to be preferentially paid from the assets of the assigning bank. We think, under the facts appearing in the record, that the chancellor was in error in holding that the assignee should pay the six notes aforesaid out of the deposit of complainant, and turn over to it said notes and their collaterals.

The plain facts of the case are as follows: (1) That the complainant had a large deposit in the defendant bank, it being in a sense the depository of the complainant. (2) The defendant suspended for a few days, and thereafter opened, and was paying its depositors in full on their checks. (3) The complainant, while the bank was paying in full after its temporary suspension, drew out all of its deposits, except about \$1,000. (4) This was April 1, 1893. At this time, it seems, there was an understanding or agreement between the bank officials and the officers of the complainant that the latter would not draw out all of its money at once, but would do so only as it needed it in its current business. (5) The bank made its assignment April 17, 1893, and was found to be hopelessly insolvent. (6) Before this, it had loaned various parties, stockholders of the complainant, different sums, taking their

notes for the loans, and these borrowers had deposited, as collaterals, with their respective notes to secure them, their certificates of stock in the complainant company. (7) The president of the bank, Mr. Etherly, believing that the complainant was not observing its agreement about not checking on its deposit except as it needed its money in its current business, saw Mr. Manning, the secretary of the complainant, about it, and told him that a number of his stockholders were borrowers from his bank, that they had deposited their certificates of stock as collaterals to secure these notes, and that the complainant ought to have enough money on deposit to protect its stock thus deposited. Manning replied that this, as a business proposition, was absurd, but stated that he would see the directors of his company about it. (8) He did see them, and the directors passed a resolution to the effect that they would keep enough money on deposit to protect their stock hypothecated by their stockholders to secure the payment of notes given by them to the bank, and the bank officials were notified of this action. (9) But there is no satisfactory evidence in this record that the bank, under this arrangement, whatever its effect was to be, was not to collect its notes at maturity, and give the notes, with their collaterals, to the makers. Neither is there any evidence that the deposit of complainant in the bank was to be set apart to pay these notes, or that it was in any sense to be kept separate from the general funds of the bank. (10) On the contrary, the evidence is clear, and the necessary inference from the conduct and conversations of the officials of the two companies is irresistible to our minds, that the bank was to deal with the deposit just as it did with its other general deposits, and to use it in its current business just as it did its other funds. (11) The most that can be said of the alleged arrangement between the officials of the two companies with respect to the deposit of the complainant that it was to allow to remain with the defendant was that it was to remain or to be in some sort a security to the bank to protect the notes or as an additional security. There is not the slightest evidence that the deposit was to be changed from a general to a special deposit, or that the bank was not to use it as it did its other funds in its current business.

Under these facts, we are aware of no well-considered authority that would hold it to be a special deposit, or that it was impressed with a trust, which entitled it to be preferentially paid out of the funds of the assigning insolvent bank. We think the decided weight of authority is to the contrary. The cases of *Bank v. Weems* (Tex. Sup.) 6 S. W. 802, *Bank v. Hummel*, 14 Colo. 259, 23 Pac. 986, and *Roca v. Byrne*, 145 N. Y. 182, 39 N. E. 812, are leading cases upholding the doctrine of trusts with respect to funds deposited or placed with parties for designated purposes. But this case, in its facts,

is covered by the principle announced in the cases of *Association v. Jacobs*, 141 Ill. 261, 31 N. E. 414, and authorities cited; *Grissom v. Bank*, 87 Tenn. 350, 10 S. W. 774; *Akin v. Jones*, 93 Tenn. 353, 27 S. W. 689; and *Howard v. Walker*, 92 Tenn. 452, 21 S. W. 897; 1 Morse, Banks, § 248. The result is that the decree of the chancellor is reversed, and the bill dismissed, with costs.

NEIL, J., concurs.

Affirmed orally by supreme court, March 19, 1896.

McEWEN v. MAYOR, ETC., OF NASHVILLE.

(Court of Chancery Appeals of Tennessee.
Feb. 13, 1896.)

MUNICIPAL CORPORATIONS—CONTRACTS—ACTION ON—LIMIT OF RECOVERY—CORRECTION OF ERROR.

1. In an action against a city, based on contracts for the excavation of stone, which provided that the work should be done in accordance with cross sections and specifications of the city engineer, no recovery can be had for excavation outside of the area so designated by the engineer.

2. Where on the trial of an action to recover for work done under a contract an error has been made in the computation of the amount due, the basis on which the computation is made being admitted to be correct, the error may be corrected, though the contract provides that the computation made shall bind both parties.

Appeal from chancery court, Davidson county; Thomas H. Malone, Chancellor.

Action by A. A. McEwen against the mayor and city council of Nashville. Decree for complainant.

Daniel & Watts, for complainant. Frank Slemons, for defendant.

NEIL, J. On December 15, 1892, a contract was let by the defendant to the complainant to excavate \$500 worth of stone at 39 cents per cubic yard, and on March 23, 1893, a similar contract at 37 cents per cubic yard, and on April 25, 1893, a similar contract at 40 cents per cubic yard, and on May 6, 1893, a similar contract at 50 cents per cubic yard. This last contract, however, he did not attempt to carry out, but was relieved of it at his own request. The contest is over the amount of stone excavated, the complainant insisting that he has not received all that he was entitled to receive under said contract. All of this stone was to be excavated on a place called "Rolling Mill Hill." And each contract contains, among other things, the following clauses: (a) That the stone shall be quarried on Rolling Mill hill, "in accordance with cross sections and specifications of city engineer, hereto attached," the specifications providing that "the stone must be quarried at Rolling Mill hill, and at such points on the ground as directed by the

city engineer." (b) "It is agreed that the city engineer shall decide upon the quantity and quality of the several descriptions of work and material furnished, and that his decision shall be final and conclusive." The suit is upon the contracts, and the complainant claims that under the several contracts he excavated \$2,307.85 worth of stone, and that there has been paid him only the sum of \$1,307.25, and that there is due him a balance of \$1,007.60. The city engineer, by one of his assistants, designated and cross-sectioned the ground to be worked according to the contracts, and the proof shows that the complainant has been fully paid for all stone quarried within the area so cross-sectioned, except a small amount hereafter mentioned. But the complainant claims that he quarried stone outside of the limits so designated by the city engineer, and that he is entitled to be paid for this. Whatever may be his rights in another suit, it is clear that he cannot maintain such a contention in the present case, inasmuch as this suit is based upon the contract, and he can only recover, if at all, in accordance with the contract. And, indeed, such a provision is most reasonable, in view of the fact that the city, as shown by this record, has many contracts going at the same time, and the system of cross sections is shown to be a most accurate, safe, and reasonable way of estimating the work done by contractors for work of the character now sued for, and is of such a character that it is equally fair to both parties, and can be tested by both parties, and, when rightly used, tends to prevent controversies of the character we now have under consideration. On the other hand, if contentions like that now put forward by the complainant could be countenanced under such contracts, the confusion would be interminable, else there would have to be a large extra expense incurred in measuring the stone after it was excavated; whereas, under the system of cross sections, measurements of the ground taken before the work is done and after it is done will disclose, by a calculation, with close accuracy the amount of stone taken out. The system is thus explained by Mr. Leftwich, a very intelligent witness, with reference to this particular case, viz.: "When he [McEwen] got his first contract, I laid out what is called the 'first block,' in this way: I first established a base line and from this line, or on this line, measured what we call sections, according to the condition of the ground, twenty, forty, fifty, and seventy feet from one end of this base line which is called 'zero.' From these stations I ran out lines at right angles to this base; then at measured intervals on these lines I took the elevations, referred to a standard bench mark. This was all done before he began his first contract. * * * Every time, from that day, that an estimate was made, I made measurements and figured the differences between the surface when he began to the surface at the time of the estimate. When he

completed the first block, and received his final estimate on the first contract, I made the measurements very carefully, taking elevations over the same sections as far as he had worked to that date, and figured the area included between the first sections taken and those taken at the date of the final estimate. I then averaged each section with the adjoining one, and multiplied the average area by the distance between those sections, thus computing the number of feet excavated. This method of computation is called 'averaging the end areas.' This gives me the number of cubic feet (measured solid) taken out between the time the first sections were taken, and the time of this estimate. * * * On this same date I laid out a new base line, parallel to the original, and measured stations on this base line every 20 feet, and I again cross-sectioned the bluff. This is known as the 'second block' laid out. * * * He worked then on this new block until June 1st, on which date I made his final cross sections. These sections were taken with the level, and very carefully, as previously shown. * * * The volume was then computed as before described." The complainant's contention is that he is not confined to these cross sections, but that he is entitled to payment for stone excavated outside of them. As before stated, we are of the opinion that he cannot obtain such relief in a suit under these contracts, which expressly provide for the cross sections. But if we should go beyond the cross sections, and examine his claims on this theory, we should find it impossible, from the evidence, to ascertain how much stone he has excavated. This results from the fact that the proof shows that the ground is of varying elevations, and that he has furnished figures as if the surface were regular, and that the space excavated would furnish a symmetrical mathematical figure, so many feet long, so many feet wide, so many feet deep. This being obviously at variance with the configuration of the ground, no reliance can be based upon figures founded upon such a theory. Mr. Leftwich testifies that the complainant excavated in the first block 1,304 cubic yards, and in the second block 2,080 cubic yards, making a total of 3,384 cubic yards, and for this he has been paid. But upon a calculation made during the progress of the trial, as set forth in the deposition of one of the defendant's witnesses, upon the measurements of the assistant engineer, it was found that the total amount excavated was 3,396.15 cubic yards, a difference in favor of complainant of 12.15 cubic yards, for which he is entitled to payment at the rate of 40 cents per cubic yard, or \$4.85.

Without going into the question as to the effect of the clauses in the contracts "that the city engineer shall decide upon the quantity and quality of the several descriptions of work and material furnished, and that his decision shall be final and conclusive," we are of opinion, and so hold, that an error in calcula-

tion appearing upon the face of the engineer's finding may be corrected when the same appears in the course of the litigation, where the suit is upon the contract, and the defendant relies upon the engineer's finding, as here; and that, upon such error appearing, the true result may be declared by the court, although the total thus reached differs from the totals reached by the engineer. Decree accordingly for complainant for \$4.85 and costs.

WILSON, J., concurs.

Affirmed orally by supreme court, March 12, 1896.

TAYLOR v. SMITH.

(Court of Chancery Appeals of Tennessee.
Jan. 25, 1896.)

APPEAL—REVIEW—RULINGS ON EVIDENCE—JUDGMENT—VALIDITY—EVIDENCE.

1. In an action on a judgment of another state, made an exhibit to the bill, the court sustained an objection to the transcript of the judgment, when offered as evidence, on the ground that it was without caption. *Held*, that the action of the court could be reviewed on appeal without a bill of exceptions making the transcript of the judgment a part of the record. *Kelley v. Fletcher*, 28 S. W. 1099, 94 Tenn. 1, distinguished.

2. In an action on a judgment of another state, it is error to exclude as evidence a transcript of the judgment simply because it is without a caption.

3. In an action on a Minnesota judgment, it appeared that under the statutes of such state the jurisdiction of the district court attached from the service of summons; that the clerk of such court, on default of a party sued on a contract for the payment of money only, could enter judgment; that the action of the clerk in such case was the action of the court, and his decision as to the sufficiency of the proof of service of summons was binding until set aside by a direct proceeding in the same action. *Held*, that a judgment in an action on notes in the district court of Minnesota, rendered by the clerk on default, was valid, where the provisions of the statute of such state were fully complied with.

4. The judgment of another state, rendered by a court having jurisdiction, is admissible in evidence under the general issue; and it has the same force and effect, when pleaded or offered in evidence, as in the state where it was rendered.

Appeal from chancery court of Lewis county; E. D. Patterson, Chancellor.

Bill by Robert B. Taylor against Eliza B. Smith, executrix of the estate of Byron M. Smith, deceased, on a judgment against deceased, in favor of complainant, in the state of Minnesota. From a judgment for defendant, complainant appeals. Reversed and rendered.

W. O. Whitthorne, Fussell & Wilkes, and G. T. Hughes & Son, for appellant. E. S. Fowler, for appellee.

WILSON, J. This bill was filed January 13, 1893, by the complainant, a citizen of the state of Minnesota, against the defend-

ant, a resident of Lewis county, Tenn., to recover on a judgment for \$2,848.86, and the costs thereof, rendered September 17, 1888, by the district court of Hennepin county, Minn., against her husband, Byron M. Smith. A transcript of the record from the court in Minnesota is exhibited with the bill, and it is averred that Byron M. Smith is dead, and that he left a will making the defendant, his wife, his executrix, sole legatee, and devisee. The main purpose of the bill is to reach, and subject to sale for the payment of the judgment sued on, certain lands of Byron M. Smith, in Lewis county, devised to his widow, on the ground that there is no personal property of the judgment debtor with which to pay the claim. The defendant answered, first individually, and thereafter as executrix of her husband. The acting chancellor heard the cause, October 29, 1895, upon the pleadings and proof, including the laws of Minnesota, as embodied in its Code, in the sections specified in his decree, and article 4, § 1, of the federal constitution, all of which were read in evidence. He dismissed the bill, holding that there was no sufficient evidence or proof of a valid judgment in the state of Minnesota. Complainant prayed and obtained an appeal to the supreme court, and has assigned errors. A statement of the averments in the pleadings and the facts appearing in the record, including the law of the state of Minnesota, relative to the subject-matter of the suit, is necessary, to present the respective contentions of the parties, and to furnish the basis for a correct determination of the difficult and interesting legal questions involved. We will make the statement as brief as is consistent with clearness.

The bill avers: (1) That the complainant, September 17, 1888, recovered a judgment for \$2,848.86, and \$7.97 costs, against Byron M. Smith, in the district court, Fourth judicial district, county of Hennepin, state of Minnesota, and that a perfect transcript of the record from said court is exhibited with the bill, as a part thereof. (2) That said judgment is unpaid, and still the property of complainant. (3) That said Smith died in the latter part of 1888, leaving a will, which had been probated in Hennepin county, Minn., and a copy thereof entered of record in Lewis county, this state. (4) That by his will he devised and bequeathed all his property to his wife, the defendant. (5) That no one had ever administered on his estate, in the state of Minnesota, or in this state. (6) That most, if not all, the estate he possessed when he died was in Lewis county, Tenn., and consisted of real estate. (7) That he had but little personality, and what he did have was taken possession of by the defendant, and that it was wholly insufficient to pay his indebtedness. (8) That the defendant—his widow, and the beneficiary under his will—had taken no steps to have his estate administered, either in Minnesota or Tennessee. (9) That he had done all he could to induce the defendant to settle his

judgment, and that she had often promised, through her attorney, to pay it, and had, within six months, through her son and agent, agreed to do so, out of the proceeds of lands in Lewis county, a sale of which he was then negotiating. (10) The bill then mentions a number of tracts of land in Lewis county which belong to Byron M. Smith. (11) That, if said Smith left personalty sufficient to pay his debts, it went into the hands of defendant, and that she is liable for the same, to creditors, as executrix de son tort; and in this aspect of the case an account is asked. (12) That if he left no personalty, or an insufficient amount with which to pay debts, complainant has the right to subject the real estate in Lewis county, described in the bill, to sale for the payment of his claim. (13) That although the defendant has been a resident of Maury county, and recently of Lewis county, Tenn., almost continuously since the death of her husband, she has never qualified as executrix or administratrix of her husband's estate in Lewis county, and no one else has been procured to do so, nor have any steps been taken to wind up the estate and pay the debts thereof. (14) The bill asks that the public administrator of Lewis county, or an administrator ad litem, be appointed to wind up the same and pay debts, inasmuch as no one has been or can be procured to act. (15) The bill prays for a decree against the defendant, as to the personalty received by her, if she received any, liable for the debts of her husband, and for the sale of the Lewis county lands to pay his claim, in the event no personal assets went into the hands of defendant, available to that end, and for special and general relief.

This bill was filed against the defendant individually. The defendant answered the bill April 23, 1893, admitting—First. That she was the widow of Byron M. Smith, deceased, and that he had made a will giving her all of his property, real and personal; that he had but little of the latter; and that most of his estate was situated in Lewis county, Tenn. Second. That she knew nothing about the judgment sued on in the bill, and averring that she was no party to the proceedings in which it was rendered, and had no notice of its pendency at the death of her husband. Third. Averring that he died September 6, 1888, before said judgment was rendered, September 17, 1888. Fourth. That she had duly qualified as executrix of her husband in the county of Hennepin, state of Minnesota, and that said cause had never been revived against her as such, and hence the judgment, being against a dead man, was void, and the complainant could not recover thereon in this suit. Fifth. That she did not know whether said judgment had ever been paid; that she had never paid it, and that she was informed and believed that it was not a just judgment, and that her husband never owed complainant the amount of it at the time of its rendition; but that as complainant is seeking a recovery simply on the judgment, and not on the original consid-

eration, she will not go into the latter in her answer. Sixth. That no one had qualified as administrator of her husband in Lewis county, or any other county in this state; that this neglect to administer was not to evade the payment of debts, or to delay creditors, but was upon advice that no administration was needed, inasmuch as her husband left no personalty to be administered. Seventh. That she is still of opinion that no administration is needed in Lewis county, but that if an administrator be deemed by the court necessary, to enable the complainant to have his rights, she claims the right to be appointed as administratrix, to defend the suit. Eighth. That she never promised to pay the judgment sued on, nor did she ever authorize any one to promise to do so for her; that she had been informed that her son had made certain promises concerning the payment of this judgment, under a misapprehension of the facts, but that he had made no promise binding upon her, even if he had possessed authority to make it. Ninth. It is admitted that her husband died possessed of the lands mentioned in the bill, and that by his will he left them to her, and that they are liable for all his just debts, as there is no personal property to pay them. Tenth. It is insisted, however, that these lands are not liable for this void judgment. Eleventh. That the complainant in this action has no right to call her to account with respect to the personalty received by her from her husband's estate, that she is in no way liable in this action, and that complainant cannot recover against the estate of her husband on the void judgment sued on.

The foregoing is a full statement of the contentions, as presented in the original bill, and the individual answer thereto of the defendant. The sole defense presented in the answer, that is a defense of itself, is that the judgment sued on was rendered against Byron M. Smith after his death, and is therefore void. After her answer aforesaid the defendant qualified as executrix of her husband, before the county court of Lewis county, and, as his executrix, March 18, 1894, answered the original bill. In this answer she states: (1) That her husband died September 6, 1888, leaving a will naming her as executrix; that the will was duly probated in Hennepin county, Minn., and a copy of the same filed in Lewis county, Tenn.; that she qualified in Hennepin county, Minn., but did not in Lewis county, this state, being advised that she need not do so. (2) That she knows nothing of the judgment sued on, that her husband was dead at the date it purports to have been rendered, and that she had no notice of the same, or of the pendency of the suit. (3) She does not admit that the judgment was rendered, and demands strict proof thereof. (4) She insists that, if rendered, it was after the death of her husband, and hence is absolutely void, and that complainant is not entitled to recover thereon. (5) That if said judgment was rendered, as charged in the bill, it was procured by fraud and collusion,

and without giving notice to her husband, in his lifetime, of the pendency of the suit, or to his legal representative, or any of his family, after his death. (6) That, at the time the transcript exhibited with the bill shows the attorney served notice on her husband, the latter was incapable of taking care of himself, or of attending to any business, and that his condition and mental unfitness were apparent to any one coming in contact with him; that he had been attacked with paralysis and nervous prostration, which had rendered him unfit, mentally and physically, to comprehend and attend to business, and that this fact was known to the attorney serving said notice and conducting the suit, resulting in the alleged judgment sued on; that no notice was given to any of his family, or to any one who could appear and defend. (7) She does not admit that any judgment was in fact rendered. She avers, upon information and belief, that there were good and valid defenses which could have been made, and which would have prevented complainant from recovering on the consideration of the judgment against her husband, if any one interested had received notice, who could have appeared and defended. What these defenses were, is not stated.

April 25, 1894, complainant applied to the court, and was permitted to file an amended bill. After stating the facts, in brief, averred in the original bill and the answer thereto, the amendment avers that since the filing of the original bill the defendant had been appointed by the county court of Lewis county executrix of her husband's will; that by consent she had become a party in her representative character, and had answered as such; that she had qualified as executrix of her husband before the proper court in the county of Hennepin, Minn.; and that after her qualification in said state the judgment of complainant against her husband had been filed in the probate court of Minnesota as a claim against the estate in that county for administration, and had been allowed therein. It is stated that a transcript of the proceedings before said probate court in Minnesota will be filed on or before the hearing. The further averment is made that the real estate of the husband of defendant, in Lewis county, is worth from fifteen to twenty thousand dollars; that his estate was regarded and treated as an insolvent estate in Minnesota; and that he (complainant) had exhausted all his legal remedies to collect his judgment in that state, and failed. Process is asked for the defendant, in her representative character, in this amended bill, and that upon the hearing the land described in the original bill be sold to satisfy his judgment and all other valid debts against the estate of Byron M. Smith, where the persons owning them come in and make themselves parties, and establish their claims. The defendant demurred to this amended bill, assigning five grounds: (1) Because it seeks to have the

estate of her husband wound up in the chancery court as an insolvent estate, without averring that its insolvency had been suggested in the county court. (2) Because the original bill was filed to sell land to pay a debt due by judgment against her husband in the district court of Hennepin county, Minn., and which land had been devised by her husband, and the amended bill sets forth the fact that said judgment had been admitted as a just claim in the probate court of Hennepin county, Minn.; and thus, under the original and amended bills, the complainant sought to recover on two distinct causes of action, on the same claim or debt. (3) That the original and amended bills were antagonistic. (4) That the amended bill is an indirect attempt to insert into the cause incompetent evidence to prove the validity of the judgment sued on. (5) That the bill shows that the complainant has his proper remedy under the original bill, and no good reason is shown for winding up the estate of her husband, in Tennessee, as an insolvent estate.

It appears from the record that counsel for defendant excepted to the introduction of the record of the judgment filed as exhibit to the bill, as evidence, on the ground that it was certified by the deputy clerk, and not by the clerk of the court from which it came. This exception the master, it seems, overruled, and there was an appeal from his action. On the same day that the master acted on this exception, Hon. W. P. Clark, acting as special chancellor by consent of parties, acted on it. His decree is as follows: "This cause was heard this the 25th day of October, 1894, before Hon. W. P. Clark, sitting as special chancellor by consent of parties; and defendant filed an exception to the reading of the exhibit to complainant's original bill as evidence, because the judgment on it was certified by R. C. Royce, deputy clerk, and not by the clerk of the court in which it is alleged said judgment was rendered. Therefore the cause was continued by consent, and the defendant agrees, in open court, to withdraw said exceptions, and not hereafter to in any manner rely in this case on any informality of the certificate of the clerk to the judgment, as an exhibit to complainant's bill; all of which is ordered to be entered of record. It is further ordered that the amended bill of complainant be dismissed." It is presumed that the last paragraph of this decree was directed to the demurrer, although there is no intimation that the demurrer was called up for action thereon before his honor the special chancellor, but the record presents no exception to the order of dismissal. The deposition of Edwin S. Slater, an attorney of Minneapolis, Minn., was taken, October 10, 1895, to prove the law of that state bearing upon the force and validity of the proceedings leading up to the judgment, and the judgment rendered in Hennepin county, in favor of complainant, against Byron M. Smith, and sued on in the original bill. In the record there is an

agreement of the parties, by counsel, that Byron M. Smith died at the date stated in the answer of defendant, to wit, September 6, 1888. It is further agreed, and made a part of the record, that by the laws of the state of Minnesota a judgment rendered in that state after the death of the party is not for that reason void. It is also agreed that the parties may read as evidence of the laws of Minnesota any of the text-books, or decisions of that state, or the law books, on said subject. We take it that this agreement relieves the court of the labor of ascertaining the law of Minnesota in respect to the effect or validity of a judgment rendered in that state against a dead man, where the suit was commenced and jurisdiction attached before his death. It is agreed, of record, by the parties, that such a judgment is not void in that state, and the evidence is to the same effect. Looking to the evidence, such judgment in that jurisdiction is simply voidable, at the instance of the party or his legal representative, by an appropriate proceeding in the cause in which it was rendered. We may also dismiss all further consideration of questions, suggested by the answer of defendant, relating to the original demand upon which the judgment of complainant was based, or involved in the charge that it was obtained by fraud or collusion. For, in the first place, the averments of the answer in relation thereto, are made in the most general terms, without any statement of facts supporting the general charges; and, in the second place, there is no evidence in the record, at all, sustaining it. Learned counsel ~~w~~ have so ably represented defendant in this contest need no citation of authorities to convince them that general charges of this character, without facts stated, enabling the court to judge for itself, and without proof supporting either, afford no ground warranting affirmative relief in a court of equity. They have not pressed them here with much insistence, but used them, if we may adopt the language of war, as skirmish outposts to aid in the protection of their main intrenchment. This brings us to the vital questions in the case: First. Is the judgment sued on, rendered in the district court of Hennepin county, Minn., such a judgment as is entitled, in the courts of this state, to the full faith and credit provided for in article 4, § 1, of the federal constitution, where the public acts, records, and judicial proceedings of one state are before the courts of another state for review? Second. If it is, is it evidenced in the manner that legally calls for according it that faith and credit?

The determination of these questions makes it important to understand the law of Minnesota regulating procedure in their courts resulting in judgments for money demands, and also to understand the character of judgments that are to be accorded full faith and credit, under the provision of the constitution cited. The learned judge presiding be-

low, as recited in his decree, heard the cause upon the pleadings and proof, including the law of Minnesota, found in its Code of 1894 (sections 5198-5199, 5208, 5209, 5267, 5354, 5437, 5447, 5933), and the articles of the federal constitution which were read in evidence. It appears from a recitation in the decree that the defendant, at the hearing, objected to the reading of the transcript filed as an exhibit to the bill, because it has no caption. His honor sustained this objection, and this action removed all the evidence in the record of the judgment sued on.

Complainant has assigned the following errors: (1) The chancellor erred in sustaining the exception of the defendant to the transcript of the record from the court in Minnesota rendering the judgment sued on, exhibited with the bill, and made a part of it, because the same had no caption, inasmuch as said transcript is a full and perfect record of the proceedings resulting in the judgment in said court, and contains all the facts necessary to show that said court had jurisdiction to render the judgment, under the law of that state. (2) He erred in dismissing the bill, because the defendant interposed no plea of nul tiel record, and the interposition of such plea was necessary in order to avail herself of an issue questioning the existence of the judgment sued on. It is insisted, under this assignment, that she, in effect, in her answer, admits that the judgment had been rendered, but claimed that it was void because rendered after the death of her husband. It is further insisted, under this assignment, that the allegations in her answer as executrix, that she did not admit that said judgment was rendered, but demanded strict proof of the same, are not sufficient as a plea of nul tiel record. (3) The chancellor erred in sustaining an exception to the transcript, as evidence, on the hearing, because at a previous term of his court the defendant excepted to it on the ground that it was certified by the deputy clerk, and not by the clerk of the court rendering the judgment, and on the call of the case for trial it was continued by consent, and therefore defendant agreed to withdraw her exceptions, and, having done so, she was not entitled thereafter to except again. In other words, the point is made that withdrawing her said exception amounted to a waiver of all exceptions not previously taken. (4) The court erred in dismissing the bill and taxing the complainant with the costs, because, the record from the court in Minnesota showing on its face a valid judgment in that court, such judgment cannot be collaterally attacked in the courts of this state, by virtue of article 4, § 1, of the federal constitution. (5) The court erred in sustaining the demurrer to the amended bill.

The first position advanced by defendant in support of the action of the chancellor in excluding the transcript as evidence is that this court cannot entertain an objection to his action in respect thereto, because, being ex-

cluded as evidence, it was not made a part of the record by bill of exceptions. *Spurlock v. Fulks*, 1 Swan, 288; *Gib. Suit in Ch.* § 1045; and *Kelley v. Fletcher*, 94 Tenn. 5, 28 S. W. 1099,—are cited in support of the proposition. If this position be well taken, it disposes of the appeal, and it would be a useless waste of time to consider and present our views of the law applicable to the other nice questions raised in the record and the assignment of errors. We have examined the cases of *Perry v. Pearson*, 1 Humph. 431; *Spurlock v. Fulks*, 1 Swan, 291; *Aymett v. Butler*, 8 Lea, 453; *Steele v. Frierson*, 85 Tenn. 438, 3 S. W. 649; *Anderson v. Railroad*, 91 Tenn. 54, 17 S. W. 803; *Kelley v. Fletcher*, 94 Tenn. 1, 28 S. W. 1099,—all of which announce the general rule on this subject. In the 1 Humph. case, supra, the deposition of a witness was objected to, and ruled out by the chancellor, and there was no bill of exceptions to the action of the chancellor, by which the deposition was made a part of the record. The supreme court, in its opinion, said: "All depositions and other papers which are read as evidence before the chancellor constitute a part of the record in the case, and will be heard by the supreme court upon an appeal; but those which, upon motion, are rejected as incompetent and illegal, and not therefore to be read, cannot be taken into consideration here, unless a bill of exceptions has made them a part of the record. Depositions are frequently rejected for matter arising upon parol evidence. The interest of witnesses is often thus proved, and, unless a bill of exceptions be filed, it is impossible for the court above to know for what cause the deposition was excluded." The point in the 1 Swan case was where the deposition of a witness was excluded, and the supreme court said: "Without intimating an opinion as to the competency of the witness, it is enough to say that his deposition, not having been made a part of the record by a bill of exceptions or order of the court, is not before us, and therefore no question can be raised on it." It cites the case in 1 Humph. The 8 Lea case was precisely to the same effect. There the chancellor excluded depositions because of the incompetency of the witnesses, and it was held that no question could be made as to his action unless the excluded depositions were made part of the record by bill of exceptions. Judge Cooper cited 1 Humph. and 1 Swan, supra. The case of *Steele v. Frierson*, 85 Tenn. 431, 3 S. W. 649, affirms the same rule. In this case the evidence of a witness was excluded in the court below, and no bill of exceptions made the excluded evidence a part of the record. Judge Lurton, delivering the opinion of the court, said: "Where evidence is excluded by the chancellor, his action can only be reviewed by us by a bill of exceptions showing the excluded evidence and his ruling upon it." The same eminent judge, in *Anderson v. Railroad*, 91 Tenn. 44, 17 S. W. 805, said: "When evi-

dence offered in a chancery cause is excluded upon objection, the correctness of the ruling cannot be challenged upon appeal unless the excluded evidence be made a part of the record by bill of exceptions." "This," says he, "has been repeatedly so ruled." He cites 85 Tenn., 3 S. W., and 8 Lea, supra. This holding was in reference to the action of the court below in excluding evidence of witnesses offered to prove matter or representations contradicting a written contract under which the parties subscribed to the capital stock of the railroad company. In *Kelley v. Fletcher*, 94 Tenn. 1, 28 S. W. 1099, Mr. Justice Caldwell reaffirmed the rule that, unless made a part of the record by bill of exceptions, evidence excluded by the chancellor on the hearing cannot be looked to by the supreme court. The ruling in this case was applied to the action of the chancellor in excluding evidence offered, tending to show that certain leases assigned by a party to a corporation in payment of his subscription to its capital stock were of but little value. The opinion does not in terms state the character of the evidence offered,—whether that of witnesses, or whether it consisted of exhibits to the pleadings, or other documentary evidence,—but the clear inference permissible to be made is that it was the proof of witnesses that was rejected. The rule announced, in general terms, in all these cases, is that evidence rejected by the chancellor cannot be considered in the supreme court unless it be made a part of the record by bill of exceptions. We are of opinion that the rule as announced in the cases cited does not, and was not intended to, apply to a state of facts such as is presented in this record. The exhibit to and a part of the bill excluded by the chancellor was, it is true, in a sense, evidence, and very strong evidence, assuming it to be a legal transcript from a court of competent jurisdiction. It also constituted the complainant's cause of action, and the vital part of his bill. Objection was made to it on the hearing, and the chancellor sustained the objection on the ground, as recited in his decree, that it was without caption. We have therefore the essential part of the bill stricken out on motion, and the reason therefor given in the decree of the chancellor; and the case is, we think, distinguishable, in a marked feature, from those relied on by counsel for defendant, and herein referred to. This holding makes it proper for us to state the facts and law on the other questions raised in the record.

We find that July 20, 1888, one A. C. Sheldon, an attorney at law of Minneapolis, Minn., having his office at 620 Temple court, in said city, as the attorney of complainant, issued and served a summons upon Byron M. Smith, under the following heading or caption: "State of Minnesota, County of Hennepin. District Court. Fourth Judicial Circuit. Robert B. Taylor, Plaintiff, vs. Byron M. Smith, Defendant. Summons. State

of Minnesota. To the above-named defendant." This is followed by a summons containing all the facts required to be in such process under the statutes of Minnesota, made evidence in this case. A copy of the complaint of Taylor accompanied this summons, under similar headings, containing all the requisites demanded by the law of that state. It gave notice of the two notes sued on, their date, where executed, to whom executed, when due, the rate of interest they bore, when payable, that they had been transferred for value to the plaintiff in the action, that they were due and unpaid, and citing him to appear and defend within 20 days in the designated court. All the provisions of the statute under a similar caption were complied with, and September 17, 1888, under the same caption, the clerk of the court, by his deputy, upon motion of the attorney for Taylor, rendered a formal judgment against Smith for the amount of the notes sued on, with interest and costs, the defendant having made default. Then follow other short entries, under a similar heading, stating the amount of the judgment, when filed, name of judgment creditor and debtor,—using the term "judgment roll." The transcript exhibited and made a part of the record in this cause, containing all these entries, is certified by the clerk of the district court of Minnesota, by his deputy, under seal. The presiding judge of that court certifies as to the official character of the clerk, and the clerk authenticates the official character and signature of the judge. In other words, we find as a fact—and so it is agreed in the record—that the transcript is properly certified. We further find that defendant qualified as executrix of the will of her husband, after his death, in Hennepin county, Minn., and that the judgment sued on, and rendered as aforesaid in Hennepin county on April 25, 1889, was filed in the probate court of Hennepin county, in said state, as a claim against the estate of Byron M. Smith, and allowed therein as a valid demand against it. The fact of the presentation of his judgment to said probate court, and its allowance therein, was the subject-matter of the amended bill of complaint. It was proposed in the amended bill to produce a certified transcript of the record of the probate court, thus showing the facts relative to this feature of the case. As before stated, the amended bill was dismissed on demurrer, and this action of the chancellor is assigned as error. The court below, we infer, acted on the idea that the probate proceedings constituted a separate demand from that sued on in the original bill, and hence that the two pleadings were inconsistent. If so, we need only say that in our opinion he was in error; for it is manifest, it seems to us, that the judgment obtained in the district court was filed in the probate court simply as a claim against the estate of the judgment debtor, and its allowance in the latter

in no wise vacated the judgment in the former, or constituted a separate, distinct, or antagonistic demand. It is easy to be seen, we think, that the record made in the probate court with respect to the judgment obtained in the district court might, in certain aspects of the suit, become very material evidence; and for this purpose, as we understand the purport of the amended bill, it was desired to bring it before the court. But no exception appears to have been taken to the action of the chancellor at the time, and as it was not made, by exhibit, a part of the amended bill, and is not made a part of the record by bill of exceptions, we cannot consider it. In other words, while it is before us as a physical fact, it is not legally before us as a part of the record. But in our view of the case this matter is wholly immaterial; for, if the judgment rendered in the district court in Minnesota was properly rendered, there is no effort made to show its payment.

The question arises, at this point, was and is the judgment rendered in that state, in the district court thereof, against the husband of the defendant, and sued on by the bill in this case, valid? It was rendered by the clerk of that court, upon default, the defendant not appearing. Under the evidence in the record, the district courts of that state are courts of original and general jurisdiction, in respect to cases triable in them. Code Minn. § 4833; Thayer v. Cole, 10 Minn. 215 (Gil. 173). There is no question as to their jurisdiction to render the judgment against Smith, conceding that jurisdiction attached. It may be said with absolute certainty, from the record,—and we so find as a fact,—that the provisions of the Code of Minnesota were fully and literally observed in all steps leading up to the judgment rendered in the district court of Hennepin county, that state, against Byron M. Smith. Code Minn. 1894, §§ 4533, 5193-5197, 5199, 5208. Under section 5209, the jurisdiction of the court attached from the time of the service of the summons, and after this it had control of all the subsequent proceedings. It is further the law of that state that the clerk of that court, upon default of the party sued on a contract for the payment of money only, may enter judgment. Code, § 5196, subd. 2; Heinrich v. Englund, 34 Minn. 395, 26 N. W. 122. And it appears that his action in such case is the action of the court, and his decision as to the sufficiency of the proof of service of the summons is of equal validity with that of the judge, and binding upon the parties until set aside or reversed by a direct proceeding in the same action. Klipp v. Fullerton, 4 Minn. 473 (Gil. 366).

As before stated, we are relieved of the labor of delving among the books and decisions to find out whether this judgment is void because rendered against a dead man; the suit having been commenced against him,

and the jurisdiction having attached, before his death. It is agreed in the record that it is not void, and the proof is that such a judgment in the state of Minnesota is not void, but only erroneous or voidable by appropriate proceedings in the same action, and in the same court. This being so, it follows that such judgment, rendered in another state, is not impeachable, when sued on in courts of this state, simply because of its erroneous or voidable character, under a direct proceeding in the case, in the court of its rendition. *Cooper v. Reynolds*, 10 Wall. 308; *Trust Co. v. Seasongood*, 130 U. S. 482, 9 Sup. Ct. 575; *Town of Plainview v. Winona & St. P. R. Co.*, 38 Minn. 505, 32 N. W. 745; *Eaton v. Hasty*, 29 Am. Rep. 365; *Fitzsimmons v. Johnson*, 90 Tenn. 416, 17 S. W. 100; Const. U. S. art. 4, § 1; Act May 26, 1790; Rev. St. U. S. § 905. Mr. Justice Miller, in delivering the opinion in *Cooper v. Reynolds*, supra, said: "It is of no avail, therefore, to show that there are errors in that record, unless they be such that prove that the court had no jurisdiction of the case, or that the judgment rendered was beyond its power. This principle has often been held by this court, and it takes rank as an axiom of the law." It is to be understood, of course, that the provision of the constitution and the section of the Revised Statutes cited apply to judgments final in their nature, and certain, or capable of being made so. *Fritz v. Fisher*, 5 Clark (Pa.) 350, 3 Am. Law Reg. 243; *Fitzsimmons v. Johnson*, 90 Tenn. 416, 17 S. W. 100. And it must have been duly entered, in accordance with the law of the state regulating the procedure of the court rendering it. 12 Am. & Eng. Enc. Law, bottom page 148n, note 1; *Knapp v. Abell*, 10 Allen, 485. The case of *Hinson v. Wall*, 20 Ala. 298, cited for defendant, does not control this case. Its facts differ radically from the facts in this. In the Alabama case the record only disclosed certain memoranda of a clerk noting judgment, and the court held that this could not be received in place of the solemn act of the court as required at common law. Here the clerk renders a solemn judgment upon process issued and served, and under power thereto, upon the default of the defendant, as provided by law; his act being the act of the judge and of equal force and effect in such case. It will be understood, also, that we recognize the difference between judgments of another state and foreign judgments and domestic judgments. The difference is clearly stated in cases from the supreme court of the United States. *Christmas v. Russell*, 5 Wall. 290, 305; *Cole v. Cunningham*, 133 U. S. 107, 10 Sup. Ct. 269. We hold simply that the judgment of another state, rendered by a court having jurisdiction, is admissible in evidence under the general issue, and that it has the same force and effect, when pleaded or offered in evidence, as in the state where it was rendered, and no more. *Insurance Co. v. Harris*, 97 Otto, 331; *Cannon v. Brame*, 45

Ala. 263; *Fitzsimmons v. Johnson*, 90 Tenn. 416, 17 S. W. 100. If the transcript of the sister state proceeding and judgment show what is required to be done under the law of that state, and be authenticated as required by the act of congress, it is sufficient. *Andrews v. Flack* (Ala.) 6 South. 907; *Ferguson v. Harwood*, 7 Cranch, 408. And so it has been held that, if the attestation conform to the laws of the state where the record is made, it is sufficient. It seems to have been held in New York that the clerk himself must sign his name to the attestation, and that his name signed by his deputy (this fact appearing on the face of the attestation) is defective. *Morris v. Patchin*, 24 N. Y. 394. Held otherwise in Iowa. *Young v. Thayer*, 1 G. Greene, 196. But it is agreed in this case that the attestation is sufficient, and it would seem that the certificate that the attestation is in due form is conclusive; and where the attestation does not, on its face, show that the transcript is of the entire record, the certificate cures this defect. *Lee v. Gause*, 2 Ired. 440; *Ferguson v. Harwood*, 7 Cranch, 408; *Coffee v. Neely*, 2 Helsk. 304.

But it is said—and so the court below held—that this record is fatally defective because it has no caption of the court, and hence could not be looked to as evidence of the existence of the judgment in Minnesota. We are of opinion that this holding of the learned chancellor is not sustainable in law, nor by the proper legal definition and origin of the word "caption," and its adaptation, as a descriptive term, in connection with legal documents and judicial proceedings. It is defined by the legal lexicographers as "the heading of a legal document, in which is shown the time when, the place where, and the person by whose authority it was prepared or executed." Anth. Dict. Law, 148. The word, in its legal application, had its origin in England, in the action of an inferior court in transmitting, in obedience to the mandate of the king's bench, an indictment to the crown office. It was accompanied with a formal history, giving the court in which the indictment was found, the jurors by whom it was found, and the time and place when it was found. This instrument, termed a "schedule," is annexed to the indictment. The history of the proceeding, as copied or extracted from the schedule, is called the "caption," and is entered of record immediately before the indictment. *Starkie, Cr. Pl. p. 287*; *Ex parte Bain*, 121 U. S. 7, 7 Sup. Ct. 781. But it was not then, and is not now, considered a part of the indictment. Authorities supra. It seems to us that the case in 2 Helsk., supra, in principle, controls this case, in respect to this question. Here we have all the heading necessary to show the court in which the judgment was rendered, and the transcript shows the service of process, when the judgment was rendered, upon what it was rendered, and by whom it was rendered. The court had jurisdiction of the person

and subject-matter. The transcript of the record is attested as being complete and in conformity to law.

This settles the case. The result is that the decree of the chancellor is reversed, and a decree will be entered here for the amount of the judgment sued on, and interest, and for the costs, against the defendant, as executrix of her husband Byron M. Smith. The cause will be remanded to the chancery court of Lewis county for further proceedings in conformity to this opinion.

NEIL and BARTON, JJ., concur.

Affirmed orally by supreme court, March 6, 1896.

NASHVILLE TRUST CO. v. LANNOM'S HEIRS et al.

(Court of Chancery Appeals of Tennessee.
Feb. 8, 1896.)

RESULTING TRUSTS—EVIDENCE.

Where a wife turns over to her husband money received from her father's estate, without any agreement for its investment, the fact that the husband subsequently informs the wife that he has invested it in certain land for her, whereas he had not, but had taken title thereto in himself, is insufficient to create therein a resulting trust in favor of the wife.

Appeal from chancery court, Davidson county; Thomas H. Malone, Chancellor.

Suit by the Nashville Trust Company, administrator, against the heirs and creditors of W. A. Lannom, deceased. From a decree for complainant, Mrs. Lannom, the widow of deceased, appeals. Affirmed.

Nolen & Slemons, for appellant. John Allison, for appellee Nashville Trust Co. Smith & Dickenson, for appellee Fourth Nat. Bank. John Ruhm & Son, for appellee Max Ernst.

WILSON, J. This bill was filed November 8, 1893, by the complainant corporation, as administrator of W. A. Lannom, deceased, against his widow and heirs and creditors, to sell the lands of the decedent to pay debts, on the ground of the insolvency of his estate. Dower and homestead, and a year's support, had been set apart to the widow and children; and all questions but one are out of the record, in so far as our determination is invoked. The bill described the separate parcels of real estate of which the intestate died seised. Among them were a house and lot in Nashville situated on Harris street. Mrs. Lannom filed her answer as a cross bill, and therein averred that said house and lot were purchased with her means, received by her husband as a trust fund to be invested for her, and that the same were invested by him in this house and lot. The prayer of the cross bill is that the title to said house and lot be divested out of all the parties to the suit, and vested in her, or, if this could not be done, that the fund belonging to her,

which was invested in the purchase of the property, be declared a lien thereon, and the lien enforced by its sale. Her cross bill was answered, and the claim presented by her denied. The depositions of seven witnesses were taken to establish her contention. The chancellor heard the cause, in respect to the contention raised by the cross bill, March 21, 1895, and decreed that Mrs. Lannom was not entitled to the property, but that it belonged to the estate of her deceased husband, and dismissed her cross bill, with the costs incident thereto. From this decree she prayed and obtained an appeal to the supreme court, and has assigned one error, the effect of which is that the chancellor erred in not giving her the relief she prayed, because the evidence makes out a case of resulting trust, in her favor, to the property in question.

It would be uninteresting, as well as wholly unprofitable to the parties litigant in this case, or their counsel, to go into a discussion of the testimony in this cause. It is sufficient to say that in our opinion, after a careful reading and consideration of the evidence, the facts disclosed thereby do not make out a case of resulting trust in this property in favor of Mrs. Lannom, nor do they establish her right to have a lien fixed on the property, in her favor, as against the creditors of her husband. The substance of the evidence is that she had an undivided interest in a tract of land in Kentucky, which she sold to her brother and brother-in-law for \$800. This sum was paid at different times, by said parties, in checks drawn in her favor, which she immediately indorsed and handed to her husband, who at the time was a prosperous merchant in Nashville, and supposed to be in easy financial circumstances. There is no evidence in this record that, at the time she turned the checks received for her interest in the Kentucky land over to her husband, there was any contract, agreement, or understanding between them that he was to invest it for her benefit, or in property, taking the title thereto in her, or that he was to hold it, or be accountable for it, as a trust fund for her. Her own evidence, giving it full credit, and deducing from it all fair and legitimate inferences, makes out no such case. In her original examination, being asked what she did with the money when it was paid to her for her interest in the Kentucky land, she said, "I gave it to Mr. Lannom." Being further asked if, at the time she gave it to him, "she had any contract, agreement, or conversation as to what was to be done with the money," she replied, "He told me, after I gave it to him, that he bought Mechanics' Bank stock with it for me." He told her this some time after the money was given to him, but how long after, she did not remember. Further on, in her original examination, she states that this money was paid to her by her brother and brother-in-law in checks payable in checks, and that she indorsed and "turned them over to her husband, and never

thought any more about them." It is true that Mrs. Lannom testifies that her husband told her that he had sold her Mechanics' Bank stock a short while before that institution failed. The proof, however, is left in obscurity in respect to the amount of this bank stock he bought or held. It is fairly evident from the facts disclosed by her own testimony that this stock was not bought and put in her name, and that she never had any control of it, for she states that she did not know its amount, nor what it sold for. It was never in her possession. In short, her only connection with the sum she received for her interest in her father's real estate, as testified to by herself, was "to indorse the checks, and deliver them to her husband." It is doubtless true that he told his wife that he had invested the proceeds of the Mechanics' Bank stock in a house and lot for her, and that, as she understood, the house and lot in question is the one he referred to in making this statement to her. As a matter of fact, the house and lot in controversy cost \$2,000, as recited in the deed, and the deed was made to him. He knew that the deed was made to him, and the evidence of Mrs. Lannom is that a short while before leaving the city for Monteagle, being in very bad health, she asked him what would become of this lot in case of his death without having the deed changed, and he said, "There would be no trouble," and went on to explain to her that she could get it; and she says, "I supposed he knew, and I believed him." It furthermore appears that Mr. Lannom told her brother and mother, and one or more of his mercantile friends, that he had invested in a house and lot for his wife; and, says her mother, "I have heard him joke her about her property." But there is not a particle of proof that Mrs. Lannom ever had control of the bank stock, or the house and lot, or that she ever received the dividends, if any, paid in the former, or the rents from the latter. That Mr. Lannom contemplated having the deed to this lot changed to his wife just before he left for Monteagle, where he died some eight or ten days after reaching there, is reasonably clear from the proof; and it is also reasonably to be inferred from the proof that he had in mind that it was his duty to make some such investment for her, in view of the sum she had received from her father's estate, and turned over to him. But, as before stated, there is not a particle of evidence that he made any agreement or contract with his wife, at the time he received the money from her, or afterwards, to do so. Giving every word of the evidence all the probative force in favor of Mrs. Lannom that can be claimed, and the most that is established is that he told her that he had bought bank stock for her, when, as an actual legal fact, he had not, and afterwards told her that he had sold this stock and invested the proceeds in this house and lot, when, as an actual legal fact, he had not.

Is this evidence, and the facts presented by

it, sufficient to raise a resulting trust in the wife, or to create a lien in her favor on the house and lot, to the extent of the fund received by her from her father's estate, against the claim of creditors of her husband? We think not. We are referred by counsel of Mrs. Lannom to *Pritchard v. Wallace*, 4 Sneed, 405; *Powell v. Powell*, 9 Humph. 477; *Click v. Click*, 1 Heisk. 607; and *Pillow v. Thomas*, 1 Baxt. 130. We have examined these cases, and believe that neither one of them sustains the contention of Mrs. Lannom. The case of *Powell v. Powell*, supra, simply held that a direct conveyance of slaves by a husband to his wife, in consideration of her relinquishment of dower, in the state of Virginia, was good, and would vest the title to the property in her, to her separate use, without any words to that effect. The case of *Pritchard v. Wallace*, supra, was a case where the wife filed a bill to set up a resulting trust in a tract of land purchased by a former husband, taking title to himself, and Judge Caruthers sustained her bill, and granted the relief prayed. But the court held that, from the evidence, there was no doubt that the wife consented to a sale of her land upon the distinct agreement and promise on the part of her then husband to invest the proceeds for her benefit, and that of her children after her, in the tract of land before the court, and that the proceeds were so invested. The case of *Pillow v. Thomas*, supra, announces a similar principle, although in this case Judge Deaderick held the evidence insufficient to establish the trust. The wife alleges in her bill that she was a minor when she married, and that her guardian refused to turn over her estate and funds to her husband until he made a distinct promise and agreement to invest her means for her use and benefit, and that he did agree and promise to invest them in the land in question. The case of *Click v. Click* is found in 1, not 9, Heisk., but we infer this is a mistake of the typewriter. But the trust in *Click v. Click*, 1 Heisk. 607, was rested upon an express agreement on the part of the husband with the wife that she should have the land for her sole and separate use. The trust must result, if at all, at the time the trade is made and the deed is taken, and must rest upon a contract that the purchase is made for the benefit of the wife, and the existence of the contract ought to be shown by clear and convincing evidence. *Pillow v. Thomas*, 1 Baxt. 120. It might be conceded, for the purposes of this case, that the evidence of the nominal purchaser as to the facts of the agreement and the receipts of the money, and payment of it, if full, clear, distinct, and convincing, will be sufficient to establish the trust. *Id.* 131; *Pritchard v. Wallace*, supra. But "the admissions of the party are always liable to be misunderstood; and, in a case where it is sought to set up a claim against the recitals of a deed, the evidence should be full, clear,

and convincing, especially after the lapse of years, or where the trust is not claimed until after the death of the alleged trustee." *Pillow v. Thomas*, supra. All the cases and the text writers hold that, before the wife can set up a resulting trust in land, the title to which is in her husband, as against the claims of creditors, it must appear that the husband received her money or estate under a contract to invest it, or its proceeds, in the land, for her use and benefit. *Loftis v. Loftis*, 94 Tenn. 232, 28 S. W. 1091; *Gates v. Card*, 93 Tenn. 340, 341, 24 S. W. 486; *Sullivan v. Sullivan*, 86 Tenn. 376-381, 6 S. W. 876. Cases from this and other states might be cited at great length. This case falls at this vital point. There is no pretense that Mr. Lannom received this money under any sort of promise or agreement to invest it for her use and benefit. His subsequent admissions are admissible in evidence, and his conduct with the fund may be shown, for what they are worth, to establish the fact that, when he received the money or funds of the wife, he received it under a promise to so invest it. But Mrs. Lannom says she turned it over to him, and thought no more about it until he told her he had invested it for her. Chancellor Kent, at an early day, after admitting this character of evidence to establish resulting trusts, says, "The cases uniformly show that the courts have been deeply impressed with the danger of this kind of proof, as tending to perjury and the insecurity of paper title, and they have required the payment by the cestui qui trust to be clearly proved." *Boyd v. McLean*, 1 Johns. Ch. 582. The courts, with great unanimity, have followed this doctrine. *McCammon v. Pettitt*, 3 Sneed, 246; *Sandford v. Weeden*, 2 Helsk. 70; *Hyden v. Hyden*, 6 Baxt. 406. In the case last above cited the court said the proof must be "most convincing and irrefragable." And it was said in a case where a wife was seeking to set up a resulting trust in land, the title to which was in the husband, upon the averment that the husband had used her money in its purchase, under an agreement with her that the title should be taken to her. One eminent court has gone so far as to say that the admission of parol evidence to establish a resulting trust was called "one of the mistakes of equity." *Lee v. Browder*, 51 Ala. 288. We have dealt with the record as if the evidence of the wife detailing conversations with her husband was competent. In *Pillow v. Thomas*, supra, it was expressly held not to be. We have also so far considered the case on the theory that the money received was received as the separate estate of the wife, and that the husband held it, in some sort, as her fund. As a matter of fact and law, she simply turned over this \$800, and some interest on it, to her husband, and his marital rights attached. *Joiner v. Franklin*, 12 Lea, 420; *Hyden v. Hyden*, 6 Baxt. 406-408. If it be conceded that he afterwards told her

that he had invested it for her in certain property, where he had not, but had taken title thereto in himself, no case is made out under the law, as we understand it, establishing a resulting trust, or fixing a lien in her favor, as to the property. The result is that the decree of the chancellor is affirmed, with costs.

BARTON and NEIL, JJ., concur.

Affirmed orally by supreme court, March 14, 1896.

CLARKSVILLE & R. TURNPIKE CO. v. CITY OF CLARKSVILLE et al.

(Court of Chancery Appeals of Tennessee.
Feb. 12, 1896.)

APPEAL—REVIEW—SHUNPIKE—WHAT CONSTITUTES.

1. The appellate court, on review, will not consider assignments of error directed to matter of argument or obiter dicta of the trial court, and not involved in the actual decision to be reviewed.

2. A county road which would be of great convenience to people living between two existing roads, one of which is a turnpike, by shortening their line of travel to the town in which the roads terminated, and which would in time of high water be of great utility, is not a shunpike, though the effect would be to decrease the business of the turnpike company so as to entitle such company to enjoin its location.

Appeal from chancery court, Montgomery county; George E. Seay, Chancellor.

Bill by the Clarksville & Russellville Turnpike Company against the city of Clarksville and Montgomery county and others. There was an account for complainant, and both parties appeal. Reversed.

Leech & Savage, for complainant. Burney & Gholson, W. M. Daniel, and Lyle & Gholson, for defendants.

WILSON, J. The complainant is a corporation chartered by the legislature of this state, in 1850, to construct and operate a turnpike from the city of Clarksville, Montgomery county, Tenn., to the Kentucky line, in the direction of Russellville, in the latter state. It maintains a pike, under its charter, as is averred, some 12 miles in length. It owns a bridge across Red river, near the present corporate limits of Clarksville, and receives toll at said bridge, as well as at two gates on its road, one of its gates being at said bridge. This bill was filed by it July 31, 1893, to enjoin the city of Clarksville, Montgomery county, and the other defendants named, from constructing a bridge across Red river, and opening a public road running thence northward to an intersection with an established public road, on the ground that the same was being opened as a shunpike, and that to open it to public travel would practically destroy the value of its franchise. The bill is also filed by complainant as a taxpayer, and it is averred that the

steps taken and money appropriated by the municipality and county to build the objectionable bridge and open the obnoxious road were without legal sanction. Relief appropriate to the allegations of the bill was asked, and a temporary injunction was granted in accordance with its prayer. The city of Clarksville, Montgomery county, and F. P. Gracey answer, stating their view of the situation and facts, and insisting that the bridge and public road in issue are, in the sense of the law, a public convenience, if not a necessity. The chancellor, at chambers, August 15, 1893, modified the temporary injunction before granted, "in so far as it enjoins the city of Clarksville and county of Montgomery from paying any more money, under the contract complained of, for the construction of the bridge across Red river." Much testimony was taken in respect to the main questions raised in the pleadings, and the cause was brought to a hearing April 24, 1894. The learned chancellor rendered a decree displeasing to both sides, and both prayed and obtained an appeal, and have assigned errors. As his decree presents the grounds of contention, we copy the same in full. He held: "(1) The grounds which attack the contract for the construction of the new bridge across Red river are not well taken. As to this, the bill will be dismissed. (2) The new road complained of has for its termini Pea Ridge and Clarksville. Its northern end begins at a point on the Newton road at or near Pea Ridge, and runs thence, in a southerly direction, to where it intersects the Peterson or New Providence road; thence, in a westward direction, over said Peterson road, several yards; and then, leaving said road, it runs southward to the new bridge. The route from Pea Ridge to its intersection with the Peterson road is nearly parallel with complainant's road, is some $1\frac{1}{2}$ miles in distance, and runs in close proximity to complainant's pike. The proof is established that, if opened up, it will divert a large portion of travel from said pike, and will afford the means whereby complainant's gate and bridge across Red river can be passed around, and its tolls evaded, and the revenues therefrom seriously reduced. The proof further shows that there is but little difference, in the distance to Clarksville, between the new road and complainant's pike,—less than a mile; that there is no trouble by reason of high waters which the new road is intended to relieve against; and that the pike is the better road. The proof does not show the existence of any material facts by reason of which the creation of this part of the proposed road is a public convenience or necessity. Unless it appear that it is reasonably essential to the public convenience, its location with reference to complainant's pike, and that it affords the easy means whereby the payment of tolls at its gate or bridge may be avoided, would make

it a shunpike, under our decisions, against the creation of which complainant is entitled to be protected. The fact that it does not touch complainant's pike is immaterial, or that it may not be intended as a shunpike. The quo animo is not the question, if it be in effect a shunpike. Whether that part of the proposed road from the new bridge, running in a northerly direction, to where it intersects the Peterson road, so as to be, in effect and substance, a continuation southward of the road now running from Needmore to the Peterson road, would be a mere shunpike, or whether such a road, with such termini, and so located, might be created by the county court, because reasonably essential to the public convenience, is not material, and need not now be determined. That, as to this part of the road, the proof does show the existence of a different state of facts and circumstances, cannot be denied. The people living along it, on its west side, as far north as Needmore, perhaps, are much inconvenienced at times by high water, and their inability to cross the West Fork at the Leonard or Peterson fords; and at such times the difference in the distance necessary to be traveled over in getting thence to and from Clarksville, as compared with the distance by this part of the new road, is considerable. That the proof does reasonably establish these facts cannot be successfully controverted. But the issue tendered is not with reference to a road having such termini and location, and questioning the power of the county court to create and open it, because required by the public convenience, notwithstanding its effect upon the travel over the complainant's pike and bridge. The road in question was applied for, located by the jury of view, and established by the county court, as a road having one of its termini at or near Pea Ridge, and running thence, along the route as indicated by the jury of view in its report, to the city of Clarksville. And in establishing the road thus indicated, in the same order, it expressly declined to pay any damages to the landowners through whose land it ran, and provided against any liability of the county for its establishment. This is the road complained of, and the order of the county with reference thereto is the one in question. Whether the county court would open the southern end without the northern end, or without it having a terminus at or near Pea Ridge, or whether, in opening it in part, it would deem it of such small importance as to refuse to pay any damages assigned, or to attempt to limit its liability therefor, or whether, if it did see proper, in the exercise of its powers, to open up such a road in part, it would injure or violate any right of complainant company, is not in question. The issue is as to the road as located and ordered opened by the court, and must be considered as an entirety. For these reasons the court—the chancery court—cannot enjoin

the opening of a material part of said road, and leave the other part unaffected by the injunction. Such a road as would be left would be one never applied for to the county court, and the opening of which it has never assented to or directed. It would be, indirectly, the creation of the chancery court, and this court has no jurisdiction to open or establish public roads. It may be proper, in this connection, to say, also, that the existence of the old road described in the exhibits from the records of the county court of 1819, and years subsequent thereto, and the powers and duties of the county court with reference thereto, and the rights of the public thereunder, are not material to the issue in this case, are not involved, and hence are not determined, and will not be, in the decree pronounced in the cause. (3) It appearing that the road, as located by the jury of view, and as now established by the order of the county court of Montgomery county, is, in effect, a shunpike, it follows that its creation was and is in violation and impairment of the charter rights of the complainant, against which it is entitled to an injunction of this court, prohibiting the same. (4) It appearing that complainant's corporate existence is, by its charter, limited to the 1st day of January, 1890, the injunction now granted will be restricted to that date, from and after which date the decree will provide that the injunction shall expire by its own limitation. (5) The defendants will pay the costs."

As will be seen, this embraces the elements of an opinion and decree, and it seems to have been entered as the decree of the lower court. Both sides, being dissatisfied, prayed an appeal, which was granted.

Complainant assigns two errors: (1) "The decree is too narrow, in limiting the bill as a protest against the establishing of the new route with termini at Pea Ridge and Clarksville. The bill presents clearly that every part of the new route described, as well as the whole of it, as one thing is a shunpike. If opened up from the Red river to the Peterson road, so as to be a mere continuation of the Needmore road, it would be just as effective as a shunpike as it is as designated in the order of the county court." It then recites the opinion of the chancellor on this point, hereinbefore copied. (2) That the contract for the construction of the bridge across Red river, to be used in connection with the new road, should have been declared void, under the averments of the bill and proof. The error assigned by the defendants is that the chancellor was in error in holding a part of this road a shunpike, and that the court could only consider the road as a whole. "If any part of it," says the assignment, "was a shunpike, and the other not, the chancellor should have closed the objectionable part, and left the other open."

It is manifest that the first error assigned by complainant cannot be sustained, for the

obvious reason that it is not directed to the decree actually rendered by the chancellor, but to his opinion as to the probative force of evidence tending to establish an issue before him, as adjudged by himself. Courts of review, unless it is so nominated in the law of their creation, are not expected or authorized to sit in judgment on the mere opinions or arguments of inferior tribunals, whose judgments or decrees are brought before them for revision. With respect to the issue tendered in the pleadings as construed by the chancellor, to the effect that the road in controversy was a shunpike, and therefore obnoxious to the chartered rights of complainant, it was adjudged that it was a shunpike, and the opening and use of it by the public as a public road were forbidden. The incidental opinions of the chancellor as to what he would or might decide, under the evidence, if the pleadings raised an issue calling for such decision, are not proper matters of review in this court.

The second error assigned by complainant and the one assigned by the defendants may be properly treated together; for, as is well said by the brief of counsel, the fundamental question in the case is whether or not the road in controversy, ordered to be opened by the county court of Montgomery county, based upon the report of a jury of view, is a shunpike, in the sense of the law. If it is, the decree of the chancellor is correct. If not, his decree is erroneous, and should be reversed. To clearly apprehend the question, and the proper basis for its right decision, the controlling facts, relevant under the pleadings, appearing in the evidence, must be stated. With these facts plainly defined, there will be no difficulty in the application of the law.

From the averments of the bill and the evidence, it appears: (1) That the complainant company was chartered by the legislature of this state in 1830, and that its charter will expire, under the terms of its legislative grant, January 1, 1899. (2) That it owns a toll bridge on its line across Red river, about one mile from Clarksville, and it has a toll gate, kept up at, or in connection with, its toll bridge. (3) Its pike runs in a northwestern direction from Clarksville towards the Kentucky line, which is some 11 miles distant from Clarksville. (4) A pike, known generally as the "Hopkinsville Pike," runs in a northwestern direction from Clarksville to the Kentucky line. This pike crosses Red river by a bridge owned by Clarksville, at which toll is charged. (5) The termini of the bridges of these two pikes, at Clarksville, are some 2 miles apart. (6) They are some 13 miles apart where they come to the Kentucky line. (7) Where the present bridge of complainant is, across Red river, there was a free bridge before and during the greater part of the late war between the states. It was destroyed by fire. In 1865 the complainant was authorized by the legislature to build a toll bridge, and to issue \$20,000 of bonds to pay therefor, and in 1867 \$5,000 more bonds were author-

ized; the act authorizing their issuance providing that all the net revenues received from tolls on the road should be applied to the payment of these bonds. These bonds were all retired in 1887. (8) The legislature in 1891 extended the corporate limits of Clarksville to the low-water mark of Red river, between and beyond these bridges, and this extension embraced some three-fourths of a mile of the pike of complainant, and, also, a tract of about 75 acres of land formerly belonging to defendant Gracey and one Woodward, and which they conveyed to a corporation known as the Gracey-Woodward Iron Company. An iron furnace was erected on this tract. Gracey and Woodward, after this, purchased a tract on the opposite bank of the river from this 75-acre tract. (9) The bill avers that Gracey and Woodward wanted a bridge across the river, so as to connect these two tracts, and that they succeeded in interesting the city of Clarksville and the county in their bridge enterprise. (10) As a matter of fact, adopting in substance the language of one of the briefs filed with the record, "a bridge across Red river, about equidistant from the two other bridges, and a road running substantially north, so as to intersect what, for descriptive purposes, may be called the Needmore road, and then the Trenton road, and then over it to the state line, was deemed by a number of people of Clarksville and the county to be a matter of importance to the commercial interests of the city, and greatly to the public convenience of a large number of people living between the two main existing roads, in getting to and from Clarksville." This purpose became organized, and the county court at its July term, 1890, appointed a jury of view to lay off such a road; and at the January term, 1891, said jury made a report designating the road in controversy, and it was declared a public road by the county court. In September, 1892, the county, the city, and defendant Gracey, for himself and other citizens, entered into a contract with one Converse to build a bridge across Red river, at the point where it was crossed by the new road, at a cost of \$10,000; each party to the contract to pay one-third of its cost. This bridge was to be of iron, and the materials for its construction were on hand, and the bridge nearing its completion, when complainant filed this bill. (11) The main income of the complainant company is derived from its tolls collected at its gate and bridge near Clarksville. It appears that its receipts at this point amount annually to some \$4,000, and those at its other gates only to some few hundred dollars. (12) It is not denied or disputed, in the record, that the opening of the road in controversy would divert a large part of the travel now passing through the gate and over the toll bridge of complainant near Clarksville, coming from the Pea Ridge country, and sections north of it, to Clarksville, and returning. In other words, the people living out from Clarksville to the Kentucky line, between the

road of complainant and the Hopkinsville pike, and in easy striking distance of this new road, would use it, and thus avoid paying toll, in going to and returning from Clarksville. That this diversion would materially lessen the revenues of the complainant is not disputable, under the evidence in this record. It is equally indisputable, from the evidence, that this new road would be a great convenience to the people occupying this territory, and who live any distance from the two existing roads. It would shorten their line of travel in reaching Clarksville, and in periods of high water its utility to them would be very great. These are the main and controlling facts in the case, aside from the peculiar environments of Clarksville in respect to the location and character of its water ways or streams. It is proper to consider these, in arriving at a correct conclusion as to the necessity or public convenience of this road in controversy. Clarksville is a city of importance, in its commercial aspects, and contains a population, commercially considered, of over 8,000. It is situated between the Cumberland and Red rivers, just above where they come together. Red river confines it on the north, and surrounds it, in the form of a semi-circle, for perhaps two-thirds of its corporate limits. In this sense, it is peninsularly located. The Cumberland is not bridged, but is crossed, in reaching Clarksville, by ferryboats. Red river is spanned by the two bridges aforestated in this opinion. Roads diverge from these two bridges northeastwardly and northwestwardly, going in the direction of the Kentucky line. Red river is divided into two prongs, in the section of country between these roads, out from Clarksville towards the Kentucky line. The fords and ferries over this stream and its prongs had much to do with the early location of roads in the early history of Montgomery county. The road in controversy, or one in substantial conformity to it as to location, was at an early day regarded by the county as a public convenience. This is not cited as a determinative fact, but to present the situation.

With these facts, is the road in issue a shunpike, or is it a public convenience? "A shunpike," says an able author, "is a road intended to furnish a way of evading a toll gate, and constructed for that special purpose." Elliott, *Roads & S.* p. 74. "It is lawful, however," says this author, "to build roads, although they may interfere with the right to collect toll, if they are built for the convenience of the public." *Id.*; *Charles River Bridge v. Warren Bridge*, 11 Pet. 420; *Turnpike Co. v. Smith*, 89 Ind. 290. Our own decisions are in accord with this view. *Bridge Co. v. Shelby*, 10 Yerg. 280; *Franklin & C. Turnpike Co. v. County Court of Maury*, 8 Humph. 350; *Hydes Ferry Turnpike Co. v. Davidson Co.*, 91 Tenn. 291, 18 S. W. 626. In the case in 91 Tenn., 18 S. W., the latest published utterance on the subject—of our supreme court—called to our attention, the

principle is distinctly announced that public roads and bridges demanded by the general convenience, and created to subserve that end, are not turnpikes, although they may afford the means of passing around the gates of a turnpike company, and evading payment of tolls. It is also held in this case that the county court may erect or open a road, when the same is required by public convenience or necessity, even though the effect of the same is to diminish or destroy the value of a franchise formerly granted to a bridge, ferry, or turnpike. Of course, the learned judge, in the opinion, in using this clear language, was speaking of former grants, which, in their terms, were not exclusive. It is not insisted that the charter of complainant was exclusive, in the sense that its charter stood in the way of chartering other roads, and hence that it had a monopoly of furnishing the "public convenience" of road travel. Just what constitutes a "public convenience" or "necessity," in reference to public roads, is not susceptible of a precise definition. The term is closely analogous to, if not synonymous with, "public use," where, under the right of eminent domain, private property is taken for public use. This term, in general, means a use open to the whole community, as distinguished from particular individuals, although every member of society need not be equally interested in such use, or be personally and directly affected by it. If the object be to meet a public want or exigency, it is sufficient. So, if the taking tends to enlarge the resources, increase the productive or industrial energies, and promote the wealth-creating power of any considerable number of the inhabitants of a section of the state, or leads to the growth of towns, and the opening of new channels for the employment of private capital, it will be upheld as a taking for public use. *Tolbot v. Hudson*, 16 Gray, 417; *Olmstead v. Camp*, 33 Conn. 532, and authorities cited. In intermediate cases, of which this is an illustration, when public and private interests are blended together, it may be difficult to decide on which side of the line they fall. In this class of cases, each must depend on its own peculiar circumstances. In this state, jurisdiction over the subject of public roads has been committed, under general laws, to our county courts. Their powers in respect thereto are in the nature of legislative powers. Primarily, they have the right to determine whether the opening of a road or the establishment of a bridge will subserve the public convenience or necessity, and to appropriate private property, upon just compensation, to that end. While their decision is not conclusive upon the judicial department that the use is public, it is entitled to weight before the courts; and it ought not to be reversed on the ground alone that the exigency for the exercise of the prerogative right of eminent domain does not exist except in clear cases. We have examined the evidence in

this record, in connection with the map, with great care; and, under the facts, we feel constrained to hold that the county had the right to open this road, and that it is a "public convenience," in the sense of the law. This settles the case.

The other objections raised in the bill, to the effect that the city of Clarksville had no authority to enter into the contract for the construction of the bridge, that there was no ordinance for the appropriation of money therefor, that the order of the county court was not effectual to open or establish the road, and as to the resolution of the county court appropriating money for the bridge, etc., and other alleged irregularities in the proceedings leading up to contract about the bridge, are not well taken, under the facts of this case; for, conceding the power in the municipality and in the county court to engage in or do what was done, all these mere irregularities or defects were cured by express ratification. The result is that the decree of the chancellor will be reversed, with costs, and the bill is dismissed.

NEIL and BARTON, JJ., concur.

Affirmed orally by supreme court, March 7, 1896.

PEOPLE'S BANK OF SPRINGFIELD v. WILLIAMS et al.

(Court of Chancery Appeals of Tennessee.
Feb. 29, 1896.)

ATTACHMENT—NONRESIDENCE—JUDGMENT—COLLATERAL ATTACK—ASSIGNEE FOR BENEFIT OF CREDITORS.

1. The fact that a defendant is absent from the state on business or pleasure, or for the benefit of his health, with the intention of returning, does not render him a nonresident within the meaning of the attachment law.

2. A decree in an action of attachment based on an affidavit of nonresidence, though such affidavit was untrue, and though the action was based on an indebtedness not due, in which case no attachment is allowed by statute on the ground of nonresidence, cannot be impeached by a defendant who knew of the action, and had an opportunity to defend, but made default, nor by his assignee for the benefit of creditors without statutory authority.

3. An assignee for the benefit of creditors, who by agreement sells property seized by a creditor under an attachment against his assignor, cannot be held personally liable therefor beyond the amount realized, or which should by proper care have been realized, from its sale, less his reasonable expenses and charges.

Appeal from chancery court, Robertson county; George E. Seay, Chancellor.

Bill by the People's Bank of Springfield against Millard F. Williams, as assignee, and his sureties. Decree for complainant against defendant Williams, and he appeals. Reversed.

Burney & Gholson, for appellant. J. L. Stark and L. T. Cobb, for appellee.

WILSON, J. The bill in this cause was filed November 17, 1892, against defendant Williams and the sureties on his bond as the assignee of the firm of Hallums Bros., composed of J. S., J. J., and C. R. Hallums, who made an assignment for the benefit of creditors. The ground of recovery averred in the bill is that complainant, under a bill filed by it against J. S. and J. J. Hallums, had attached a lot of property conveyed in the assignment to Williams before its registration, and obtained a decree for its sale by the master in that case to satisfy its recovery therein adjudged, but that said Williams was permitted to sell said property under a distinct agreement that he should turn over a sufficiency of the proceeds to pay off its debts fixed in that case, which agreement, although leaving the proceeds in his hands, he refused to observe. A personal decree is asked against the assignee and his sureties for the unpaid balance of its decree obtained in that case, and that pending the litigation the assignee be directed to pay into court the sum realized by him from the sale of property it had attached in its prior case. There is also a prayer for general relief. The sureties of the assignee demurred to the bill, and their demurrer was sustained, and the bill dismissed as to them. Williams filed his answer as a cross bill. In it he denies that he agreed to sell the property and turn the proceeds over to complainant. His insistence is that he was to sell the property attached by complainant, conveyed in the assignment to him, and hold the proceeds for whomsoever the court might adjudge. In his cross bill he avers that the attachment and decree of complainant against J. J. and J. S. Hallums, under which the property of the firm of Hallums Bros., composed of J. J., J. S., and C. R. Hallums, was attached and ordered to be sold, were null and void, because the attachment in the case was issued upon the averment and an affidavit that J. J. and J. S. Hallums were not residents of the state, when they were. Williams, May 7, 1893, filed an amended cross bill, and, after stating in substance the facts of his former cross bill, alleged that the complainant had in its bill against J. J. and J. S. Hallums averred that its debts or demands sued on were due, when in fact they were not; and that, in order to obtain the attachment, the cashier had sworn to the bill containing the averment that the debts were due; and that this fact had recently come to his knowledge in the taking of the deposition of said cashier in this case. This amended cross bill insists that if the court had known as a matter of fact that the debts sued on in that case of the complainant against J. J. and J. S. Hallums were not due, no decree would have passed in its favor, notwithstanding it had a pro confesso, and that its bill and attachment would have been dismissed. The cross bill also avers that the paper evidencing the debts of complainant sued on in that case was not filed

with the record, and that the court in rendering the decree therein acted upon the allegations of the bill, which was sworn to. Upon the fact that its debt was not due, and the further fact, averred in his first cross bill, that J. J. and J. S. Hallums were not nonresidents, it is prayed that the court set aside and rescind the decree rendered in favor of complainant in its case against J. J. and J. S. Hallums, in which the property of the firm of Hallums Bros., composed of the three Hallums aforesaid, was attached, and which property had been conveyed to him in the general assignment of said firm. This rescission is asked on the ground that, in view of the facts stated, the said attachment and decree thereon in favor of complainant were void. The complainant, in its answer to the cross bill, states that there was a firm composed of J. J. and J. S. Hallums, known as Hallums Bros., and that there was also a firm composed of the two Hallums aforesaid and C. R. Hallums, known as Hallums Bros. It reaffirmed the allegations of its bill against J. J. and J. S. Hallums, and that at the time it was filed they were in law nonresidents of the state. It denies that defendant Williams was to take the property it attached in that case, and which had been conveyed to him in the assignment of the firm composed of the three brothers, and sell the same, and pay the proceeds to whomsoever should be entitled. On the contrary, it insists that he was to sell said property, and pay the proceeds over to it. It avers that it commenced its suit against J. J. and J. S. Hallums according to law, and that it proceeded to a final decree according to law, and denied that its decree could be attacked, as was attempted in the cross bill; and the answer ends by saying that the complainant demurs to the same. Proof was adduced by the parties, and the chancellor heard the case May 10, 1893. His decree recites that the case was heard upon the original bill, the demurrer thereto of the sureties of Williams, the answer and cross bill of Williams, the answer and demurrer thereto, and the application of Williams to file an amended cross bill in connection with the evidence. As before stated, the demurrer of the sureties was sustained, and at this hearing the demurrer of complainant to the cross bill was sustained. He held that Williams, under the evidence, received the property under an agreement with complainant to sell the same, and apply a sufficiency of the proceeds thereof to the payment of the decree of complainant rendered at the May term, 1891, of his court; that he had failed and refused to carry out this agreement; and that, as there was a balance of \$6,633.56 of said decree unpaid, Williams was liable therefor; and thereupon rendered a personal decree against him for that sum, and all the costs, except that incident to making his sureties defendants. Williams prayed and was granted an appeal from this decree except that part sustaining

the demurrer of his sureties, and was given 30 days to give bond. He failed to perfect his appeal by giving the bond, but June 20, 1894, presented a petition to one of the judges of the supreme court for writ of error and supersedeas, which was granted, and the case is before us on this writ of error.

The errors assigned may be considered under two heads: (1) That the original attachment proceedings of complainant against J. J. and J. S. Hallums, and the decree thereunder, were fraudulent and void, because the defendants thereto were not nonresidents, and because the debt sued on was not due, as averred in its bill. (2) That the personal decree in this case against Williams and the awarding of execution thereon were not warranted under the evidence, in any reasonable aspect of the facts.

We think the first ground of objection is not well taken, but that the second is. In order that the parties litigant may have the full benefit of the facts as we find them, we proceed to state them as briefly as possible, with the preliminary remark that we have heretofore, in an opinion in the case of *Farmers' & Merchants' Nat. Bank v. People's Bank*, covered, as we think, the ground of complainant presented in the first objection above stated. We find as follows:

1. The complainant bank, December 13, 1890, filed its original attachment bill in the chancery court at Springfield against J. J. and J. S. Hallums as a business firm to recover on various drafts drawn on the firm of Hancock, Hallums & Co., of Clarksville, Tenn., and accepted by the latter firm, said drafts aggregating over \$8,000, and none of which were due at the time the bill was filed. The bill, however, contained this averment: "Complainant states that the defendants are indebted to it in the sum of \$8,885.65, due by drafts drawn by the defendants on their warehousemen or commission merchants in Clarksville. Said indebtedness was contracted for money loaned to defendants in their partnership business. Said drafts as evidence of said indebtedness will be filed on or before the final hearing of the cause." It also contained this averment: "Complainant alleges, believes, and charges that the defendants are nonresidents of the state of Tennessee and residents of the state of Colorado." There was a prayer that an attachment issue against the estate of defendants, especially the property set out in the bill; that upon the hearing a decree be given it against the defendants for its indebtedness, interest and costs, and that the property levied upon or attached be sold to pay the same. This bill was sworn to by the cashier of the bank.

2. An attachment was issued under this bill, and levied upon the property described, some of it being in Robertson and some in Cheat-ham county; and publication was made for the defendants as nonresidents.

3. We find as a matter of fact, and as a matter of law applicable to the facts, that

said J. J. and J. S. Hallums were not nonresidents of the state of Tennessee when this bill was filed. The simple, plain facts in connection with their absence from the state at that time are these: In the summer of 1890 J. S. Hallums, being a consumptive, under the advice of his physicians, went to Colorado and other points west, for the benefit of his health. He expected to remain until he was restored to health, or as long as he was benefited. He did not contemplate moving his citizenship, nor did he move his property, or dissolve his business connections or relations with his brothers, J. J. and C. R. Hallums. Some six weeks or more after J. S. Hallums left for the West, his brother J. J., who was a physician, hearing that his brother was not doing well, and needed his presence, immediately went to him, to wait on and look after him. His contemplated absence from the state was indefinite, depending upon the condition of his brother's health. He did not, however, when he went to his brother, contemplate removing permanently from the state, nor did he move his business and property. At the time the sick brother went west, and at the time his brother J. J. went to look after him, these brothers, J. S. and J. J., and another brother, C. R. Hallums, were partners in business in various branches of business and trade, and C. R. Hallums was also a member of the warehouse firm at Clarksville, Tenn., of Hancock, Hallums & Co. The three Hallums brothers did business under the firm name of Hallums Bros., and when J. J. Hallums left to look after his brother J. S. he left the business affairs of the three brothers under the control, direction, and management of C. R. Hallums.

4. The warehouse firm of Hancock, Hallums & Co. failed, and made an assignment. Their failure involved the firm of Hallums Bros., and C. R. Hallums, who was left in charge, knowing this fact, made a general assignment for the firm of Hallums Bros.

5. The solicitor of the complainant bank was in Clarksville when he received information of the embarrassment of Hancock, Hallums & Co., who were primarily liable for the drafts drawn by the firm of Hallums Bros., held by it. He immediately returned to Springfield, and prepared the bill containing the averments aforesaid. It was prepared in the bank building, and was sworn to by the cashier. Said solicitor, perhaps acting upon the information hurriedly communicated to him by the cashier, did not know or notice that the drafts he was suing on were not due, but said cashier knew they were not due, and the probabilities are that both he and the solicitor were aware of the fact when the bill was prepared, sworn to, and filed. It is also quite probable that the cashier, and possible that the solicitor, in the hurry of getting their bill ready, and their attachment and its levy, did not at the time think that the nonmaturity of the debt stood in the way of obtaining the attachment. It is also more than probable that

both the solicitor and the cashier believed that in the sense of the law J. J. and J. S. Hallums were nonresidents of the state.

6. The attachment issued under this bill was levied upon a lot of property conveyed to Williams under the assignment made by the firm of Hallums Bros., composed of the three brothers acting as aforesaid, in the matter by C. R. Hallums. It was also levied upon a lot of property not embraced in said assignment.

7. C. R. Hallums was not made a defendant to that bill of this complainant, and, as stated, publication was made for J. J. and J. S. Hallums. J. J. and J. S. Hallums, although absent from the state, had notice in fact or knew of the filing of the bill and of the levy of the attachment. C. R. Hallums also knew all about it. J. J. and J. S. Hallums both returned to their homes in Tennessee before the case was tried, and before the bill was taken for confessed. None of them appeared, or offered to make any defense. In regular course, and at the next term of the court after the bill was filed, no defense being interposed, the bill was taken for confessed, and upon its allegations a final decree was rendered for the amount of the drafts sued on, all of them having matured by that time, and the recovery was declared a lien on the property attached, which the master was ordered to sell to satisfy the decree.

8. As before stated, some of the property attached had been conveyed in the assignment of Hallums Bros. to Williams, and it being believed that Williams, as assignee, could sell the same for better prices than the master under the forced sale ordered under the decree obtained by complainant, it was agreed that he should do so. The complainant in this bill insists that the agreement was that Williams was to sell the property, and turn over to it enough of the proceeds to pay off whatever of its decree the other property attached by it failed to discharge. Williams contends that the agreement was that he was to sell this property, and hold the proceeds for the parties entitled, as might be adjudged by the court. The chancellor adopted the theory of complainant, and rendered a decree accordingly against Williams personally. In this, we think he was in error. It is, at best, doubtful if Williams had any right to make any such promise as is insisted upon. In view of the situation and his relation to the property, it was perfectly natural and consistent for him to say that he would sell the property, and hold the proceeds, or turn them over to the court to be appropriated to whomsoever might be entitled. This, in our opinion, from this record, is what he did promise to do. It is manifestly the promise, and the only promise, in connection with the subject, that he ought to have made, if he made any at all; and we are unable to see what right the complainant had in view of the situation, and the rela-

tion of Williams to the property, to exact any other. As before stated, we find as a fact that J. J. and J. S. Hallums were not nonresidents of the state when this complainant filed its attachment bill against them. Nor were they in contemplation of our attachment laws. *Smith v. Story*, 1 Humph. 421; *Stratton v. Brigham*, 2 Sneed, 420. All the facts and circumstances may be considered in determining the question of residence in the suing out an attachment under our statute on the ground of nonresidence, and under all the facts appearing in this record it is impossible, it seems to us, to come to the conclusion that J. J. and J. S. Hallums were nonresidents. See, also, *Klepper v. Powell*, 6 Helsk. 504, and *Whitly v. Steakly*, 3 Baxt. 393. We find no case holding that an absence from the state on business or pleasure or for the benefit of health, the intention being to return, amounts to or constitutes nonresidence under our statute authorizing the issuance of an attachment. The defendant Williams insists that, not being nonresidents, there was no valid process, and, this being so, the proceeding by attachment on this ground was a fraud, and the decree should be set aside at his instance as assignee representing creditors, under his cross bill. His counsel cites: *Haynes v. Powell*, 1 Lea, 352; *Brown v. Brown*, 2 Sneed, 432; *Day v. Walker*, 7 Lea, 713; *Walker v. Day*, 8 Baxt. 77. An examination of these cases, in our opinion, will show that they are not in point, under the facts of this case, in respect to the contention of defendant. In *Haynes v. Powell*, *Day v. Walker*, and *Walker v. Day*, supra, the general principle was announced "that a charge of nonresidence, of removal, or removing from the state, absconding, etc., as grounds of attachment, when, in fact, the defendant was beyond the state by reason of his hostile attitude as a belligerent or a follower of either cause during the late war, and when he was separated from the place where the court was held by hostile lines of the opposing armies, was in the nature of a fraud." Under this principle it was rightfully held that the parties thus fraudulently proceeded against might impeach the proceedings. But if the parties thus proceeded against were cognizant of the proceedings, had an opportunity to defend, and did not, and by their acquiescence or conduct ratified the proceedings, we do not understand that the proceedings were open to attack by the parties themselves. *Haynes v. Powell*, supra. And if not impeachable by the parties themselves, they cannot be by their assignees. In general, an assignee stands in the shoes of his assignor. *Kingman v. Loyer*, 40 Ohio St. 109; *Shaw v. Glen*, 37 N. J. Eq. 32; *Keller v. Smalley*, 63 Tex. 512; *Brownell v. Curtis*, 10 Paige, 210; *Flower v. Cornish*, 25 Minn. 473. Of course, the rule is different in states having a statute covering the subject. In this state it has been expressly

held that the assignee does not take as a purchaser for value, but that he is the simple representative of the assignor and his estate, and stands in his shoes. *Nashville Trust Co. v. Bank*, 91 Tenn. 336, 18 S. W. 822, and authorities cited.

It is also insisted that the debt of this bank was not due when it filed its bill against J. J. and J. S. Hallums as nonresidents, and that this fact was concealed from the court, and thus a gross fraud was perpetrated upon the court. This contention is based upon sections 4192, 4194, Mill. & V. Code. The first section cited provides that a party having a debt or demand due at the commencement of an action may have an attachment in the enumerated cases specified in the statute. Section 4194 provides that an attachment may in like manner be sued out on debts or demands not due in any of the cases mentioned in the preceding section except the first, where the debtor or defendant resides out of the state. And our court has held that an attachment shall not issue for a debt not due if the sole ground of the attachment is the nonresidence of the defendant. *Bank v. McCarger*, 9 Helsk. 401. It seems to us that the matter of defense against the jurisdiction of the court to issue the attachment was a matter of abatement to be pleaded in that suit. *Smith v. Story*, 1 Humph. 420; *Foster v. Hall*, 4 Humph. 346; *Isaacks v. Edwards*, 7 Humph. 465; *Kendrick v. Davis*, 3 Cold. 527; *Boyd v. Martin*, 9 Helsk. 386; *Tarbox v. Tonder*, 1 Tenn. Ch. 165; Mill. & V. Code, §§ 5062, 5128, 5131. Under the case of *Pigue v. Young*, 85 Tenn. 263, 1 S. W. 889, the defendants J. J. and J. S. Hallums, or either of them, could have made the defense of the prematurity of the suit against them by answering (see, also, *Robinson v. Grubb*, 8 Baxt. 19); the suit against them being in equity. But, knowing of it, and having time and the opportunity to do so after their return home, they did not present the defense, either by plea in abatement or by answer. We do not think the case of *Bank v. Haselton*, 15 Lea, 216 et seq., in which the opinion was delivered by Special Judge Ingersoll, is in conflict with the views we have expressed herein. He seemed, in the opinion, to be inclined to differ from the opinion of the majority of the court on several material questions in issue. Speaking of the attachment, he said: "It was issued upon no other statutory ground than that of the nonresidence of the debtors; yet by it complainants sought to secure debts not due. This was a fatal defect (New Code, § 4194), and it was apparent on the face of the proceedings." The following page of the opinion (page 232) does not directly bear upon the question in hand. We feel constrained to hold that there is no legal merit in the contention under the decisions that the decree of this bank was void in the sense that it was open to attack in

the collateral matter attempted by defendant Williams in his cross bill. We do hold, however, that the personal decree against him, and the awarding of execution thereon, were not warranted by the facts stated, and that the decree of the chancellor should be reversed on this ground. This assignee, so far as we can see from this record, is entitled to proper compensation for his services in selling said property and collecting the proceeds, and all that can be required of him is to pay into court such of the proceeds of the sale as by proper care and diligence should be in his hands, and out of this, after ascertaining the same, a proper allowance should be given him for his services. The cause will be remanded to the court below for all proper orders of reference to carry out this opinion, and to have said Williams pay into court the proceeds in his hands, or that should be there, arising from the attached property sold by him under his agreement thereto. The bank will pay the costs of the writ of error to the supreme court, and the costs below will be paid out of the funds.

NEIL, J., concurs.

Affirmed orally by supreme court, March 10, 1896.

TODD, Mayor, v. JOHNSON, County Clerk, et al.

(Court of Appeals of Kentucky. June 23, 1896.)

ELECTIVE OFFICES—VACANCY—HOW FILLED—STATE OFFICERS—PRESIDENTIAL ELECTORS.

1. Const. § 152, provides that, except as otherwise provided therein, vacancies in all elective offices shall be filled as follows: If the unexpired term ends at the next succeeding annual election at which either city, town, county, district, or state officers are elected, the office shall be filled by appointment for the remainder of the term. If the unexpired term does not so end, and if three months intervene before such election, the office shall be filled by appointment until said election, and then said vacancy shall be filled by election. Section 160 provides that the general assembly shall provide for removal of all officers of towns and cities, and for filling vacancies in such offices. *Held*, that the power of the general assembly is limited to providing how vacancies in elective offices of towns and cities may be filled temporarily, and until an election can be had as provided by section 152; and that the time when the election to fill the vacancy shall be held is fixed by section 152, and cannot be prescribed by the general assembly.

2. St. 1894, § 1514, prescribes the time for the election of electors of president and vice president. Section 1543 requires them to convene at the state capitol on the second Monday in January, after their election. Section 1545 provides that each elector is entitled to receive the same per diem and mileage as a member of the general assembly, to be paid out of the state treasury. *Held*, that presidential electors are "state officers," within Const. § 152, providing that if the unexpired term of an elective officer does not end at the next succeeding annual election at which either city or state officers, etc., are elected, and three months intervene before

such election, the office shall be filled by appointment until said election, and then said vacancy shall be filled by election. Guffy and Durelle, JJ., dissenting.

Appeal from circuit court, Jefferson county.
"To be officially reported."

Action between George D. Todd, mayor of the city of Louisville, Ky., and William P. Johnson, county clerk of Jefferson county, Ky. There was a judgment in favor of Johnson and others, and Todd appeals. Affirmed.

John Marshall, Henry S. Barker, and Fairleigh & Straus, for appellant. Humphrey & Davie, T. L. Burnett, Lytle Buchanan, Robert E. Woods, Phelps & Thum, and Alfred Selligman, for appellees.

HAZELRIGG, J. The death of Henry S. Tyler, in January, 1896, caused a vacancy in the office of mayor of the city of Louisville; and the appellant, George D. Todd, was in due time, and as provided by statute, chosen mayor pro tempore by the general council. Whether this temporary election by the council was to fill out the entire unexpired term of Tyler, who had been elected in November, 1893, for four years, or was to provide an incumbent only until an election by the people in November, 1896, is the sole question presented on this appeal.

The sections of the constitution supposed to affect the question are as follows: Section 152: "Except as otherwise provided in this constitution, vacancies in all elective offices shall be filled by election or appointment, as follows: If the unexpired term will end at the next succeeding annual election at which either city, town, county, district or state officers are to be elected, the office shall be filled by appointment for the remainder of the term. If the unexpired term will not end at the next succeeding annual election at which either city, town, county, district or state officers are to be elected, and if three months intervene before said succeeding election at which either city, town, county, district or state officers are to be elected, the office shall be filled by appointment until said election, and then said vacancy shall be filled by election for the remainder of the term."

* * * The balance of the section is not involved here. Section 160, after making certain provisions as to mayors or chief executives, police judges, and members of legislative boards or councils of towns and cities, and providing for the election or appointment of other officers of towns and cities, concludes as follows: "The general assembly shall prescribe the qualifications of all officers of towns and cities, the manner in, and causes for which they may be removed from office, and how vacancies in such offices may be filled." In obedience to the one or the other of these sections, or of both, the general assembly, in the enactment of a charter for cities of the first class (section 2788, St. Ky. 1894), provided as follows: "When a vacancy shall

take place in the office of the mayor, a mayor pro tempore shall be chosen by the general council, in joint session, by the votes of a majority of the members elected. If the vacancy occur three months or more prior to a regular municipal election, a mayor shall be chosen for the unexpired term at the said election. If the vacancy occur within three months, the mayor pro tempore, chosen by the general council, shall serve until the regular election for mayor. It shall be the duty of the president of the board of aldermen to issue his proclamation for such joint session, to be held not less than ten nor more than twenty days after such vacancy shall take place. Until the vacancy is filled, the president of the board of aldermen shall act as mayor."

As there is to be no "regular municipal election" in Louisville in November, 1896, the appellant contends that the vacancy cannot be filled then, if the plain letter of the statute be observed. But, without regard to the meaning to be given the words "regular municipal election," it seems clear to us that in so far as the statute provides "how" or by what process the vacancy is to be filled, namely, by the action of the general council, in joint session, and by the votes of a majority of the members elected, etc., it conforms to and meets the requirements of the provisions of section 160, giving the general assembly the power to provide how such vacancy may be filled; but we think, when it comes to providing the time at which an election is to be held by the people to fill the vacancy for the unexpired term of this officer,—confessedly "elective," under the constitution,—we must look to section 152 of that instrument. And, if the statute changes the time there fixed, so much the worse for the statute; the constitution must control.

In considering this precise question in *Shelley v. McCulloch* (Ky.) 30 S. W. 193, we reached the conclusion that the power of the general assembly was limited to providing how vacancies in elective offices of towns and cities might be filled temporarily, and until an election could be had by the people to fill the unexpired term as provided by section 152. We need not repeat here the reasons there given fully for our conclusions. However, granting this, the appellant says there is to be at the November election, 1896, no election "at which either city, town, county, district or state officers" are to be elected, and therefore the vacancy cannot then be filled. And this brings us to consider the only serious question in this case. There will be elected at that time the electors of president and vice president; and these, say counsel for the appellees, are "state officers." And such they undoubtedly are. St. Ky. 1894, § 1514, provides for their election (which means an election by the people on a general ticket) on the Tuesday next after the first Monday in November, 1892, and on the same day in every fourth year thereafter. By section 1543 they

are required to convene at the capitol of the state on the morning of the second Monday in January after their election, cast their votes, and make due return thereof according to law; and for each day an elector so attends (section 1545) he is entitled to receive the same per diem and mileage as may at the time be allowed to a member of the general assembly, to be paid out of the state treasury. He would seem, therefore, to be no more converted into a federal officer because he is elected by the people to cast his vote for a presidential candidate than a member of the general assembly would be considered a federal officer because, when elected, he casts his vote for a senator of the United States; for, while the latter is supposed to do more than that, he does that much, and his status as a state officer is not affected. In *Re Green*, 134 U. S. 379, 10 Sup. Ct. 587, Mr. Justice Gray said: "By the constitution of the United States, the electors for president and vice president in each state are appointed by the state in such manner as its legislature may direct. * * * Const. art 2, § 1. The sole function of the presidential electors is to cast, certify, and transmit the vote of the state for president and vice president of the nation. Although the electors are appointed and act under and pursuant to the constitution of the United States, they are no more officers or agents of the United States than are the members of the state legislatures when acting as electors of federal senators, or the people of the states when acting as electors of representatives in congress." And a conviction in the state court for illegal voting for electors at a regular state election was upheld. So, in *McPherson v. Blacker*, 146 U. S. 35, 13 Sup. Ct. 3, where the validity of a state law was attacked as repugnant to the constitution of the United States, because the law provided for the appointment of electors by district elections, the court upheld the state law, on the ground that "the legislatures of the several states have exclusive power to direct the manner in which the electors of president and vice president shall be appointed," and held that they might be appointed by the legislatures directly, or by popular vote in districts, or by general ticket. "In short," said the court, "the appointment and mode of appointment of electors belong exclusively to the states under the constitution of the United States." When framing the present constitution, therefore, its makers had before them the plain provisions of the statutes making these officers "state officers," not in some peculiar or qualified sense, but in every conceivable sense; congress having no control over their election or appointment, but being empowered merely to determine the time when they should be chosen. And they had before them, if they were needed, the decisions of the supreme court to this effect. Why they should be held, therefore, to have intended that the words "state officers," in section 152, should not include these electors,

—these particular state officers,—we cannot conceive.

It is said, however, that these officers are not named in the constitution. This is true, and for the best of reasons. It would have been a wholly useless thing, unless, indeed, it had been thought desirable to fix permanently the mode of electing such officers. The technical rule of construction which would confine the words "city, town, county, district or state officers" to those officers who had been mentioned in the constitution, if adopted, would not only override the literal construction of the section, which undeniably includes those electors, but would also set at defiance the well-settled constitutional policy of our state since the abrogation in 1850 of the old constitution of 1799. And that policy is to refer to the people—the source of all governmental power—the right of filling the officers of their creation with incumbents of their own selection. The only excuse for the appointment of any officer made elective under the law is founded on the emergency of the public business; and when, by death, removal, resignation, or otherwise, an elective office is made vacant, the policy of the law is to give to the people a chance to fill it as soon as practicable. "The great object in the change in the system," said this court in *Speed v. Crawford*, 3 Metc. (Ky.) 207, and which is emphasized in the well-considered case of *Toney v. Harris*, 85 Ky. 473, 3 S. W. 614, "was to refer to the people the choice of their officers of all grades and classes, whether state, district, county, city, or town offices. That choice was to be made through the instrumentality of an election." In *Berry v. McCollough*, 94 Ky. 247, 22 S. W. 78, we had under consideration section 148 of the constitution in so far as it prohibited the election of city, town, or county officers in the same year in which members of congress are elected; and it was contended that a vacancy in the office of coroner of Jefferson county could not be filled at the election of county officers in 1892. We held that the adoption of such a construction "would stretch the appointive term very far beyond what was intended or provided for under either the old or the new constitution," and "construed the prohibition to apply to regular elections only." The framers of the constitution were not ignorant of this policy, and they must be supposed to have intended to embrace in the comprehensive language used in the section, viz. "city, town, county, district or state officers," all the officers of these divisions and subdivisions, from the highest to the lowest, which were then electible by the people, or which under any future law might become so, and to have intended that the occasion of any such election must furnish also the occasion for filling vacancies in any elective office. It will be observed that the vacancy is to be filled at the "next succeeding annual election at which," etc. The

use of the word "annual" is not without significance. It carries with it the idea of an annually recurring election, and one which must, under the scheme devised in the constitution, recur in every November for all time. The construction we have adopted gives at least some force to this word, for, including presidential elections, the occasions afforded for filling vacancies are largely increased, and elections for that purpose become, at least, more nearly "annual." Indeed, the use of this word gives strong color to the argument of one of our associates that, upon the first Tuesday after the first Monday in November of every year, the occasion arises for filling any vacancy in an elective office, if it occurs, of course, more than three months before, because no such November can occur when there will not be an election in some of the classes named. As to odd years, there would seem to be no question of the right to hold the elections to fill any vacancy; and in even years there will always either be an election for presidential electors, or a district election for a judge or judges of the court of appeals.

Waiving for the present the question of the electors, an illustration of this argument may be drawn from the present situation. The regular election for a judge of this court from the Fifth district is to be held at the approaching November election. There was a vacancy on the bench, caused, in — of this year, by the death of our late associate, the lamented John R. Grace. And the argument is that it is most inconceivable to suppose the lawmakers intended that an election might be held for the purpose of electing a regular judge of this court, and yet not one held at the same regular election to fill a vacancy on the same bench. This view of the matter, however, is not suggested or argued by counsel, and need not, therefore, be considered further than to say that the use of these words "at which either city," etc., would seem to indicate that it was not at every succeeding November election that vacancies might be filled, but only when those were to be elected of the classes named, and hence, unless an officer of that class is to be elected, the vacancy cannot be filled, even if there be an election for members of the lower house of congress. Be, this as it may, we are convinced that, within the meaning and intent of the constitution, vacancies in elective offices may be filled at the succeeding annual election at which electors for president and vice president are to be elected. It appears from the agreed facts, and from the statute on the subject, that a trustee for the Louisville common schools is to be elected in each legislative district of the city; and it is argued that this is an election at which "district officers" are to be elected, within the meaning of section 152, and an election, too, in the same territory as that covered in the

election for mayor. This would seem to be true, but a determination of the question is not necessary in this case. The judgment must be affirmed.

LANDES, J., not sitting.

GUFFY and DURELLE, JJ. (dissenting). Henry S. Tyler, mayor of Louisville, died on January 14, 1896, and the appellant, George D. Todd, was thereupon elected mayor by the general council. The election was had under the provisions of the act for the government of cities of the first class (St. Ky. 1894, § 2788), as follows: "When a vacancy shall take place in the office of the mayor, a mayor pro tempore shall be chosen by the general council, in joint session, by the votes of a majority of the members elected. If the vacancy occur three months or more prior to a regular municipal election, a mayor shall be chosen for the unexpired term at the said election. If the vacancy occur within three months, the mayor pro tempore chosen by the general council shall serve until the regular election for mayor. It shall be the duty of the president of the board of aldermen to issue the proclamation for such joint session, to be held not less than ten nor more than twenty days after such vacancy shall take place. Until the vacancy is filled, the president of the board of aldermen shall act as mayor." The term for which Mayor Tyler was elected will expire in November, 1897, and the vacancy occurred more than three months before the November, 1896, election. As there is to be no "regular municipal election" in November, 1896, as conceded by the opinion of the majority, the plain letter of the statute requires the election to be in November, 1897, unless the constitution renders the statute inoperative as to the time of holding the election. It is contended by appellees that the time of holding the election for mayor is controlled by section 152 of the constitution, because of the fact that in November, 1896, there are to be elected school trustees in the city of Louisville and presidential electors throughout the state. Section 152 of the constitution provides: "Except as otherwise provided in this constitution, vacancies in all elective offices shall be filled by election or appointment, as follows: If the unexpired term will end at the next succeeding annual election at which either city, town, county, district or state officers are to be elected, the office shall be filled by appointment for the remainder of the term. If the unexpired term will not end at the next succeeding annual election at which either city, town, county, district or state officers are to be elected, and if three months intervene before said succeeding election at which either city, town, county, district or state officers are to be elected, the office shall be filled by appointment until said election, and then said vacancy shall be filled by election for the re-

mainder of the term." The remainder of the section need not be considered here, except to note the somewhat striking fact that the "succeeding annual election" is referred to five times in this section, and each time is followed by the qualifying phrase "at which either city, town, county, district or state officers are to be elected."

The questions involved in the case are reduced to these: First. Is it "otherwise provided in this constitution" that the office of mayor may be filled at a different time, and in a different manner, to be prescribed by the general assembly, from the time and manner prescribed by section 152? Second. If the constitution has not so otherwise provided, (a) are school trustees either such city or such district officers, within the meaning of section 152, as to control the time of the election of the mayor, and (b) are presidential electors state officers, within the meaning of section 152 of the constitution?

First. Is there a provision otherwise in the constitution? Section 160, after making certain provisions as to the mayor and other named officers of municipalities, provides: "The general assembly shall prescribe the qualification of all officers of towns and cities, the manner in and causes for which they may be removed from office, and how vacancies in such offices may be filled." This provision is not ambiguous. It delegates to the legislature the control of the manner in which vacancies in such offices may be filled. But it is insisted that this section does not mean what it says, and that its specific provisions are controlled by the general expression contained in section 152, in spite of the saving clause at the beginning of that section, "Except as otherwise provided in this constitution." It is further contended that in *Shelley v. McCulloch*, 30 S. W. 193, this court so decided. There was no statutory provision for filling a vacancy in the office of tax receiver involved in that case, and this court held that the provision of section 152 controlled in the absence of statutory provision. It is freely admitted, however, that the logic of that opinion goes further than the point expressly decided; and while in that case there has been no legislative construction of the meaning of the constitution, and the court was not there confronted with the question whether an act of the general assembly was unconstitutional, we do not think we should be justified in dissenting from the opinion of the majority upon this ground alone. But the remaining questions are a different matter.

Leaving the statute out of the question, and assuming that it is unconstitutional and void, we have first the question whether school trustees are officers of cities or districts, within the meaning of section 152; and in this connection it may be doubted whether they are "officers" at all, in the strict meaning of the term, and whether they are not, in the view of the constitu-

tion, what their name implies, trustees of their districts for the management of the educational interests thereof, having no other power or duty, and exercising no official functions. The act for the government of cities of the first class, after fully providing for all city officers, and for a complete system of city government, enters upon a distinct field, namely, that of education. All the statutory provisions on the subject are under the distinct title of "Education," beginning with section 2949, St. Ky. 1894. At the very beginning, the school board is created an independent corporation, with a distinct government of its own, responsible for its own acts, making its own contracts, suing and being sued in its own name, and from time to time in litigation with the city. Its autonomy is perfect, and the only connection it has with the city government lies in the fact that the city is required to levy, collect, and pay over to the school board an annual tax. A consideration of that portion of the act for the government of cities of the first class relating to the school board leads us to the conclusion that they are not city officers, within the meaning of the section of the constitution under consideration. Their election, moreover, is put by the constitution upon an entirely different footing from that of city, town, county, district, or state officers. By section 155 of the constitution it is provided that their election shall not be governed by the rules laid down in the constitution for other elections. It is not required to be, and is not in fact, held by secret ballot, but under the old viva voce method, and the votes are registered by the clerks of the election in separate books provided for that purpose. The very qualifications of the voters may, under the section referred to, be different from the constitutional qualifications for electors of state and other officers, and it is probably competent for the legislature to provide that women shall be entitled to vote at such an election. Their election need not be in November. Generally throughout the state it is held on the first Saturday in June. Both in the cities of the first class and in the county districts it is an annual election. St. Ky. 1894, § 4434. And if the construction contended for by appellees on this point, and intimated at the close of the opinion of the majority, be correct, there is no year in which there is not an annual election at which district officers are to be elected. And this would lead logically to the conclusion that vacancies in county offices throughout the state would be required by section 152 to be filled at the annual June election, if that happened to be the next succeeding election before which three months intervened after the vacancy occurred, although this is forbidden by section 148, which requires all such officers to be elected in November. Moreover, the constitution itself, in section 155, provides that section 152 "shall not ap-

ply to the election of school trustees and other common school" district elections; thereby excluding those elections from consideration in determining the meaning of section 152.

Nor does this case come within the rule laid down in *Shelley v. McCulloch*, before referred to; for in order to cover the territory embraced in the city of Louisville, throughout which the mayor's election is held, it is necessary to combine seven separate school trustee districts, in each of which there is to be held a district and independent election for school trustees. There is no officer to be elected whose electoral district covers the territorial limits of the city. In *Shelley v. McCulloch* the court said: "Unless the territorial limits of the particular office to be filled were embraced by that of the nearest succeeding election, the rule might be different. For example, a vacancy in a state office would not be filled at a succeeding election in which only city officers were to be elected." We think the true construction of section 152 probably is that a vacancy in an office can be filled only at an election at which officers of the like class are to be elected; but, be that as it may, the case of *Shelley v. McCulloch* does not decide the point contended for by appellees, that a number of independent elections can be united to authorize the filling of a vacancy in an office the election district of which embraces them all. We do not believe that an election in every constable's district in the state would of itself authorize the filling of a vacancy in a state office, under section 152. In our opinion, the school trustees' election to be held in Louisville in November, 1896, does not make that election one at which either city, district, or state officers are to be elected. And this brings us to consider what is aptly termed in the opinion of the majority the "only serious question in the case."

There will be elected in November, 1896, electors for president and vice president, and these, say the counsel for appellees, are state officers. In a limited sense they may be so termed, and they have sometimes been described as agents of the state to cast its vote for president and vice president. But are they officers of the state, within the meaning of section 152 of the Kentucky constitution? They are nowhere mentioned in that instrument. The act which authorizes their election was not authorized thereby. The Kentucky legislature derives its whole power in that regard from the constitution of the United States. "Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress, but no senator or representative or person holding an office of trust or profit under the United States shall be appointed an elector." Article 2, § 1. The sole power of the state as

to the electors is the power of naming them in such manner as the legislature may direct. The act which provides the mode of selecting electors derives its authority, not from the Kentucky constitution, but from the constitution of the United States. When the constitution of this state provided for the government of the commonwealth, and the officers who were to administer that government, no officers were in contemplation except those who derived their official capacity from the state constitution, or the laws passed in pursuance thereto. The framers of the instrument, and the people who voted to adopt it, certainly did not contemplate officers deriving their official existence solely from the federal constitution. Electors perform but one function. That done, their power is exhausted. They have no possible power or duty to be exercised or performed in connection with the government created by the constitution of Kentucky. They are not state officers, within the meaning of section 152. Much stress was laid by counsel for appellees upon the United States supreme court cases of *In re Green*, 134 U. S. 377, 10 Sup. Ct. 586, and *McPherson v. Blacker*, 146 U. S. 1, 13 Sup. Ct. 3, as holding that presidential electors were state officers; but the cases do not support that contention. The *Green Case* decided that as the federal constitution had delegated the mode of selection to the state legislature, and the legislature had determined that it should be done by election by the people, the state courts had jurisdiction to punish an offense committed at such election against the state election laws. The court in that case said of the question whether the state had concurrent power with the United States to punish fraudulent voting for representative in congress, "It may be that it has." Neither that case nor the *Blacker Case* anywhere decides that electors are state officers. The latter case arose from the Michigan legislature providing for the election of electors by districts; and it was held that, as the United States constitution gave the power of determining the mode of selection to the state legislature, the legislature might exercise that power in any way it saw fit, and might provide for the selection of electors upon a state ticket voted for throughout the state, or by election by districts, or by election by the legislature. In this state, down as late as in 1824, presidential electors were selected by the legislature. But in no just sense does either of the words "officer" or "agent" of the state describe the powers and duties of presidential electors. They are best described by the word used in the constitution. They are "electors,"—a body of men to each of whom, when appointed by the state, the federal constitution gives the power to cast, not the vote of the state, but his own vote for president and vice president. It may be conceded that when the state legislature provides for their appointment by a vote of the people, under the power given by the federal constitution,

that election is held under the power and subject to the control of the state, and frauds in its conduct may be punished by the state laws. "In short," as said in the *Blacker Case*, "the appointment and mode of appointment of electors belong exclusively to the states, under the constitution of the United States." "They are," as remarked by Justice Gray in *Re Green*, 134 U. S. 377, 379, 10 Sup. Ct. 587, "no more officers or agents of the United States than are the members of the state legislature when acting as electors of federal senators, or the people of the states when acting as the electors of representatives in congress." On the other hand, it may be said with equal truth that, when appointed and exercising their only power, they are no more officers or agents of the state than are the free electors of Kentucky when, under the section of the Kentucky constitution, they cast their votes for governor of the commonwealth. They are independent electors. As originally adopted, and as it now exists, it was "supposed that the body of electors interposed between the state legislature and the presidential office would exercise a reasonable independence and fair judgment in the selection of the chief executive of the national government, and that thus the evil of a president selected by immediate popular suffrage, on the one side, and the opposite evil of an elector by the direct vote of the states in their legislative bodies, on the other, would both be avoided." Miller, Const. U. S. 149. And see Rawle, Const. 55; Story, Const. § 1473; Federalist No. 68. It is true that in practice they have come to be mere "puppets selected under a moral restraint to vote for some particular person who represented the preferences of the appointing power, whether that was the legislature, or the more popular suffrage by which the legislature itself was elected." Miller, Const. U. S. p. 149. But their power under the constitution still remains, and we cannot concede that they have ceased to be independent electors because, in practice, they have ceased to act independently, or that they have become mere officers or agents of the state, charged with any official power or duty to register the will of the majority of the voters in the election of president and vice president, because, under the moral restraint referred to, they have come to act as if they were. In casting their votes for president and vice president, they do not act as representatives of the states, but, if representatives at all, they represent the people of the United States in the electoral college. They do not cast the vote of the state, but their own votes as electors. "The constitution," says Chancellor Kent (1 Kent, Comm. 275), "from an enlightened view of all the difficulties that attend the subject, has not thought it safe or prudent to refer the election of president directly and immediately to the people, but it has confided the power to a small body of electors, appointed in each state, under the discretion

of the legislature." It is only in the event that the electoral college fails to elect, and the election is thereby thrown into the house of representatives, that the states are represented in voting for a president, or the votes of the states, as states, are cast. In our judgment, electors are not officers, within the meaning of the Kentucky constitution. So far as the intent of the constitutional convention can be shown by the debates which took place among the members, it can be demonstrated that that body was influenced by a strong desire to separate, as far as possible, federal elections from those of the state, through fear of federal interference; but we do not attach much importance to arguments drawn from such evidence. We base our views upon the language which the framers of the constitution used, and the sense in which the words must have been understood, not only by the members of the convention, but by the people by whose suffrage the instrument was made the constitution of Kentucky. To say that the overwhelming majority of the voters of Kentucky understand an election for presidential electors to be a federal election, and not an election of state officers, is to understate the proposition. The percentage of the people who understand or think of it otherwise is infinitesimal, and it is the understanding of the people who voted for the adoption of the instrument which should control in its construction. This canon of constitutional construction is too well settled to require the citation of authority.

Nor can we concur in the conclusion of the majority that the election of a judge of the court of appeals in another district is an annual election, at which a vacancy in the office of mayor of the city of Louisville can be filled. The conclusion of the majority completely nullified the qualifying words of the phrase "succeeding annual election, at which either city, town, county, district or state officers are to be elected," which, with painful particularity and emphasis, are reiterated no less than five times in section 152. And the policy of the adoption of the constitution of 1850 should have nothing to do with the construction of the present constitution. It must be assumed that the new constitution was intended to effect a change of policy in every respect in which the language used indicates a different purpose from that used in the former instrument. Constitutional conventions are not held, nor are constitutions adopted, for the purpose of perpetrating governmental policies, but for the purpose of changing them. A new constitution is a new departure. And so the policy of the constitution of 1850 to refer all matters to the vote of the people as quickly as possible can have no place in the construction of the language of section 152 of the present constitution, which indicates, in five separate places, an intention to alter or qualify that policy. In our opinion, it was a matter of little importance whether the constitution should fix the time of fill-

ing the vacancy in one year or another; but we deem it of great importance that the correct rule of constitutional construction be adopted by this court.

CITY OF LOUISVILLE v. BOARD OF TRUSTEES OF NAZARETH LITERARY AND BENEVOLENT INSTITUTION. SAME v. ST. XAVIER'S COLLEGE. COMMONWEALTH v. ST. MARY'S COLLEGE. SAME v. LORETTO LITERARY AND BENEVOLENT INSTITUTION. BOARD OF EDUCATION OF COMMON-SCHOOL DIST. NO. 1, PIKE COUNTY, v. TRUSTEES OF PIKEVILLE COLLEGIATE INSTITUTE.

(Court of Appeals of Kentucky. May 23, 1896.)
CHARITABLE AND BENEVOLENT INSTITUTIONS—WHEAT CONSTITUTES—EXEMPTIONS FROM TAXATION.

Institutions where a general education is imparted to all who may apply, whose property has been acquired by gift, and from which no personal gain accrues, are "institutions of purely public charity, institutions of education, not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education," within Const. § 170, and are exempt from taxation, though they are conducted by a particular sect or denomination. Guffy and Du Relle, JJ., dissenting.

Appeals from chancery court, Jefferson county.

Appeals from circuit court, Marion county.

Appeal from circuit court, Pike county.

"To be officially reported."

Action by the board of trustees of the Nazareth Literary and Benevolent Institution against the city of Louisville, and separate actions by St. Xavier's College against the same defendant, by St. Mary's College and by the Loretto Literary and Benevolent Institution against the commonwealth of Kentucky, and by the trustees of Pikeville Collegiate Institute against the board of education of common-school district No. 1, in Pike county, to establish the right of such institutions to exemptions from taxation. From judgments in favor of the plaintiffs in each case, the defendants appeal. Affirmed.

Laf Joseph and Lee Suter, for appellant city of Louisville. W. J. Hendrick and Samuel J. Spalding, for the Commonwealth. Stewart & Stewart, for appellant Board of Education of Common-School District No. 1 of Pike County. E. J. McDermott, for appellee St. Xavier's College. P. B. & Upton W. Muir, for appellee Board of Trustees of Nazareth Literary and Benevolent Institution. H. W. Rives, for appellees St. Mary's College and Loretto Literary and Benevolent Institution. W. J. Hendrick and C. M. Parsons, for appellee trustees of Pikeville Collegiate Institute.

HAZELRIGG, J. The institutions claiming exemption from taxation here, save as

named afterwards, are schools and colleges where general education is imparted to all who may apply, without regard to nationality or religious creed. All save the last case named above are under the control of members of the Roman Catholic faith. The last named is managed by the presbytery of Ebenezer, of the Presbyterian Church. The object of all is to furnish general education, either free, or at merely nominal prices. The property of all has been acquired by gift from charitable people, or by purchase with funds so derived, and in none of them is there any element of personal gain or profit. In St. Xavier's College there are some 22 brothers, who work and teach for nothing, and some 200 boys. These brothers also teach some 400 boys in the parochial schools. When old, and unable longer to teach or be useful, they are allowed to remain at the college, as a matter of charity. The Loretto Literary and Benevolent Institution is an educational institution for females, located, as is that of St. Mary's College, in Marion county, and both founded some 65 or 70 years ago. The whole income from nominal tuition fees, etc., is devoted exclusively to the cause of education, and the lives of those in charge are devoted likewise, without compensation. While a Catholic school, many non-Catholics attend. Nazareth is a corporation under the management of the sisters of charity, who control a number of schools and hospitals. In all these institutions the sisters and managers devote their lives to charitable and educational work, and, in all of them, persons are taken without reference to their social position, their property, or their religious opinions. Charges are made, when practicable, particularly at the infirmary and at Presentation Academy; but none of the establishments are more than self-supporting, and some are not that. They barely take in more than their actual expenses, and they live only because the sisters give their work for nothing. If money is received from one who is able to pay, it is spent on the poor who are not able. The work of the Pikeville Collegiate Institute was commenced in 1889 in Pike county, and its object was purely educational. Moderate tuition fees are charged, but the income is not sufficient to maintain the institution. In all these cases the trial courts properly held the appellees to be "institutions of purely public charity, and institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education."¹ See *Trustees Kentucky Female Orphan School v. City of Louisville*, 36 S. W. 921. The respective judgments are affirmed.

GUFFY and DU RELLE, JJ., dissent.

¹ Such institutions are exempted from taxation by Const. § 170.

CITY OF LOUISVILLE v. SOUTHERN BAPTIST THEOLOGICAL SEMINARY.

SOUTHERN BAPTIST THEOLOGICAL SEMINARY v. CLAGGETT, Sheriff.

(Court of Appeals of Kentucky. May 23, 1896.)

Appeal from circuit court, Jefferson county.

Appeal from circuit court, Grayson county.

"To be officially reported."

Action by the Southern Baptist Theological Seminary against the city of Louisville, and separate actions by the same plaintiff against C. W. Claggett, sheriff, to determine plaintiff's right to exemption from taxation. The cases involved the same points, and were heard together. There was a judgment for plaintiff in the first case, and for defendant in the second, and plaintiff and the city appeal. Affirmed in first case, and reversed in second.

Laf Joseph and Lee Suter, for appellant city of Louisville. Humphrey & Davie, for appellant Southern Baptist Theological Seminary. Humphrey & Davie, for appellee Southern Baptist Theological Seminary. J. S. Wortham and Thos. H. Hines, for appellee C. W. Claggett.

HAZELRIGG, J. The question involved here is the right of the city of Louisville and the state to impose a tax on the lands of the Southern Baptist Theological Seminary,—an institution of learning located at Louisville, and owning lands and property not in actual use for teaching, and some of which is situated in a distant county. By its act of incorporation, in 1876, the seminary was entitled to hold its property, of whatever kind it might own, "exempt from any taxes or assessments of whatever kind, whether state, county, municipal or otherwise," provided the amount should never exceed \$2,000,000, and provided the income from rents, profits, dividends, and other annual proceeds of the estate, funds, and investments of the corporation, after payment of current expenses, should be expended for the annual support and maintenance of the institution. By an amendment to its charter it was provided that the seminary should have an endowment fund, and by a subsequent amendment (April 19, 1884) it was provided that the exemptions contained in the original charter should "continue in force so long as said seminary shall not make any charge for tuition to persons of any denomination of Christians studying or preparing for the ministry, and any law allowing a repeal or limitation of such exemption is hereby repealed so far as said act is concerned." Acts 1883-84, vol. 2, p. 267. It appears from the petitions filed to enjoin the collection of the tax that the object of the institution was to furnish, free

of charge, educational facilities to young men studying or preparing for the Christian ministry,—refusing none from any denomination; and, as its entire property is devoted to the cause of charity and education, it is contended that its institution is exempt from taxation under section 170 of the constitution, and by its charter contract as well.

With respect to its first contention, it is reasonably clear that the principles announced in Kentucky Female Orphan School Case (just decided) 36 S. W. 921, are conclusive, and need not be repeated here. The work of the institution is confessedly a pure charity, and we think it is no less a public one. It is free to all, and, while under denominational control, so are nearly all successful seats of learning; and this fact has never been held to affect the nature of the charity, but a systematic course of religious instruction must surely embrace much that promotes morality and good citizenship. A religion that does not inculcate obedience to the laws of the land, and instill into the pupil's mind lessons of patriotism and love of country, is a hollow mockery. The high standing of this institution leaves no room to doubt its usefulness to the state. It performs a "public service," in the very best sense of those words. The peculiar tenets of this denomination are doubtless taught, but a belief of them is not required, and is not made the test of admission. The course of study is not set out in the pleadings. In Episcopal Academy v. Philadelphia, 150 Pa. St. 565, 25 Atl. 55, the language to be construed was, "institutions of purely public charity," and it was said: "The fact that the school is under the control of a denomination, or of a religious sect, and that a preference is given to the children of parents connected with the denomination, does not destroy its character as a public charity, since no one is excluded by reason of denominational connection or preference, but such persons are admitted as fast as vacancies occur." It seems clear to us that the charity administered by this institution is purely public, though the management and organization are private and denominational. We are of opinion that both under the constitutional enactment, and in virtue of its charter provisions, the institution is exempt. Wherefore the judgment in the first named appeal is affirmed, and in the second reversed, for proceedings consistent herewith.

DU RELLE and GUFFY, JJ. We dissent from the opinion in these cases. Upon the question of the exemption claimed under the clause of Const. § 170, exempting "institutions of education not used or employed for gain by any person or corporation, and the income of which is devoted solely to the cause of education," our views have been stated in the dissenting opinion filed to-day in the cases of

Trustees Kentucky Female Orphan School v. City of Louisville, 36 S. W. 921, so far as that claim is based on the construction of the word "institution," as meaning corporation. We are further of opinion that the kind of education given at this seminary does not bring it within the meaning of section 170 of the constitution; it being purely sectarian, and not general, education, and devoted entirely to the propagation of the doctrines of a sect. It is not a purely public charity, if a charity at all, as the nature of the instruction given forbids any but professors of that religion receiving it, and by its charter it is not required to be free to any but Christians. Being created solely for the purpose of giving religious instruction, and spreading the tenets of a particular religion, it would seem to fall within the meaning of sections 3 and 5 of the constitution. The general doctrine as to religious instruction is thus stated by Judge Cooley: "This, to the individual, is an object of the very highest moment, and formerly it was thought to be the duty of government to provide for it. The more enlightened opinion of the present day denies the duty, and affirms that anything in that direction is, in greater or less degree, a species of persecution of those whose views are not favored, and therefore incompetent in any country whose political institutions are based upon the principles of equality before the law. Religious instruction is therefore, by common consent, referred exclusively to the voluntary action of the people." Cooley, *Tax'n*, 118. It is to be observed that, under section 170, institutions of purely public charity and institutions of education have been separated into two classes, indicating an intention that those institutions which belonged to one class were to be excluded from the other. Two separate classes having been established, it may be doubted whether an institution falling properly within the description of one class can be exempted from taxation, as belonging to the other. But, be that as it may, we are of opinion that this appellee does not belong to either class. What, in our view, is the correct doctrine as to institutions of purely public charity, has been well stated in a recent case: "There is nothing of doubt in this case, except the question as to whether the appellee is an institution of 'purely public charity,' within the meaning of section 1, art. 9, of the constitution of 1874. If it be not, nothing in its charter or the statute can avail to exempt it from liability to taxation. The contention turns on the constructional meaning of the words 'purely public charity.' The legal definition of the word 'charity' has been the subject of much discussion in the courts, especially in those of England; but its meaning here, discarding all technical sense, is 'a gift to promote the welfare of others.' The appellee is clearly a charity. It provides for and maintains, in the Masonic Home, indigent, afflicted, and aged Freema-

sons,—this, too, from voluntary contributions, without charge to the beneficiaries, and with no profit either to the corporation or its officers. Not one of the corporate officers receives a cent of compensation for administering its affairs. Such unselfishness excites the admiration and approval of all friends of humanity. Gen. Wagner, the president of the institution, testifies: 'The number of inmates at present is thirty. Their average age is seventy-two years. All are decrepit. If they could support themselves, they would not be admitted. The money to support them is contributed by different Masonic lodges, individuals, Masons, men and women. The receipts are always less than the expenses, and a deficit has to be made up at the end of each year. No one is benefited, except the inmates. They are fed, clothed, and lodged during life, and buried at death, at the expense of the home.' Of course, if this is not purely charity, nothing is. But is it a public charity? The word 'public' relates to or affects the whole people of a nation or state. * * * But then, to exclude every other idea of public, as distinguished from private, the word 'purely' is prefixed by the constitution. This is to intensify the word 'public,' not the word 'charity.' It must be purely public; that is, there must be no admixture of any qualification for admission, heterogeneous, and not solely relating to the public. That the appellee is wholly without profit or gain only shows that it is purely a charity, and not that it is a purely public charity. Nor does the argument that, to the extent it benefits Masons, it necessarily relieves the public burden, offset the question. This is not a question to be decided on sentiment. If it were, our inclinations would prompt to a different conclusion. But there is not much sentiment in the constitution. It is a barrier erected by the whole people against encroachments on the rights of the people as a whole. They have forbidden an annual appropriation of their money in a sum equal to the amount of taxes here imposed for the benefit of a favored few. The duty of a court, when called upon to decide such a question, is so plain that 'he who runs may read.'" *Philadelphia v. Masonic Home of Philadelphia*, 160 Pa. St. 572, 28 Atl. 964. The claim of contract exemption we need not stop to discuss. Whether free tuition to Christians was a real consideration for an exemption, or a clumsy device to evade the provisions of the act of 1856, need not be here considered. It is sufficient to say here that, if the appellee has a contract exemption from taxation, the case should be decided upon that ground, and not upon a theory which is subversive of one of the main purposes of the constitution, and which, in practical application, will result disastrously, not merely to the people whose burdens are increased, but to the very corporations in whose favor it is urged.

PENNSYLVANIA FIRE INS. CO. v.
WAGLEY.

(Court of Civil Appeals of Texas. June 6,
1896.)

JUDGMENT—WHEN SET ASIDE—CORRECTION—RE-
MITTITUR—ACTION ON FIRE POLICY—PARTIES
— TAXATION OF COSTS.

1. Where a citation states the true date of filing a petition, a judgment by default against defendant will not be arrested and set aside because the filing on the back of the petition does not correspond in date with the citation, but the filing on the petition will be corrected.

2. Where a judgment by default is too large, and plaintiff remits the excess, the court may correct the judgment to conform to the remittitur.

3. Where all the children of a deceased husband are of age and living away from home at the time of his death, his surviving second wife may alone maintain an action on a fire insurance policy obtained by him on the homestead of the husband and wife, which was community property.

4. The taxation of costs will not be revised on appeal, in the absence of a motion to retax.

Error from district court, Johnson county.
J. M. Hall, Judge.

Action by Mrs. E. B. Wagley against the Pennsylvania Fire Insurance Company and others on a fire insurance policy. Pending the action, it was dismissed as to all the defendants except the company. There was a judgment in favor of plaintiff, and defendant brings error. Affirmed.

Morgan & Thompson, for plaintiff in error.
Poindexter & Padelford, for defendant in error.

FINLEY, J. This suit was instituted November 2, 1894, in the district court of Johnson county, Tex., by Mrs. E. B. Wagley against the Pennsylvania Fire Insurance Company and R. B. and H. M. Wagley, Mrs. Helen Wilson and her husband (George Wilson), Mrs. V. Joiner and her husband (B. H. Joiner), and Mrs. Kate Sherwood and her husband (I. C. Sherwood), alleging, in substance, as follows: (1) That plaintiff and her deceased husband, Dr. J. L. Wagley, owned a community homestead lot, upon which they had built a house which was their home; that Dr. Wagley, during his lifetime, insured said homestead dwelling with the defendant insurance company for \$750; that prior to and at the time of the issuance of said insurance policy, and at the time of the death of Dr. Wagley, the said lot and dwelling house had been and was the homestead of plaintiff and her deceased husband alone; that the other defendants were the only children of the said Dr. Wagley, deceased, but that long before the taking out of said policy they had reached their majority, had married and had homes of their own, and were not members of the family of plaintiff and her deceased husband, and did not live upon said homestead, but lived at other different homes of their own; that the plaintiff and Dr. Wagley were the only members of their family prior to Dr.

Wagley's death, and that after his death plaintiff was the only surviving constituent of said family; and that the said lot continued to be, and still was, the homestead of plaintiff alone. (2) That on January —, 1894, a fire occurred, and destroyed said dwelling on said homestead lot, which was described in said insurance policy. (3) That the said loss was adjusted on January —, 1894, and that the defendant company acknowledged said loss, and agreed to pay the full amount of said policy, upon the condition that the plaintiff and the other defendants, the children of Dr. Wagley, deceased, would sign a release and receipt, and refused to pay said amount to plaintiff unless the said children of Dr. Wagley, deceased, would sign said release and receipt. (4) That the other defendants refused to sign said release and receipt, or at least some of them refused to sign said receipt, and that they were setting up some kind of a claim to the proceeds of the said policy, and that the defendant company refused to pay the plaintiff the amount of said policy, which was due on January —, 1894. (5) That the said lot upon which said dwelling so insured was located was still the homestead of plaintiff, and her only homestead, and that she had no other money than the proceeds of said policy to replace her dwelling upon said lot, and that she needed said insurance money to rebuild her homestead dwelling, and that the other defendants had no interest in or right to the said money. All of the defendants except the insurance company came in and answered merely by general denial, and set up no claim whatever to the insurance money. That defendant company being duly cited, and not having answered at all, the plaintiff dismissed as to all the other defendants, and the court rendered judgment by default against said insurance company November 20, 1894 (same being default day), for the amount of said policy and interest, aggregating \$780, said judgment being rendered upon the evidence. And the court found, as a fact, that the insurance company, by refusing to pay said insurance policy unless the other defendants would sign the receipt, and by its actions and statements caused the plaintiff to make them parties to this suit, and that said defendants, after having been made parties, failed to set up any claim to said loss, and, the defendant insurance company having caused plaintiff to make the other defendants parties to this suit, the court rendered judgment in favor of plaintiff against the defendant insurance company for all costs of suit. November 28, 1894, the insurance company filed an answer admitting its liability under said policy declared upon in plaintiff's petition, and merely asked that the court render judgment in favor of the parties entitled to said money, etc. And on the same day and date, which was eight days after the judgment, the defendant company filed also a motion to set aside said

judgment for the sole reason that plaintiff had dismissed the case against the other defendants, and took judgment against the defendant company alone. On December 14, 1894, the defendant company for the first time filed a motion in arrest of judgment, and a renewal motion to set aside judgment, for the following reasons: (1) That citation was defective in this: that it stated the wrong date of filing the petition. (2) That the judgment was for too large an amount, the interest being calculated from a wrong date, (3) Because the court had dismissed this case as to the other defendants, and rendered judgment against said defendant. Plaintiff filed a reply to defendant's motion in arrest of judgment, setting up the fact that plaintiff's petition was in truth and in fact filed on November 2, 1894, and that the statement in the citation served on the defendant, that plaintiff's petition had been filed on the 2d day of November, 1894, was correct, and that all of the record in this case shows that said petition was filed on the 2d day of November, 1894, as alleged in plaintiff's petition, and prays the court to have said clerk file said petition nunc pro tunc as of the 2d day of November, 1894,—the day upon which said petition was in truth and in fact filed. On January 18, 1895, the defendant's motion to set aside the judgment, and in arrest of judgment, and plaintiff's reply thereto, came on to be heard, and the court, after hearing all the evidence and having examined the record, overruled defendant's motions; and, the plaintiff having remitted \$5, the court overruled defendant's motions, and corrected its former judgment so as to conform to the remittitur, and corrected the judgment so that plaintiff recovered only \$775, instead of \$780, against the defendant company. From the judgment rendered the insurance company has sued out and prosecutes its writ of error to this court. There are three reasons urged for the reversal of the judgment of the court below:

1. It is contended that the variance between the citation served upon the insurance company in its recital of the date of the filing of the petition, and that shown by the file mark upon the petition itself, is fatal to the judgment. As before stated, the citation recited that the petition was filed November 2, 1894, while the file mark upon the petition showed it to have been filed October 2, 1894. It was shown that the citation gave the true date that the petition was deposited with the clerk for filing, and the file mark upon the petition was corrected, under order of court, so as to show the true date when it was received by the clerk to be filed. The court did not err as to this matter. *Holman v. Chevallier*, 14 Tex. 339; *Turner v. State*, 41 Tex. 552; *Snider v. Methvin*, 60 Tex. 494; *Lessing v. Gilbert* (Tex. Civ. App.) 27 S. W. 751; *Allen v. Traylor*, 51 Tex. 124; *Austin v. Clapp*, 5 Tex. 133; *Cartwright v. Chabert*, 3 Tex. 261; *Brack v. McMahan*, 61 Tex. 2;

Eggenberger v. Brandenberger, 74 Tex. 274, 11 S. W. 1099; *Burdett v. Marshall*, 3 Tex. 24; *Messner v. Lewis*, 20 Tex. 221; *Porter v. Miller*, 7 Tex. 463; *Hill v. Cunningham*, 25 Tex. 26; *May v. Ferrill*, 22 Tex. 340; *McKay v. Speak*, 8 Tex. 377; *Burke v. Thompson*, 29 Tex. 159; *Chambers v. Hodges*, 3 Tex. 517; *Trammell v. Trammell*, 25 Tex. Supp. 261; *Hopkins v. Donaho*, 4 Tex. 338; *Ramsey v. McCauley*, 9 Tex. 107; *Hickey v. Behrens*, 75 Tex. 495, 12 S. W. 679; *Ximenes v. Ximenes*, 43 Tex. 464; *Russell v. Miller*, 40 Tex. 500; *Smith v. Lang*, 2 Tex. Civ. App. 687, 22 S. W. 197; *Swift v. Paris*, 11 Tex. 19; *Cowan v. Ross*, 28 Tex. 230; *Whittaker v. Gee*, 63 Tex. 436; *McPherson v. Johnson*, 69 Tex. 489, 6 S. W. 798; *Moseley v. Brigham*, 12 Tex. 107; *Coffee v. Black*, 50 Tex. 118; *Trevino v. Fernandez*, 13 Tex. 667; *Burnett v. State*, 14 Tex. 456.

2. It is urged that the judgment was originally rendered for too great a sum, and that the court erred in correcting the judgment, and rendering for a less sum. The amount of the excess in the judgment was remitted by plaintiff, and there was no error in the action of the court in so amending the judgment as to make it conform to the remittitur entered.

3. It is insisted that the plaintiff is not entitled to recover upon the allegations made in her petition. The proposition here urged is that the petition shows that the policy of insurance was issued to the husband of the plaintiff upon the homestead,—community property of plaintiff and her deceased husband,—and that the husband had children surviving who were entitled to share in the insurance money. The property insured was alleged and shown to be the community property of plaintiff and her deceased husband, and was their homestead, and so remained after the death of Dr. Wagley. Plaintiff was the second wife. There were children of Dr. Wagley by the first marriage living. They were all grown, and none of them were living upon the place as a member of the family at the time of the death of their father, or at the time of the burning of the property. They were all living by themselves away from this place, and constituted no part of the family residing upon the homestead. Mrs. Wagley was entitled to occupy the place as her home, and the insurance money due upon the policy after the destruction of the house stood in the place of the house, and was exempt from all claims against the estate of the deceased spouse, the community or individual debts of plaintiff. *Chase v. Swayne*, 88 Tex. 218, 30 S. W. 1049. The surviving wife (plaintiff here) being entitled to the possession, use, and occupancy of the premises as a home, she would be entitled to sue for its possession if wrongfully deprived of it. *Steel v. Metcalf*, 4 Tex. Civ. App. 313, 23 S. W. 474; *Railway Co. v. Timmerman*, 61 Tex. 662; *Thompson v. Ogle* (Ark.) 17 S. W. 593; *Railway Co. v. Knapp*,

51 Tex. 599. The same principle which would authorize her to sue for the recovery of the property if wrongfully deprived of its possession would justify her suit and recovery of that which stands in the place of the house, it being involuntarily destroyed, namely, the insurance money. We think the court correctly held that the wife was entitled to recover of the insurance company the amount of its policy upon the house.

4. It is also insisted that the court erred in adjudging all the costs against the insurance company. No motion was made in the court below to retax the costs, and we will not revise the action of the court upon this question, in the absence of such motion. The judgment of the court below is in all things affirmed.

CORSICANA COTTON-OIL CO. v. VALLEY.

(Court of Civil Appeals of Texas. June 20, 1896.)

DAMAGES—RESULTING FROM NUISANCE—HUSBAND AND WIFE—SURVIVAL OF CAUSE OF ACTION—EVIDENCE.

1. In an action by a widow to recover damages for her own separate use on account of a nuisance rendering the occupancy of her homestead uncomfortable, she is not entitled to prove injuries sustained by her deceased husband nor her minor child, it not being shown that such injuries resulted in personal damages to herself.

2. Damages for personal injuries to a wife being community property, for which the husband may sue, where an action by a husband to recover damages for injuries to both himself and wife by reason of a nuisance was pending at the time of his death the cause of action as to injuries to the wife survived to her, and she may be substituted as plaintiff for their recovery.

3. Upon an issue as to whether matters complained of constitute a nuisance, evidence that the municipal authorities have not taken action against them as such is immaterial.

Appeal from district court, Navarro county; Rufus Hardy, Judge.

Action by Mrs. Georgiana Valley against the Corsicana Cotton-Oil Company. Judgment for plaintiff, and defendant appeals. Reversed.

McKie & Autry, for appellant. Jink Evans and Croft & Croft, for appellee.

FINLEY, J. This suit was originally instituted by Peter Valley against the Corsicana Cotton-Oil Company, to recover damages on account of a nuisance. The petition alleged two elements of damage, namely, damage to the property of the plaintiff, consisting of his homestead residence, and also personal damages to himself and family, consisting of wife and children, by reason of the noxious, poisonous, disagreeable, and unhealthful gases, odors, and filth, which affected their health, and rendered the occupancy of their property disagreeable, etc. Peter Valley died prior to the trial, and his wife, Georgiana Valley, came into the case by pleading; set up the death of her husband

since the institution of the suit; that there was no administration or necessity for administration upon his estate; that the homestead was all the property that he possessed; that it was her homestead at the time of his death, and was occupied then and now by herself and their minor child, as such homestead. She prayed that she be considered the sole plaintiff in the suit, and permitted to prosecute the same. Her petition then alleged the cause of action substantially as alleged in the original pleadings of plaintiff, with the exception that she did not allege damages to the property, and seek a recovery therefor. She alleged personal damages to herself and child in the destruction of their enjoyment and occupancy of the home, sickness, discomfort, etc., caused by the nuisance described in the petition. She also set up a claim for exemplary damages. By express allegation in the petition, the plaintiff seeks to recover the damages claimed for her own separate use and benefit, and sets up the damages alleged to have accrued as being personal damages to herself and minor child. The case was tried, and resulted in a verdict and judgment for \$1,000 actual damages, and \$500 exemplary damages. Appellee remitted the exemplary damages upon the suggestion of the court that a new trial would be awarded unless a remittitur was entered, and from the judgment for actual damages this appeal has been prosecuted.

We deem it unnecessary to take up the different assignments of error as presented in the brief of appellant. It will be sufficient to pass upon the different propositions raised by assignments which we deem of material importance in the case.

1. The scope given the jury, both in the matter of the introduction of evidence before the jury, and the charge of the court, was broad enough to permit a recovery of actual damages for the personal injury sustained, not only by Georgiana Valley, the plaintiff, but by her minor child and deceased husband. This was error. Under the pleadings of the plaintiff, she was only entitled to recover the personal damages which she herself had sustained by reason of the nuisance. As she sought to recover for her own separate use and benefit, she was not entitled to recover the damages sustained by the child. There was no pretense in the petition that she had thereby been deprived of the services of the child, or had been put to any expense on her account by reason of the nuisance. Neither was she entitled to recover under her allegations for any personal damages sustained by the husband; and the evidence should have been restricted to the damages to herself, and the charge of the court should have presented the case, so limited, to the jury.

2. It is urged by appellant that the cause of action did not survive upon the death of Peter Valley, but died with him, and for that reason Georgiana, the surviving wife, could not recover. This question presents some dif-

ficulty, and we have been cited to no authorities satisfactorily settling the proposition announced. While our decisions have treated damages flowing from personal injuries to the wife as community property, and declared the husband to be the only proper party to prosecute such suit (*Ezell v. Dodson*, 60 Tex. 331), they, nevertheless, recognize the right of the wife to sue for such damages when relieved of coverture by death or divorce (*Nickerson v. Nickerson*, 65 Tex. 281). Under our community system, the husband is the controlling manager of the partnership, has the right and is the only proper party to institute suit for a recovery which inures to the benefit of the community; but, while this is true, the wife is represented in the suit by and through him, and it would seem to be harsh and inequitable to cut off her right to sue for damages which she had sustained in her own person for the reason that the husband, who acted for her in the suit, died before the termination of the litigation. The damages which she had sustained were embraced in the petition filed by her deceased husband, and we are of the opinion, upon his death, that she had the right, upon proper allegations, to make herself party plaintiff, and prosecute the suit for the recovery of such personal damages as she had sustained from the nuisance.

3. By assignment of error on the part of appellant, urging improper argument by appellee's counsel, and by cross assignment by appellee relating to the rejection of testimony, the question is presented whether or not the failure of the city of Corsicana to abate the nuisance was a legitimate matter for the consideration of the jury. The court permitted defendant to introduce evidence tending to show that the city of Corsicana did not regard the matter complained of as being a nuisance, and did not therefore abate it. The court rejected evidence offered by the plaintiff to the effect that the mayor of Corsicana was a stockholder and director in the defendant company. Appellee's counsel, in his argument, asserted this last-named fact, and it is that which appellant complains of. In our view of this case, the nonaction of the city of Corsicana was an immaterial and improper matter for the consideration of the jury. Whether the matters complained of as a nuisance were, in fact, such, was an issue for the determination of the court in which this suit was instituted, and that issue should have been determined upon the evidence directed at the fact of the nuisance; and the opinion of the city officials, as disclosed by their nonaction was not legitimate evidence to disprove the nuisance, or to mitigate the consequences of it. The court, therefore, should not have admitted any evidence of this character. In view of the fact that the cause has to be remanded, it is unnecessary to discuss the respective contentions in regard to the influence of the argument, claimed to be improper, upon the jury trying the case.

4. Appellant contends that the amount of

the damages recovered should bear a legitimate proportion to the value of the homestead. The appellee does not sue for damages to the property. She sues for the personal damages sustained by herself and child while occupying the property as a residence and home. The market value of the home property in such a suit as this furnishes no basis for determining the amount of damages which should be awarded. It is unnecessary to discuss the question of the excessiveness of the verdict, in relation to which the proposition last announced is urged by appellant. The judgment is reversed, and the cause remanded.

STEPHENS v. ANDERSON et al.¹

(Court of Civil Appeals of Texas. April 11, 1896.)

PLEADING—VERIFICATION—ACTION ON NOTE—EVIDENCE—INSTRUCTIONS—VERDICT—SUFFICIENCY—APPEAL—REVIEW—OBJECTIONS WAIVED—HARMLESS ERROR.

1. A jurat to a plea recited that it was "sworn to and subscribed before me, by [defendant], this 7th day of December, 1894," and had the notary's official seal and signature attached. *Held*, that the affidavit complied with Rev. St. art. 1265, subd. 8, and was sufficient.

2. In an action on a note for \$2,850, alleged to have been executed by defendant and O. to plaintiff's indorser, defendant pleaded non est factum. Plaintiff, by supplemental petition, claimed to be an innocent holder, and that he had been misled by defendant into its purchase under the belief that it was valid. *Held*, that it was not error to admit evidence that defendant had executed with O. to such indorser, a note of a certain date, for \$150, which had been raised to \$2,850, and that plaintiff afterwards sent a telegram to O., who was a fugitive from justice, charged with the forgery, warning him of his danger under such charge.

3. The omission to give a proper instruction is not available error, in the absence of a request for such instruction.

4. It is not error to refuse a correct instruction which is given in almost the same language in the main charge.

5. Where the charge given is a fair presentation of the issues, a party cannot complain on appeal that other explanations of the law applicable to the case should have been given unless he asked special instructions covering them.

6. Where the note declared on was for \$2,850, and defendant alleged that, when he signed the note, it was for \$150, a plea of non est factum is good, though the signature and the paper were that of the original note.

7. Where plaintiff sued on a note for \$2,850, and alleged that, before he took it from the payee, the maker told him it was all right, defendant is not estopped to claim that it was changed from \$150 to \$2,850, unless the conversation referred to the note after such alleged fraudulent change.

8. An action on a note was against one of the two alleged makers, and plaintiff's indorser. The latter did not appear, and the court rendered judgment against him, of which no complaint was made on appeal. The other defendant pleaded a general denial and non est factum; and plaintiff, by supplemental petition, claimed he was an innocent holder of the note, and that he had been misled by such defendant into its purchase, under the belief that it was valid. *Held*, that a verdict for defendant disposed of all the issues, and justified a judgment in favor of the defendant maker.

¹ Writ of error denied by supreme court.

Appeal from district court, Dallas county; R. E. Burke, Judge.

Action by W. P. Stephens against J. P. Anderson and B. F. Emmerson on a note alleged to have been executed by defendant Anderson and one Adolph Ott to defendant Emmerson, who sold and indorsed it to plaintiff. Defendant Emmerson did not appear, and judgment by default was rendered against him. From a judgment in favor of defendant Anderson, plaintiff appeals. Affirmed.

Jeff Word and W. N. Coombes, for appellant. Gano, Gano & Gano, for appellees.

LIGHTFOOT, C. J. We adopt the following statement of the case by appellant: This suit was instituted in the district court of Dallas county, November 9, 1894, by appellant against appellees, J. P. Anderson, one of the makers of, and B. F. Emmerson, as indorser on, a promissory note alleged to have been made by one Adolph Ott and J. P. Anderson, and by said Emmerson, for value by him received of appellant, indorsed and delivered to appellant; said note being, in substance, as follows, to wit: "2,850. Cedar Hill, Texas, July 9, 1894. Ninety days after date, we promise to pay to the order of B. F. Emmerson twenty-eight hundred and fifty dollars, value received, with interest at ten per cent. per annum. If this note is not paid at maturity, undersigned agree to pay expenses of collection, including attorney's fees. [Signed] Adolph Ott. J. P. Anderson." The petition alleged that Adolph Ott, one of the makers, was and is a nonresident of the state of Texas, residing beyond the jurisdiction of the court, in the republic of Mexico, and wholly insolvent; alleged the placing of the note in the hands of attorneys for collection; claimed 10 per cent. for attorney's fees; default in the payment of the note; and prayed judgment for the debt, damages, attorney's fees, and costs of court. On December 8, 1894, defendant J. P. Anderson answered (1) by general demurrer; (2) general denial; and (3) plea of non est factum. The plea of non est factum was in the usual form, signed by J. P. Anderson. The jurat was: "Sworn to and subscribed before me, by J. P. Anderson, this 7th day of December, 1894,"—to which the notary's official seal and signature were attached. By leave of the court, appellant filed his first supplemental petition in reply to appellee Anderson's answer, consisting: (1) Of special demurrer to the plea of non est factum, to the effect that appellee, in the purported affidavit, did not state that the facts set forth in the plea were true. (2) That the instrument sued on was fair on its face; that no vice or infirmity was apparent on its face; that appellee Emmerson, the payee therein, for value by him received of appellant, and in due course of

trade, indorsed and delivered the note sued on to plaintiff; that plaintiff, in due course of trade, in good faith, purchased the same without any notice of any defect, vice, or infirmity in said note, and paid a valuable consideration therefor. (3) That appellant, while negotiating for the purchase of said note, presented the same to appellee Anderson, and informed him that he was negotiating for the purchase thereof; that appellee Anderson stated to appellant that the note was all right, would be paid when due, and told appellant to purchase the same; that appellant, relying on said representation of appellee Anderson, purchased the note in good faith, which he would not have done but for said representations. The court overruled appellant's special exceptions to the plea of non est factum. The case was tried by a jury on the issues submitted by the court in his charge, as between appellant and appellee Anderson. The jury returned a verdict for defendant, and the court entered its judgment, on the verdict of the jury, in favor of defendant J. P. Anderson, and, by default, in favor of appellant, and against appellee B. F. Emmerson, for \$3,075.62, from which judgment plaintiff, Stephens, alone, has appealed.

The facts proved, and the verdict and judgment thereon, justify the conclusion that the defense set up by the defendant J. P. Anderson, that he did not execute the note sued on, and was not liable on the same, was fully sustained, and that the same was a valid claim against defendant B. F. Emmerson, who has not complained of the judgment.

1. The first assignment of error by appellant, Stephens,—to the effect that the exceptions to the plea of non est factum should have been sustained, because the affidavit to the plea was insufficient,—is not well taken. The affidavit is a compliance with the statute. Rev. St. art. 1265, subd. 8. This question was passed upon by the supreme court in the case of Kohn v. Washer, 69 Tex. 67, 6 S. W. 551.

2. Under the second and third assignments, appellant complains that the court permitted the introduction of testimony tending to show that defendant J. P. Anderson had executed with Adolph Ott a note to B. F. Emmerson, July 9, 1894, for \$150, which note had been raised to \$2,850, and that plaintiff had subsequently sent a telegram to Adolph Ott, at Monterey, Mex., who was a fugitive from justice, charged with the forgery, such telegram warning him of his danger under such charge. Under the issues in the case, this testimony was pertinent, and was properly admitted. The main issue under the plea of non est factum was whether the note sued on was the note executed by defendant Anderson, with Adolph Ott. The plaintiff, in his supplemental petition, claimed to be an innocent holder of the note, without any notice whatever of any

vice or infirmity therein, and that he had been misled by defendant Anderson into its purchase, under the belief that the note was valid. There was other testimony tending to put plaintiff upon notice of the forgery. The fourth, fifth, and sixth assignments of error raise the same questions in different form, and need not be further considered.

3. The seventh assignment is as follows: "The court erred in failing to charge the jury to return a verdict for plaintiff against the defendant B. F. Emmerson, for the amount of the note sued on, principal, interest, and attorney's fees." This would not have been an improper charge, and the court would, no doubt, have given it if it had been requested by appellant, but no such request was made. The court very clearly charged the jury upon the leading issues made in the case; but as to the defendant Emmerson, who had been duly cited, and had failed to appear and answer, the court rendered judgment by default; and, the cause of action against him being upon a liquidated demand, the court rendered judgment against him in favor of plaintiff, from which judgment Emmerson has not appealed; nor has appellant anywhere, by proper assignments of error, complained that the amount of the judgment against him was not sufficient. It has been repeatedly held that an omission on the part of a trial court to charge the jury on a particular phase of the case will not be considered by the appellate court unless the party complaining directed the attention of the trial court to the question, by requesting special instructions to the jury. *Cockrill v. Cox*, 65 Tex. 669; *Weaver v. Nugent*, 72 Tex. 278, 10 S. W. 458. The ninth, twelfth, and thirteenth assignments of error are open to the same objections as is the seventh.

4. Under the eighth assignment, complaint is made at the refusal of the following special instruction: "The jury are instructed that if they believe from the evidence that the plaintiff, while negotiating for the purchase of the note sued on, and before he had paid for the same, showed the note sued on to defendant Anderson, and told him that he was negotiating for the purchase thereof, and asked said defendant if the note was all right, and would be paid promptly, and the said defendant replied to plaintiff that it was all right, and would be paid, and that plaintiff, relying on said statement, purchased the same, and paid a valuable consideration therefor, you will find for plaintiff the amount of said note, principal, interest, and attorney's fees." This instruction is correct, and the complaint would be well founded, but the court, in its main charge to the jury, presented this question with remarkable clearness, and almost in the language of the requested charge. It was not error to refuse to repeat it.

5. In the tenth and eleventh assignments of error, complaint is made that the instructions of the court to the jury were to the effect

that if the defendant Anderson signed the note sued on, but that, after it was executed, it was changed by raising it to a higher amount without his consent, and that he (Anderson) never told Stephens that the note as it now appears was all right, and would be paid, then defendant Anderson would not be liable on the same. The charge of the court upon these points was as follows: "If you find and believe from the evidence before you that the defendant Anderson signed the note as it is now in amount, that his signature to the same is not a forgery, then he would be liable thereon; or if you find and believe that he did not sign the note as it is now in amount, but that he signed the note for an amount smaller than its present face amount, and you further find that the plaintiff, Stephens, before he purchased the note, called the defendant Anderson's attention to the note as it now appears in amount, to wit, '\$2,850,' and was told by Anderson that this note was all right, and would be paid, and, relying on this statement of Anderson, he (Stephens) paid a valuable consideration for the note, then, if you find this to be true, the defendant Anderson would be estopped from denying his liability upon the note. But if you find that Anderson did in fact sign the note, but it was for an amount less than the present face of the note, and the defendant never told Stephens that the note as it appears now was all right and would be paid, then the defendant Anderson would not be liable on the same. The burden is upon the defendant Anderson to show, by a fair preponderance of the facts and circumstances in evidence, that he did not sign the note as sued on. * * *" The charge given was a fair presentation of the issues. The first proposition made by appellant under these two assignments is that "It is the duty of the court to explain to the jury the law applicable to every phase of the case made by the pleadings." If any other explanations were necessary, appellant's counsel should have asked special instructions covering them. If there was any error in the charge given, it is not pointed out in appellant's brief. Under the second proposition, it is claimed that the charge presented issues not in the case. The note declared on, for \$2,850, cannot be the note signed, for \$150, although the signature and paper may be the same; and the plea of non est factum was sustained. The estoppel plea by plaintiff would not apply, unless the conversation between him and Anderson referred to the note as it now appears; and this was a question of fact for the jury. The tenth and eleventh assignments are not well taken.

6. The fourteenth assignment is as follows: "The court erred in rendering judgment for defendant Anderson upon the verdict of the jury, because the verdict of the jury did not dispose of all the issues raised by the pleading and proof." The issues between the appellant and the defendant Anderson were clearly made, and the verdict of the jury was for

the defendant. It has been held under such a verdict that no recovery could be had by the plaintiff against any one of several defendants, but that it would be considered a verdict in favor of them all. *Railway Co. v. James*, 73 Tex. 18, 10 S. W. 744; *Kinkler v. Junica*, 84 Tex. 120, 19 S. W. 359; *Railway Co. v. Kingsbury* (Tex. Civ. App.) 25 S. W. 322. But in this case the court rendered judgment in favor of plaintiff against defendant Emmerson, of which Emmerson has not complained; nor has appellant assigned any error complaining of the amount of his judgment against Emmerson. This assignment presents no error.

7. The fifteenth assignment is, in substance, that the verdict is contrary to the evidence. The evidence was conflicting, but there was evidence sufficient to sustain the verdict. The judgment is affirmed.

TEXAS & P. RY. CO. v. CURLIN.¹
(Court of Civil Appeals of Texas. April 18, 1896.)

RAILROAD COMPANIES—CROSSING ACCIDENT—REASONABLE CARE—NEGLIGENCE—IMCOMPLETE INSTRUCTIONS—COMPARATIVE NEGLIGENCE—IMPUTED NEGLIGENCE.

1. An instruction that negligence is the failure to do what a reasonable and prudent person would have done under the circumstances, or doing what such person would not have done under the circumstances, is correct.

2. An instruction that contributory negligence is the want of reasonable care on the part of the person injured, which concurs with the negligence of the defendant, is substantially correct, in the absence of a request for more specific instructions.

3. In an action against a railroad company for injuries sustained by plaintiff while riding across a railroad track in a carriage driven by the employé of a livery stable, an instruction that if the accident was caused by the gross negligence of the driver of the carriage, and the persons in charge of the engine were guilty of only slight negligence, plaintiff cannot recover, was properly refused, as invoking the doctrine of comparative negligence.

4. It appeared that a carriage driven by an employé of a livery stable where the carriage was hired was struck by an engine, and plaintiff's wife, who was riding therein, was injured. *Held*, that an instruction that if the driver was negligent, contributing to the injury, plaintiff could not recover, even if defendant was negligent, was properly refused, where no negligence on the part of plaintiff was alleged.

5. An instruction that an engine standing on the track near a crossing, if there was nothing on the track ahead of it, had the right to go ahead, and need not wait for an approaching carriage to cross in front of it, and the persons in charge of the engine were not bound to look for a carriage approaching the crossing, was properly refused, as it relieved the railroad company of the duty of exercising reasonable care or precaution.

Appeal from district court, Harrison county; W. J. Graham, Judge.

Action by S. O. Curlin against the Texas & Pacific Railway Company to recover damages for injuries to plaintiff's wife. There

was a judgment for plaintiff, and the defendant appeals. Affirmed.

F. H. Prendergast, for appellant. T. P. Young, for appellee.

LIGHTFOOT, C. J. The statement of the case by appellant is substantially correct: On March 22, 1887, S. O. Curlin and his wife were in a carriage, and, while crossing the railroad track at a public crossing in the city of Marshall, a switch engine of the Texas & Pacific Railway Company collided with the carriage, and injured Mrs. Curlin. On August 8, 1887, S. O. Curlin filed suit in the district court of Harrison county for \$10,000 damages against Brown & Sheldon, receivers, who were then operating the road. On September 23, 1890, plaintiff made the Texas & Pacific Railway Company a defendant. The railway company filed a general denial, and also set up that the driver of the carriage drove on the crossing, and so near the approaching engine that it caused the injury. On February 21, 1895, there was a trial by jury, and verdict and judgment for \$2,725 rendered for plaintiff, from which the railway company appeals. There were three carriages. They had been to a wedding at the Methodist church in Marshall, on the south side of the railroad, and were proceeding, one in front of the other, across to the north side of the railroad; the place where the carriage road crossed the track being just at the end of the yard, where much switching was done. The carriages were hired from a public livery stable for the occasion, the livery man furnishing the driver. The carriages traveled north to the railroad, and it is downhill to the track for 100 yards from the south to the track. The carriages approached the track some 20 or 30 feet apart, traveling in a trot, but before crossing the speed was slackened. There were about five tracks there, and there was a two-story house, belonging to the defendant, standing even with the edge of the street, on the right-hand side, and a box car on the first track, projecting into the street a few feet on the right-hand side, and on the second track stood the switch engine hitched to a train of cars. Some person with a lantern signaled to the front carriage to come ahead, and the first and second hacks passed over in safety. As the third hack came on the second track the engine moved up and struck the hack, and moved it some two or four feet, and knocked Mrs. Curlin and Mrs. Gilleland out, and injured them. The former was damaged thereby to the amount found in favor of plaintiff by the verdict. The headlight of the engine was shining on the crossing. The occurrence was at 9 o'clock at night. It was a public street crossing, and a great many people cross at the place, both day and night. A flagman was kept there by the railroad company in

¹ Writ of error denied by the supreme court.

daytime, but not at night. The passengers sat in the carriage, facing each other, and the driver sat in front. The driver of the carriage was not a regular driver, but drove when called on. The carriage way over the track is about 20 or 25 feet wide.

1. The first assignment of error objects to the definition of negligence given in the following charge of the court, to wit: "Negligence is the failure to do what a reasonable and prudent person would have done under the circumstances of the situation, or doing what such person would not have done. The duty is dictated and measured by the circumstances of the occasion. Contributory negligence is the want of reasonable care on the part of the person injured, which concurs with the negligence of the servants or employes of the defendant inflicting the injury." This definition of negligence, although not as specific and clear as it might have been, yet was substantially correct; and, if not, is not without authority to sustain it. See reasoning of the court in *Rost v. Railway Co.*, 76 Tex. 172, 12 S. W. 1131; *Railway Co. v. Gorman*, 2 Tex. Civ. App. 146, 21 S. W. 158; *Railway Co. v. Ives*, 144 U. S. 416, 12 Sup. Ct. 679; *Railroad Co. v. Jones*, 95 U. S. 441. If appellant desired a more specific definition of negligence than was given by the court in its general charge, it should have requested it by special instruction, but no such request was made; and we are unable to see how appellant could have been injured by the general definition of negligence as given by the court.

2. The second assigned error is the refusal of the court to give the following special instruction: "If from the evidence the jury believe that the accident was caused by the gross negligence of the driver of the carriage, and the persons in charge of the engine were guilty of only slight negligence, the plaintiff cannot recover. The mere fact that defendant was guilty of negligence would not make it liable, unless its negligence amounted to the want of ordinary care, and also that its negligence contributed to the injury." This charge would not have been proper, because it invokes the doctrine of comparative negligence, and for the further reason that it attempts to hold the appellee responsible for the negligence of the railway company and for the negligence of the driver of the hired cab, over whom appellee had but little control. The court, in its main charge, instructed the jury as follows: "If you believe from the evidence in this cause that plaintiffs were riding in a carriage, and when crossing the track of defendant company the carriage was run into by the train operated by the servants of the defendant company, and in doing so the defendant company was guilty of negligence, and thereby plaintiffs, or either of them, were injured, and you further believe there was not contributory negligence on the part of the injured ones, then

you should find for plaintiff such sum in money as will fairly compensate for the injuries proximately resulting from such negligence." "If you find that either or both of plaintiffs were injured, but further believe that the injuries were caused by negligence of the injured one, concurring with the negligence of the defendant, if any, or if they were injured, and you should believe that the injury was not caused by the negligence of the defendant company, in either event you will find for defendant. If the driver of the carriage was negligent, and his negligence was the sole cause of the injury, then you should find for the defendant. But if the driver of the carriage and the servants of the company operating the train were both negligent, and the negligence of both concurred in producing the injury, and the jury should be unable to separate their negligence and say that one or the other was the sole cause of the injury, then plaintiff would not be prevented from a recovery on account of the driver's negligence, but in such case the defendant company would be responsible for the injury. If the carriage that plaintiffs were riding in went on the track while the train was approaching the crossing, and you believe that their going on the track was not caused by the negligence of the defendant company, and after going upon the track they were discovered by the employes of the defendant company operating the train, and they, as soon as they saw them, used all reasonable efforts and means at their command to avoid the injury, then defendant company would not be liable for the injury." Appellant has not complained of the above charge, and we think the issues therein were fairly presented to the jury, and that the special instruction presented in the above assignment was properly refused.

3. The third, fourth, and fifth assignments of error complain of the refusal of special instructions asked by the appellant, in which it was sought to instruct the jury that if the driver of the carriage in which appellee was riding was guilty of negligence, and this negligence contributed to the injury of Mrs. Curlin, then she cannot recover, even if the persons in charge of the engine were also guilty of negligence. The same point is made in the ninth assignment of error, upon the refusal of the court to grant a new trial. In the first place it was shown without controversy that the carriages and their drivers had been employed from the livery stable to haul a wedding party from the church to the bride's home; that Mr. and Mrs. Curlin were members of the party. It appears that as the three carriages approached the crossing the driver of the front carriage hailed to know if they could cross. A person who came out of the office of the yard master answered. The driver told him that three carriages wanted to cross. The reply came:

"All right. Drive over." The yard master's office is on the north side, a few feet east of the crossing, the carriages being on the south side. They started over the track; the two in front passed over safely, but as the last carriage went on the track the engine was standing still; the latter started forward without notice or signal, and struck the last carriage, injuring Mrs. Curlin. It was not shown that the driver was guilty of negligence in going upon the track. It was not shown that the driver was incompetent, or that appellee was guilty of any negligence in employing him. In the case of *Railway Co. v. Kutac*, 72 Tex. 652, 11 S. W. 130, 131, where Kutac and his wife had taken passage in the wagon of a neighbor, over which they had no control, and in which Mrs. Kutac was killed at the railway crossing, the court said: "The court, in substance, instructed the jury that, if the driver of the wagon was guilty of negligence, this would not prevent a recovery, if the negligence of the defendant, and not the contributory negligence of Mrs. Kutac, caused her death, unless the jury believed she was assisting, advising, or controlling the driver in his actions, and thus contributed to her injury. As we have stated, we do not think the negligence of the driver is imputable to Mrs. Kutac, if she used ordinary care to avoid the injury. In so far as it announces that principle, the charge was correct. * * * There was no error in refusing the instructions requested by the appellant, because embodying the principle that the negligence of the driver is imputed to the passenger, which is not the law applicable to this case." See, also, *Markham v. Navigation Co.*, 73 Tex. 247, 11 S. W. 131; *Railway Co. v. Pendery* (Tex. Sup.) 20 S. W. 1038; *Garteliser v. Railway Co.*, 2 Tex. Civ. App. 236, 21 S. W. 631, and authorities there cited. But in this case the only pleading on the part of the defendant below upon the question of contributory negligence was as follows: "And the defendant further says that it was negligence of those in charge of the carriage in which plaintiff and his wife were riding, in driving on the railroad track in front of the engine which caused the injury." The defendant set up no contributory negligence on the part of Mrs. Curlin or her husband, and the pleading of the defendant itself thus practically admits that they did not have charge of the carriage. This fact was established beyond controversy. The court, under the circumstances, would have been justified in refusing to submit the issue of contributory negligence to the jury at all. *Railway Co. v. Shieder* (Tex. Sup.; by Denman, J.) 30 S. W. 902; *Railway Co. v. Jamison* (Tex. Civ. App.) 34 S. W. 674.

4. The sixth assignment of error is upon the refusal of the court to give the following special instruction: "The jury are charged that when an engine is standing on the track near a crossing, and there is nothing on the track in front of it, it had the right

to go ahead, and need not wait for an approaching carriage to cross in front of it. The persons in charge of the engine were not required to look for a carriage approaching the crossing." This charge was correctly refused. The crossing was a public street in a city, where the public was in the habit of crossing and recrossing; and the railway company, in crossing such street, was required by law to use certain precautions to avoid danger to persons upon such public street, and the requested charge would have exempted the company from any reasonable care or precaution.

5. The questions growing out of the seventh, eighth, tenth, and eleventh assignments have been fully considered in the foregoing discussion. We find no error in the judgment, and it is affirmed. Affirmed.

CAMPBELL PRINTING-PRESS & MANUF'G CO. v. POWELL et al.¹

(Court of Civil Appeals of Texas. May 2, 1896.)

PRINCIPAL AND SURETY—CONDITIONAL DELIVERY—LIABILITY OF SURETY—ESTOPPEL.

1. Where a note was signed by defendant and others as sureties, with a written condition thereon that it should "not be delivered until 10 men of unqualified solvency shall have first signed it as sureties," with an agreement that the solvency of the signers should be passed on by one of the sureties, a delivery without compliance with such conditions was not binding on the sureties.

2. Defendant and others, as sureties, signed a note conditioned that it should not be delivered until 10 solvent men should have first signed it as sureties. The note was delivered without compliance with the condition, and subsequently defendant executed a chattel mortgage upon the property for which the note was given, to secure the sureties from loss, but without their knowledge. Held that, in the absence of anything to show acceptance by the sureties, the giving of the mortgage would not estop them from denying their liability on the note.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action by the Campbell Printing-Press & Manufacturing Company against L. F. Powell and others, as sureties on a note given by Powell. There was a judgment against Powell, and in favor of the sureties, from which plaintiff appeals. Affirmed.

Robt. H. Rogers and Dickson & Moroney, for appellant.

FINLEY, J. This suit was instituted by appellant against L. F. Powell upon a note executed by him for \$4,253.94, and a \$5,000 note payable to Powell, and signed by other persons, defendants herein, and indorsed by Powell in blank, and placed as collateral to secure the first note mentioned. The case has been appealed twice before,—once to the supreme court, and once to this court. A full understanding of the merits of the litigation

¹ Writ of error denied by supreme court.

may be had by examination of the reports of the case to be found in 78 Tex. 58, 14 S. W. 245, and 24 S. W. 965, and it is deemed unnecessary to give a further statement of the case in this opinion. Judgment was had against Powell, and a foreclosure of the lien, but not against the sureties.

We find that the court below, upon the last trial, fairly submitted the issues involved in the case, and committed no error in its general charge, or in refusing special charges requested. The evidence showed that the \$5,000 note used as collateral, at the time it was signed by the parties other than Powell, had the place for the name of the payee and the date blank, and there was written above, this stipulation: "The following note shall not be delivered until ten men of unqualified solvency shall have first signed the same as sureties." It was also understood that, before any use of the note should be made, it should be submitted to E. T. Morris, the first signer, to pass upon the solvency of the sureties. The evidence shows that the names of the 10 solvent men were not obtained to the note, and that it was not submitted to Morris, for him to pass upon the solvency of the signers, after 10 persons had signed it. The note was exhibited to the agent of appellant, Tilletson, after it had been signed by all the parties, with the condition still upon the note, and with the places for the date and payee still blank. He told Powell to date the note, put his name in it as payee, and tear off the condition. Powell did as requested, and then delivered the note as collateral security. After the printing outfit was delivered to Powell, to secure the purchase price of which the notes were delivered, Powell executed and caused to be recorded a mortgage upon such printing outfit, in favor of the signers of the \$5,000 note. This Powell did of his own motion, and not at the instance of those named as beneficiaries in the mortgage.

The only material issues of fact upon which arise any dispute, under the evidence, are as follows: (1) Did appellant have notice of the condition attached to the \$5,000 note at the time it accepted it as security for Powell's note for \$4,253.94? The evidence was ample to warrant the jury in finding that it had such notice, and we conclude the fact so to be. (2) Did any of the sureties sign the note with the understanding that they were to be unconditionally bound? The jury were justified in finding the negative of this proposition, and we so conclude. (3) Did the sureties, or any of them, accept the mortgage executed by Powell to them upon the property, or attempt to exercise the rights conferred upon them by the mortgage? The evidence authorized a negative conclusion upon this issue. (4) Did the surety signers, or any of them, ratify the act of Powell in delivering the \$5,000 note as collateral, with knowledge that the condition attached to it had not been complied with? The evidence upon the trial did not establish this fact.

Upon this state of facts, the surety signers of the \$5,000 note were not liable upon it. They signed it conditionally. The condition was not complied with, and appellant had notice of the condition. There was no subsequent ratification, and no conduct on their part estopping them to deny their liability. The law of the case, as declared by the supreme court and this court upon former appeals, was fairly submitted to the jury, and we find no error calling for a reversal of the judgment.

On Rehearing.

(May 23, 1896.)

In its motion for rehearing, appellant first complains of the reference made in the introductory statement contained in our opinion, to the reports of the case upon the two previous appeals, found in 78 Tex. 58, 14 S. W. 245, and 24 S. W. 965. It contends that the record now before us presents a different state of case, and that reference to the previous reports of the case is misleading. In referring to such reports, it was our purpose to give the general character and history of the litigation, without a tedious restatement of it, and with no design that such reports should control the disposition of any issue raised by the record now presented. It is merely a preliminary statement of the general features of the case, intended to render easily comprehended the subsequent disposition of the issues raised by this record. We think this course legitimate, fair to appellant, and quite preferable to a lengthy restatement of the case already published in the Reports. Entertaining this view, we decline to comply with the request of appellant to make an original statement containing the issues and facts of the case, further than we have already done.

Appellant complains of our conclusions of fact that the evidence justified the conclusion that none of the surety signers of the \$5,000 note signed the same with the understanding that they were to be unconditionally bound, and asserts that the uncontradicted evidence showed that J. M. Rolls so signed the note. The evidence showed that the written condition of liability was upon the paper when Rolls signed it, and so remained until the time of its delivery to appellant's agent, and there is no evidence that Rolls ever waived the condition. It is true, Rolls says that he expected to have to pay it if Powell did not, but he did not agree to do so. This evidence certainly does not show an unconditional signing as surety for Powell.

It is also urged that we are in error in concluding that the surety signers did not accept the mortgage executed to them by Powell upon the property, or attempt to exercise the rights conferred by the mortgage, and it is claimed that the uncontradicted evidence showed that E. T. Morris and H. Hulen took possession of the property under the mort-

gage. The testimony of Hulen shows that they took possession under a bill of sale of the property, and not the mortgage; that they repudiated the mortgage, and also turned the property back into Powell's possession.

Complaint is also made that our conclusions of fact do not sufficiently disclose the facts proven. We think our conclusions of fact cover every material issue of fact involved, and this is the extent to which we intended to go, and to which the law directs that we shall go.

It is unnecessary to discuss the criticism of the manner in which our conclusions are prepared. It is sufficient to say that we do not think the law undertakes to prescribe the form in which our views shall be expressed. The motion for rehearing is refused.

LYONS v. TEXAS & P. RY. CO.

(Court of Civil Appeals of Texas. May 30, 1896.)

CARRIERS — EJECTION OF PERSON FROM TRAIN — DECLARATIONS OF BRAKEMAN — PLEAD- ING — PRACTICE.

1. The declarations of a brakeman when ejecting a person from a train are inadmissible to prove that he acted under orders from the conductor. *Finley, J.*, dissenting.

2. As to questions of pleading and practice, courts are governed by the laws of their own state, though the cause of action arose in another.

3. Under a petition seeking to recover damages for wrongful ejection of plaintiff from a train on which he was passenger, by orders of the conductor, proof of a general practice of brakemen on defendant's road to eject trespassers was immaterial.

4. Plaintiff, who had made prima facie proof of being a passenger on a train of defendant, and of being ejected therefrom, took a nonsuit, with leave to reinstate, for the purpose of amending his petition to permit the introduction of evidence also on the theory that he was a trespasser. *Held*, that a reinstatement should have been permitted.

Appeal from district court, Dallas county; R. E. Burke, Judge.

Action by William Lyons against the Texas & Pacific Railway Company. From a refusal to permit a reinstatement after a voluntary nonsuit, plaintiff appeals. Reversed.

W. L. McDonald, for appellant. Alexander, Clark & Hall, for appellee.

LIGHTFOOT, C. J. This suit was brought by appellant against the railway company to recover damages caused by the wrongful act of a brakeman on defendant's line in wrongfully and forcibly ejecting him from a local freight train in Louisiana while such train was in motion. It was alleged in the petition that the train from which he was ejected was a common carrier of freight and passengers, and that plaintiff was a passenger ready and willing to pay his fare, and offering to do so; that in forcing plaintiff from such train the brakeman was acting under the order and direction of the conductor. Upon the trial of the case, plaintiff

offered evidence tending to show, substantially, that on February 19, 1894, he boarded defendant's local freight train at Wear's Spur to go to Alexandria, intending to pay the usual fare, which he was able to do; that such train habitually carried passengers; and that the brakeman on the train, while it was running at a rapid rate of speed, presented a pistol and forced him to jump from the train, whereby he was injured as alleged.

Plaintiff, while on the stand, offered to prove by his own testimony the declarations of the brakeman, which were excluded, and the question is thus presented in the bill of exceptions: "Plaintiff, as a witness on the stand, and while being interrogated by his counsel, undertook to state to the jury a remark alleged to have been made to him by the negro brakeman, when, as he testified, the latter forced him to leave the train, viz. 'The boss ordered me to put you off,' which was offered for the purpose of showing that plaintiff was put off by orders of the conductor. Defendant objected to the alleged declarations of the brakeman as not being competent evidence to bind defendant. The court sustained the objection," etc. The rule in regard to admitting declarations of parties at the time of the transaction, as a part of the *res gestæ*, is broad and liberal. The theory upon which they are admitted is that they are a part of the acts done by the parties, and tend to throw light on the transaction itself. But it would be straining this rule beyond all reasonable proportion to admit the declarations of the brakeman for the purpose of showing that the plaintiff was put off by the order and direction of the conductor. The main fact, that plaintiff was ejected, was clearly shown, and the declarations of the brakeman could not have made that clearer. For the purpose of showing that he acted under the authority of the conductor,—the only purpose for which it was offered,—it was not admissible. The declarations of a party assuming to act for another are not admissible to prove agency. It was not shown that the conductor knew anything of the acts of the brakeman or that he was present or gave any directions in the matter. *Railway Co. v. Sherwood*, 84 Tex. 135, 19 S. W. 455; *Noel v. Denman*, 76 Tex. 306, 13 S. W. 318; *Blum v. Gaines*, 57 Tex. 142; *Latham v. Pledger*, 11 Tex. 445; *Blain v. Express Co.*, 69 Tex. 78, 6 S. W. 679; *Harker v. Dement*, 9 Gill, 7; *Hatch v. Squires*, 11 Mich. 185; *French v. Wade*, 35 Kan. 391, 11 Pac. 138; *Maxey v. Heckethorn*, 44 Ill. 438; *Machine Co. v. Crow*, 70 Iowa, 340, 30 N. W. 609; *Mechem, Ag. § 100*, note, and authorities cited; 2 Greenl. Ev. § 63, note b, and authorities there cited. While the above proposition is regarded as well settled, still, if appellant was a passenger on the train, and was rightfully there as such, the company owed him the duty of protection, and the question of

the brakeman's authority would not be important in the case. Appellant alleged in his pleading that the relation of passenger and carrier existed, and introduced evidence tending to prove it.

Under the second assignment of error, appellant complains that "the court erred in ruling that the allegations in the amended petition were insufficient, under the Louisiana Code, pleaded herein, when not specially excepted to, to admit proof of a general practice among brakemen on railroads, including defendant's railroad, in both Louisiana, where the injury occurred, and Texas, to order trespassers off the trains. * * * This assignment seems to be made on the theory that appellant was a trespasser. It is always more or less embarrassing for the courts of our state to undertake to enforce the law of another state in a transitory action of this character, where the injury and not occur in this state, none of the parties reside here, and the only ground of jurisdiction rests upon a supposed comity growing out of the fact that a part of an extensive line of railway runs through this state. But it is enough for the disposition of the question raised to say that the sections of the Louisiana Code proved by appellant do not seem to change in any material respect the general rule in force here. Even if they did, our courts would be governed, in questions of pleading and practice, by our own laws. *Railroad Co. v. Jackson* (Tex. Sup.) 83 S. W. 860. The rule that the allegations and the proof must correspond is elementary. The plaintiff's petition is based upon the allegation that the brakeman acted under the order and direction of the conductor, in ejecting him from the train. No other authority is alleged, nor is there anything in the petition intimating that such acts come within the ordinary scope of the brakeman's employment, or that it was customary for him to do such acts, or that the defendant ever in any manner recognized or ratified any such acts. Under such pleading, it was not proper for appellant's witness to testify to any custom or practice of brakemen on railroads in Texas or Louisiana to eject trespassers. *Railway Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039; *Moore v. Kennedy*, 81 Tex. 146, 16 S. W. 740. Such proof, if admitted, would not have tended to prove that the brakeman was acting under the order and directions of the conductor, as alleged, which would have made it the act of such officer, who is presumed to have the power to eject persons from the train. In the case of *Railway Co. v. Mother*, 5 Tex. Civ. App. 90, 24 S. W. 80, relied upon by appellant, the question of the sufficiency of pleading to admit the evidence was not raised. In that case the court said: "It has been several times decided in this state that the court has no right to charge the jury that a brakeman has either express or implied authority

to eject trespassers from the train upon which he is employed, this being prima facie the business of the conductor. *Railway Co. v. Anderson*, 82 Tex. 516, 17 S. W. 1039; *Railway Co. v. Armstrong* (Tex. Civ. App.) 23 S. W. 236. It has not, however, been intimated that the company could not, as a matter of fact, confer this authority upon its brakemen, should it see proper to do so. If, then, one wrongfully thereon be injured by being improperly expelled from the cars by a brakeman, and seeks to hold the company liable therefor, it devolves upon him to show that the acts of the brakeman were within the scope of the authority in fact conferred upon him. *Railway Co. v. Kirkbride*, 79 Tex. 457, 15 S. W. 495."

Appellant complains that he was surprised at the ruling of the court in excluding his testimony, and asked leave to withdraw his announcement of "ready," and amend his pleadings so as to meet the views of the court, which was refused, and that he then took a nonsuit, with leave to reinstate his cause, and that the court refused to reinstate. It appears from the statement of facts that no testimony was introduced by defendant. Under the record as it stands, we must treat the case as though plaintiff had established a prima facie case showing the relation of passenger and carrier, even though some of his assignments of error are directed towards the theory that he was a trespasser. If he was in fact a passenger, and was wrongfully ejected from the train, different questions arise, and the authority of the brakeman to eject trespassers becomes unimportant. Under all the facts and circumstances, the court should have allowed appellant to reinstate his case, and erred in refusing to do so. The judgment is reversed and the cause remanded.

FINLEY, J. I concur in the reversal of this case, but do not assent to the views expressed in the opinion upon the admission of the declarations of the brakeman, made while ejecting plaintiff from the train. I think the evidence was clearly admissible as part of the res gestæ, and that the court erred in excluding it.

PADDOCK v. TEXAS BUILDING & LOAN ASS'N.¹

(Court of Civil Appeals of Texas. April 25, 1896.)

BUILDING ASSOCIATIONS—CONTRACT TO IMPROVE PROPERTY—ASSIGNMENT—HOMESTEAD RIGHT.

In an action by a building association on a contract to make improvements on homestead property, and providing that the owner should pay therefor in installments, and for a lien against the property, and for attorney's fees in the lien, defendant, who was a grantee of the property, cannot set up as a defense to the claim for such fees that when the contract was executed the property was the homestead of the owner.

¹ Writ of error denied by the supreme court.

Appeal from district court, Navarro county; Rufus Hardy, Judge.

Action by the Texas Building & Loan Association against B. B. Paddock, receiver. Judgment for plaintiff, and defendant appeals. Affirmed.

McKie & Autry and Jenkins & McCartney, for appellant. Frost, Neblett & Blanding, for appellee.

FINLEY, J. The statement of the case as made by appellant, together with the addenda presented in the brief of appellee, will present the case with sufficient accuracy, and are here given:

Appellant's statement: "August 29, 1892, S. J. Walling and wife, Idell Walling, of Brown county, Texas, executed to the Texas Building & Loan Association, of Corsicana, Texas, a note for the sum of \$2,250, payable in sixty monthly installments of \$37.50 each; the first installment being payable the 1st day of October, 1892, and the other installments one each every month thereafter until the whole shall have been paid; providing that, if any installment should remain unpaid for ten days after its maturity, the whole sum unpaid should become immediately due, and that all installments, when due and unpaid, should bear 10 per cent. interest per annum, and providing also for 10 per cent. of the amount due as attorney's fees. The note recited that it was given for labor and material advanced by the building and loan association for the improvement of the homestead of the said Wallings, in Brownwood, Texas. On the same day the said Wallings and the said association entered into a written contract, which contract, upon its face, recited the ownership of the homestead premises in the Wallings, and, further, that the association was to build on said premises a house (giving its description), upon said premises (giving their description), according to specifications then agreed upon. The said contract further recited upon its face that the Wallings should keep said premises insured, as the work progressed, making the loss payable to the association, and that the association might cause said premises to be insured, and charge same to the Wallings, and, further, giving the association an option to declare the whole sum of money due in case the Wallings should not keep up said insurance. Said contract further recited upon its face that the Wallings were to pay the association, or its representatives, the sum of \$300 cash, and the further sum of \$2,250 in monthly installments, as hereinbefore set out. Said contract further recited that the payment of said money was to be secured by a mechanic's lien upon said homestead, and that said premises were then and there conveyed, in trust, to said association to secure said money. The association also at the same time entered into a contract with G. W. Porter for the building of said house for the sum of \$1,800, and said Porter entered into a bond with the association for

the faithful performance of said contract. After said house was built the said property passed from the Wallings to G. I. Goodwin, and subsequently from Goodwin to the City National Bank of Brownwood, Texas; and said bank, before and at the time of the filing of this suit and trial, was in the hands of a receiver, to wit, B. B. Paddock. August 3, 1894, the building and loan association filed suit in the district court of Navarro county, Texas, against the Wallings, G. I. Goodwin, the City National Bank of Brownwood, and its receiver, B. B. Paddock, alleging and setting out the execution of the aforesaid notes and contract; setting forth the terms thereof as before given; describing the homestead property; and setting forth and alleging that one of the monthly installments of \$37.50 was due and unpaid, and defendants had refused to pay same, and the further fact that the association had exercised its option to declare the whole amount due; asking for judgment for the amount of all the installments from and after the installment maturing on the 1st day of August, 1894, amounting to the sum of \$——; and praying for a foreclosure of its lien on said property to satisfy said indebtedness, including 10 per cent. thereon as attorney's fees. On March 22, 1895, B. B. Paddock, receiver, filed his first amended original answer, verified as the law requires, alleging, among other matters, that all the recitals contained in the aforementioned notes, contracts, and declarations were false and untrue, and made for the purpose of cloaking, covering up, and concealing the exaction and collection by the association of an exorbitant and usurious rate of interest for the investment and loan of money by the association to the Wallings, and that the true and real transactions between the association and the Wallings was the loan and investment for said Wallings of the sum of \$1,500, and that the Wallings, at the instance and dictation of the association, had entered into said fictitious and fraudulent contracts for the purpose of cloaking and concealing the usurious purpose and intent; that the association advanced the sum of \$1,500, and that the balance of \$750 was for the use and forbearance of the \$1,500, and an illegal and usurious transaction, and that the Wallings and those claiming under them had paid the sum of \$325 on said obligation; and tendering the balance. Said answer, after setting out the usurious nature of the transaction in detail, set up the inability of the association to make such contract, and that said homestead could not be incumbered with any lien for the payment of said attorney's fees. Trial resulted in a judgment in favor of the building and loan association for the entire number and amount of the said several installments of money sued for,—principal, interest, and attorney's fees,—in amount, \$1,750.30, from which judgment this appeal is prosecuted."

Addenda statement by appellee: "Walling and wife, with whom the contract sued on

was made, sold the house and lot on which the lien is sought to be foreclosed to G. I. Goodwin, June 19, 1893, and Goodwin assumed the payment of the note sued on. Paddock, appellant, recovered the property by judgment from Goodwin on April 28, 1894. Walling and wife made no answer to this suit, and Goodwin disclaimed all interest in the property. Paddock does not claim the property was his homestead, nor does he claim the house and lot involved was the homestead of the National Bank he represents as receiver. There was no plea of usury filed by Walling and wife, with whom the contract was made. There was no plea of usury filed by Goodwin, who bought from Walling and wife."

(1) The evidence upon the trial justifies the conclusion: That the transaction between appellee and Walling and wife was a contract on the part of appellee to construct a house upon the property owned by Walling and wife for an agreed sum, \$2,550. Three hundred dollars of this amount was to be paid in cash, and the balance in 60 monthly installments of \$37.50 each. The Wallings executed their note for the \$2,250 payable in such installments, bearing 10 per cent. interest, and providing for the payment of attorney's fees in case collection had to be forced. The contention of appellant is that this form of contract was adopted merely to cover a loan of money or the advancement of money and materials for constructing the house, and that a portion of the principal was usurious interest. This contention is not sustained by the evidence. The court below was justified in finding that the contract was a bona fide contract for the erection of a house for the aggregate amount of \$2,550, and that there was no usurious interest embraced within the said amount. (2) The appellee caused the house to be built upon the lot of Walling and wife in accordance with the terms of the contract. Walling and wife afterwards sold the house to G. I. Goodwin, and the deed from Walling and wife to Goodwin recites the following consideration: "Twenty-five hundred dollars in hand paid, and the further consideration that the said G. I. Goodwin assumes, and will pay off and discharge, an incumbrance to the Texas Building and Loan Association of Corsicana, Texas, for \$1,500." This was the true consideration. The title of Goodwin passed to the City National Bank of Brownwood, and B. B. Paddock is the duly-appointed receiver of such bank. (3) At the time the contract was made with Walling and wife, the lot upon which the house was afterwards built was their homestead. When they sold to Goodwin they had no further homestead interest in the property.

Conclusions of Law.

1. The facts, as established on the trial, failed to show that there was any usury in the contract sued upon by the plaintiff.

2. The contention of appellant that attorney's fees cannot be recovered in this case, because the property was the homestead of Walling and wife at the time the contract was entered into, and that it cannot be incumbered for attorney's fees, cannot be sustained, even though the property may not have been bound for the attorney's fees in the hands of Walling and wife. Walling was personally liable for the attorney's fees contracted, and, when he sold to Goodwin, Goodwin assumed the payment of his contract debt to the association; that is, the amount then remaining unpaid (\$1,500) and this debt became a part of the consideration to be paid by Goodwin for the house and lot, and he cannot defeat its enforcement against the property by showing that the property was the homestead of Walling and wife when the debt was originally contracted. The property was not homestead at the time of the trial, and appellant was in no attitude to urge its original homestead character as a defense against the enforcement of attorney's fees against the property. The question of usury and the recovery of attorney's fees are the only legitimate questions involved in the case, as presented to us. We find no error committed by the trial court, and the judgment will therefore be affirmed. Affirmed.

WILLIS et al. v. MUNGER IMPROVED COTTON MACHINE MANUF'G CO. et al.¹

(Court of Civil Appeals of Texas. May 2, 1896.)

FIXTURES — RIGHT TO REMOVE — SUBJECTION TO VENDOR'S LIEN — CONNECTION OF MORTGAGE — MUTUAL MISTAKE.

1. Machinery necessary for the operation of a gin mill, but which is not attached thereto, and which may be removed without injury to the realty, is subject to removal under a chattel mortgage executed for the purchase price thereof, reciting that the property should be considered as chattels.

2. Machinery, the purchase price of which was secured by chattel mortgage, and which was capable of removal without injury to the realty, does not become subject to a prior vendor's lien, though it was placed in the mill without the knowledge of the lien holder.

3. In an action to foreclose a chattel mortgage on certain machinery placed in a gin mill, it was proper to permit the mortgage to be corrected so as to include an article which was omitted therefrom by mutual mistake, the purchase price of which was included in notes to secure which the mortgage was given, even as against one who held a prior vendor's lien on the mill.

Appeal from district court, Dallas county; R. E. Burke, Judge.

Action by the Munger Improved Cotton Machine Manufacturing Company against P. J. Willis & Bro. and others to reform and foreclose a chattel mortgage. There was a judgment for plaintiff, and defendants P. J. Willis & Bro. appeal. Affirmed.

¹ Writ of error denied by supreme court.

Morris & Crow, for appellants. Coke & Coke, for appellee.

FINLEY, J. Appellants' statement of the nature of the suit, and the facts established upon the trial, is substantially correct, and is here adopted: "February 20, 1895, the Munger Improved Cotton Machine Manufacturing Company, plaintiff and appellee, filed this suit in the district court of Dallas county, Texas, against A. Hildebrandt and H. Bohne, defendants, on certain promissory notes, dated March 30, 1893, executed by them to plaintiff for the purchase money of certain machinery sold by plaintiff to said defendants; and foreclosure of mortgage lien of date March 30, 1893, was asked for on said machinery, against said defendants, and against P. J. Willis & Bro., also made defendants, and alleged to set up some claim (unknown to plaintiff) to said property. A double box press was alleged to have been, by mutual mistake, omitted from said written mortgage; and the court was asked to reform the mortgage so as to include it, and grant foreclosure thereon. Hildebrandt & Bohne were duly cited, but filed no answer. P. J. Willis & Bro. filed answer March 4, 1895, and amended answer May 16, 1895, wherein they set up general demurrer, general denial, and specially that about December 13, 1892, M. Hausman conveyed to Hildebrandt & Bohne, defendants, one acre of land on the L. M. Mason survey, in the town of Myersville, Dewitt county, Texas, known as their gin and mill property, and took in payment three notes of \$500 each, reserving a vendor's lien on said land to secure their payment, and said Hausman, of even date therewith, for a valuable consideration to him paid, sold and transferred said notes to appellant; that in March, 1893, plaintiff sold Hildebrandt & Bohne the machinery on which foreclosure is sought in this action, and it was at once moved on said lot of land, and became fixtures thereon, and part of the realty; that at that time appellants did not know said machinery was moved thereon, and did not consent thereto, or that it might remain chattels subject to removal until paid for; that in the fall of 1894 appellants brought suit against Hildebrandt & Bohne, in the district court of Dewitt county, on said vendor's lien notes, and December 18, 1894, obtained judgment for the amount of same, with foreclosure of its vendor's lien on said lot of land,—said machinery still situate thereon as fixtures; that order of sale was issued on said judgment, and at a sale of said lot of land thereunder by the sheriff, as under execution, on the first Tuesday in April, 1895, appellant became the purchaser, and is now the owner and in possession of said lot of land, and all said machinery still situate thereon. May 16, 1895, the cause was tried before the court, and plaintiff recovered judgment against A. Hildebrandt and H. Bohne for its debt, \$1,157.68, with judgment reforming said mort-

gage so as to include one double box press, and, as reformed, foreclosing said mortgage lien against all the defendants on all said property. At the trial there was no conflict in the evidence, and the facts, as agreed to and proven, were as follows: The Munger Improved Cotton Machine Manufacturing Company, appellee, read in evidence its notes and mortgage executed by Hildebrandt & Bohne, dated March 30, 1893, and established their debt and lien as alleged against Hildebrandt & Bohne. Said mortgage was registered in Dewitt county, Texas, May 13, 1893. P. J. Willis & Bro., appellants, read agreed statement of their evidence, which, with the testimony of Hildebrandt, established the following facts: December 13, 1892, M. Hausman, by his deed, conveyed to Hildebrandt & Bohne the real estate (one acre of ground in Myersville) on which the machinery in controversy was afterward located, and three notes of \$500 each were given to secure the purchase money of said lot of land, and a vendor's lien was reserved to secure their payment, which notes M. Hausman at once assigned to P. J. Willis & Bro., who in the fall of 1894 sued Hildebrandt & Bohne thereon in the district court of Dewitt county, and December 18, 1894, obtained judgment thereon for \$2,100, foreclosing their vendor's lien, and afterwards order of sale was issued thereon, and said lot of land, and all fixtures thereon, were sold thereunder by the sheriff of said county the first Tuesday in April, 1895, at which sale P. J. Willis & Bro., for \$1,000 bid, became the purchaser. That in December, 1892, said acre of ground had on it a two-story frame house with gin and mill machinery, and had long been in use as a gin and mill house, and in the spring of 1893, such machinery becoming old, Hildebrandt & Bohne bought said new machinery, on which foreclosure is sought herein, and placed it on said lot of land, and displaced the old machinery; and appellants had no notice of this until the fall of 1894, when they filed suit to foreclose their vendor's lien. The two new gin stands bought were placed on the floor of the second story of the house on said lot, but were not fastened to same, and have since been in use ginning cotton, and all said new machinery has occupied its appropriate place in said house, and been in use; but none of it has been fastened to the building, except the shafting and pulleys, which have remained screwed and nailed thereto. The double box press was bought at the same time with said other new machinery, and was intended to be included in the Munger Company's mortgage, but, through oversight and mistake, was left out, and this mistake was not discovered until this suit was filed. This press was set down on the ground, through a hole in the floor, and rests on two sills, which are not bedded in the ground, but laid on top of it. The press is not fastened at the top, but is braced on the sides to

~~Keep~~ it in place,—from moving while in operation. This machinery could all be removed ~~from~~ the house or land without injury to either, but other machinery would have to be added before its use for a gin and mill (for which it has been exclusively used since prior to December, 1892) could be restored."

Appellants' first assignment of error urges that the machinery in question had been annexed to the freehold as a benefit to it, and had become an accessory necessary to the enjoyment of the freehold, and partook so much of the realty that its ownership vested with the fee to the land, and was not subject to removal except by consent. The machinery in question was sold to Hildebrandt & Bohné, March 30, 1893, and a chattel mortgage executed thereon, bearing date on that day, to secure the purchase money thereof; said mortgage providing that the property should be considered chattel property, and be taken possession of as such by appellee, should default be made in the payment of said purchase price. Said mortgage was made and executed before said property was delivered to Hildebrandt & Bohné, and before it was located at its present site, which was about May 1st,—one month after it was purchased. The gin stand at all times rested on the floor of the second story of the gin house, and has never in any way been fastened to the same, or any other part of the building. All of said machinery has occupied its proper place in the gin house, but none of it has ever been fixed or fastened in any way to the building, except the shafting and pulleys, which have been screwed thereto. The double box press is set down on the ground through a hole cut in the floor, and rests upon two sills. The sills are not bedded in the ground, but simply laid on top of it. The press is not fastened at the top, but sufficiently braced to keep it from moving while being operated. All of the property in question can be removed from said building without injuring the house or the land or the machinery in the least, and the building and lot, without the machinery, would be worth as much as \$1,900. The facts shown upon the trial clearly evidence the intention that the machinery should remain personalty, and not become a part of the realty until it should be paid for. It was also clearly shown that there was not such an actual annexation of the machinery to the realty as would prevent its being removed without damage to the freehold. Where it is clearly shown, as in this case, that the intention was that the property should remain chattel, and there has been no such attachment of the chattel to the realty as would injure the realty by the removal of the chattel, the chattel should not be regarded as a part of the realty. *Hutchins v. Masterson*, 46 Tex. 554; *Ewell*, Fxst. p. 21; *Menger v. Ward* (Tex. Civ. App.) 28 S. W. 824, and authorities cited; *Binkley v. Forkner* (Ind. Sup.) 19 N.

E. 755; *Eaves v. Estes*, 10 Kan. 314; *Tift v. Horton*, 53 N. Y. 377.

The second assignment of error insists that as appellants held a vendor's lien upon the realty at the time the machinery was placed upon it, and the machinery was so placed without their knowledge or consent, and without any agreement on their part that it should remain chattel until paid for, as to them it became a part of the realty. The vendor's lien notes held by Willis & Bro. were made and executed by Hildebrandt & Bohné December 13, 1892, and on the same day transferred to said Willis & Bro. The machinery in question was bought from the Munger Machine Company by Hildebrandt & Bohné March 30, 1893, when the mortgage in question was executed, and the machinery was, about one month thereafter, placed upon the real estate upon which said lien existed. Willis & Bro. were fully apprised of Munger's claim to the property at the time they brought their suit to foreclose their vendor's lien, and long prior to the time of sale thereunder. The property to which the vendor's lien attached would not be injured by the removal of the machinery. The contention is that notwithstanding the machinery should be treated as personalty, as between the Munger Company and Hildebrandt & Bohné, as to appellants it should be regarded as a part of the realty. We do not think this contention is based upon any sound principle. By sustaining and applying it in this case, the Munger Company would lose the security taken for their machinery, and appellants would have the value of the machinery added to the realty upon which their vendor's lien rested, without valuable consideration paid, or any damage to be done to their security by the removal of the machinery. The vendees had the right to place the machinery upon the lot without forfeiting the right of its removal, so long as it could be done without injury to the realty. As they possessed that right, they could incumber it with a mortgage to another, with such right of removal to satisfy the mortgage lien. *Harkey v. Cain*, 69 Tex. 150, 6 S. W. 637; *San Antonio Brewing Ass'n v. Arctic Ice Machine Manuf'g Co.*, 81 Tex. 103, 16 S. W. 797; *McJunkin v. Dupree*, 44 Tex. 500; *Campbell v. Roddy* (N. J. Err. & App.) 14 Atl. 279; *Binkley v. Forkner* (Ind. Sup.) 19 N. E. 755; *Crippen v. Morrison*, 13 Mich. 24.

The third assigned error complains of the action of the court in foreclosing the mortgage upon the double box press, which, by mutual mistake and oversight, was omitted from the written mortgage. The manner in which said double box press was located upon the premises has been hereinbefore stated. The press was sold to Hildebrandt & Bohné along with the balance of the property in question. The purchase money therefor was included in the notes sued on, and it was agreed, when said property was pur-

chased, that plaintiff should have a lien on the same, including said press, for the purchase money, but through oversight and mutual mistake said press was omitted from the written mortgage. As between the Munger Company and Hildebrandt & Bohne, the right to correct the mistake, and foreclose the mortgage lien upon this part of the machinery, is clear; and, as appellants had acquired no lien upon it or right in it, they have no rights which have been affected by such foreclosure. 2 Beach, Modern Eq. Jur. § 538 et seq.; 1 Jones, Mortg. § 97. We find no errors committed upon the trial, and the judgment is affirmed.

VAUGHN v. MUTUAL BLDG. ASS'N.

(Court of Civil Appeals of Texas. May 23, 1896.)

USURY — ASSUMPTION OF DEBT — FORECLOSURE OF TRUST DEED — TITLE OF PURCHASER — PAYMENT OF PRINCIPAL.

1. One who assumes the payment of a loan secured by trust deed is not entitled to be relieved from payment thereof by reason of its being tainted with usury.

2. A purchaser at foreclosure sale under a deed of trust, executed to secure both principal and interest of a usurious loan, obtains title if the principal sum due was not tendered before sale, though the consideration may have been inadequate.

Appeal from district court, Dallas county; R. E. Burke, Judge.

Action by Mutual Building Association against W. L. Vaughn to recover certain land. Plaintiff had judgment, and defendant appeals. Affirmed.

M. L. Dye, for appellant. Hill, Dabney & Edmonson, for appellee.

Conclusions of Fact.

RAINEY, J. On April 20, 1888, R. C. Ayres borrowed of the Dallas Homestead & Loan Association \$1,000, being the purchase money for the property here sued for. Said \$1,000 was secured by deed of trust executed by Ayres and wife to W. H. Thompson, trustee. Said note was conditioned on payment of \$1 per share per month on 10 shares of stock of the said Dallas Homestead & Loan Association, Series D, owned by Ayres, and on the payment of interest at the rate of 10 per cent. per annum on said \$1,000 until the maturity of said stock at the value of \$100 per share. On this transaction a premium of \$80 was charged or deducted. Said note and deed of trust recited that said 10 shares of stock were also pledged as collateral security for said debt. On this loan payments were made as follows: On stock to January 1, 1891, \$440; on interest to January 1, 1891, \$283.90,—total paid, \$723.90. On July 6, 1893, on account of default in pay-

ments, said deed of trust was foreclosed, and the land bought in by appellee. There is a conflict in the evidence as to whether notice of this sale was posted and remained posted for 10 days, as required by said deed of trust. There is no evidence that said 10 shares of stock, Series D, had matured at the date of said sale, or that said stock was sold out or appropriated. On September 7, 1888, Ayres and wife borrowed of the Mutual Building Association \$1,500. From this sum \$220 was deducted as premium. A note was executed, bearing 10 per cent. per annum interest, payable in monthly installments, and conditioned on the payment of monthly installments on 15 shares of stock. Said note was secured by deed of trust executed by said Ayres and wife to H. C. Stephenson, trustee, conditioned in the usual form. On this loan there was paid on stock to May 20, 1893, \$710; interest paid to May 20, 1893, \$485,—total paid, \$1,195. On April 10, 1894, said loan being nearly one year in default, at a regular meeting of the directors of the Mutual Building Association, they passed the following resolution: "Resolved, that in the case of the \$1,500 loan made by the Mutual Building Association to R. C. Ayres, and assumed by W. L. Vaughn, the amounts paid on stock in Series A shall be credited on the indebtedness of said parties to the association, as of date of closing said Series A, August 31, 1893, and that said credits be applied, first, to the payment of fines and stock dues then accrued, and the balance to the payment of said note and interest; and, default having been made in the payment of interest on said note for more than six months prior to August 31, 1893, and also in the payment of fines on stock due for a like period, said note is hereby declared due, and the attorney is directed to collect the same, by suit or foreclosure." On August 8, 1894, the trustee under this deed of trust sold the said premises to the Mutual Building Association for \$150 cash, and executed a deed to it, reciting default, request to sell, and compliance in all things with the terms and conditions of said trust deed. The indebtedness due the Dallas Homestead & Loan Association before the sale, under the deed of trust securing the same, was duly transferred to the Mutual Building Association, appellee herein. On June 1, 1889, Ayres and wife conveyed said premises to W. L. Vaughn, appellant, part of the consideration being the amount due on the two loans heretofore mentioned. Soon after the sale of July, 1893, the association offered to let Vaughn have the property back if he would pay what he owed it. About January, 1894, Vaughn contracted a sale of the property to one Elliott. Vaughn asked the association for a statement, but it failed to furnish such statement for about a month, and by that time Elliott refused to close the trade. After the contract of sale with Elliott fell through, the association told Vaughn that it

he would sell the property he could have all above what he owed them. Vaughn did not offer to pay the association any amount at all, as he had nothing to offer. When Vaughn bought the premises from Ayres and wife, he was duly informed of the amount due by Ayres to the association. The premises were worth about \$2,500 at the time of sale. No fraud was perpetrated by the association upon Vaughn in the sale, nor was there any irregularity in the sales under the trust deeds. The transactions between the associations and Ayres were usurious, but at the time of the sales under the trust deeds, deducting interest entirely, there was still due of the original principal about \$270. This action was brought by appellee to recover of Vaughn the land in controversy. Vaughn pleaded that there had not been notice given, posted at the courthouse door, of the sale under the first mortgage, that the price for which said property was bid in was greatly inadequate, that the contract was usurious, and that payments had been made to more than cover the principal of said loans; and prayed for a cancellation and setting aside of said sales under said trust deeds, etc. To this answer special demurrers were interposed by plaintiff, and, as to the plea of usury, were sustained.

Conclusions of Law.

1. Appellant complains of the action of the court in sustaining the exceptions to the plea of usury. By an examination of the record, we find that the court heard testimony covering the entire transaction. Under the pleadings of appellant, it was, technically, error for the court to have sustained said plea; but, the evidence showing that the assumption of the indebtedness due by Ayres to the association was a part of the consideration for the premises sold by Ayres to appellant, the action of the court in failing to overrule the demurrer is immaterial, as, under the state of facts as shown by the evidence, appellant was not entitled to be relieved from payment of any part of the contract by reason of its being tainted with usury. *Johnson v. Association*, 2 Tex. Civ. App. 499, 21 S. W. 961; *Maloney v. Eahheart*, 81 Tex. 284, 16 S. W. 1030; 1 Jones, Mortg. § 644; *Stephens v. Muir*, 8 Ind. 352; *De Wolf v. Johnson*, 10 Wheat. 393; *Frost v. Shaw*, 10 Iowa, 492; *Maher v. Lanfrom*, 86 Ill. 521.

2. There can be no question as to the regularity of the sale made September 7, 1888, under the deed of trust to secure the payment of the \$1,500. There still being due, at that time, after deducting all the amounts paid thereon, a part of the original sum loaned, and no tender of the amount due having been made, such sale conveyed the title to the association, although the consideration may have been inadequate. *Hemphill v. Watson*, 60 Tex. 679; *Goldfrank v. Young*, 64 Tex. 440; 1 Jones, Mortg. 620.

3. The evidence supports the judgment, and it is affirmed.

MULCAHY et al. v. STATE.

(Court of Civil Appeals of Texas. June 13, 1896.)

TRIAL—SPECIAL VERDICT—SUFFICIENCY.

Where a case is submitted to a jury under special issues, the court must submit every material issuable fact.

Appeal from district court, Harrison county; W. J. Graham, Judge.

Action by the state of Texas against M. J. Mulcahy as principal, and others as sureties, on a liquor dealer's bond. From a judgment for plaintiff, defendants appeal. Reversed.

L. P. Wilson, for appellants.

LIGHTFOOT, C. J. This was a suit instituted in the district court of Harrison county by John H. Carter, district attorney, and M. P. McGee, county attorney of Harrison county, in the name of the state of Texas, for the use and benefit of Harrison county, against appellants, to recover the penalty of \$500 for the alleged violation of one of the conditions of a liquor dealer's bond given by M. J. Mulcahy, principal, and Albert Williams and J. Crossman, sureties. Judgment was rendered in the court below in favor of appellee, upon the bond, from which Mulcahy and the sureties on his bond have appealed to this court.

The questions involved in this case have been fully discussed by this court in the case of *Merzbacher v. State* (decided by us at the present term) 36 S. W. 308. The court in this case, as in the case above cited, submitted the questions involved to a jury, under special issues, but failed to submit to the jury all the material issues necessary to be found in order to authorize a judgment against appellants. Where a case is submitted to a jury under special issues, it is necessary for the court to submit every material issuable fact for the determination of the jury. We deem it unnecessary to enter into a fuller discussion of the questions than we have done in the case of *Merzbacher v. State*, referred to above, which involves the material questions here presented. For the error of the court above indicated, the judgment is reversed, and the cause remanded for a new trial. Reversed and remanded.

BONNER v. BRADLEY.

(Court of Civil Appeals of Texas. June 13, 1896.)

ACTION FOR MEDICAL SERVICES—IMPLIED PROMISE TO PAY.

In an action for medical services it appeared that plaintiff was not in the actual practice of medicine; that he was closely related to defendant's family, and the families of the parties were on the most intimate terms; that most of the time plaintiff made defendant's home a general stopping place for rest, etc.; and that it was under such circumstances that plaintiff prescribed for defendant's family.

The court charged that, if plaintiff's demand was just, he was entitled to recover, and that, if it was not just and due, but was contrary to law and equity, the jury should find for defendant. *Held*, that it was error to refuse a special charge asked by plaintiff on the question of implied contract.

Error from Freestone county court; A. G. Anderson, Judge.

Action by J. T. Bonner against J. T. Bradley on an account for medical services rendered by plaintiff for defendant. There was a judgment in favor of defendant, and plaintiff brings error. Reversed and remanded.

J. R. Bell, for plaintiff in error.

RAINEY, J. This is a suit by plaintiff in error to recover of defendant in error for medical services rendered defendant in error's daughter, which plaintiff in error alleged in his petition were rendered at the instance and request of defendant in error. Defendant answered, denying that he owed plaintiff anything, and that plaintiff was not in the active practice of medicine at the time such services were alleged to have been rendered; that plaintiff was closely related to the family of defendant by consanguinity and affinity, and the families were upon the most intimate terms; that for 30 or 40 years plaintiff and defendant extended hospitalities, courtesies, and favors to each other in the way of kindnesses and substantial benefits, without charges or any kind of legal obligation from one to the other, and especially about the times of the rendering of such services; and that a greater part of the time plaintiff made defendant's home a general stopping place for rest, recreation, and refreshments, and it was at these times, and on these occasions, and under these circumstances, that said plaintiff, as defendant then thought and believed, and was so impressed, acting as much or more in the capacity of a friend than as a physician, examined and prescribed for the family of defendant when indisposed. The evidence shows that the services of plaintiff in error were rendered as stated in his account, and also further shows that the relation existing between the parties was as stated in defendant in error's answer, and that their conduct and transactions with each other were the same as alleged. On the trial the court gave a general charge to the jury to the effect that, if plaintiff's demand was just and due, he would be entitled to recover, and, further, that if they did not believe such account was just and due, and was contrary to law and equity, then they should find for defendant. The plaintiff asked a special charge upon the question of implied contract, which the court refused to give. We think, under the circumstances, the court failed to properly charge the jury. When services are performed at the request of a party, the law will imply a promise to pay the reasonable value thereof, unless such request be made and acceded to as a gratuitous favor. "That the service for which plaintiff seeks to recov-

er was done under an implied promise that he should be paid for it may be rebutted by evidence that the relation between the parties was such as to exclude the inference that they were dealing on a footing of contract." *Potter v. Carpenter*, 76 N. Y. 157; *Moyer's Appeal*, 112 Pa. St. 290, 3 Atl. 811; 3 Am. & Eng. Enc. Law, p. 61. In *Taylor v. Deseve*, 81 Tex. 246, 18 S. W. 1008, the court says "that it is a settled principle of law that a promise to pay will not be implied contrary to the intention of the parties," citing *Lippman v. Tittmann*, 31 Mo. 74. If, at the time the services were performed by plaintiff in error, it was not the intention of the parties that charges should be made for such services, then defendant in error would not be liable therefor. As the law applicable to the facts of the case was not given to the jury in the charge of the court, the judgment will be reversed, and the cause remanded. Reversed and remanded.

ADAMS et al. v. PARDUE.¹

(Court of Civil Appeals of Texas. April 11, 1896.)

EXCHANGE OF PROPERTY—RESCISSION OF CONTRACT—CERTIFICATE OF ACKNOWLEDGMENT—SUFFICIENCY—MARRIED WOMAN—EXAMINATION—INNOCENT PURCHASER.

1. One who had ample opportunity to examine the goods in exchange for which he conveyed land cannot have the deed rescinded because he overvalued the goods.

2. Rev. St. 1879, art. 4309, requires that the certificate of an officer must show that the person making an acknowledgment was known to him to be the grantor in the conveyance, or that proof of that fact was made before him. *Held*, that a certificate copied from the statute, and reciting, "Personally appeared before me J. A. and N. A., his wife, both known to me (or proven to me on the oath of —) to be the persons whose names are subscribed," etc., was sufficient, as it was evident that the officer intended to certify that the parties to the deed were known to him, and the parenthetical clause could be rejected as surplusage.

3. It is not necessary that an officer taking the acknowledgment of a married woman should ask, in the words of the statute, whether "she wished to retract it." It is sufficient if he elicits from her that it was her present purpose to willingly execute the instrument.

Appeal from district court, Collin county; J. E. Dillard, Judge.

Action by Nancy Adams and another against D. C. Pardue to set aside a certain deed. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

Dillard & Muse and M. H. Garnett, for appellants. Abernathy & Beverly, for appellee.

LIGHTFOOT, C. J. This suit was brought by appellants against appellee to rescind and set aside a deed executed by them for 32 acres of land to appellee, on the 11th day of February, 1893; and they set up, as ground

¹ Writ of error denied by supreme court.

therefor, that plaintiffs are husband and wife, and have a family; that the land was a part of their homestead, and the separate property of appellant Nancy Adams; that the deed was obtained by fraud; that it was never acknowledged or executed by the wife as a deed, but was understood by her to be a mortgage. The case was tried before the court, without a jury, and the facts proved justify the conclusions that the 32 acres of land sued for was community property between plaintiff Nancy Adams and her husband, John Adams, and was a part of their homestead, and about February 11, 1893, they entered into a trade with appellee, whereby they deeded to him the 32 acres of land, for the consideration of appellee's half interest in a stock of drugs and house and lot in the town of Nevada, and \$260 in money, \$50 of which was paid in cash, leaving the balance due them on such transaction \$210; that appellants, after the trade, retained possession of the 32 acres of land, and, at the time of the trial, the rents of said land for the year 1894, in their hands, had decreased the balance due them from \$210 to \$90. The court below rendered its judgment in favor of appellee for the land and costs, and in favor of appellants for \$90, the balance due them, from which they have appealed.

We adopt the conclusions of fact found by the court below, so that each of the parties may have the full benefit of them. As the appeal to this court is based mainly on the facts, we will treat them more in detail under the different assignments of error.

1. Under the third, fourth, twentieth, twenty-fourth, twenty-fifth, twenty-sixth, twenty-second, and thirty-first assignments of error, appellants present two propositions, which are as follows: (1) "That portion of the third finding by the court wherein he finds that the value of the house and lot was seven hundred dollars, but that they were not separately valued in the trade, but were lumped, is erroneous, because the proof shows that in the trade the interest of defendant in the house and also the stock of drugs was placed at seven hundred dollars. Such finding is also erroneous wherein the court finds, as a matter of fact, that plaintiffs did not exclusively rely upon the representations of Pardue as to the value of the house and lot and stock of drugs, because such finding is unsupported by the proof." (2) "Where, in an exchange of property, one of the parties is ignorant of the value of the property that he is to receive in the trade, and the other has knowledge of such value, and makes representations in regard thereto which are shown to be false, and which are relied on by the other party to the transaction, equity, at the instance of the injured party, will rescind the trade, where the parties are placed in the same position occupied by them prior to the trade."

Under the first proposition above, the as-

signments on which it is based cannot be maintained under the facts proved, for the reason that the appellants both knew the property for which they were trading. They had ample opportunity to have examined it if they had desired to do so, and place a correct valuation upon the same. If they valued it higher than they should have done, it was their own fault; and, if they have suffered by reason of such overvaluation, they have only themselves to blame. The parties were on the trade for a sufficient length of time to have enabled appellants to have correctly estimated the value of the property, and no obstructions seem to have been placed in their way in making a fair estimate of it. If appellants were disappointed in their belief that they could make money more rapidly in handling a stock of drugs in a small town, when they knew nothing about the business, it is a misfortune, against which the courts cannot grant them relief. The facts clearly indicate that the findings of the court upon the subject of valuation were correct.

The second proposition above cannot be maintained under the facts in this case, because it is not shown that there were any fraudulent concealments by the appellee in regard to the value of his property; but appellants had ample opportunity to have ascertained the value of it, and, if they did not do so, it was their own fault.

2. Under the seventh, ninth, tenth, eighteenth and twenty-seventh assignments of error, appellants present this proposition: "An instrument which is upon its face an absolute deed may be shown to be a mortgage. In this case the deed from appellants to appellee is shown to have been a mortgage, and appellants should have been permitted to redeem the land; or, as the land was the homestead of appellants, such mortgage in the form of a deed should have been declared void." We are not prepared to deny the correctness of the legal proposition announced above, if there were facts upon which to base it; but the conclusions of fact found by the court below, based upon ample testimony, show, beyond question, that the instrument which appellants made to appellee was an absolute deed, and not a mortgage.

3. Under the sixteenth, seventeenth, and twenty-ninth assignments of error, appellants present the following propositions: (1) There was no such delivery of the deed from appellants to appellee for the land in controversy as would fix title to it in him. (2) "The delivery of the deed by the grantor to the grantee, while either the grantor or grantee has under consideration whether a good and sufficient title will vest in the grantee in the land mentioned under such deed, is not a sufficient delivery of the deed; and, under such facts, the deed would not be placed in escrow." In the first place, it was shown that the deed was delivered. The testimony

did not tend to show merely a delivery of the deed in escrow, but it clearly shows that, when the deed was executed by the appellants, it was executed for absolute delivery, and it was sufficient to pass the title.

4. Under the fifth, sixth, eighth, tenth, twelfth, fifteenth, sixteenth, thirty-second, thirty-third, and thirty-fourth assignments of error, appellants lay down the following propositions: (1) "Where, in the certificate of acknowledgment of a deed, the officer certifies that the grantors were well known to him, or proved to him on the oath of some person, whose name is left blank, to be, etc., such acknowledgment is void, and no title will be conveyed to the grantee to the land described in such deed; and especially is this true if the land so conveyed is the homestead of the grantors or the separate property of the wife." (2) "If the certificate of a married woman to a deed conveying her homestead or separate property is in proper form, yet, if in fact such certificate does not speak the truth, and such acknowledgment was not properly taken, and if fraud, imposition, and false representations entered into the transaction on the part of the grantee, such deed would be invalid as between the grantors and grantee." (3) "Although a proper certificate be attached to the deed of the wife attempting to convey the separate property or the homestead, it may be avoided by her if it does not speak the truth, or the acknowledgment was obtained by fraud; provided the purchaser is chargeable with notice of either of these facts before the payment of the purchase money." (4) "That when Mrs. Adams acknowledged the deed to appellee, if she was then under the impression that such deed and such acknowledgment were only to take effect provided she could make title to the land in controversy, and if it afterwards transpired that she could not make such title, then the acknowledgment to such deed would be insufficient to convey title to the appellee to the land in controversy." (5) "If, when Mrs. Adams' acknowledgment was taken to the deed from herself and husband to the appellee, she then believed that she and her husband would have the right to redeem said land, then such deed would be ineffectual to pass title to appellee."

Under these propositions, appellants present the only serious controversy in the case. The deed from appellants to appellee was in the usual form, and the certificate of the acknowledgment attached thereto was as follows: "The State of Texas, County of Collin. Before me, J. T. Lacy, justice of the peace and ex officio notary public in and for the county of Collin, state of Texas, on this day personally appeared before me J. K. Adams and N. A. Adams, his wife, both known to me (or proven to me on the oath of —) to be the persons whose names are subscribed to the foregoing instrument, and acknowledged to me that they executed the same for the purposes and considerations therein expressed; and the

said N. A. Adams having been examined by me privily and apart from her husband, and having the same fully explained to her, she, the said N. A. Adams, acknowledged the same to be her act and deed, and declared that she had willingly signed the same for the purposes and considerations therein expressed, and that she did not wish to retract it. Given under my hand and seal of office, this the 11th day of February, 1893. [L. S.] J. T. Lacy, Justice of the Peace and Ex Officio Notary Public." The above form was copied from the statute. The words inclosed in the marks are not parenthetical, and the proper marks should be brackets, as it was clearly intended that the words should form no part of the certificate unless some other part, including the bracket marks, should be stricken out, and the blank inclosed in brackets filled with the name of the person who proved the identity of the grantor. We fully recognize the law to be settled that, since the Revised Statutes went into effect, the certificate of the officer must show that the person making the acknowledgment was known to him to be the grantor in the conveyance, or that proof of the fact was made before him. *Davidson v. Willingford*, 88 Tex. 623, 32 S. W. 1030, citing *McKie v. Anderson*, 78 Tex. 207, 14 S. W. 576. Under this rule, does the certificate of acknowledgment above show either of these facts? Under a similar acknowledgment in the case of *Farrell v. Association* (Tex. Civ. App.), reported in 30 S. W. 814, it was held by Garrett, C. J., that the words inclosed in brackets, "or proven to me on the oath of —," could be considered by the court as surplusage, under the rules indicated by the supreme court in *Gray v. Kauffman*, 82 Tex. 65, 17 S. W. 513; *Talbert v. Dull*, 70 Tex. 678, 8 S. W. 530. It is evident from an inspection of the certificate of the officer taking the acknowledgment that he simply neglected to strike out the words contained in the brackets. Under such circumstances, could they be considered as effective as if contained in the body of the certificate without the marks? We think, under a fair construction of the language of the certificate as it stands, that it is evident the officer intended to certify that the parties to the deed were known to him, and that he did not intend to indicate that they were proved to be the parties named by any person or persons, because the marks are left in the certificate, which have the effect of cutting off those words from the balance of the certificate. They are simply left blank, and may be treated as surplusage.

Under the second proposition above, we think it was clearly shown that the certificate of the officer substantially speaks the truth; that the acknowledgment was properly taken; and that no fraud or imposition or false representations entered into it on the part of the grantee. Certainly, there was no collusion shown between the grantee and the officer taking the acknowledgment. The officer

seems to have done his duty in explaining the deed to Mrs. Adams; and, if there was any defect whatever in such explanation made by the officer, no knowledge or notice of it was shown to the grantee in the deed. He was not present at the time the acknowledgment was taken, and cannot be affected by it. *Loan Co. v. Blalock*, 76 Tex. 85, 13 S. W. 12.

Under the third proposition, the same questions are presented as under the second. The principal point attempted to be made by the appellants under these two propositions seems to be under the finding of the court that the officer did not in fact ask Mrs. Adams the question whether or not "she wished to retract it." The whole object and purpose of the statute requiring this examination of the wife separate and apart from her husband seems to be for her protection, and that the officer may be able to elicit from her, by means of this examination, whether she willingly signed and executed the instrument, and whether it was her present purpose to execute it. The object of showing her present intention and purpose to convey may be carried out even without the use of the exact words of the statute in the examination made by the officer; and if, under his examination, it was shown that Mrs. Adams had freely and voluntarily executed the deed, and that it was her present purpose and intention to make the conveyance, then the officer could safely make the certificate required by the statute, which he did make in this case. In the case of *Norton v. Davis*, 83 Tex. 35, 18 S. W. 430, it was held that, although the certificate failed to show that "she did not wish to retract it," yet that the words "that she still voluntarily assents thereto" were equivalent to the expression that "she did not wish to retract it." This interpretation seems to us to be in full accord with the spirit of the statute, and is a substantial compliance therewith. If the wife, at the time of the acknowledgment, still assents to the execution of the deed, she certainly cannot wish to retract it. In this case the certificate of the officer is in the exact language of the statute; but it is claimed by the appellants that, on the examination of the wife, she was not asked the question whether "she wished to retract it." It was fully shown that equivalent words were used, showing her present intention to convey, which we think was sufficient. But, whether this was true or not, it was not shown that the vendee had any notice or knowledge whatever of any claimed defect in the examination of Mrs. Adams by the officer. The certificate on its face is good, and appellee took a good title under the deed.

Under the fourth and fifth propositions above, it is claimed by appellants that Mrs. Adams, at the time of the acknowledgment of the deed, was under the impression that it should take effect only upon condition that she could make a good title. This is not supported by the facts.

It is further claimed that Mrs. Adams be-

lieved she and her husband would have the right to redeem the land. The facts in regard to this were controverted, and we think the findings of the court upon this subject were amply supported by the testimony, to the effect that while the appellee, at the time of the transaction, may have held out to appellants that they could become purchasers of the land afterwards, provided they desired to repurchase, yet there was no agreement that they should be allowed to redeem, for the reason that it was an absolute sale, and was so understood and consummated by the parties. Any secret intention or belief on the part of Mrs. Adams in regard to their rights to redeem, which did not enter into or form a part of the contract, cannot be used to set aside the conveyance. *Gray v. Shelby*, 83 Tex. 405, 18 S. W. 809, and authorities there cited. We find no error in the judgment, and it is affirmed.

H. B. CLAFLIN CO. v. KAMSLER.

(Court of Civil Appeals of Texas. June 13, 1896.)

ATTACHMENT—SUFFICIENCY OF AFFIDAVIT—PRACTICE.

1. A statement in an affidavit for attachment that defendant is "indebted," instead of "justly indebted," as provided by statute, does not render the attachment invalid, where the petition is positively verified, and embodies as an exhibit a statement of the indebtedness, verified by an affidavit stating that it is just.

2. In attachment, where a writ has been issued and levied, a second writ issued and levied on the same property is not invalid because made returnable at once.

Appeal from district court, Limestone county; Rufus Hardy, Judge.

Action by the H. B. Claflin Company against William Kamsler. From a judgment quashing writs of attachment, plaintiff appeals. Modified.

Simkins & Mays, for appellant.

LIGHTFOOT, C. J. Appellee has filed no brief or other appearance in this court, and the statement in appellant's brief is adopted: On April 25, 1895, the H. B. Claflin Company, of New York, instituted suit by attachment in the district court of Limestone county against William Kamsler. The writ of attachment was levied on real estate, and writs of garnishment were issued and served on various parties. Defendant filed a motion to quash on various grounds, but presented but one, to wit, that the word "justly" was omitted from the affidavit before the word "indebted," and therefore plaintiff did not make the statutory affidavit that defendant was "justly indebted." Pending this motion, plaintiff filed a second affidavit and bond, and again caused a writ to issue, and writs of garnishment to be served. Defendant moved to quash this second writ of attachment, because it was made returnable instantan. On hearing the

case, the court quashed both writs,—the first writ because the word “justly” was omitted, and the second writ because the clerk had made it returnable *instanter*, and dismissed the writs of garnishment. Plaintiff appealed, and assigns the following errors:

First. “The court erred in quashing the attachment proceedings first sued out in this cause, and dismissing the proceedings thereunder, because it appeared from the original petition, and the exhibits thereto attached, and made a part thereof, and sworn to, and constituting the affidavit for attachment, that the defendant, William Kamsler, is justly indebted to the plaintiff, the H. B. Clafin Company.” The petition is sworn to by counsel, who states “that the matters and things set forth in the foregoing petition are true.” The petition alleges that the account marked “Exhibit A” is attached to the petition, and made a part thereof, and the notes marked “B” and “C” were also made a part of the petition. The exhibit attached to the petitions shows an indebtedness of \$7,356.34, consisting of the following items, to wit: An open account of \$4,664.74; and two notes at four months, one for \$1,345, and the other for \$1,346.60. These were all placed in one account, and marked “Exhibit A” by the affiant in New York, for the purposes of this suit; and the several items severally and the total amount were duly sworn to by D. N. Force, treasurer of said company, as being within his knowledge just, due, and unpaid. It appearing that the affidavit to the sworn statement of the debt, which is made a part of the petition, states in substance that the defendant is justly indebted to plaintiff, it was sufficient to sustain the attachment, and it was wrongfully quashed. *Willis v. Mooring*, 63 Tex. 341; Rev. St. Final Title, § 3.

The first attachment was wrongfully quashed by the court, and this makes it really unnecessary for us to pass upon the second assignment, but we will do so. After the levy of the attachment upon certain real estate, some question being raised about the validity of the attachment, appellant, out of an abundance of precaution, sued out another attachment in the same case, and caused it to be levied upon the same real estate. The court below also quashed the last attachment, on the ground that it was made returnable “*instanter*,” instead of the next term of the court. This ruling was also erroneous. *Bank v. Still*, 84 Tex. 339, 19 S. W. 479.

The court rendered judgment below in favor of the H. B. Clafin Company for its debt, but refused to foreclose the attachment lien. The judgment of the court below is affirmed in so far as it affects the amount recovered by appellant against appellee for the debt, interest, and costs; but it is here reformed, and rendered in favor of appellant, foreclosing the attachment lien upon the land levied upon under the writs of attachment; and this judgment shall be certified below for observance.

LINDSAY v. CITY OF SHERMAN.

(Court of Civil Appeals of Texas. June 20, 1896.)

MUNICIPAL CORPORATIONS — DEFECTIVE SEWERS.

Where a city has exercised its statutory authority to construct a sewer, it must keep it in proper repair, even though it was properly constructed in the first instance; and where it has notice of its condition, or by the use of reasonable diligence could have known it, the city is liable for damages to adjacent property owners, where the condition of the sewer has become a nuisance.

Appeal from district court, Grayson county; Don A. Bliss, Judge.

Action by George F. Lindsay against the city of Sherman for damages resulting from an alleged nuisance. From a judgment in favor of defendant, plaintiff appeals. Reversed.

W. D. Gordon and W. J. Brown, for appellant. G. P. Webb, for appellee.

LIGHTFOOT, C. J. Appellant sued the appellee for damages for an alleged nuisance, caused from the defective manner in which a sewer in front of his house was constructed and maintained. There was judgment for the defendant. Under the charge of the court, the whole case was made to turn upon the original construction of the sewer; and the jury were charged, if the sewer was constructed in a proper manner, to find for the defendant. In a portion of the charge which is complained of by appellant, the court says: “If you believe from the evidence that the said sewer was constructed by the defendant in a careful manner, you will find for the defendant, even though you should believe from the evidence that filth and refuse collected in front of plaintiff’s premises, or in the sewer below said premises, and generated noxious gases and unpleasant odors, which caused discomfort to plaintiff and his said wife, or caused the health of the said child to be impaired.” The pleadings of plaintiff had alleged that by the negligent construction of the sewer, and by reason of defendant’s negligence in failing to properly flush said sewer with water, and in refusing to remove obstructions which were allowed to accumulate therein, and by its negligence in leaving flaws and sinks in the bottom of the sewer, below plaintiff’s house, the sewer became offensive and unhealthy to himself and family, and became a nuisance; that the defendant was notified of the nuisance, and requested to abate it, which it had failed to do. He fully pleads his damages by reason of such nuisance, and the testimony was sufficient to authorize the submission of the issues pleaded.

Under the statute, the city has the power to construct sewers and keep them in repair. Rev. Civ. St. art. 376. It also has ample power to prevent and abate nuisances. *Id.* arts. 382, 403. While the city was not compelled to exercise the authority to construct the sewer, yet, when it saw proper to call into

exercise the power which was given to construct the sewer in front of plaintiff's premises, it was not only its duty to exercise the proper care in the original construction of the sewer, but, even if it was properly constructed in the first instance, it was appellee's duty to keep it in proper repair and condition, so as not to become a nuisance to adjacent property owners. *City of Ft. Worth v. Crawford*, 74 Tex. 404, 12 S. W. 52; *Id.*, 64 Tex. 202; *City of Sherman v. Langham* (Tex. Sup.), 13 S. W. 1042; *Vanderslice v. City of Philadelphia*, 103 Pa. St. 102; *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743; *Harper v. Milwaukee*, 30 Wis. 365; *Ranlett v. Lowell*, 126 Mass. 431; *Haskell v. New Bedford*, 108 Mass. 208; *Brayton v. City of Fall River*, 113 Mass. 227; *Boston Rolling Mills v. Cambridge*, 117 Mass. 396; 2 Dill. Mun. Corp. § 1047; *Id.* § 1049.

We consider it unnecessary to consider the assignments of error in detail, as we think the learned court below, throughout its charge, held the plaintiff's right to recover to depend wholly upon the negligence of the city in failing to construct the sewer properly. If the city constructed the sewer, and had exclusive control over it, and afterwards allowed it to get out of repair, and to become a nuisance by the manner in which it was used, and the city had notice of its condition, or by the use of reasonable diligence could have known it, and failed to abate such nuisance, and the plaintiff was damaged by reason thereof, he would be entitled to recover. Upon the main question at issue the facts were conflicting, and we will not refer to them. For the errors of the court in its charge to the jury, the judgment is reversed, and the cause remanded for a new trial.

SULLIVAN v. ST. LOUIS S. W. RY. CO.

(Court of Civil Appeals of Texas. June 20, 1896.)

KILLING OF PERSON ON TRACK—LIABILITY—EVIDENCE.

To entitle plaintiff to recover for the death of her husband, under pleadings which allege that deceased, "when killed, was lying on defendant's track, asleep and unconscious, in a helpless condition, being in a state of intoxication," it is necessary to show that defendant railroad company's servants saw deceased on the track in time to have avoided his death, and their failure, then, to use the proper care to prevent it.

Appeal from district court, Henderson county; J. R. Burnett, Judge.

Action by Isabella Sullivan against the St. Louis Southwestern Railway Company for the death of her husband. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Faulk & Faulk, for appellant. S. H. West and Clark & Bolinger, for appellee.

Conclusions of Fact.

PER CURIAM. Sullivan, husband of appellant, was killed, on the night of June 2, 1894, by a train on appellee's road.

K. Richardson testified for plaintiff as follows. The passenger train going west on Sunday morning, about 5 o'clock, was the first discovery made of the body of Sullivan. The conductor of said train went to the jail, waked up the jailer, K. Richardson, who was also deputy sheriff, and reported the matter to him. The jailer then found the body of Sullivan, which, he says, was lying on the track about where the public street going to the Methodist church crosses the railroad, just above and east of the crossing. He was not quite sure which side of the crossing the body was on. It was lying between the irons of the track and lying lengthwise. One foot was cut clean off. The other was cut nearly off,—just hanging by a piece of skin. There was a bad gash cut in his head, skull broken in, and brains running out. The foot that was cut off was lying on the north side of the track. There was blood, marrow, etc., along the track, and, from its appearance, showed that the body had been pushed along the track some 12 or 15 feet. Sullivan was a drinking man.

C. K. Miller, witness for plaintiff, lived about one block from the railroad, south of it, in the town of Athens, and was up that night with one of his children. It was about 12 or 1 o'clock on Saturday night. Heard the train whistling near the Sullivan crossing, some 600 yards west of where the dead body of Sullivan was found. It whistled some four or five times. It was not the kind of whistle they whistle at public crossings. More like whistling for stock on the track. After running a little further on, it gave one straight whistle. The train did not stop, nor did it stop at the depot. About 150 yards from the depot to where Sullivan was killed, just below and west of the Methodist Church street,—within a few steps of it. The train was a heavy freight, running slowly, puffing like it could hardly get along. Never noticed the puffing and struggling till the four or five whistles were made. Could not say what speed the train was running, but thought slow enough for a person to get on and off. On being cross-examined, the witness said at that time he did not know the number of whistles a train had to make for public crossings, but has since learned that it is two long and two short whistles, but the whistles made by the train were not that kind. Witness did not know whether freight trains whistled for public crossings or not. Thought they did sometimes, and then again they did not. Thought they never whistled for public street crossings like the Methodist Church street crossing, but they ring the bell. Sullivan was a drinking man. Have seen him drunk often. Have advised him time and again about getting drunk, and walking down the track home, and told him he was liable

to get killed by a train. Have carried him home several times when he was drunk.

C. H. Thomas, witness for plaintiff, lived between the depot and Methodist Church street. Is not a practical engineer, but was a fireman for 10 years. Was engineer for a switch engine for one year. In riding on an engine the engineer can usually see, by the headlight, as far as four spaces between telegraph poles. The space between poles is about 200 to 220 feet. In the range of the headlight the engineer ought to be able to distinguish one object from another,—a dog from a hog or a man. An engine shades the light from 40 to 60 feet in front, so that an engineer can see better at a distance than close. If the train was running slowly when Sullivan was killed, and puffing and struggling to get along, it could be stopped by simply cutting off the steam. If running 15 miles an hour it could be stopped in the space of one telegraph pole to another, and quicker than that if it had airbrakes, and if it was a cattle train it likely had airbrakes. On cross-examination, witness said he had worked for several different railroads,—among others the International & Great Northern, and on railroads in North Carolina. Had also worked for the defendant railroad. Said he had not been discharged from this road. Got hurt, and voluntarily quit. Brought suit against the company for the injury, and was defeated. Had no unkind feeling against the defendant railway company. A train of 11 cars, 5 of which had airbrakes, going upgrade, could have been stopped in the space of one telegraph pole to another, if running 15 miles per hour, and if running only 4 or 5 miles per hour could have been stopped right off. Sullivan often got drunk.

W. S. Coker, witness for plaintiff, testified that he lived not exceeding 300 yards from where Sullivan was killed, a little northwest. Was awake. Heard the train whistling below and west of where Sullivan was killed, near the brick and tile works. Could not see it, or tell exactly where it was. It whistled an unusual whistle; did not know what it meant. It was not like the whistle they give at public crossings. It whistled some four or five times. The train ran right through town without stopping. The grade is steep, and the train appeared to be a heavy train. It was puffing to get along. Went to the place next morning where Sullivan was killed. Saw dead body, and where it had been dragged or pushed along the track some 10 or 15 feet. Could see, on the ties on the south side of the track, blood and hair. On the north side, on the irons, saw blood and marrow. His head must have been lying south and his feet north. Sullivan was a good painter and paper hanger. Made good wages and a good support for his family. On cross-examination, witness said Sullivan drank a good deal. Had seen him drunk often. The whistling was not like public crossing whistles, but more like whistling for stock.

C. H. Hawn, witness for plaintiff, testified that he is a lumber dealer and building contractor. Sullivan, the deceased, did witness' painting and paper hanging. Was a very fine painter. Provided well for his family. Would often get on a spree. Sometimes would go two or three months, and one time he went one year without drinking. He would sometimes fail to work on Monday from his sprees of Saturday and Sunday. He was not a spendthrift. Did his own drinking, without treating others. He gave the most of his money to his wife when paid off. He did pretty near all my painting work. At least, when others worked they worked under him. Paid him three dollars per day for work. When he was not working for witness, usually had a job for some one else. He was industrious and kept busy.

Julius Williamson, undertaker, witness for plaintiff, testified that he dressed the body, and tells how he was wounded, similar to that told by other witnesses, and on cross-examination says Sullivan was a drinking man.

Will Thomas, for plaintiff: Boy 16 years old. Was out hunting and fishing that night with several boys. Was within about 75 yards of the railroad, about a quarter of a mile east of the railroad tank. Tank is two miles west of Athens. The train stopped at the tank to water. The grade from tank to depot is upgrade nearly all the way. About a quarter of a mile east of the tank the track is about level for 200 or 300 yards. From there to the depot upgrade. From Sullivan's crossing to the depot heavy upgrade. When train passed witness and the boys hunting, it was running slowly. Just after the train passed the public road at the Sullivan crossing, heard it whistle like stock or something was on the track, and a little further on heard the train give one straight whistle. It was a very clear night, and could hear the train puffing and making a hard pull at the time it was whistling. The pilot (cow-catcher) is about the lowest thing on a train. Perhaps the ashpan and portions of brakes are nearly or quite as low as the pilot. On cross-examination witness said he could tell when the train crossed at the Sullivan crossing, and it was two miles from the tank to the depot, but said he was about a quarter of a mile east of the tank, and Sullivan crossing is about a half mile west of depot. Could tell about where train was when it whistled. Could not tell exactly, but it was somewhere between Sullivan crossing and brick and tile works. The whistling was not for a public crossing. The whistles they make for a public crossing are two long and two short whistles. These were not that kind.

J. T. Deen testified for plaintiff: Was out fox hunting the night Sullivan was killed. Got back between 12 and 1 o'clock. Heard the train whistling like it was whistling for stock. Could not say exactly where it was, but somewhere down below the brick and tile works. The track is straight all along from

Sullivan's up to the depot, and a steep grade. The train was running slowly. It was puffing, and making a considerable effort to get along. Was running about six or eight miles per hour. Deceased was well liked by everybody. Had no enemies.

Mrs. Emma Thomas, for plaintiff, testified that on the night Mr. Sullivan was killed, just as the east-bound passenger train stopped at the depot, she heard Sullivan coming along singing. Thought he was going to the depot. After the passenger train left, he came towards the railroad track and fell. Got up, and walked down the track, and fell again. Got up, and pulled alongside of my fence. The fence is right at the track. He seemed to be very drunk. This was about 11 o'clock, and was the last time witness saw him. From the side of the fence where witness saw him pulling along, to where he was killed, is a little more than twice the length of this courthouse. He was killed near Methodist Church street crossing. Suppose 75 feet from it. Witness' house is within 15 feet of the railroad track, and the back yard fence where he was pulling along, runs within 5 or 6 feet of the track. The Methodist Church street runs right in front of the residence of witness. Witness lives right in the forks of the railroad and Methodist Church street. Deceased's hat was found next morning right where witness saw him fall on the railroad track.

Mrs. Isabella Sullivan, the plaintiff, testified: That she is the wife of deceased. That they had the following children at the date of his death: Vesta Webb, 26 years old, wife of William Webb; William F. Sullivan, 24 years old; Gardner, about 19 years old; Kate, 16, and Nellie, 14. Nellie has died since the institution of this suit. Deceased did not contribute any to the support of Webb and wife, Vesta, or to the support of her son, William F., the two oldest children. He had no parents living. He was about 47 years old, stout, and healthy. Provided well for his family. Was a fine painter and paper hanger. Was industrious. The family depended on him for support. Was a drinking man, but kind to his family. Always handed his money to witness when he made it. Would keep out a little change to spend.

It was agreed by attorneys for both parties that the expectancy of life for the deceased was 23 years. The defendant did not introduce any testimony, and the court charged the jury to return a verdict for the defendant.

Conclusions of Law.

The court did not err in instructing the jury to return a verdict for the defendant. Plaintiff's pleadings allege that deceased, "when killed, was lying on defendant's track, asleep and unconscious, in a helpless condition, being in a state of intoxication." Deceased, being on the track in such a condition, was negligent, and, in order to fix liability on defend-

ant, it was necessary to show that its servants saw deceased on the track in time to have avoided his death, and their failure, then, to use the proper care to prevent it. The evidence fails to show such facts as would entitle plaintiff to recover. The judgment is affirmed.

EDWARDS et al. v. BUCHANAN.

(Court of Civil Appeals of Texas. July 3, 1896.)

VENUE—JOINT TORT—PARTNERSHIP—WHEAT CONSTITUTES.

1. Where the allegation of the complaint alleging a joint tort is traversed by sworn pleas setting up the privilege of each defendant to be sued in the county of his residence, the fact that plaintiff acted in good faith in making such allegation, and not merely to enable him to bring the action in the county in which only one of the defendants lived, is insufficient, where no joint tort is proven.

2. G. agreed to purchase cattle to be shipped to B., who was to furnish money to pay for their feed until ready for market. On the sale of the cattle the proceeds were to be divided as follows: B. was first to receive the amount of his expenditures, with interest, and then G. the amount of his, and then the profits or losses were to be equally divided between them. Held, that the parties were partners, as between themselves and a third person selling cattle to G., so as to affect B. with notice of the terms of the sale.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action by R. G. Buchanan against J. C. Edwards and others. There was a judgment for plaintiff, and defendants appeal. Reversed.

Appellee states his cause of action, as set forth by his pleadings, as follows: "This suit was brought by appellees, R. G. Buchanan and wife, Sallie Buchanan, of Tennessee, against appellants, J. L. Edwards, W. L. Donnell, Thos. Powers, E. P. Davis, B. Gatewood, D. H. and J. W. Snyder, S. D. Davis, J. J. Daws, and R. A. Ferris, of Texas. Plaintiffs' amended petition dismissed as to Powers, deceased, and alleged that in the latter part of September, 1891, the petitioner R. G. Buchanan entered into an agreement with B. Gatewood and J. L. Edwards, acting together as the firm of Gatewood & Edwards, with a view to feeding and fattening cattle for the market, the purport of which was that Gatewood & Edwards should buy 1,000 head of cattle in Texas, at the most advantageous price attainable, and place them on the cars in Texas, and ship them to the feeding points at Memphis, Tennessee, where they were to be taken in charge by R. G. Buchanan (the freight to Memphis and feeding to be paid by Buchanan), and that when the cattle were sold Buchanan should be first repaid his said expenses, with 10% interest on same; that then Gatewood & Edwards were to be repaid the cost of said cattle with 10% interest, and that the remainder of the proceeds should go one-half to Buchanan, and one-

half to Gatewood & Edwards, and in the event of a loss Buchanan was to bear one-half, and Gatewood & Edwards the other half; that subsequently the number of cattle to which this agreement should apply was increased to 1,500 head, and later to 2,170 head (all of which were placed in the Union Stock Yards), and later still 1,209 were included in the above agreement, though these were placed in some stock yards in North Memphis. Plaintiff further alleged that he was using his wife's means, name and credit, and was thereby enabled to perform all his said agreements; that he believed Gatewood & Edwards were men of large means, and it was understood that said cattle were to be free from incumbrance, and that under the contract Buchanan had a first lien for what he had expended, but that, after Buchanan had expended about \$24,000 of his wife's means in preparing the cattle for market, it developed that the cattle had been bought upon credit, and the title retained to secure the purchase money, by secret agreements with the sellers, to defraud the plaintiffs, who were feeding and attending to said cattle at great expense, and that petitioner was in a position to carry out his contract when he discovered the liens, if the sellers would ratify the same, and recognize his superior interest in the cattle or their proceeds, on account of his expenditures, but that, instead of doing so, said parties, acting together (those who were not present knew of the condition of matters, and ratified the same), held a secret meeting, without plaintiff's consent, acting under their secret agreements with Gatewood & Edwards, about June 30, 1892, took possession of said cattle, and deprived petitioner of the possession and control thereof, and refused to allow him any voice in their management; that at the time of such seizure Buchanan had fully carried out his contract with Gatewood & Edwards, in feeding and caring for said cattle, and so improved their condition that they had increased in value about \$10 per head above their cost and price for fattening them, so that there was a profit in 3,199 cattle of \$31,990, and that Buchanan had at that time spent on them \$24,000; that plaintiff does not know how the proceeds of said cattle were distributed among defendants, but is advised that it was a common agreement among them that they would ignore plaintiff's rights in said cattle, and deprive him of possession thereof, and that they conspired together for that purpose, and that the sellers were to receive, when the cattle were sold, each his share of the proceeds as shown by their contracts of sale. Petitioner further charged, by way of second count, that plaintiffs were entitled to larger damages than the sum above named, for the reason that it was contemplated in their agreement with Gatewood & Edwards that the cattle should be held until about April 1, 1892, but that after sellers took possession of same the sellers misfed them, and in consequence sixty-

five head died, and the others lost flesh, and decreased in value so that when they were sold they had sustained an average loss, from the value they would have reached if properly fed, of \$25 per head; that the defendants sold said cattle for about \$100,000, and plaintiffs got no part thereof; and that same was converted by said sellers to their own use. Plaintiff charged that the property and money used in feeding said cattle and caring for the same were, in the main, the separate property and means of Sallie Buchanan, in whose name some of the arrangements and contracts were made, and that said Sallie Buchanan was made a party plaintiff in order that the judgment might inure to her separate estate and benefit, so far as the facts and the consent of R. G. Buchanan justified." Plaintiff claimed damages for the above matters in the sum of \$75,000, and ended with a prayer for general relief. Gatewood & Edwards answered, pleading in abatement their privilege to be sued in the county of their residence, Ellis county, and by exceptions and general denial. They have filed no brief here.

Appellants E. P. Davis, S. D. Davis, W. L. Donnell, and J. J. Daws jointly answered, and pleaded: (1) Plea to the jurisdiction, controverting under oath plaintiff's allegations of joint tort with Ferris and other defendants, and claiming the privilege to be sued in the counties of their residence. (2) Exceptions to plaintiff's petition. (3) General denial. (4) Statute of two years' limitation. (5) They answered that they sold some of the cattle, as described in plaintiff's petition, to one J. L. Edwards, and reserved, by conditional sales, the title to said cattle so sold by them, at all times, in themselves, until said cattle should be paid for in full, and that plaintiff had notice of said facts; that the plaintiffs performed no labor, and expended no time and money, and incurred no indebtedness in regard to said cattle prior to the execution of said sales aforesaid; that all of said work and labor performed, and money expended, and indebtedness incurred in regard to said cattle, as alleged by plaintiffs, was done and performed in the state of Tennessee, subsequent to the time said cattle arrived in Shelby county, Tenn., and subsequent to delivery and execution of said sales as aforesaid; that under the laws of the state of Tennessee, where plaintiffs at all times resided, said conditional sales were valid as to all parties, and notice to plaintiffs, without the necessity of registration; that the registration law of Texas, requiring conditional sales of personal property to be recorded, in order to give notice, is not the law in Tennessee; that the contracts of conditional sales made between these appellants and J. L. Edwards were valid and binding, under the laws of the state of Tennessee, and notice to all parties, without registration; that the appellant E. P. Davis sold to J. L. Edwards 847 head of cattle

November 3, 1891, and 323 head on the 23d day of November, 1891, and that both of said sales were in writing, and were conditional sales, reserving the title in appellant Davis, and that each of said conditional sales was executed and delivered, on their respective dates, in the state of Tennessee; that appellant W. L. Donnell sold to J. L. Edwards on December 22, 1891, 165 head of cattle, and on January 6, 1892, 196 head; that said sales were in writing, and were conditional sales, reserving the title in said W. L. Donnell until said cattle were paid for in full; that said contract dated January 6, 1892, was filed for registration in Shelby county, Tenn., January 11, 1892, and properly recorded in Shelby county, Tenn.; that said contracts were valid, without registration, as to all parties, under the laws of Tennessee; that said conditional sale of December 22, 1891, was filed for registration in Shelby county, Tenn., on January 11, 1892, and properly recorded in Shelby county, Tenn., according to the laws of the state of Tennessee; that appellants had no contract of any kind with plaintiff; that appellants had no notice of any contracts between the plaintiff and Gatewood & Edwards, as alleged in their petition, prior to the time of the execution or delivery of their conditional sales; that there was a partnership between R. G. Buchanan and Gatewood & Edwards from about September 1, 1891, until May 1, 1892, which partnership was for the purpose of buying, feeding, fattening, shipping and selling cattle; that, in pursuance of said partnership business, said J. L. Edwards executed and delivered to these appellants said conditional sales, and purchased said cattle, as stated in said contracts of conditional sales for said partnership, and that the original purchase price of said cattle has never been paid these appellants; and that there are yet large sums of money due the appellants on their contracts of conditional sales.

Defendants D. H. and J. W. Snyder answered by pleading misjoinder of parties plaintiff and defendant, and, under the latter plea, set up that they had no connection of any kind with any of their co-defendants, and did not act in connection with them in any of the matters complained of; that in all they did they acted separately, and independently of the other defendants, and did not act except in relation to 1,000 head of cattle sold by them to Gatewood & Edwards, and therefore prayed that the suit abate. They also answered by general demurrer and general denial, and by special plea that the matters complained of were as follows: "That Buchanan and Gatewood & Edwards were a partnership firm engaged in buying cattle and shipping them into Tennessee, and there fattening them for sale, and that on December 1, 1891, the Snyders sold to Edwards, who purchased same for said firm, 1,000 head of cattle for \$21,500,

and 10% interest, payable April 1, 1892, and that said contract of sale expressly retained title to said cattle in the Snyders until paid for; that all the contracts in relation to said cattle were made in view of, and contemplated, their removal to Tennessee, and the performance of the contract there." And they attached to their answer, as an exhibit, their said contract of sale to Edwards, showing said retention of title, and containing an agreement by Edwards to ship said cattle to Tennessee, and there feed them for market, and not to sell them without the Snyders' consent; that the cattle were at once shipped to Memphis, Tenn., in which state plaintiffs at all times resided; that none of plaintiffs' expenditures, etc., on said cattle, occurred prior to their arrival there, and that under the laws of Tennessee said conditional sale was valid against all persons without registration, and that plaintiffs also had notice at all times of the above matters; "that plaintiffs failed to pay the freight on said cattle to Memphis, amounting to \$3,672, and that, having contracted large indebtedness for feed, they were unable to meet same, or procure feed for the cattle, and thereupon, with the consent of all members of said firm, defendants Snyders had the payment of the amounts due and to become due for feeding said 1,000 head of cattle guarantied, with the understanding that when the cattle were sold their proceeds should be applied first to the payment of said amounts, and next to the payments of Snyders' claim; that all the Snyders' acts were done under said contracts, and with the consent of all parties, and the amount received by them was insufficient to pay their claim, and that, Buchanan having failed to comply with his contract, it was impossible for said firm to accomplish its purpose, and the other members were compelled to take said steps to protect themselves, and Buchanan forfeited all his rights in the cattle; that there had never been any settlement of said partnership affairs; that plaintiffs could recover only what such settlement would show their interest in said cattle to be, and that such a settlement would show such interest to be nothing, for, if they had any such interest, then, as such partnership venture resulted in a loss, of which, under the contract between Buchanan and Gatewood & Edwards, one-half was to be borne by Buchanan, the portion of such loss which had already fallen upon Gatewood & Edwards so far exceeded that of Buchanan as to leave him no interest in the assets of the concern."

Appellant R. A. Ferris interposed the following defenses: (1) General denial (2) That on December 18, 1891, Ferris & Price, co-partners, sold to J. L. Edwards 313 head of cattle, at the price of \$18 per head for three year olds and upward, and \$13 per head for two year olds; said cattle to be delivered on the cars at latan, on the Texas & Pacific

Railway, for shipment to Memphis, Tenn., within 30 days from date of said contract. By the terms of said contract of sale, said Edwards agreed to pay the freight on said cattle to Memphis, Tenn., and at his own expense to fatten said cattle at Memphis. They were not to be sold without the written consent of Ferris & Price, and the said purchase money was to be first paid out of the proceeds of sale; the title to said cattle to remain in said Ferris & Price until said purchase money was paid. If treated as a Texas contract, then, by its terms, Ferris & Price retained a lien on said cattle for said purchase money. It was further agreed that Ferris & Price should have the right to appoint an agent or agents to look after said cattle, and see that they were properly cared for; and said contract further stipulated that if said Ferris & Price should conclude that said cattle were not being properly cared for and fed, they, at their option, should have the right to take possession of said cattle, and have them properly cared for and fed and marketed as their own, and they to be under no obligation to said Edwards for any sums of money that had been expended in the transportation of said cattle, or in the feeding of the same; that said cattle should in no way be subject to a lien for any feed fed to said cattle,—said sale being for all the cattle of Ferris & Price on the Wardell ranch, whether more or less than 500 head. This contract was duly acknowledged for registration. Under it 313 head of cattle were on December 26, 1891, delivered to J. L. Edwards at Iatan, in Mitchell county, Tex. Said cattle reached Memphis, Shelby county, Tenn., on December 28, 1891, and said contract was duly filed for registration in the office of the register of chattel mortgages of Shelby county, Tenn., on December 31, 1891. At the date of said contract between J. L. Edwards and Ferris & Price, and also when said cattle were so delivered at Iatan, Ferris & Price were wholly ignorant of the arrangement and agreements between Gatewood & Edwards and R. G. Buchanan.

Upon the trial of the case, it appearing that Thomas Powers was dead, the cause was dismissed as to him. By action of the court, that feature of the case presented by the pleadings of plaintiff setting up an alleged separate interest in the suit for his wife was eliminated. The cause was tried by a jury, and resulted in a verdict and judgment in favor of the plaintiff for \$18,120.32 against all of the defendants jointly, except J. J. Daws and S. D. Davis. As to the last-named defendants, the jury found in their favor upon the issue of limitation. All the defendants in the judgment have appealed to this court.

Watts, Aldredge & Eckford, Carrigan & Montgomery, and Bell & Atwell, for appellants. A. S. James, H. G. Robertson, and J. C. Robertson, for appellee.

FINLEY, J. (after stating the facts). It will not be necessary to a proper disposition of the case that we should take up the assignments of error as presented in the briefs of the different sets of defendants. We will examine the material questions raised by the several defendants, and consider them in regard to the entire case, rather than in connection with the interests of the defendants separately. The different appellants, under separate assignments of error, and in different forms, urge that the case, as developed upon the trial, does not show a joint tort, for which the defendants may all be sued in one action, and be made jointly liable. The petition of plaintiff clearly discloses the character of the suit to be an action for damages, based upon a tort committed upon plaintiff's possession of the cattle by the defendants, acting together under a common understanding and agreement, they having conspired together to commit the wrongs and injuries complained of. The venue of the suit is laid in the petition, by the allegation that Royal A. Ferris, one of the alleged joint tortfeasors, resides in Dallas county, Tex., the county in which the suit was instituted. The verdict and judgment pronounce a joint liability against the defendants for the sum of \$18,120.32. The case, as made by the pleadings, must have been established by the evidence, to justify the verdict and judgment rendered. The special pleas of privilege to be sued in the county of their residence, filed by some of the defendants, and the pleas of misjoinder filed by others, are based upon the proposition that there was no joint tort as alleged. It is deemed unnecessary to consider whether the pleas were waived by not being urged upon the attention of the court at the first term, as the question involved in such pleas is properly raised in a different manner, and is of controlling effect in the disposition of this appeal. To sustain the verdict and judgment, the evidence must be sufficient to sustain the finding that the defendants acted together in the commission of the alleged trespass. If they acted separately, without a common understanding, and such separate action had relation to different cattle claimed separately by them, and their actions entailing consequences of different magnitude, then the case of a joint tort, made by the pleadings, was not sustained by the proof.

(1) The plaintiff R. G. Buchanan entered into a contract with Gatewood & Edwards, by the terms of which Gatewood & Edwards were to purchase 1,000 head of feeding steers in Texas, and ship them to Memphis, Tenn., or Huntsville, Ala. Buchanan was to pay the freight on the cattle from Texas to Memphis, or Huntsville, and was to furnish the money to pay the feed bills, the cattle to be fed until they were fat. The cattle were then to be sold, and the proceeds of the sale applied—First, to payment of expense of freight, feeding, and yard rents, and 10 per cent. per annum interest on the money paid out for these

purposes by Buchanan; second, the payment to Gatewood & Edwards the cost of the cattle, and 10 per cent. per annum interest on the money paid out by them; third, the profit or loss should be equally divided between Buchanan and Gatewood & Edwards,—one-half to Buchanan, and one-half to Gatewood & Edwards. The agreement as to the number of cattle was subsequently extended until it reached 3,223 head of cattle. (2) In pursuance of this agreement, Gatewood & Edwards purchased, and shipped to Memphis, the following bunches of cattle: In October, 1891, they contracted with E. P. Davis, in Texas, for 847 head of cattle. They were shipped to Memphis, and consigned to J. L. Edwards, and arrived in Memphis November 3, 1891, and were by Edwards delivered to Buchanan for feeding. Later they purchased 323 head from E. P. Davis, and in the same manner shipped them to Memphis, and delivered them to Buchanan, about November 23, 1891. The sale to Edwards of these cattle by Davis was conditional upon the payment of the purchase price, which amounted to \$21,286.86, nothing being paid at the time. Davis and Edwards both went with the cattle to Memphis, and there they entered into a written contract of sale, Davis reserving title to the property until the cattle were paid for by Edwards. This contract was not recorded, and Buchanan did not know that Davis had reserved title in himself to secure payment of the purchase money. December 22, 1891, they bought of W. L. Donnell, in Texas, 165 head of cattle, and on January 6, 1892, 186 head. The contracts of sale were in writing, and, in terms, substantially the same as the Davis contracts. The purchase price was \$6,457, and none of this sum was paid at the time of purchase. The contracts were recorded in Memphis, Shelby county, Tenn., January 11, 1892, after the cattle were delivered there to Buchanan. They bought from D. H. and J. W. Snyder 1,000 head of cattle, December 1, 1891, which were delivered to Buchanan, in Memphis, December 5, 1891. The terms of this contract of purchase were, in effect, the same as those previously mentioned. The price agreed to be paid was \$21,500, no cash being paid. The contract was recorded in Shelby county, Tenn. (Memphis being in Shelby county), January 8, 1892. There were sold to Gatewood & Edwards, in Texas, under similar contracts; by Thomas Powers, 186 head of cattle; by J. J. Daws, 122 head; and by S. P. Davis, 45 head. These cattle were delivered in Memphis December 24, 1891. Royal A. Ferris sold to Edwards, in Texas, 343 head of cattle, under same character of contract; and they were shipped by Edwards to Memphis, and delivered to Buchanan, arriving there December 28, 1891. The contract was duly recorded there December 31, 1891, at 9:45 a. m. All the cattle of E. P. Davis and Snyder Bros., amounting to 2,174 head, were placed and fed by Buchanan in the Union Stock Yards at Memphis, and the feed was procured by

Buchanan from the De Soto Oil Company. The remainder of the cattle, amounting to 1,053 head, were placed in the North Memphis Yards, and feed procured from the Gayoso Oil Company. The cattle were branded so that they could be identified. All the cattle were bought upon credit. Each of the contracts provided for the shipment of the cattle to Memphis, there to be fed and fattened for market; and, in addition to the express reservation of title in the vendors to secure the purchase money, the contracts also gave the vendors the right to resume possession in case it should be seen that the cattle were not properly fed and cared for. None of these contracts recognized Buchanan as a party, and at the time of their execution the vendors were not apprised of the terms of the contract between Buchanan and Gatewood & Edwards. Buchanan fed and cared for the cattle for some time, making considerable expenditures for feed; but the mills furnishing the feed finally declined to furnish it unless they were paid in cash, or given a first lien upon the cattle. Buchanan was unable to pay cash for the feed for so large a lot of cattle, and testified that it was understood between Gatewood & Edwards and himself that the cattle should be security for the feed. He notified Gatewood & Edwards of the demand for security made by the mills, and then they notified him (he claims, for the first time) that the owners of the cattle had retained title in themselves to secure the purchase price. The several owners of the cattle were then called to Memphis by telegraphic message, and advised of the situation. Each of them resumed the possession of the cattle sold by them respectively, separately arranged for their feed and care, left them in charge of Edwards, and they were finally sold at a loss to the owners; and Buchanan was not reimbursed for his expenditures upon the cattle, amounting to a large sum.

It is the contention of appellee Buchanan that appellants were not justified, under the law, in depriving him of the possession of the cattle, and that they conspired together and acted together with Royal A. Ferris in wrongfully and forcibly dispossessing him of the cattle. Leaving out of view for the present the contention that his rights were superior to those of the vendors; that he was not affected by the reservation of title in the contract of sale,—did the defendants conspire and act together in depriving him of the possession of the cattle? As has been shown, their contracts of sale were separate, made at different times and different places, under different conditions, and wholly without reference to each other. When they came to Memphis in answer to the request of Gatewood & Edwards and Buchanan, it was shown that several of them met in the room of Royal A. Ferris, that they were there fully informed of the situation, and it may be fairly assumed that they talked about the matter. But it was not shown that any common understand-

ing was reached, or plan of action agreed upon, by them. On the contrary, the evidence shows that they acted separately, each for himself, and in relation to his own particular interest and property. It may be also remarked that the record fails to show that they forcibly dispossessed Buchanan of the cattle. It does show that they resumed possession, but that they regained possession by force or fraud, so as to be chargeable with the commission of a tort, is not shown by the evidence. The record tends to show that Buchanan acquiesced in their resumption of the possession of their respective cattle, and we find no basis in the proof upon which the allegation of joint tort can rest. It is not surprising that the jury should have rendered a verdict for the plaintiff, in so far as this issue may be concerned, for the charge of the court did not make it necessary that they should find that a joint tort had been committed before they could find against the defendants. The court only submitted that issue in relation to the special plea of privilege to be sued in the county of their residence, urged by some of the defendants, and did not properly present the law in that connection. The jury were told, in effect, that if they believed the plaintiff had filed his suit in good faith, believing that the defendants had acted together, and did not fraudulently make the allegation of joint tort to fix the venue in Dallas county, they would find for the plaintiff on this issue, though the evidence showed that the defendants did not in fact act together. This was error. It was a question of joint tort *vel non*, raised by the sworn plea traversing the fact of a joint tort. Proof of good faith in the making of the allegation would not answer for proof of the fact alleged.

It is urged by appellants, under assignments of error directed at the main charge, the refusal of special charges, and the evidence produced, that the claim of Buchanan upon the cattle and the proceeds of sale is subordinate to the rights of the owners, who contracted with Gatewood & Edwards for their sale, upon condition of the payment of the purchase money, and retained title in themselves until the performance of that condition. In support of this contention it is first urged that Buchanan was a partner with Gatewood & Edwards in the dealings and transactions had, and that he must take notice of the facts known to his partners. It is admitted that the following correspondence correctly states the terms of the agreement between Buchanan and Gatewood & Edwards: "Ennis, Texas, Sept. 29, 1891. R. G. Buchanan, Memphis, Tenn.—Dear Sir: * * * Let us see if we understand each other. Mr. Gatewood informs me that Gatewood & Edwards are to furnish 1,000 head of feeding steers, the best that can be bought in Texas for the money; to select them with great care and make the best trade possible, and load them on the cars, and start them to the

feeding pens in Memphis, Tenn. * * * R. G. Buchanan is to pay the freight bills from the place of shipment in Texas to the feeding pens, to the R. R. company and furnish the money to pay the feed bills until the cattle are fat. The cattle are to be sold, and the proceeds to go first to pay for the expense of feeding, and all yard rents, and the freight money advanced by Buchanan, and ten per cent. per annum on all money paid out by said Buchanan; and next to pay Gatewood & Edwards the cost of the cattle, and ten per cent. interest on all moneys paid out by said Gatewood & Edwards; third, whatever moneys are made as profits to be divided equally into two parts,—Buchanan to have one part, and Gatewood & Edwards to have the other part. In the event there is a loss, instead of a profit, then Buchanan is to bear one-half the loss, and Gatewood & Edwards the other half. Now, if this is your understanding of the agreement between you and Gatewood, then I say, close the contract for the feed and lots. * * * Gatewood & Edwards, per J. L. Edwards." In reply to said letter the following telegram was sent: "Memphis, Tenn., Oct. 1, 1891. Gatewood & Edwards, Ennis: Statement agreement your letter correct. Closed contract feed and yards. Will write. R. G. Buchanan." The letter was as follows: "Memphis, Tenn., Oct. 1, 1891. Messrs. Gatewood & Edwards—Dear Sirs: Your letter, per Mr. Edwards, reciting the agreement previously agreed verbally between Mr. Gatewood and myself, is correct in every particular. It occurs to me, it might be better to begin feeding later; but, our interests being identical with yours, I leave the matter altogether with you. [Signed] R. G. Buchanan." The only change in the contract above set out, which appellee contends was made, relates to the increased number of cattle, the payment of freight on such increased number, and the understanding that a lien was to be given upon the cattle to secure their feed.

If this was a partnership agreement and undertaking, in the absence of fraud and collusion by the owners of the cattle and Gatewood & Edwards against Buchanan, the latter must be held to have had full notice of the dealings and transactions of his partnership associates in relation to the subject-matter of the partnership. 17 Am. & Eng. Enc. Law, 1080. The parties to this agreement saw proper to express the terms of their contract in writing, and, as it is clear and unambiguous, their relations must be determined from such written expression. Appellee's counsel construe the contract to mean an engagement by Buchanan to feed and fatten cattle for Gatewood & Edwards, he to pay the freight bills and freight charges upon the cattle, for which services and expenditures he was to be paid and reimbursed by Gatewood & Edwards out of the proceeds of the sale of the cattle; and the

court below took this view of the case. Appellants, on the other hand, insist that there was a joint undertaking of the parties in a speculative venture, and that the agreement possesses all the essential features of a partnership. (1) The agreement provides for the purchase by Gatewood & Edwards of a certain number of feeding steers,—the best that can be bought in Texas for the money; they to select them with the greatest care, and to make the best trade possible, and ship them to Memphis, Tenn. (2) Buchanan is to pay the freight bills for shipping the cattle from Texas to Memphis, and furnish the money to pay for the feed until the cattle are fat. (3) The cattle are then to be sold, and the proceeds of the sale to go as follows: First, Buchanan is to be reimbursed for his expenditures, with 10 per cent. per annum interest on his money; second, Gatewood & Edwards are to be reimbursed for their expenditures, and 10 per cent. interest on their money so paid out; third, the profits or losses are to be equally divided, one-half to Buchanan, and one-half to Gatewood & Edwards. Here we have a speculative venture entered into by the parties, into which each is to put money, with the object of gaining profit, and being benefited by sharing therein. Each party contributes to the enterprise, is entitled to share in the profits, and assumes the risk of loss. If there is any essential feature of a partnership which is not present in this agreement, we have not been able to discover it. T. Pars. Partn. §§ 41-60; 17 Am. & Eng. Enc. Law, 836, 837; Rogers v. Nichols, 20 Tex. 724; Cothran v. Marmaduke, 60 Tex. 370; Goode v. McCartney, 10 Tex. 193. The court should have instructed the jury that the effect of the contract made Buchanan a partner with Gatewood & Edwards, and that the law affected him with notice of the facts known to his associates relating to the subject-matter of the contract. Taking this view of the case, it is unnecessary to consider the question of notice, as affected by the registration laws of the states of Texas and Tennessee. For the errors indicated the judgment is reversed and the cause remanded.

HUNT et al v. HARDIN et al.

(Court of Civil Appeals of Texas. July 3, 1896.)

VENUE IN CIVIL CASES — REMOVAL OF CAUSES — CONVERSION—SUFFICIENCY OF EVIDENCE.

1. The venue of an action based on a trespass is properly laid in the county in which the trespass was committed, though defendant resides without the county.

2. An action against a United States marshal for the wrongful seizure and conversion of property, under execution issued by a federal court, is not removable to the United States circuit court where the amount of damages laid in the petition is \$1,016; such court not having jurisdiction of a controversy involving such sum.

3. A judgment against an officer for the

conversion of property by seizure and sale of it under execution against a third person is erroneous where the evidence clearly shows that such person transferred it to plaintiff for the purpose of defrauding his creditors, and plaintiff had knowledge of such fact.

Appeal from district court, Hunt county; E. W. Terhune, Judge.

Action by G. N. Hardin against P. B. Hunt, United States marshal, and others, sureties on his official bond, for the conversion of certain property seized and sold by such marshal under an execution issued on a judgment rendered in the United States circuit court in favor of W. W. Avery, and against J. H. Cooke and others. After judgment in favor of plaintiff, he died, and his heirs were allowed to make themselves plaintiffs in his stead. From the judgment in favor of plaintiff, defendants appeal. Reversed.

The statement of the nature and result of the suit as made by appellants in their brief is not objected to, and is as follows: "This was a suit by G. N. Hardin against P. R. Hunt, United States marshal for the Northern district of Texas, and the other appellants, sureties on his official bond, filed in the district court of Hunt county, November 28, 1893, to recover \$1,016, the alleged value of certain horses, mules, cattle, etc., alleged to have been owned by said Hardin, and to have been seized by said marshal on June 14, 15, and 16, 1893, and July 3, 4, 5, 6, and 7, 1893, under an execution issued from the United States circuit court for the Northern district of Texas, at Dallas, in favor of W. W. Avery, and against J. H. Cooke and others, and alleged to have been afterwards sold under said execution, and converted by said marshal; all of which was done in Hunt county. (1) Defendants filed a plea to the jurisdiction, on the ground that they did not reside in Hunt county, etc. (2) They filed a petition and bond for removal of the case to the United States circuit court, which was overruled, and they reserved a bill of exceptions. (3) They filed an amended answer, consisting of (1) a special exception to the jurisdiction, on the ground of nonresidence in Hunt county, which was overruled, and they excepted; (2) a plea to the jurisdiction, on the ground that the real amount in controversy was less than \$500, and that the property for which plaintiff was entitled to recover was worth less than \$500, and that he had fraudulently alleged his damages at more than \$500, to give the district court jurisdiction, etc.; (3) a general exception and special exceptions, to the effect that the property was not sufficiently described in the petition, which were overruled, and they excepted; (4) a general denial and a special answer, that plaintiffs acquired the property from J. H. Cooke in fraud of his creditors, etc. The case was tried before a jury, who gave a verdict for \$500 and interest, and judgment thereon was rendered for plaintiff. G. N. Hardin then died, and the other appellees were allowed to make them-

selves parties plaintiff, as heirs. Motion for new trial being overruled, appeal was perfected by defendants to this court."

Cobb & Avery, for appellants. Craddock & Looney, for appellees.

FINLEY, J. (after stating the facts). There are quite a number of assignments of error presented in the brief of appellants. Under the view we take of the case, it will only be necessary to consider a few of the questions of material importance.

1. The plea to the jurisdiction of the court, on the ground that the appellants did not reside in Hunt county, was properly overruled. The suit is based upon a trespass committed in Hunt county, and the venue properly obtained in Hunt county.

2. The motion to remove the case to the United States court, upon the ground that the property was seized under an execution issued out of the federal court, was properly refused by the court. The amount of the damages for the wrongful seizure of the property was laid in the petition at \$1,016, and the United States circuit court did not have jurisdiction of the controversy involving this sum. In *re Pennsylvania Co.*, 137 U. S. 451, 11 Sup. Ct. 141.

3. The court did not err in overruling the exceptions to the petition. The petition sufficiently alleged that the property was taken from the possession of the plaintiff, and the property was sufficiently described to put the defendants upon notice of what they were called upon to meet on the trial.

4. The court erred in not granting a new trial. The evidence of the plaintiff himself showed that the bulk of the property seized under execution, for the value of which he sued to recover, was transferred to him by J. H. Cooke. According to his own testimony, all of the property, except a sufficient amount to be of \$327 in value, was so transferred to him by said Cooke. At the time of this transfer, and long anterior thereto, Cooke was insolvent, owed a large amount of indebtedness, and there were a number of judgments against him; and these facts were well known to the plaintiff at and before the time of the transfer of the stock (horses, cattle, etc.) to him. The transfer to him by Cooke was made just before and in anticipation of the seizure of said stock under the execution. The evidence showed that Cooke applied to several persons to claim different portions of his property, to aid him in covering up and concealing it, to prevent seizure under execution by his creditors. That he was trying to make such transfers for the purpose of defrauding his creditors is conclusively shown by the record. The amount of the property conveyed to the plaintiff by Cooke, according to plaintiff's own testimony, was of the approximate value of \$1,000. According to plaintiff's testimony, the transfer of the property to him was made for the purpose of sat-

isfying a debt due to him by Cooke, which debt did not amount to more than \$350. Indeed, the testimony is quite unsatisfactory as to the amount of such indebtedness; but, giving the most liberal interpretation to plaintiff's testimony, such indebtedness did not exceed the sum of \$250. Plaintiff was the brother-in-law of Cooke, and lived with him at the time of the seizure of his property. The property was not actually delivered into plaintiff's possession, and the evidence shows that the transfer of the property to plaintiff was intended to serve the purpose of Cooke to put it out of the way of his creditors. The execution under which the stock were seized was against J. H. Cooke. The value of the property conveyed to plaintiff, upon his own estimate of value, so far exceeded the amount of Cooke's indebtedness to him as to show conclusively to our minds, that the transaction was a fraud upon Cooke's creditors. *Edwards v. Dickson*, 66 Tex. 613, 2 S. W. 718; *Black v. Vaughan*, 70 Tex. 47, 7 S. W. 604.

The amount of the property conveyed by Cooke to plaintiff, and which is sued for here, exceeds the amount of the verdict in this case; and the evidence as to the remainder of the property sued for, which was not obtained from Cooke, is not of such character as would justify us in allowing a remittitur of any portions of the judgment, to cure the error committed by the trial court. The judgment of the court below is reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. FLATT.

(Court of Civil Appeals of Texas. July 3, 1896.)

CARRIERS—INJURIES TO PASSENGERS—STATUTE OF LIMITATIONS—QUESTION FOR JURY.

1. In an action against a railroad company for injuries to plaintiff's wife, where her evidence raised the question of contributory negligence, and the court submitted such issue only in a general way, it was error to refuse a charge, applicable to the evidence, that though defendant was negligent, if plaintiff's wife went out on the car platform so hurriedly that, when the train started, she was unable to remain on the steps, but had to jump off, and her injuries resulted therefrom, and her attempt to leave the train was a failure to use reasonable care, the verdict should be for defendant.

2. In an action against a railroad company for injuries received December 24, 1892, the petition was filed December 5, 1893; the citation was issued December 20, 1893, and was served April 16, 1894. Defendant pleaded the one-year statute of limitations. *Held*, that whether plaintiff had procured the citation to be issued and served within a reasonable time after the petition was filed was a question for the jury, and it was not error to refuse to charge, in effect, that the action was barred.

Appeal from district court, Ellis county; J. E. Dillard, Judge.

Action by P. A. Flatt against the Gulf, Colorado & Santa Fé Railway Company for personal injuries to plaintiff's wife caused by defendant's negligence. From a judg-

ment for plaintiff, defendant appeals. Reversed.

J. W. Terry and Chas. K. Lee, for appellant.

LIGHTFOOT, C. J. Appellee has filed no brief in this court, and we adopt the statement of the case by appellant. Appellee instituted this suit in the district court of Ellis county to recover of appellant damages for injuries claimed to have been sustained by his wife while getting off of a train at Wyatt station, his wife having been a passenger on the train from Alvarado to Wyatt; damages claimed by first amended original petition being \$20,000. Defendant answered by general and special exceptions, general denial, and plea of contributory negligence, and plea of limitation. There was a trial before a jury on July 9, 1895, and verdict and judgment for the plaintiff for the sum of \$500, from which this appeal is taken.

There was much testimony upon each side in regard to the question as to whether the appellee's wife was injured by the negligence of appellant, and the extent of her injuries, if any. Upon the question of contributory negligence and the occurrences at the time of the claimed injury, the testimony of Mrs. Flatt and Mrs. Glass, as set out in appellant's brief, is the only evidence, and is as follows: Mrs. Juan Flatt, for plaintiff, testified: "Live near Tolosa, Kaufman county. Am wife of plaintiff. In December, 1892, I lived near Wyatt Switch, Ellis county, southwest of railroad. Lived there until about last of January, 1893, when we moved to Kaufman. About December, 1892, I bought a ticket at Alvarado, for Wyatt, on defendant's road. Wyatt is just a switch; a storehouse and a schoolhouse there, that is all. Conductor did not take ticket up. My two children were with me at the time. The little boy was ten years old, and the little girl was eight. I sat in back part of coach. It was night when I arrived at Wyatt, about 10 o'clock. When I got to Wyatt, when train stopped, I rose up, and started out just as fast as I could. Had to go out through a little short coach; and, when I got through there, I turned down steps. I always got off on north side when there was any one to help me off; but I did not see any one there, and I got off on south side. When I started to get off, there was an old lady I knew who started to get off. When I started to get off, I started in such a hurry that I could not stop myself; and, when I got to second step, they started, and I jumped from last step. That hurt me, when I jumped down. When I jumped, I halloosed to children to jump. Little girl would not jump, but boy jumped. She was afraid, I reckon. I thought she was not going to jump, and I ran, and caught hold of coach with my left hand, and tried to

pull her off with my right hand, and she sort of hung back. I don't remember then when I got off, but it took me a right smart piece, as far as across this house. I don't remember when she struck ground, nor when I let go of coach. When I went down the steps, my children were on the platform, ready to step off, right behind me; and this old lady was behind me, too. Train started just as I stepped on second step. There were no lights out there; no platform and no box or stool fixed to get off on; no brakeman or conductor to assist me. I never saw any living person except my two children and this old lady. I just grabbed coach with my left hand, and reached in with my right hand to pull little girl off, and kept hollering to her to jump; and finally, I reckon, she jumped, but I don't remember when she struck ground, nor when I let go. She was crying out loud on steps; was afraid to jump. Seemed to me like it was a high place where I jumped; a mighty high place. North of coach it looked like there was a box car. I thought there was. That was one reason, too, I went off on side I did. Train could not have stood still half a minute, because I walked mighty fast, and I think I could walk it in half a minute and less from where I was seated back in coach. First I discovered I was loose from car, I was standing on track. Didn't know where I was then. Turned around for something, and first thing I remember saying, I said to children, 'Where am I, anyhow?' And my oldest boy heard me, and came to me." Cross-examined: "There was a little short coach attached to coach that I was sitting in. I know I went through that. I turned down first steps I came to. First coach I went through there were no steps. Mrs. Glass was in same coach I was. I came out, and looked down one side, and then hurried down other side. I looked out to see a conductor or a light, and I saw nothing of the sort, and I got off as quick as I could. It looked to me like on left side of coach was a box car, and I thought I would get off on other side. Conductor had not taken up my ticket. Cannot say whether there were more cars than usual on the train. There was no depot at Wyatt Switch. There is no agent there. I don't know whether brakemen were up at other cars to help off passengers or not. I got to second step, and the train started, and I could not stop myself. I rushed down steps so fast, I couldn't stop myself. It was dark, and I knew it was my place to get off, and I had to get off. I was going down steps so fast I could not help myself. and, after it started, I went right on off." Mrs. Glass, for defendant, testified: "I know Mrs. P. A. Flatt. Have known her seven years 16th of this last December. Was on train with Mrs. Flatt on December 24, 1892. Was standing right there, ready to get off myself.

She and her two children were in front of me; little boy first getting off, Mrs. Flatt next, calling for her little girl to be handed to her. As car got there, she said, 'I don't believe they are going to stop.' I said, 'Yes; we are hardly far enough.' As we walked out, car was just in motion of stopping. It backed, and then, as it moved forward, little boy stepped off. It was in very slow motion. Brakeman helped her down, and the brakeman and some other gentlemen took hold of child, and handed child down to her. Train was in very slow motion. Mrs. Flatt did not fall at all. She stepped off, and she said, 'Hand me my child.' She did not fall. She was not dragged at all. Child might have been a little, but train was in very slow motion; and, if she had stepped forward just one step, child would not have been dragged any at all. If there had been any one hurt, it would have been child, but neither one was hurt. I did not get off then. They went, I reckon, 200 yards down track. I asked one gentleman to ring the bell, that I had to get off; and he rang the bell. Train stopped, and conductor asked what was up, and he told me to get off there. Told him I would not do it, that I would report him unless he backed the train, and put me off; and he says, 'I will do so at once.' The train backed back, and put me off, and I said to Mrs. Flatt, 'Did little girl get hurt?' 'No,' she said, 'I would just as soon be hurt as scared to death.' I did not have any further conversation. She was up on nag then, going off. Haven't seen Mrs. Flatt from that day until this."

The court, in its charge to the jury, submitted to them, in a general way, the issue of contributory negligence. Appellant requested the court to charge the jury as follows: "If you believe from the evidence that Mrs. Flatt received any injuries of any character as alleged; and if you further believe from the evidence that the defendant, its agents or employes, were guilty of any negligence as defined to you by the charge of the court; and still you believe from the evidence that, at the time Mrs. Flatt received the injuries, she went out upon the platform of the defendant's cars hurriedly, and attempted to get down off the cars with such rapidity that, when the train started in motion, she was unable to check herself, and to remain on the steps, but had to jump from the steps of the train; and you believe that her injuries were the result of such jump or such haste upon her part to alight, and that her attempting to disembark from the train under the circumstances of this particular case, as shown to you by the evidence, and in the way shown by the evidence, was a failure upon her part to exercise such care and prudence as a reasonably prudent person would have exercised under the same circumstances,—you will find for defendant." The question

of contributory negligence was clearly raised by the testimony of Mrs. Flatt herself, and the appellant had the right to have this question fully and fairly submitted in the charge of the court, which was not done. If Mrs. Flatt was injured, and such injuries were caused by her contributory negligence, she should not recover. *Railway Co. v. Scott* (Tex. Civ. App.) 27 S. W. 827; *Railway Co. v. Shieder* (Tex. Sup.) 30 S. W. 902; *Railway Co. v. Younger* (Tex. Civ. App.) 29 S. W. 948.

2. The appellant's ninth assignment of error is that the "court erred in refusing to give defendant's special charge No. 4, which is as follows: 'The undisputed evidence in this case showing that plaintiff received her injuries, if any, on the 24th day of December, 1892, and that petition was not filed in this case until December 6, 1893, and citation was not issued until December 20, 1893, and was not served until April 6, 1894, and there being no evidence whatever shown to excuse the delay on the part of the plaintiff in having such citation served, you are charged to find for the defendant on its plea of limitation, and so say by your verdict.'" It appears from the evidence that the claimed injuries which Mrs. Flatt received were received on December 24, 1892. The petition was filed in this case on December 5, 1893. Citation was issued December 20, 1893, and served on April 16, 1894. We do not think this state of facts would justify the requested charge; but the question having been called to the attention of the court by the requested charge, and limitation having been plead, the court should have given to the jury proper instructions upon that subject. In order to prevent the bar of the statute of limitation, the petition should not only have been filed in the district court, but plaintiff should have seen that citation was issued and served within a reasonable time thereafter. If plaintiff intended in good faith to prosecute his suit, and was not to blame that citation was not sooner served on defendant, the statute of limitation would not apply. *Insurance Co. v. Templeton*, 3 Wilson, Civ. Cas. Ct. App. § 424; *Ricker v. Shoemaker*, 81 Tex. 22, 16 S. W. 645; *Bates v. Smith*, 80 Tex. 243, 16 S. W. 47. It was a question of fact to be determined by the jury whether the plaintiff had prosecuted his suit by causing citation to be issued and served within a reasonable time after the petition was filed, and the court should not have undertaken to charge the jury directly to find for the defendant on its plea of limitation, as was asked by the requested charge.

There are many other interesting questions discussed in the brief of counsel for appellant, which will not probably arise upon another trial. For the error of the court in refusing the third requested charge of appellant, the judgment is reversed, and the cause remanded for a new trial.

BURNETTE et al. v. FOREMAN.

(Court of Civil Appeals of Texas. March 20, 1895.)

ASSIGNMENT FOR BENEFIT OF CREDITORS — RESIDENCE OF ASSIGNEE—STATUTE.

Sayles' Civ. St. art. 65f, providing that the assignee shall be a resident of the county where the assignor resides, or his principal business is conducted, is directory only.

Appeal from district court, Dallas county; Edward Gray, Judge.

Action by G. N. Foreman against Owen D. Burnette and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Leake, Henry & Reeves and Hogsett & Orlick, for appellants. C. L. Herbert and Harris & Knight, for appellees.

Conclusions of Fact.

RAINEY, J. On October 7, 1887, J. E. Mainor, a merchant, made a conveyance to Burnette of his property, by deed as follows: "State of Texas, County of Montague. Know all men by these presents, that I, J. E. Mainor, of said county and state, for and in consideration of one dollar to me in hand paid, have transferred, sold, and conveyed, and by these presents do transfer, sell, and convey and deliver, unto Owen D. Burnette, agent for Blankenship & Blake Company, a chartered corporation doing business at Dallas, Dallas county, Texas, as trustee, the following described personal property, situated in the town of Bowie, Montague county, Texas, consisting of a stock of merchandise contained in a certain storehouse on Tarrant street, in the town of Bowie, Texas, and now occupied by me as such; said stock consisting of dry goods, boots, shoes, clothing, hats, caps, trunks, valises, show cases, etc., an itemized statement of which cannot now be given, no invoice of same being accessible, but estimated value of said stock of merchandise, at original invoice price, is about ten thousand dollars, more or less, and said goods here conveyed being all of said merchandise, except about five hundred dollars' worth of millinery belonging to Miss Kate Lancaster & Brother, now in said storehouse, and which may be fully identified and taken in possession by the description here given. This conveyance, however, is made in trust for the following purposes, with the powers and authorities herein annexed: That is to say, the undersigned, being indebted to various persons hereinafter named, and being desirous of applying said stock of merchandise to the payment of said indebtedness as far as the same may be sufficient for the purposes, with the preferences and in the manner herein designated, make this conveyance in trust, with directions as follows: The said Owen D. Burnette, agent for Blankenship & Blake Company, as trustee, is authorized and empowered to take immediate possession of said property, and proceed as soon as possible to

dispose of same at private sale, or otherwise, at retail or in bulk, for cash; and, for the purpose of properly and expediently disposing of said property, he is authorized to employ all necessary assistance to that end, and incur reasonable and necessary expense, and to so manage and dispose of said property within a reasonable time as will enable him to derive the best price for the same. It is agreed and said trustee is authorized and empowered to apply the proceeds of the sale of said property as follows: Said trustee shall pay out of the proceeds of such sale all the expense of executing this trust and preserving said property, and of maintaining and asserting the right of his trust, and all expense of every kind properly connected with this, and legal discharge of his duties as trustee. The net proceeds of said sale, after paying in full said expenses hereinbefore named, shall be applied as follows: 1st. To the payment in full of my entire indebtedness to Blankenship & Blake, of Dallas, Texas, amounting to forty-two hundred and eighty-four & ⁵⁹/₁₀₀ dollars (\$4,285.59), together with such interest as may be due or may accrue on said indebtedness. Evidence of this indebtedness is an account against me for mdse., which I hereby acknowledge as just and true. 2nd. If any balance remain after the payment in full of the indebtedness as hereinbefore named, to pay in full the debt I owe B. O. Evans Company of Fort Worth, Texas, amounting to fourteen hundred and fifty dollars, together with interest in full that may now be due or that may accrue from said indebtedness; evidence of said indebtedness being an open acct. and balance on a note for mdse., which I hereby acknowledge to be just and true. 3rd. If any balance remain after the payment in full of all of my indebtedness as hereinbefore named, to pay in full the debt I owe the Martin-Brown Company, of Fort Worth, Texas, amounting to twelve hundred and seventy-four & ⁵⁹/₁₀₀ dollars, for mdse.; evidence of said indebtedness being an open acct., which I hereby acknowledge to be just and true. 4th. In the event all of the foregoing indebtedness and demands have been fully paid off and discharged by the proceeds of the said sale, and there remains a balance, the same shall be prorated, according to amounts due by me, on the following other debts, each creditor to receive his proportion of such surplus, when said trustee is directed and authorized to pay—

Lawman, Sons & Co., Chicago, Ill.	\$ 587 22
H. F. Simon, Gregor & Co., St. Louis	1,172 35
Bennett, Bauer & Co., St. Louis, Mo.	252 75
N. Druckner & Co., Cincinnati, O.	117 10
T. K. Hammer & Co., Kansas City, Mo.	562 93
Top, Leather & Co., Louisville, Ky.	154 25
Stix, Krouse & Co., Cincinnati, Ohio	2,320 75
M. D. Wells & Co., Chicago Ill.	1,549 25
Megerburg, Rothchild & Bro., St. Louis, Mo.	179 80
Coyle, Seargent, St. Louis, Mo.	27 40

"The execution of this trust is to be proceeded with prompt and reasonable dispatch, and the money, as fast as realized from the disposal of said property, applied to the purposes of this trust as soon as practicable. In witness all of which I hereunto set my hand this the 8th day of October, 1887. J. E. Mainor."

—Which deed was duly acknowledged and recorded. Mainor was insolvent, and the conveyance included all of his exempt property, except notes and accounts. Upon the execution of the conveyance, Burnette took possession of the goods, part of which were sold, and the proceeds paid over to Blankenship & Blake Company, and those not sold, amounting to about \$3,100 in value, were turned over to B. C. Evans Company. Burnette failed to qualify as assignee, and certain creditors of Mainor, on the theory that the instrument was a general statutory deed of assignment, applied to the district court to appoint a substitute assignee, on the ground that Burnette had failed to give bond as required by the statute.² The court, without notice to Burnette, appointed Foreman (appellee) as substitute assignee, who qualified as such, and made demand for the goods, of those who held possession under Burnette, but was refused, and the goods were disposed of as above stated. The notes and accounts, on the order of the district court, were turned over to Foreman, none of which have been collected, the same proving valueless. Burnette was the regularly employed agent of Blankenship & Blake Company, and, at the request of said company and of B. C. Evans Company, he acted for the latter in securing claims in such cases as the one under consideration; and in this case he acted for both companies, of which B. C. Evans Company had full notice, and not only acquiesced in his acts in the premises, but participated in the transaction, and received of the goods about \$3,100 worth to pay a claim of about \$1,500. B. C. Evans was the principal stockholder and president of the B. C. Evans Company, and was also a stockholder in the Blankenship & Blake Company. These two companies acted together, and were joint trespassers in the conversion of the said stock of goods, which were of the value as found by the verdict of the jury. The millinery goods that were found with the stock of Mainor belonged to other parties, though Mainor was security for same. They were afterwards sold, and the proceeds paid to E. Bauman, from whom said goods were bought. The deed of conveyance was made by Mainor with a view to a general winding up of his business, and distribution of his assets among his creditors.

² Sayles' Civ. St. art. 65f, provides that the assignee shall give bond within 5 days after delivery of the deed.

Conclusions of Law.

1. The appellants contend that the conveyance made by Mainor was a partial common-law assignment, and, being such, Burnette, the assignee, was not required to give bond; that Burnette, assignee, not being a resident of Montague county, "did not have the statutory qualifications of a statutory assignee, and, not possessing such qualifications, the deed made to him could not be a statutory assignment; and that the court erred in appointing plaintiff substitute assignee." This case was once appealed to the supreme court from a judgment of the district court sustaining demurrers to the petition and dismissing the case. The supreme court held the petition good, and reversed the cause. The material allegations of the petition are supported by the evidence adduced on the trial. Such being the case, the questions at issue are settled adversely to appellants by said decision; and we so hold, in conformity therewith. *Foreman v. Burnette*, 83 Tex. 396, 18 S. W. 756.

2. As to the assignments of error made by the B. C. Evans Company, it is only necessary to say that under our findings of fact said company is justly liable with Blankenship & Blake Company; and there is no material error in the charge of the court complained of, nor in the court's refusing to give the special charges asked. The judgment is affirmed.

HEREFORD CATTLE CO. v. POWELL.

(Court of Civil Appeals of Texas. April 18, 1896.)

ATTACHMENT—LIQUIDATED DEMAND—BILL OF EXCEPTIONS—SUFFICIENCY—EVIDENCE—ADMISSIBILITY.

1. Lands were leased by a company for an annual rental of \$3,200, payable \$2,400 in cash, and \$800 in the capital stock of the company at its face value. In an action to collect the rent the allegations of the petition clearly showed that both parties valued the stock at its face value. *Held*, that attachment could issue for the sum payable in stock as well as for the sum payable in money, under Sayles' Civ. St. arts. 152, 155, which provide that attachment may issue for debts and demands on affidavit which states "that the defendant is justly indebted to the plaintiff, and the amount of the demand."

2. The fact that there is a small amount of interest in plaintiff's claim in excess of that to which he is entitled is not a sufficient ground on which to quash an attachment.

3. To support an assignment that "the court erred in refusing to permit defendant to prove, as it offered to do, each and every allegation made in the fourteenth paragraph of its * * * answer," the bill of exceptions must set out the specific testimony which was sought to be introduced, and which was objected to, as required by rule 59 of the district courts, which provides that "bills of exception must state enough

¹ Writ of error denied by the supreme court.

of the evidence or facts proved in the case to make intelligible the ruling of the court excepted to, in reference to the issue made by the pleadings."

4. Where it was agreed between the parties to a sale of real property under an executory contract that the grantor should continue to collect the rents, a subsequent written conveyance, in keeping with such agreement, which was set up by the grantor in his petition in an action against the lessee for rents, and made an exhibit thereto, was admissible in evidence to establish plaintiff's authority to collect the rents.

5. Such agreement could also be properly shown by parol evidence.

6. Correspondence between the grantor and grantee, tending to show the ownership by the grantor of the rents sued for, was properly admitted for that purpose.

Error from district court, Dallas county; R. E. Burke, Judge.

Action by E. M. Powell against the Hereford Cattle Company on a rent contract for certain pasture lands. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

F. M. Etheridge, for plaintiff in error. Holloway & Holloway, for defendant in error.

LIGHTFOOT, C. J. This suit was brought by defendant in error, E. M. Powell, upon a rent contract for the sum of \$4,021.28 for certain pasture lands, and a writ of attachment was sued out and levied upon the property of plaintiff in error for that amount. Upon the trial there was a recovery by plaintiff below, from which this writ of error is prosecuted.

The following statement of the facts in the brief of defendant in error is adopted: On June 12, 1886, the plaintiff rented to the defendant company the ranch Almyra, for an annual rental of \$2,400 in money and \$800 of the stock of the company, to be paid by the company at Dallas, Tex., in equal semiannual installments, in advance; "that is to say, the sum of \$1,200 in cash and \$400 in face value of the stock of the company on the first day of July and January in each and every year." The lease provided that the plaintiff should expend \$400 annually in digging wells and building outside boundary fences. It was afterwards agreed that the company might make the improvements, the amount so expended by it to be deducted from the rents. Four hundred dollars of the cash rent due January 1, 1890, has not been paid. On September 26, 1890, the plaintiff conveyed the ranch to W. M. Dubois, retaining the vendor's lien to secure 10 purchase-money notes, the first of which was due September 26, 1891. These notes were also secured by a trust deed on the ranch, executed by Dubois. Two thousand five hundred dollars of the cash payment recited in the deed was not paid at its delivery, and it was agreed by plaintiff and Dubois that plaintiff should have the rent of the ranch until this sum was paid. On May 4, 1891, the Hereford Cattle Company executed to plaintiff the \$1,000 note sued on for the

cash rent due January 1, 1891. The term of the original lease expired June 30, 1891. On May 4, 1891, the company executed to plaintiff the \$500 note sued on for the cash rent from July 1 to October 1, 1891, with the understanding that, if Dubois should not be satisfied with the arrangement, the plaintiff would return the \$500 note, and the company would hold him harmless in the matter. In June, 1891, Dubois assented to the extension of the lease to October 1, 1891, and promised defendant that he would have an agreement with plaintiff as to whom the rent for the extension should be paid. On September 26, 1891, Dubois made default in the payment of the purchase-money note due on that day. On November 28, 1891, in consideration of a year's extension, Dubois agreed that he would exercise no further control over the ranch, and that the plaintiff should have all the rents. On January 20, 1892, the plaintiff wrote to the company: "Inclosed find note for you to sign for the rent of the ranch Almyra, to the 1st of April, 1892, on terms you have had it on for the past five years." On January 30, 1892, the company replied, "I hasten to send you the note as requested." The note referred to is the \$1,040 note sued on. On December 6, 1892, the trust deed given by Dubois was foreclosed, and the ranch conveyed by the trustee to the plaintiff. The company retained possession of the ranch until some time in December, 1892. No payments have been made on the notes, except as stated in plaintiff's amended petition. No rent has been paid for the time from April 1, 1892, to December 31, 1892. No stock rent has been paid for the 18 months during which the company occupied the ranch after the original lease expired. Under instructions of the court the jury found for the plaintiff for the \$400 part of the cash rent due January 1, 1890, for the balance due on the \$1,000 note, for the amounts of the \$500 and the \$1,040 notes, and for the cash rent from April 1, 1892, to December 31, 1892.

1. The first assignment of error is based upon the refusal of the court to quash the writ of attachment upon motion of defendant, which motion substantially presents the following grounds: That the cause of action sued on is partly for unliquidated damages, which will not support an attachment, and that a part of such amount is made up of interest charged at 8 per cent. per annum, where it should have been 6 per cent. The first portion of the objection, and upon which the main contention of the company seems to be based, grows out of the contract between the parties, by which it was agreed that the company should pay as rents for the lands embraced in the contract "annual rental of twenty-four hundred dollars (\$2,400) in lawful money of the United States, and eight hundred dollars of the stock of its company." It was also agreed that \$400 of the money should annual-

ly be used in improvements on the land. It is contended by plaintiff in error that the portion of the claim sued on (about \$800) which is for the "stock rent," or the item including the rentals which the company agreed to pay in its capital stock, is not such a debt as will support an attachment. Under our statutes an attachment may be sued out for a "debt or demand." Sayles' Civ. St. arts. 152, 155. While such demand should be sufficiently certain, as distinguished from unliquidated damages, to really constitute an indebtedness which may be declared upon with reasonable certainty, yet damages of an uncertain character, such as might grow out of a tort, would be excluded. In this case the action is *ex contractu*, the amount is certain and fixed, and we see no good reason why an attachment could not issue for the sum payable in stock as well as for the sum payable in money. It has been so held in a number of states, as shown by the numerous cases cited by Mr. Drake. Drake, *Attachm.* §§ 13-23, and authorities there cited. In our own state the rule has been clearly laid down by our own supreme court in an able opinion by Judge Henry, as follows: "Our statutes allow attachments to be issued for 'debts and demands' (article 155) upon plaintiff's making affidavit 'that the defendant is justly indebted to the plaintiff and the amount of the demand' (article 152). It requires neither argument nor illustration to prove that the amount here meant is such as can be fairly approximated and stated upon existing facts, such as the value of property destroyed, or its use when detained. An attachment may be issued in every instance when the amount does not depend upon uncertain contingencies unprovided for by the contract, and when it is susceptible of proof based upon certain and existing facts. When the suit is for damages for breach of contract dependent upon existing and uncontingent facts, and the damages claimed are actual and capable of estimation by the usual means of evidence, and not resting wholly or in part in the discretion of the jury, the affidavit required by our statute may properly be made, and the attachment sued out." *Hochstadler v. Sam*, 73 Tex. 318, 11 S. W. 409. See, also, *Grocer Co. v. Basham* (Tex. Civ. App.) 29 S. W. 1118; *Stiff v. Fisher*, 2 Tex. Civ. App. 346, 21 S. W. 291; *Devoe v. Stewart*, 32 Tex. 713. Even if there should be a small amount of interest in the claim of the plaintiff in excess of that to which he may be found to be entitled upon the trial, this would not be sufficient ground upon which to quash the attachment. *Hat Co. v. O'Neal*, 82 Tex. 337, 18 S. W. 570; *Donnelly v. Elser*, 69 Tex. 282, 6 S. W. 563; *Rogers v. Lumber Co.* (Tex. Civ. App.) 33 S. W. 312.

2. The thirteenth assignment of error is as follows: "The court erred in refusing to permit defendant to prove, as it offered to do, each and every allegation made in the fourteenth paragraph of its third amended

original answer, filed herein April 9, 1895, as shown by defendant's bill of exceptions No. 5, and for the reason that defendant did not voluntarily come into this court, but was involuntarily brought into this court by the plaintiff, and it had the right, if not to recover over against the plaintiff, at least to prove the breach of the rental contract upon which the plaintiff declared, as a defense to plaintiff's alleged cause of action." This assignment is rather general, and points us to defendant's bill of exceptions No. 5 for a statement of the objection to the evidence; and upon reference to the bill of exceptions it shows that defendant offered to prove each and every allegation in the fourteenth paragraph of its said answer, and we must find the answer in order to see what these allegations were. The specific testimony objected to is not set out in the bill of exceptions, or in any other paper referred to in it. We do not think this is a compliance with the rules. We cannot tell from the bill of exceptions whether the testimony offered was legitimate evidence or not. The undisputed evidence contained in the record shows that the contract between the cattle company and E. M. Powell, defendant in error, was entered into June 12, 1886, for the term of five years; that prior to the termination of the lease, on September 28, 1890, a sale of the ranch was made by Powell under an executory contract to W. M. Dubois, Powell retaining the rents. It further shows that afterwards, through the consent of Dubois, the lease contract with plaintiff in error was renewed, and that, subsequent to the damage which the cattle company claims was done to it by reason of Dubois turning his cattle into the pasture, the cattle company, through its legally authorized agent, had a long correspondence with the defendant in error, which resulted in a settlement between them, and the execution of the note sued on. At this time the cattle company made no pretense that the defendant in error was in any wise responsible for any damage done to it by Dubois. The pleading of the cattle company in this case setting up such damage against defendant in error seems to have been an afterthought.

3. Under the fourteenth assignment of error complaint is made that the court allowed the introduction in evidence of the conveyance from Dubois to plaintiff, Powell, of date October 10, 1892, in which it was agreed that said Powell should be entitled to receive the rents from the ranch, which objection is made on nine different grounds. We do not deem it necessary to consider these grounds in detail. In the sale of the property under executory contract from Powell to Dubois, it was agreed between the parties that Powell should collect the rents. This agreement was recognized by the plaintiff in error, who executed to Powell its notes for the rent, and, even if the introduction of the instrument should be considered as errone-

ous, still such error would be harmless, in view of the facts proved outside of such instrument; but the written conveyance of the rents was set up by plaintiff below in his supplemental petition. It was made an exhibit to such pleading, and plaintiff in error had full opportunity to reply thereto. We think the evidence was legitimate. Especially is this true in view of the fact that at the time of the execution of the \$500 note—October 1, 1891—by the cattle company to Powell it was understood between them that, if Dubois was not satisfied with the arrangement, Powell would return the \$500 note. The conveyance in writing from Dubois to Powell, which was objected to, shows fully that Dubois was satisfied with the arrangement, and was certainly legitimate evidence to establish that fact.

4. Under the fifteenth assignment of error objection is made to the testimony of E. M. Powell, tending to show a verbal understanding between himself and Dubois to the effect that plaintiff should collect the rents, and apply the same to that part of the cash payment which Dubois failed to make at the time the deed was delivered; that he collected some of the rents, and appropriated the same in that way. The only interest which plaintiff in error could possibly have in that question was whether or not E. M. Powell had authority to collect the rents. The cattle company throughout the whole transaction seems to have recognized that authority, and recognized it to the extent of executing its promissory notes to the defendant in error for such rents. The testimony shows without dispute that Dubois did authorize Powell to collect the rents, and this fact could be properly shown by parol testimony. But the plaintiff below went further than this, and proved it also by written evidence.

5. Under the twenty-eighth assignment of error objection is made to that portion of the court's charge in which it is said: "It is further shown, without dispute, that plaintiff sold and conveyed this ranch to one Dubois in September, 1890; but it was expressly understood between them (plaintiff and Dubois) that plaintiff should collect from the defendant company the rents due upon this lease contract." It is claimed by plaintiff in error that the court should not have undertaken to decide this question, because there was testimony in the record disputing the fact. We have carefully examined the record, but have not been able to find such testimony. The testimony does show that on October 4, 1891, Dubois wrote to the agent of the company, asking him to send a draft for \$500 to close up the year's rent, and also proposing to rent the property for a longer term to the company; but it was shown beyond question that subsequent to that time Dubois arranged with defendant in error, Powell, for him to collect all the rents on the ranch, which was fully acqui-

esced in by the parties, including plaintiff in error, and that the rents sued for in this case are unquestionably the property of defendant in error, and are not claimed by Dubois.

6. The sixteenth, seventeenth, eighteenth, and nineteenth assignments of error are all of the same character, objecting to the correspondence between Dubois and defendant in error, and tending to show the ownership of defendant in error of the rents sued for in this case. The evidence was not objectionable, and was properly admitted.

We find no material error, and the judgment is affirmed.

On Rehearing.

(May 23, 1896.)

1. In the able argument of counsel for plaintiff in error on the motion for rehearing several points are presented which we deem it proper to notice. Upon the first ground of the motion it is insisted that the writ of attachment should have been quashed, because \$800 of the amount was for capital stock of the company, and the petition does not allege that it was of any value. The allegations of the petition were, in part, as follows: "The defendant agreed to pay plaintiff an annual rental of \$3,200, said rent to be paid semiannually in advance, and to be paid in the city and county of Dallas, \$1,200 in cash, and \$400 in the face value of the capital stock of said company, on the 1st days of July and January; * * * and plaintiff alleges that the said sum of \$800 per annum, payable in capital stock of said company, was, in making said lease, estimated as cash, dollar for dollar, and that said rental of \$3,200 per year, including said \$800 per year, was and is a fair and reasonable cash value for the use and occupation of said lands." The petition then sets out specifically the items of rent unpaid. The allegations of the petition clearly show that the \$800 to be paid in stock was valued by the parties in their contract at its face value. The fact that on the trial of the case on its merits the court instructed the jury to find against the plaintiff on the claim of \$800 to be paid in capital stock of the company, because the proof failed to show its value, is no reason why the court should have sustained the motion to quash the writ of attachment, the allegations of the petition being sufficient. For the reasons fully set out in the original opinion, we conclude that the first ground of appellant's motion is not well taken.

2. The second and third grounds of the motion for rehearing raise practically the same question, and are considered together. We think the point considered in the original opinion is fairly stated. In order that there could not be any mistake in the point made by plaintiff in error, we set out in full in the opinion the thirteenth assignment of error, which complains that the court erred in refusing to permit defendant to prove, as it

offered to do, each and every allegation made in the fourteenth paragraph of its third amended original answer, filed April 9, 1895, as shown by defendant's bill of exceptions No. 5. By reference to bill of exceptions No. 5, as set out in the record, we find that "defendant offered to prove each and every allegation set forth by it in the fourteenth paragraph of its third amended original answer, filed herein April 9, 1895, as a cross action or counterclaim." By what testimony, or by what character of testimony, such proof was offered to be made, does not appear. We are wholly unable to determine from the record whether such proof was proposed to be made by oral or written evidence, whether it was original or hearsay, or whether such testimony would be relevant or irrelevant. We have not been able to find any rule or decision of our courts authorizing us to consider an objection to testimony without knowing what testimony was offered. To say that appellant offered to prove each and every allegation set forth in the fourteenth paragraph of the amended answer is but little more definite than that he offered testimony to sustain his answer. The point is not technical, but substantial. Rule 59 of the district courts is as follows: "Bills of exceptions must state enough of the evidence or facts proved in the case, to make intelligible the ruling of the court excepted to, in reference to the issue made by the pleadings." In the case of *Beeman v. Jester*, 62 Tex. 433, our supreme court said: "A party bringing up for revision a ruling of the court below excluding evidence must clearly lay before us in a bill of exceptions the nature of the evidence he proposed to introduce. It must be plainly shown that it does not consist of facts which were irrelevant or unimportant, and not leave us to presume that they were otherwise by putting upon the evidence a construction that would render its exclusion error, when a construction might be placed upon it that would justify the ruling of the court." In the case of *Brothers v. Mundell*, 60 Tex. 242, our supreme court said: "The bill of exceptions taken to the ruling of the court rejecting the testimony as to damages offered by Brothers does not inform us what the testimony was, so that we can tell whether or not it conformed to his pleadings upon this subject. It merely says that 'the defendant offered evidence to prove actual and exemplary damages, to which plaintiff objected, because there were no allegations in defendant's answer sufficient to admit such evidence.' The inference from this is that the proof offered did not correspond with the allegations made; and as the defendant has not informed us of the nature of his proof we must presume that the court rejected it for that reason. Without deciding as to whether or not any proof of this character was admissible under his pleas, we do hold that the bill of exceptions points out no error whatever in the rejection of the evidence." In *Railway Co. v. Leak*, 64 Tex. 656, the court says: "In the absence

of a bill of exceptions distinctly stating what testimony was objected to, we cannot revise the action of the court below in admitting the evidence." In *Moss v. Cameron*, 66 Tex. 413, 1 S. W. 177, Judge Wille said: "This court has invariably refused to revise the action of the district court in excluding testimony when there is no proper bill of exceptions showing what the testimony would have been." *Milliken v. Smoot*, 64 Tex. 171. See, also, *Cheek v. Herndon*, 82 Tex. 146, 17 S. W. 763; *Railway Co. v. Locker*, 78 Tex. 280, 14 S. W. 611; *McAuley v. Harris*, 71 Tex. 632, 9 S. W. 679; *Beeks v. Odom*, 70 Tex. 186, 7 S. W. 702; *Burleson v. Hancock*, 28 Tex. 84. This rule is not of modern origin, but has been enforced almost from the beginning of our judicial system. *Burleson v. Hancock*, 28 Tex. 83; *Jones v. Cavazos*, 20 Tex. 432; *Bast v. Alford*, 22 Tex. 399; *King v. Gray*, 17 Tex. 71; *Styles v. Gray*, 10 Tex. 507. In the last-named case this question was discussed by Judge Lipscomb. In that case the first bill of exceptions showed that the defendant offered to prove an outstanding title to the land sued for. The court said: "There might have been exceptions to the kind of evidence offered; hence the necessity of a party, excepting to a decision of the court excluding evidence, showing in his bill what the evidence substantially was that he wished to use in his defense." Further on in the same case the court says: "The fourth and last of appellant's bills of exception shows 'that the defendant offered evidence to attack the correctness of the surveyor's record, and to show fraud in the dates of the location and survey of Ann Gray, which was ruled out by court.' There can be no doubt but that it was competent for the defendant to show that the record of the surveyor was fraudulently incorrect; and, if so fraudulently made by him to give preference over an older location, such fraud would vitiate the entry so made with that intent, and sustain the rights of the party really entitled to the preference; and what we have said in discussing the second bill of exceptions upon the effect of fraud supersedes the necessity of its further discussion. This bill of exceptions is, however, subject to the same objection raised to the one referred to,—it is too vague and uncertain as to the character of the evidence by which the defendant sought to establish the fraud to enable this court to say whether the court below erred in ruling out the evidence offered." A further discussion of the bill of exceptions seems to us unnecessary. It is true, as suggested by counsel, that the court below in its bill of exceptions certified that the plaintiff in error offered to prove the allegations of the amended answer, but by what testimony it proposed to make such proof does not appear, and for this reason the bill of exceptions is defective. It is insisted that the court should consider only such objections as were made to the testimony in the court below. This may be conceded, and still we must know what testimony was offered,

before we can intelligently consider the objections to it. In the argument of counsel for plaintiff in error, in attempting to show clearly the objections made, he refers to the fourteenth paragraph of the answer, as follows: "These allegations were, in short, that the defendant in error had during the lease period conveyed by general warranty deed the leased premises to one Dubois, and that Dubois, armed with such deed as his authority so to do, entered upon the leased premises, subjecting the plaintiff in error to damages by his occupancy thereof and his trespasses thereon, which were fully set forth in appropriate averments." That the defendant in error had during the lease period conveyed by general warranty deed the leased premises to Dubois was charged in the defendant's answer and admitted in plaintiff's supplemental petition. This fact was not disputed, and the court so charged the jury. By what testimony plaintiff in error desired to show he was damaged by Dubois in any manner for which the defendant in error would be responsible, the bill of exceptions does not disclose. The settlement between the cattle company and Powell, after the time at which the damage is claimed to have accrued, the long correspondence between the parties in which the Dubois matter was mentioned, but no claims made against Powell therefor, the execution of the notes sued on without any such claim, all seem to justify the correctness of our original conclusions upon the matter.

The other points presented by plaintiff in error, we think, are fully discussed in our original opinion. The motion for rehearing is overruled.

STATE *ex rel.* HOFFMAN *v.* WITHROW,
Judge.

(Supreme Court of Missouri. July 20, 1896.)

In banc. For majority opinion, see 36 S. W. 896.

BAROLAY, J. (dissenting). It is my misfortune not to be able to unite in the judgment announced by my learned colleague. Every circuit court in Missouri is not only empowered to regulate the course of practice so as to secure the due administration of justice, but it is made its duty "to prescribe rules that will procure uniformity, regularity and accuracy in the transaction of the business of the court." Rev. St. 1889, § 3239. All the trial courts of record are specially authorized, by many parts of the written law, to adopt rules fixing the time for pleadings of various kinds, when the time is not regulated by express statute. Rev. St. 1889, §§ 579, 2052, 2053, 2209, 2211, 3238. It is true that the law permits the filing of a bill of exceptions at any time during the term of the order excepted to (Rev. St. 1889, § 2168); but that does not imply that the court shall not make any rules to secure a fair and correct settle-

ment of such bills before they are filed. The rule in question does not pretend to deal with short bills, preserving mere motions and exceptions thereto; nor does it apply to rulings entered within 15 days of the close of the term. It is merely designed to establish an orderly system for the preparation of bills which describe trials the history of which counsel do not agree upon. The only point at which the rule comes even near to any encroachment on the statute is in the requirement that the bill shall be laid before the judge for settlement "at least two days before the adjournment of the term." All the other provisions of the rule are mere regulations (in the nature of orders for pleadings) intended to bring the bill into shape for action by the court with as little call for its intervention as possible, thus accomplishing a saving of the public time of the court. It surely is no unreasonable regulation of practice to require any controverted bill to reach the judge two days before the close of the term, so that it may be properly settled, and then filed during the term, after the disputed points have been decided. Such a regulation affords meager enough time to the judge for revision and correction of the controverted bills of a term's work in a large city. Nor does the rule conflict with the statute, which is silent as to any mode of settling a bill before it is filed. In many states the statute law prescribes the steps to obtain a settlement of these important histories of litigated cases. 3 Enc. Pl. & Prac. p. 443. In decisions and in the treatises on bills of exceptions the settlement of disputes as to the contents of such bills is regarded as a topic quite distinct from the rules governing the time for filing a settled bill. Elliott, App. Proc. (1st Ed.) § 798; 3 Enc. Pl. & Prac. p. 441; Shipherd *v.* White (1824) 3 Cow. 32; *Ex parte* Bradstreet (1830) 4 Pet. 102; Jones *v.* Meneff (1882) 28 Kan. 437; Haines *v.* Com. (1882) 99 Pa. St. 410. The Missouri law says nothing about any process to settle exceptions. It only fixes a limit of time to file them, and then confers power on the courts to make rules to secure the orderly and prompt dispatch of business. It seems to me that a rule of court designed to secure a reasonable opportunity for an examination of a proposed bill of exceptions by adverse counsel and by the court is a commendable and necessary rule for the orderly administration of justice, where the statute is silent on that point. Road in Little Britain (1856) 27 Pa. St. 69; Redman *v.* State (1867) 28 Ind. 205; People *v.* Blades (1882) 104 Ill. 591; Smith *v.* State (1884) 20 Fla. 839. In my opinion, it is a grave error to so interpret section 2168 as to prevent all the trial courts from enforcing reasonable rules to bring proposed drafts for such bills as far towards settlement as possible by the systematic action of counsel, within the time marked by the statute for filing the bills. In my opinion, the rule of court

before us should be upheld under the general authority given to the circuit courts of the state to adopt rules of practice. Hence it is not necessary to discuss whether the rule may not also be sustainable under the laws specially applicable to the circuit court in the city of St. Louis.

TOBIN v. SOUTH'S ADM'R et al.

(Court of Appeals of Kentucky. June 18, 1896.)

WAREHOUSEMEN—ACTION FOR SERVICES—EVIDENCE
—COMPETENCY OF WITNESS—VERDICT—
WHEN RESPONSIVE—INTEREST.

1. In an action where the issue was as to the value of plaintiff's services as warehouseman, evidence was not admissible to show the character of other business he was engaged or interested in, and that needed his attention; and that he was responsible to banks for the safety of the goods in his warehouse.

2. Where the owner of goods stored in a warehouse is dead, in an action by the warehouseman against the administrator for his services he is not a competent witness as to the amount it was agreed he should receive under Civ. Code, § 606, cl. 2.

3. In an action against an administrator for services as warehouseman for 5½ years, the issues were whether plaintiff and deceased agreed on the amount plaintiff was to receive, and as to the value of the services. Plaintiff claimed \$500 per year, and defendant claimed he was entitled to no more than \$500 for the whole time. *Held*, that a verdict for plaintiff for \$850 was responsive to the issues.

4. Where the mutual claims of parties remain unsettled for a number of years, during which they might be settled, and the amount of the balance due either party is uncertain, the party in whose favor a balance is found is not entitled to interest before suit is brought.

Appeal from circuit court, Franklin county.
"Not to be officially reported."

Claim by L. Tobin against Samuel South's administrator and others for services as warehouseman. The issue as to the amount due claimant was submitted to a jury by the court as an issue out of chancery. There was a verdict and judgment for claimant, from which he appeals. Reversed.

W. H. Julian and Ira Julian, for appellant.
Frank Chinn and John W. Rodman, for appellees.

LANDES, J. The issue as to the amount due the appellant for services as warehouseman was submitted to a jury by the court as an issue out of chancery. The appellant claimed the sum of \$2,750 for his services, being at the rate of \$500 per year for 5½ years, while the appellees asserted that his service for the whole time was worth not exceeding \$500. Upon the trial of that issue the court refused to permit the appellant to introduce testimony as to the character of other business in which appellant was engaged or interested, and that needed his attention, and also that he was responsible to the banks for the safety of the goods stored in the warehouse. The object of offering

this testimony was that it might be considered as the basis in part of estimating the value of his services. We think the testimony was properly excluded, for, although it might have been considered by the appellant, in a proper case, in making his own estimate of the value or worth of his services, it does not follow that it was proper to be considered as affecting the question as between himself and those for whom he was employed, or that it would have thrown light upon that question. The appellant also offered to testify as to his having made an agreement with Samuel South with reference to what he was to receive for his services as warehouseman, and the court refused to permit him to testify on that matter. In our opinion, the action of the court in this regard was proper. Samuel South was dead, and it does not appear that any one interested in the estate of the decedent, or his representative, had testified with reference to the making of the agreement, and the appellant was on that account not a competent witness. Civ. Code, § 606, cl. 2. The objection that the verdict was not responsive to the questions submitted cannot be sustained. The questions to be tried under the submission were as to whether the appellant and South had agreed as to what he was to receive, and as to the value of his services as warehouseman; his claim being for \$500 per year for the whole time, and the appellees asserting that he was entitled to no more than \$500 for the whole time. The jury fixed the amount at \$850 for the whole time, thus showing that the jury found against his claim that his compensation had been agreed on, and at the same time fixed the amount he was entitled to for his services.

These questions being disposed of, the next question is whether the judgment allowing interest on the balance found due from appellant to appellees was proper. In our opinion, the court erred in allowing interest on the balance of \$796.50 from January 1, 1881. The whole case shows that the matters between the parties had remained unsettled for a number of years, during which they might have been settled, and in the meantime the amount of balance due either party on their mutual claims was uncertain and indefinite. We do not think it was the character of case, upon the facts shown in this record, in which the court was authorized to allow interest for this long period of time. Interest should have been allowed, and ought to be allowed now only from the date of the commencement of the action, November 7, 1890, on the sum of \$796.50. Therefore the judgment, in so far as it allows interest on said sum from January 1, 1881, is reversed, and the cause remanded for further proceedings consistent with this opinion.

LONG et al. v. MAYBERRY.

(Supreme Court of Tennessee. Jan. 7, 1896.)

EASEMENTS—HOW CREATED—RIGHT OF WAY—USE.

1. A right of way over the land of another is an interest in lands, and can only be created by grant, either by deed, or by prescription implying a grant.

2. The use of a way over the land of another does not constitute adverse possession of the land used, where it is also used by the owner. Nor will the doing of work thereon, in keeping it in repair for the use of both parties, estop the owner from denying the right to an easement.

Appeal from chancery court, Maury county; A. J. Abernathy, Chancellor.

Action by Lemuel Long and others against J. W. Mayberry. Decree for complainants, and defendant appeals. Affirmed.

W. B. Gordon, for appellant. Figuers & Padgett, for appellees.

MCALISTER, J. This bill was filed in the chancery court of Maury county by the heirs of Jerome B. Pillow, deceased, to enjoin the defendant, J. W. Mayberry, against using a right of way over the lands of complainants. The bill alleges that defendant is continually and unlawfully entering upon the lands of complainants with horses and wagons; that this is a great injury to complainants, and is a trespass, as defendant is not entitled to any easement or right of way over their lands. The defendant, in his answer, states that his farm adjoins the Pillow farm on the north, and that he passes through the farm of complainants by a road from his farm to the Mt. Pleasant pike, but denies that he does so wrongfully, or that he is a trespasser upon said premises. Defendant avers that he acquired the right to use the right of way from Jerome B. Pillow, the ancestor of complainants, and that he has exercised the right continuously for 17 or 18 years. He further alleges that he performed work and rendered valuable services to the late Jerome B. Pillow in his lifetime, and, in addition, assisted him in building and graveling the road leading from the pike to the residence on said farm, and that in consideration of all these services the said Jerome B. Pillow granted to the defendant a right of way across his (Pillow's) farm from defendant's farm to the Mt. Pleasant pike, and that said Pillow marked out the right of way, and had fences built in accordance therewith, and that the defendant erected gates at the places designated by said Pillow as agreed upon between them; that said Pillow required of defendant that he should keep in repair the gates so erected, and promised to give him a deed to that part of the right of way used exclusively by him. Defendant further avers that he used said right uninterruptedly during the life of said Pillow, without objection or restraint from the latter. The chancellor, upon final hearing, decreed that Mayberry had no right of way

over complainants' lands, and made the injunction perpetual. The defendant appealed, and the court of chancery appeals affirmed the decree of the chancellor. The cause is now before this court upon the appeal of defendant.

The court of chancery appeals, in its findings, states, viz.: "We find that it is a road running from Mayberry's farm on the north, through the Pillow farm, to the turnpike on the south, some 350 yards,—a part of the road, some 175 yards, being one that said Pillow had laid out for his own use, and which is used by the complainants for their own use and convenience,—and a part of the road was opened out by said Pillow in his lifetime for the use and benefit of the defendant, Mayberry; that said Pillow had said road opened and laid out, and had it fenced off, furnishing part of the material, and having part of the work done, in so fencing it, and that defendant, Mayberry, furnished part of the material for the fence, and helped to build the fence; that gates were put up along the right of way, and that J. B. Pillow furnished the material for the gates, and the defendant, Mayberry, constructed them and kept them in repair, and kept the road in repair, during the life of said Pillow, but has done no work on the same for two or three years before the filing of the bill." The court of chancery appeals further found "that no writing was executed and no deed was made by the said J. B. Pillow, nor by any one, to the said Mayberry, to the right of way, but that the same was laid out by the said Pillow with the intention and purpose of giving it to the said Mayberry, and that he told the said Mayberry at the time that he could have it as long as he and his family lived upon or occupied said place, and that he had laid it off, and said that he would protect him in it, and would fix it so that he would be protected after he was dead, and that said Mayberry had used this right of way under these circumstances for eighteen years before the bill was filed, using it as of right under a parol grant from J. B. Pillow, and that defendant and his employes passed frequently over the road, on foot, horseback, in carriages, wagons, etc., in going to and from his farm to the pike." Upon these facts the court of chancery appeals adjudged that "a right of way can only be acquired by grant, or by a presumptive user of twenty years, and that such an easement in real estate cannot be created by a parol license, and that, while the court was satisfied that it was Pillow's intention that the defendant should have this right of way as long as he lived, yet there has been a failure to comply with the requirements of the law which would protect the defendant in this right of way." And the decree of the chancellor was therefore affirmed.

We think the decree of the court of chancery appeals is in entire accord with our authorities on this subject. It has been held by

this court that an easement in land, though an incorporeal right, is a hereditament,—an interest in land,—and a verbal contract for this right is void under the statute of frauds. *Ferrell v. Ferrell*, 1 Baxt. 329; *Nunnally v. Iron Co.*, 94 Tenn. 413, 29 S. W. 361. "An easement implies an interest in the land, which can only be created by grant, or, constructively, by its equivalent,—prescription. In the absence of a grant or deed, it is settled that such a right can only be acquired by an uninterrupted user, by the acquiescence of the owner, for a period of twenty years, under an adverse claim of right." *Ferrell v. Ferrell*, 1 Baxt. 329. It is very strenuously insisted, however, that this case falls within the principle laid down in the case of *Heiskell v. Cobb*, 11 Heisk. 638, in which it was held that verbal permission to erect and use a milldam upon another's land, coupled with more than seven years' continuous and adverse holding, is a good defense to a suit for the possession of the premises. In that case the court held that *Heiskell* could not acquire an easement in the land by mere operation of the parol license; yet, by reason of his adverse possession of seven years, he acquired such a right as would enable him to defend his possession at law, and to protect it in equity against invasion. The case at bar is easily distinguished from that case in this: that here there was no adverse possession of the land whatever. On the contrary, the right of way in controversy, the proof showed, had been used as much by Pillow as by Mayberry.

Again, it is insisted that, Mayberry having furnished material and performed work on this right of way, there was a consideration or contract underlying the parol license from Pillow, which cannot now be disturbed, and he invokes the doctrine of equitable estoppel. But we think a conclusive answer to this position is that these services were rendered by defendant as much for his own benefit as for Pillow. On this point the court of chancery appeals, through Judge Barton, said: "The only proof in the record on this subject, of any expenditure by the defendant, is that he hung the gates furnished by Pillow, furnished a part of the rails to build a short line of fence, and kept the road in repair, and he had used the road for some eighteen years. It is evident to us that all this was for the defendant's benefit. Even if part of the road was used by Pillow, it would be necessary for the defendant's benefit that it should be kept in repair, and was but a fair compensation on his part for the use of the road. So far as we can see [continues the court], the building of the fences and the hanging of the gates would be as much for the defendant's benefit as for Pillow's. At least, we are bound to conclude there is no proof of any substantial expenditure on his part, induced by the action of Pillow, which could estop him, or those claiming under him."

It was also assigned as error that defendant was not allowed by the chancellor to amend his answer so as to present a formal plea of the statute of limitations of seven years. As we have held that this statute would not have protected the defendant, there was no error on the part of the chancellor in refusing to allow it to be pleaded by amendment. Affirmed.

REELFOOT LAKE LEVEE DIST. et al. v.
DAWSON et al.

(Supreme Court of Tennessee. June 30, 1896.)
LEVEE DISTRICT—CONSTITUTIONAL LAW—TAXATION
—POLICE POWER.

1. Const. 1870, art. 2, § 28, providing that "all property," with certain specified exceptions, shall be taxed, and all taxable property shall be taxed "according to its value," applies to all taxation,—special assessments as well as general taxes.

2. Acts 1895 (Ex. Sess.) c. 1, providing for taxation for levee purposes of the lands, only, within a levee district, with a certain exception from such lands, violates the provision of Const. 1870, art. 2, § 28, that "all property," with certain specified exceptions, not including that in the act, shall be taxed.

3. The act, by providing for taxation, "by the acre," also violates the provision of the constitution that property be taxed "according to its value."

4. Acts 1895 (Ex. Sess.) c. 1, creating a levee district, and providing for a tax on the land therein for construction and maintenance of a levee to protect the territory from overflows, cannot be sustained under the police power, revenue, not regulation, being the primary purpose of the burden placed on the land.

5. The power of the legislature to tax cannot be delegated to a levee district, as attempted by Acts 1895 (Ex. Sess.) c. 1; the only authority to delegate the taxing powers being contained in Const. 1870, art. 2, § 29, declaring that the legislature may authorize counties and incorporated towns to tax for county and corporate purposes.

6. The creation by special law of a levee district, with a board of directors, for construction and maintenance of a levee from taxes on the property therein, to protect from overflow the large area of land embraced therein, is constitutional; not being within the prohibition of Const. art. 11, § 8, that "no corporation shall be created by special law."

7. A tax on the property within a large district subject to overflow, for the purpose of constructing and maintaining a levee, is for an object of a public nature, and therefore within the taxing power.

8. Acts 1895 (Ex. Sess.) c. 1, creating a levee district, must fail in toto, there not being enough left for a complete law, capable of enforcement and fairly answering the object of its passage, after rejection, for unconstitutionality, of the provisions for taxation, by which revenue for construction and maintenance of a levee was to be supplied.

Appeal from chancery court, Dyer county; John S. Cooper, Chancellor.

Suit by the Reelfoot Lake levee district and others against C. C. Dawson and others. Bill dismissed, and complainants appeal. Affirmed.

Leech & Savage and M. A. Lowe, for appellants. Deason & Rankin and M. M. Marshall, for appellee.

CALDWELL, J. In June, 1895, the legislature of the state, while in extraordinary session, by special act, created the Reelfoot Lake levee district, comprising certain territory in the counties of Lake, Obion, Dyer, and Lauderdale, "known as a part of Reelfoot Lake Basin of overflowed lands," and appointed two citizens of each of those counties as "a board of directors" therefor, to serve until the first Monday in March, 1898, and until the appointment and qualification of their successors; the said board to have power to "sue and be sued, plead and be impleaded, and have continual succession," for the purpose, and with the power and duty, of erecting and maintaining a levee sufficient to shield and protect the territory mentioned from recurring overflows by the waters of the Mississippi river. Acts 1895 (Ex. Sess.) c. 1, §§ 1-4. The fifth section of the act provides for the organization of the board; for an estimate by it of the amount of land within the district subject to overflow, of the length and height of the levee required for its protection, and of the probable cost of the same; and for a submission of the question of the necessary taxation to a vote of the people of the district. And the sixth section is as follows: "That for the purposes of building and maintaining the levee aforesaid, and for carrying into effect the objects and purposes of this act, the board of levee directors shall have the power, and it is hereby made their duty, to assess and levy a contribution tax, not exceeding ten cents per acre, and two per cent. valuation tax on all the land embraced within the said boundary of said levee district herein named; provided that the board of directors, through their president and secretary, shall notify the sheriffs of Dyer, Lake, Lauderdale and Obion counties to open and hold an election at the various voting places in the parts of the four (4) counties embraced within the area and bounded and described in the first section of this act; and it is hereby made the duty of the said sheriffs aforesaid, upon receiving such notice from the board of directors hereby created by this act, to open and hold said election in the usual manner prescribed by law for popular elections, after giving not less than ten days public notice at five (5) different public places in the overflowed district, of each county named, and at the time and places named by them; all the legal and qualified electors according to law, shall be entitled to vote at such election, and at such election the proposition shall be written or printed on the tickets so voted, 'For assessment,' or 'No assessment,' and the said sheriffs shall make returns of the said election to the secretary of the levee board, and also to the secretary of state, Nashville, Tennessee, and if it appear that three-fourths of those voting are in favor of the assessment, it shall then be the duty of said board of directors to levy said tax for that year, and

annually thereafter, so long as it shall be found necessary to accomplish the objects of this act." Section 7 requires the board of directors to elect four citizens of the district—one from each county—to act as a board of tax assessors for the district; and section 8 requires the board of directors to elect from the citizens of the district four tax collectors, one in and for the included portion of each county. The twentieth section empowers the board of directors to issue and sell long-term, 6 per cent. bonds, from time to time, not to exceed \$700,000 in all, "to raise funds to carry out the purposes" of the act; and the twenty-first section is as follows: "That for the purpose of providing for the payment of the interest on the bonds authorized by section 20, annually, and to provide a sinking fund for their ultimate redemption, it is hereby enacted that a tax per acre on all the lands embraced within the boundary described in section 1 of this act, (except the area now covered by standing water of Reelfoot lake, and the lands outside of the levee), sufficient in total amount to pay the interest on the bonds issued, shall be assessed and collected annually; provided, the said tax shall not exceed ten per cent. per acre; and provided further, that an assessment on the valuation of the lands, not exceeding two (2) per cent., shall be assessed annually, and collected as provided for in sections 6, 7 and 8 of this act, and the same shall be paid over to the treasurer of said board, giving priority to the bonds of first date."

On the 14th day of November, 1895, the Reelfoot Lake levee district, by and through its board of directors, and jointly with certain other persons, landowners of Lake county, filed the present bill in the chancery court of Dyer county, against the sheriff of the latter county and other citizens thereof, some of them being election officers, and others landowners and taxpayers in that part of Dyer county within the levee district. Complainants alleged, among other things, and in substance, that the board of directors provided for by the act was promptly organized, and that it entered upon its duties as therein directed; that it made all requisite estimates for construction and taxation, and thereupon submitted to the vote of the people of the district, in the manner prescribed in the sixth section, their recommendation of a present annual tax of 10 cents on the acre, and of 2 per cent. on the value, of all taxable lands within the levee district; that an election was held throughout the district, upon this recommendation, on the 10th day of September, 1895, and resulted, as shown by the returns sent to the secretary of the board, in a total of 732 votes "For assessment," and 632 votes for "No assessment"; that 497 of the votes for "No assessment" were fraudulently cast in Dyer county by persons known not to be legally qualified to vote in that election;

that, counting such fraudulent and illegal ballots, the proposed taxation was defeated, and, rejecting them, it was approved. And upon these allegations complainants prayed the court to purge the returns from specified precincts in that county, and eliminate therefrom the alleged illegal and fraudulent ballots, so that the true result might be declared, and its legitimate advantages enjoyed by the people of the levee district. The defendants, by demurrer, disputed the jurisdiction of the court, and also impeached the act in question, as being in violation of the state constitution in several particulars. Chancellor Cooper, hearing the cause upon these pleadings, sustained the demurrer so far as it assailed the act for violation of the revenue provisions of the constitution, but overruled it as to other questions. The act was adjudged unconstitutional, and the bill dismissed. Complainants have appealed, and the debate of learned counsel before this court, though embracing the whole demurrer, has been addressed chiefly to the grounds sustained by the chancellor; one side denying, and the other affirming, the correctness of the decree in respect thereto.

The power of taxation is an incident of sovereignty,—a prerogative, coeval with the government itself, and indispensable to its perpetuity. It is essentially a legislative power, and as such, in the general apportionment of governmental powers, falls to the legislative department, under section 3, art. 2, of the constitution, which vests “the legislative authority” of the state in the “general assembly.” *Marr v. Enloe*, 1 Yerg. 454; *Keesee v. Board*, 6 Cold. 130; *Waterhouse v. Board*, 8 Heisk. 859; *City of Memphis v. Union & Planters’ Bank*, 91 Tenn. 550, 19 S. W. 758; *Cooley, Tax’n* (2d Ed.) pp. 4, 41; *Burroughs, Tax’n*, § 6; 25 Am. & Eng. Enc. Law, 18. In respect to taxation, therefore, as to all other subjects of legislation, the general assembly has full power to pass any law not in conflict with the delegated powers of the federal government, or with the restrictions of the state constitution; and he who would show the unconstitutionality of tax legislation, as of other legislation, must be able to put his finger on the provision of the constitution, federal or state, violated thereby. *Bell v. Bank, Peck*, 269; *Hope v. Deaderick*, 8 Humph. 8; *Demoville v. Davidson Co.*, 87 Tenn. 220, 10 S. W. 353; *Stratton Claimants v. Morris Claimants*, 89 Tenn. 511, 15 S. W. 87. Confessedly, the act before us does not violate any provision of the federal constitution. The restrictions of the state constitution on the subject of taxation are found in sections 28 and 29 of article 2 of the constitution of 1870. Such parts of those sections as it is desirable now to quote are in the following language, namely:

“Sec. 28. All property, real, personal or mixed, shall be taxed, but the legislature may except such as may be held by the state, by counties, cities or towns, and used exclusively

for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary or educational, and shall except one thousand dollars’ worth of personal property in the hands of each taxpayer, and the direct product of the soil in the hands of the producer or his immediate vendee. All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that the taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value. * * *

“Sec. 29. The general assembly shall have power to authorize the several counties and incorporated towns in this state, to impose taxes for county and corporation purposes respectively, in such manner as shall be prescribed by law; and all property shall be taxed according to its value upon the principles established in regard to state taxation. * * *

The language of both sections is plain and positive. Its meaning cannot be mistaken, nor its force evaded. Both sections are mandatory in at least two points that are urged against the present act. Section 28 imperatively requires (1) that all property, of whatever kind, except that mentioned for conditional and unconditional exemption, shall be taxed; and (2) that all such taxable property shall be taxed according to its value. Section 29, though not repeating the first sentence of section 28, makes the same imperative requirements; so that whether a given tax law falls under the one section or the other, or under both of them, those requirements are equally applicable and mandatory. In every instance the requirement that all property (except that mentioned for exemption) shall be taxed prohibits the legislature from making additional exemptions. *Railway Co. v. Wilson Co.*, 89 Tenn. 608, 15 S. W. 446; *City of Memphis v. Memphis City Bank*, 91 Tenn. 583, 19 S. W. 1045. And likewise the requirement that all such property shall be taxed according to its value prohibits the legislature from laying a tax on any property in specie, or by the acre. Under the constitution of 1796, lands were taxed by the hundred acres; but the constitution of 1834, like that of 1870, contained the provision that “all property shall be taxed according to its value.” This means that every property tax shall be graduated by the value of the property on which it is laid. *Jenkins v. Ewin*, 8 Heisk. 478; *Chattanooga v. Nashville, C. & St. L. R. Co.*, 7 Lea, 561; *Railroad Co. v. Morrow*, 87 Tenn. 406, 11 S. W. 348. The sixth section of the act before us utterly ignores the first-named requirement, in that it expressly limits taxes therein provided for to land alone, and thereby exempts all personal property,—that without as well as that within the exceptions mentioned in the fundamental law; and it also ignores the second-named requirement, in that it provides for taxation mainly by the acre, regardless of value, and not ex-

clusively according to value. Section 21 of the act ignores both of those requirements in the same manner, and the first one additionally, in that it expressly exempts from all taxation "the area now covered by standing water of Reelfoot lake"; that area being of some value, however small, and not being otherwise exempt.

There can be no doubt, therefore, that sections 6 and 21 of the act violate the constitution in the particulars mentioned, if the taxation contemplated by those sections is within and subject to the aforesaid limitations of the organic law. Complainants deny that it is within or subject to those limitations, and seek to sustain that denial and to vindicate the act by the contention that the burden intended to be imposed upon the citizen is a special assessment for the benefit of his land, and not a tax for the support of the state, or any county or municipality therein, and, consequently, that those limitations are inapplicable in this case. The distinction thus urged has been frequently considered by the courts. Judge Cooley, after referring to some of the cases on both sides of the question, says: "The fact very clearly appears that, while there is not such a concurrence of judicial opinion as would be desirable, the overwhelming weight of authority is in favor of the position that all such provisions for equality and uniformity in taxation, and for taxation by value, have no application to these special assessments. * * * It is safe to assume, as the result of the cases, that the constitutional provisions refer solely to state taxation, or, when they go further, to general taxation for state, county, and municipal purposes; and though assessments are laid under the taxing power, and are, in a certain sense, taxes, yet that they are a peculiar class of taxes, and not within the meaning of that term as it is usually employed in our constitutions and statutes. They may therefore be laid on property specially benefited, notwithstanding such constitutional restrictions as have been mentioned." Cooley, *Tax'n*, pp. 634, 636. It could serve no valuable purpose for us at this time to review, or even cite, the numerous adjudged cases on this vexed question. Our examination of them justifies full concurrence with Judge Cooley in the statement that the great weight of authority, for one reason and another, favors the distinction insisted upon by the complainants in this case. Nevertheless, it must be confessed that the adjudications found to be in the minority are not without support in sound reasoning. The great divergence in judicial decisions is due in part to a substantial difference in constitutional provisions, and in part to unlike interpretations put upon similar provisions. This court considered the question elaborately in 1872, and ranged itself with those courts holding what is now the minority view. It thought and held that the distinction then asserted, and now contended for,—being a distinction between local assessments and taxes,—was not allowable in this state, and

therefore that local assessments according to lot frontage, and not according to value, were "absolutely void," because in conflict with sections 28 and 29 of article 2 of the constitution, which requires that all taxes shall be equal and uniform, and according to value. *Taylor v. Chandler*, 9 Heisk. 349. That construction was approved in the case of *Nashville v. Berry* (1877) 2 Leg. Rep. (Tenn.) 26, and in that of *State v. Butler* (1883) 11 Lea, 419, and has in no instance been departed from. We have been able to find no decision of the court, prior or subsequent, in conflict with that construction. In 1845 it was decided in the case of *Mayor, etc., v. Maberry*, 6 Humph. 369, that the legislature might lawfully authorize the passage of a municipal ordinance requiring lot owners to construct suitable sidewalks along the streets in front of their property at their own expense, and, in case of default, to pay to the corporation the cost of having the same done for them, although the burdens imposed thereby were not equal and uniform as to value, and were not intended to be so; but the ordinance involved in that case was sustained as a legitimate police regulation, and not as a piece of tax legislation. Referring to the ordinance, Judge Green, speaking for the court, said: "We do not think that this law levies a tax. A tax is a sum which is required to be paid by the citizens, annually, for revenue for public purposes. But the ordinance levies no sum of money to be paid by the citizens. It requires a duty to be performed for the well-being and comfort of the citizens of the town. It is in the nature of a nuisance to be removed. * * * The ordinance in question is therefore not unconstitutional on the ground of being an unequal tax." *Id.* 372. That ruling was followed in *Washington v. Mayor, etc.*, 1 Swan, 180; in *Whyte v. Mayor, etc.*, 2 Swan, 369; and in *Mayor, etc., v. Beny*, 2 Leg. Rep. (Tenn.) 26. The last-named case, which was decided in 1877, refers to and approves the case of *Taylor v. Chandler*, 9 Heisk. 349, decided five years earlier; and this 9 Heisk. Case approves the 6 Humph. and 1 Swan Cases, *supra*; saying, however, that they should not be extended.

Coming back to the language of our constitution, which, after all, must be controlling, we can entertain no other opinion than that the limitations of section 28 of article 2 apply equally and alike to every kind of taxes that the legislature has the power to levy, whether they be levied for the support of the state government, as such, in the strict sense, or more especially for the benefit of particular governmental agencies or instrumentalities duly ordained for the accomplishment of authorized local ends. They apply to all taxes in which the state has either a direct or indirect interest; and, if an exaction be made of a citizen for an object in which the state is entirely without an interest, that exaction is not taxation, whatever it may be called. Such an exaction cannot be justified by the

assertion that it flows from an exercise of the taxing power of the government. To come within that power, the demand upon the citizen must be made for a public purpose; and, in order that a purpose be public, it must include some advantage to the state in the aggregate, or in some one of its counties, incorporated towns, or other authorized governmental agencies or instrumentalities. If the purpose be exclusively private, then it is totally foreign to the taxing power. "It is the first requisite of lawful taxation that the purpose for which it is laid shall be a public purpose." Cooley, Tax'n, 55. Every legitimate function of the taxing power of the government is embraced in the word "taxation," and all legitimate taxation is embraced in that provision of the constitution. Likewise, every exaction without that provision is without that power. "Tax" and "taxes," in their most comprehensive sense, and without qualification, are the words employed by the framers of the constitution. These words, in their usual and general sense, include every burden that may be lawfully laid upon the citizen by virtue of the taxing power; and they must be so interpreted, in the absence of anything showing them to have been used with a different meaning. Constitutions must receive the same interpretation in this respect as other written instruments and laws. Judge Story, speaking on this subject, said: "In the first place, then, every word employed in the constitution is to be expounded in its plain, obvious, and common-sense meaning, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or logical subtleties, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understandings. The people make them, the people adopt them, the people must be supposed to read them with the help of common sense, and cannot be presumed to admit in them any recondite meaning, or any extraordinary gloss." Story, Const. § 451. No words of exception or exclusion, as to the purpose of any tax, are to be found in our constitution. Words of exception and exclusion are used, but they relate alone to the property that may be and that shall be exempt from taxation altogether. The requirement that all property, except that exempt, shall be taxed, embraces every tax that may be legitimately levied; and the requirement that all taxable property shall be taxed according to its value likewise embraces every legitimate tax. These requirements apply in every case, whether the tax be general or special. In like manner, the direction that certain specified property shall be exempt from taxation, and that certain other property may be exempt in the discretion of the legislature, refers alike to each and

every tax. If it be true that special assessments, as contradistinguished from general taxes, are not within the aforesaid requirements of equality and uniformity of taxation, and of taxation by value, it must be equally true that they are not within the direction as to exemption; and in the latter event they may include the whole of the taxpayer's personalty at full value, not deducting \$1,000 therefrom, nor excluding the direct product of the soil, and they may also include all property held for public, religious, charitable, scientific, literary, and educational purposes; and that, too, in the face of the direction that the first two items shall be, and the others may be and are, universally, exempted from general taxation. Special assessments are entirely within, or entirely without, the provisions of section 28 of article 2 of the constitution. If the former, then they are subject to the same requirements as general taxes; and, if the latter, then they are not subject to any of those requirements, and may rightfully be laid on property exempted from general taxes, such as the taxpayer's first \$1,000 worth of personalty, the direct product of the soil in the hands of the producer or his immediate vendee, churches, schoolhouses, townhalls, courthouses, asylums, and even the statehouse itself, when within the territory contemplated. It is no answer to the latter suggestion to say that special assessments should be confined to the property especially benefited; for, if they be not subject to those provisions, there is nothing to prevent the inclusion of all property, that exempt as well as that not exempt from other taxation. It is not believed that the framers of the constitution intended to restrict one kind of taxes, and not the other kind, or that they intended to discriminate in favor of special assessments, and against general taxation; nor is it believed that they constructed an instrument susceptible of such interpretation. They included all taxes, and excluded none. Construing section 28, art. 2, of the constitution, in a case involving a claim of exemption from taxation, this court recently said: "This provision comprehends the whole domain of taxation, and, in explicit terms, prescribes the maximum of exemptions, beyond which the legislature may not go. It declares what property may be, and what shall be, exempted from taxation, and directs that all the rest shall be taxed. By that mandatory direction the legislature is prohibited from making any other exemption from taxation, upon any ground or consideration whatever; 'and if it attempt to do so the effort is unavailing and void, for want of legislative power.'" City of Memphis v. Memphis City Bank, 91 Tenn. 588, 19 S. W. 1045. It was truly said in that case that the particular section of the organic law under consideration there and here "comprehends the whole domain of taxation." The next section (29), however, expressly empowers the general assembly "to authorize the several counties and incorporated towns in

this state, to impose taxes for county and corporation purposes respectively." The latter section relates alone to taxes laid for county and municipal purposes, and covers the whole domain of county and municipal taxation, so far as the same shall be delegated. *Waterhouse v. Board*, 8 Helsk. 857, 9 Baxt. 398; *Shelby Co. v. Tennessee Centennial Exposition Co.*, 96 Tenn. —, 36 S. W. 694. And under it, as under section 28, the requirements with respect to equality and uniformity of taxation, and as to taxation according to value, must be observed (*Taylor v. Chandler*, 9 Helsk. 368), and all proper exemptions made; each county and each town acting for itself, and not being in any degree constrained or controlled by what any other county or town may have done or may do. Taxes laid primarily for the state must be laid on all non-exempt property according to value, so as to make them equal and uniform throughout the state; and taxes laid primarily for county, municipal, or other authorized local purposes must be laid on all nonexempt property according to value, so as to make them equal and uniform throughout the more restricted territory to be especially benefited thereby. It is perfectly manifest that the present act does not fall within section 29, because the Reelfoot Lake levee district is in no sense either a county or an incorporated town. All taxes that are leviable at all, except those authorized to be levied by counties and incorporated towns, respectively, must undoubtedly be levied by the legislature; and all taxes levied by the legislature must as certainly be levied with reference to the restrictions of section 28. It follows, therefore, that, if a levy of taxes for the benefit of the Reelfoot Lake levee district be permissible at all, it must be made by the legislature, and subject to those restrictions. Whether taxes for such an object be allowable in any case will be considered hereafter.

Complainants contend in the next place that, if the act be not sustainable under the taxing power, it can be and should be sustained under the police power of the state. This latter power, like the former one, is an attribute of sovereignty; and it may rightfully have expression in the form of legislation, whenever needful for the promotion of public health, or the preservation of public safety, order, or well-being. Rules and regulations established in the proper exercise of this power often require the payment of money for certain specified objects, and thereby in some measure partake of the nature of tax laws, though in primary purpose entirely distinct from them. "The distinction between a demand of money under the police power, and one made under the power to tax, is not so much one of form as of substance. The proceedings may be the same in the two cases, though the purpose is essentially different. The one is made for regulation, and the other for revenue. If, therefore, the purpose is evident in any particular

instance, there can be no difficulty in classifying the case, and referring it to the proper power. * * * Only those cases where regulation is the primary purpose can be specially referred to the police power." *Coolley, Tax'n*, 586, 587. Obviously, the burden intended to be laid on the property of the citizen by the act under consideration is not primarily for regulation; but, on the contrary, revenue is the primary and greatly preponderating purpose, if not, indeed, the exclusive purpose, in the legislative mind. The paramount and controlling idea disclosed in every part of the act is to raise a fund with which to reclaim from frequent inundation a large body (some 300,000 acres) of land in the Mississippi valley, and thereby enhance its value and the wealth of its owners. Strictly speaking, it is without an element or feature of regulation. The health of the people in the locality might be somewhat improved, and even life itself might be saved occasionally, by the construction of the contemplated levee, and the consequent prevention of periodical overflows; but those are the most remote of the benefits to be anticipated from such a work, and were likely not thought of by the members of the general assembly. Without further enlarging upon the subject, we hold, unhesitatingly, that this legislation is in no sense referable to the police power of the state, and that it cannot be justified thereunder. It does not fall within the reason of *Mayor, etc., v. Maberry*, 6 *Humph.* 369; *Washington v. Mayor, etc.*, 1 *Swan*, 180; *Whyte v. Mayor, etc.*, 2 *Swan*, 369; and *Mayor, etc., v. Berry*, 2 *Leg. Rep. (Tenn.)* 26,—before mentioned, but rather within that of *Taylor v. Chandler*, 9 *Helsk.* 349, and *State v. Butler*, 11 *Lea*, 419,—before mentioned. The former cases ruled that the municipal ordinances therein considered were in the nature of regulations for the removal and prevention of nuisances along the sidewalks, and were therefore within the police power of the state; and the latter cases ruled that the special assessments there involved were for municipal purposes, in the general sense, and therefore within the taxing power.

The act is unconstitutional for the further reason that the legislature attempts thereby and therein to delegate a portion of the taxing power to the Reelfoot Lake levee district, without express authorization so to do. It has already been seen that the power of taxation is essentially legislative, and, that being so, it fell to the legislative branch of the government, in the organic division of governmental powers. Such being the case, that branch, and that branch alone, is authorized to levy taxes in the first instance, and it can delegate its power to do so only to the extent expressly stated in the twenty-ninth section of article 2 of the fundamental law; that is, to the extent of authorizing counties and incorporated towns to levy taxes for county and corporation purposes.

respectively. No department of the government can resign or abdicate any of its distinctive and essential powers to another department, and much less to a mere subdivision or inferior agency, unless expressly authorized by the organic law itself. *State v. Armstrong*, 3 Sneed, 654. "It is a general rule of constitutional law that a sovereign power conferred by the people upon any one branch or department of the government is not to be delegated by that branch or department to any other. This is a principle which pervades our whole political system and, when properly understood, admits of no exception. And it is applicable with peculiar force to the case of taxation." *Cooley, Tax'n*, 61; *Waterhouse v. Board*, 8 Helsk. 850. The mere apportionment of sovereign powers among the three co-ordinate branches of the state government, without more, imposed upon each of those branches the affirmative duty of exercising its own peculiar powers for itself, and prohibited the delegation of any of those powers, except in cases expressly permitted. Such was the interpretation of the constitution of 1796, under which an act authorizing county courts to levy taxes for county purposes, and also another act authorizing a navigation tax in a collection of designated river counties, were adjudged to be unconstitutional and void because that instrument did not in terms empower the legislature to confer such authority upon county courts. *Marr v. Enloe*, 1 Yerg. 452. That case was decided at the close of the year 1830, and must have been well known to the delegates composing the convention that framed the constitution of 1834. That convention had the power to abrogate the rule of construction announced and applied in that case "totally, or to subject it to partial modifications. It chose the latter, and authorized the legislature to delegate the power of taxation to the counties and incorporated towns. This was done by the twenty-ninth section of the second article of the constitution, then framed and subsequently adopted. The convention did not mean to go further. The implication is irresistible that the expression of the authority to delegate the power to the counties and towns is an absolute exclusion of authority to delegate the power to any other agency. It is impossible to doubt that the convention designated the counties and incorporated towns, and authorized the power to be conferred on them, for the reason that without such designation the power of taxation would be restricted to the legislature only." *Keese v. Board*, 6 Cold. 131. That provision of the constitution of 1834 was copied literally into the constitution of 1870, without any further modification; and it must be presumed to have been so copied with the understanding and intent that the whole of the taxing power should remain in the legislature, except that part expressly authorized to be delegated. *Waterhouse v. Board*, 8

Helsk. 850; *Taylor v. Chandler*, 9 Helsk. 372. The particular feature of the act that is most objectionable as a delegation of the taxing power is that in which the levee district is authorized to decide for itself what rate of taxation, if any, shall be laid annually, only the maximum rate being prescribed. The legislature, before passing the law, should have determined at least three things: (1) that the purpose in view was a proper purpose for taxation; (2) the annual rate required for the present; and (3) the rule under which it should be levied. These matters are within the legislative function, and cannot be delegated, in the absence of express authority of the fundamental law. Such questions may be left to counties and incorporated towns, in respect of their own taxes, and within proper limitations; but that is so because the general assembly is expressly empowered to grant them that authority. No other agency or instrumentality of the government can be given such power. Had the legislature adequate power to create by special law such an agency or instrumentality as that set forth in the act before us? We have been able to discover no good and valid reason why it had not. The intended creature was clearly not a private corporation, and consequently could not have been within the prohibition (*Const. art. 11, § 8*) that "no corporation shall be created by special law." *State v. Wilson*, 12 Lea, 246; *Ballentine v. Mayor, etc.*, 15 Lea, 633; *Williams v. Nashville*, 89 Tenn. 490, 15 S. W. 364. Nor, indeed, was it to be a corporation at all. It could have been but an inferior agency or instrumentality of the state, in the nature of a taxing district, designed to reclaim and perpetually protect about 300,000 acres of land in the northwestern corner of the state,—rich and of great value, but for the periodical overflows to which it is subjected by the high waters of the Mississippi river. The accomplishment of such an object would greatly benefit the numerous owners of the soil, and thereby enhance the resources of the state, and enlarge her wealth and population. The owners, who would have to bear the burden of reclamation and continued protection, would naturally and justly receive the greatest and most direct benefit. Nevertheless, the state would be benefited in the important respects just mentioned. Her general revenues would be increased, not by reason of her receipt of any part of the taxes to be raised under the special act, but because the taxable value of the lands reclaimed and protected would be increased, and the general taxes thereon correspondingly enlarged. The exaction made of the citizens of the district for such an object would be of a public nature, and therefore within the taxing power. It would be for a public purpose in a twofold sense: First, because beneficial to a large community of people within the district; and, secondly, because beneficial to the state in the par-

ticulars already indicated. The taxes to be raised by and for such an agency or instrumentality, however, would be subject to the same requirements as are taxes levied for state, county, and municipal purposes, under sections 28 and 29 of article 2 of the constitution. The creation of levee districts has been adjudged to be within the legislative power in Arkansas (*Keel v. Board*, 27 S. W. 590), in Louisiana (*Draining Co. Case*, 11 La. Ann. 338), in Mississippi (*Daily v. Swope*, 47 Miss. 367), in Missouri (*Egyptian Levee Co. v. Hardin*, 27 Mo. 495), in Wisconsin (*Donnelly v. Decker*, 17 N. W. 899), and in other states; and the creation of irrigation districts has been held to be within that power in California (*Hagar v. Supervisors*, 47 Cal. 222, and *Turlock Irrigation Dist. v. Williams*, 18 Pac. 379), and perhaps in other states. It is said by Judge Cooley that "taxing districts may be as numerous as the purposes for which taxes are levied." *Cooley, Tax'n*, 151. It is not every act with unconstitutional provisions that must fail in toto. If, notwithstanding and without such provisions, there be left enough for a complete law, capable of enforcement, and fairly answering the object of its passage, the courts will reject only the void parts, and enforce the residue. *Cooley, Const. Lim.* 215, 216; *Allen v. Louisiana*, 103 U. S. 80; *Railroad v. Schutte*, Id. 118; *Tillman v. Cocke*, 9 Baxt. 420. We regret that the act before us is not susceptible of such division and enforcement. Take out the taxing feature, and the act is completely emasculated. A levee district without a levee, or the means of constructing one, is a creature without force or power to exist.

Since the bill of complainants must inevitably fail for reasons already stated, it is entirely unnecessary to determine, or even consider, the question of jurisdiction. Affirm the decree, and dismiss the bill.

SMITH v. WHITSETT et al.

(Court of Chancery Appeals of Tennessee.
Feb. 1, 1896.)

RIGHTS OF WIDOW—WRIT OF POSSESSION—INJUNCTION—EVIDENCE.

1. The widow, left in possession of land at the death of the husband, prior to the assignment of dower has no standing, by virtue of her dower right, to attack a decree rendered against the husband for possession of the land, on the ground that it was rendered after the death of the husband without revivor.

2. In a suit by a widow to enjoin a writ of possession in favor of the heirs of her husband, where complainant was in possession of the land, to entitle her to such relief on the ground of an outstanding title in devisees of the decedent, it is insufficient to show only that a will was left by the decedent, in which the land was devised to certain other persons.

Appeal from chancery court, Davidson county; J. A. Cartwright, Special Chancellor.

Bill by Edith Smith against Green Whit-

sett and others. There was a decree for defendants, and complainant appeals. Affirmed.

F. O. Maury and Eli T. Morris, for appellant. S. A. McElwee, for appellees.

NEIL, J. The bill in this case charges that on September 1, 1888, the complainant intermarried with one George Smith; that he died, intestate, August 28, 1893, leaving a son of the same name, and a daughter, Anna Smith, children of a former marriage, and that he left the complainant as his widow; that the mother of said children died prior to June, 1868; that in the month of June, 1868, the said intestate intermarried with one Isabella Smith; that she was at the date of her marriage a widow, with one child, Thomas Shelby; that the intestate and said Isabella lived together as husband and wife until about February 6, 1888; that, about the date last mentioned, the said Isabella died, leaving, surviving her, said son, Thomas Shelby, and the two children of the intestate, Anna and George; that all three of these children are still living; that said Isabella left a last will and testament, duly probated in Davidson county; that, by this will, she devised the lot upon which the present complainant was residing at the filing of the bill to said intestate for life, with remainder in fee to said three children; that the title to said lot is now a valid subsisting title, in fee simple, in the said children, as tenants in common; that the said lot was conveyed to said Isabella by Ebenezer Bradley, May 11, 1871, by deed of that date, duly recorded; that on May 19, 1892, the intestate filed his bill in the chancery court of Davidson county against the defendants to the present bill, who claim to be the heirs at law of the said Isabella; that in this bill the intestate claimed that the title to said lot had been, through fraud, vested in the said Isabella; that he had paid the entire purchase money for the lot, and that a trust resulted to him in the same, as against said Isabella and her heirs at law; that the defendants answered, denying the allegations of the bill, and also filed a cross bill to obtain possession of said lot, as the pretended heirs of their sister, the said Isabella, and asking for an account of rents and profits from the date of her death; that no reference was made in any of the pleadings to the said will of Isabella; that intestate knew nothing of said will; that neither complainant to the present bill, nor any of the devisees under said will, were made parties to either the original or the cross bill, "although complainant, before and at the time said pleadings were filed, was, and has ever since been, and is now, in the possession and occupancy of said lot, by permission or without objection from the true owners thereof"; that such proceedings were had in the cause that by a decree of the said chancery court, of date May 13, 1893, the original bill was dismissed, and the

defendants adjudged to be the owners of the lot in controversy, and a writ of possession awarded in their favor, and an account for said rents ordered; that the intestate appealed from this decree, under the oath prescribed for poor persons, but died before the meeting of the supreme court; that the transcript was filed in the supreme court October 10, 1893; that by the supreme court "the appeal was dismissed, at the instance of the appellees, without reviving the suit against the widow or the heirs of said intestate, and without their knowledge or consent, on March 23, 1894; that said cause was then remanded to the chancery court of Davidson county; and that the writ of possession was issued on July 23, 1894, and was delivered to the sheriff of Davidson county, directing him to put the defendants in possession of said lot. The prayer was for a temporary injunction restraining the execution of said writ, and that the same should be made perpetual on the hearing."

The answer admits that the complainant is the widow of George Smith, deceased, and that he died, intestate, about August 28, 1893; that George Smith intermarried in the month of June, 1868, with the said Isabella, and that she was a sister of the defendants, and that Isabella died about February 6, 1888, and that the lot was conveyed to Isabella by Ebenezer Bradley, May 11, 1871; that, about three years after the death of Isabella,—that is, on May 19, 1892,—the said George Smith filed his bill against the same persons who are defendants to the present bill, except the sheriff, and that in this bill he claimed the title to the property now in controversy; that he asserted in said bill that the conveyance to his wife Isabella was fraudulent, for the purpose of defeating his rights, or that it was made by mistake, and he asked in the bill that title be divested out of said defendants, and vested in him; that defendants filed a cross bill, "in which, among other things, they denied all of the allegations in the bill of the said George Smith"; that the chancery court decided that the complainants in the cross bill were entitled to the possession of the property; that thereupon George Smith appealed the cause to the supreme court; and that, "before the said case was reached on the docket, the said Smith died, and, as the case was not revived, it was dismissed, and a writ of restitution [possession] issued from your honorable court to put respondents in possession of the property in question"; that this decree of the chancery court was dated May 13, 1893. The answer denies that George Smith left surviving him a son and daughter by a former marriage, George and Anna Smith; also denies that Isabella left surviving her a son, Thomas Shelby; but says that she never was the mother of a child. As to said children George and Anna, the answer contains the further statement that they had been dead "several years." They deny that the said Isabella left

a will, but admit that there is of record in the county court of Davidson county a paper writing purporting to be her will, as shown by Exhibit A to the bill in the present case. They deny that there is a valid subsisting title in said alleged children by virtue of said will, but say that, at the death of said Isabella, the title descended to the defendants, as her only heirs at law. The copy of the will filed with the bill purports to devise the property as stated in the bill, and the will seems to have been probated at the June term, 1888, of the county court of Davidson county.

On the trial, the complainant offered to introduce in evidence two decrees of the supreme court,—that is to say, certified copies,—one dated March 12, 1894, and the other March 23, 1894. The court declined to permit the decree of March 12, 1894, to be introduced and read as evidence, because the certificate did not state that the two decrees constituted a complete record in the cause in the supreme court, but permitted the introduction and reading of the decree of March 23, 1894, in proof of the allegation of the bill setting out the date and substance of that decree. The complainant then offered to introduce and read as evidence what purported to be a decree of the chancery court of Davidson county in the said case of George Smith v. Green Whitsett et al., dated July 23, 1894, and offered to prove by the solicitor F. C. Maury that he had himself copied the document from the decree as entered on page 404 of Minute Book No. 42 of said court, and that it was a true, complete, and perfect copy of said decree; but the court declined to permit the said document to be read, or the said witness to prove the findings of the copy, upon the grounds that such was not the proper mode of authenticating said document. The supreme court decree which the chancellor refused to allow the complainant to read, that of March 12, 1894, was as follows: "This cause, being regularly reached on the call of the docket, is continued until the next term of the court for revivor." The supreme court decree of March 23, 1894, which the chancellor permitted the complainant to read, was as follows: "In this cause, the complainant, who is the appellant, by attorneys, comes and dismisses his appeal. It is therefore ordered, adjudged, and decreed by the court that the appeal be dismissed, and that the defendants recover of the complainants the costs of this appeal, for which let execution issue." The decree of the chancery court of July 23, 1894, which the chancellor refused to allow the complainant to introduce by the aforesaid copy, was as follows: "In this cause, it appearing to the court from admissions of solicitors for complainant in open court that the appeal heretofore prayed and granted to the supreme court was at the last term of the court dismissed, it is ordered that the writ of possession heretofore decreed to be issued, putting

the complainants to the cross bill in possession of the real estate described in the pleadings, be issued by the master upon demand of said complainants in the cross bill, or their solicitors, upon the payment of costs thereof."

The foregoing recital contains all the evidence offered or introduced. Before the final hearing of this cause in the chancery court, the complainant asked leave of the court to file an amended and supplemental bill. This application the chancellor declined. The proposed bill accompanied the application, and was as follows, viz.: After reciting the substance of the original bill, then proceeded to set forth the following matters, by way of amendment to the original bill, to wit: The contents of the before-mentioned supreme court order of March 12, 1894, exhibiting a copy of it; the contents of the decree of the supreme court of March 23, 1894, exhibiting a copy of it; an allegation that these were the only orders or decrees entered in the supreme court in said cause, and that they were entered long after the death of the said George Smith; the contents of the decree of the chancery court of July 23, 1894, exhibiting a copy of it, accompanied with an allegation that this was the only order or decree rendered in the cause by the chancery court after the dismissal of the appeal; and the following matters by way of supplement, viz.: A recitation of the fact that injunction had been issued under the original bill, but had since been dissolved, on the — day of March, 1895, but that the writ of possession had not been executed up to the time of the complainant's swearing to the amended and supplemental bill; a recitation of the fact that the defendants, in their answer, had omitted many of the material allegations of the original bill, and, among others, the death of George Smith pending the appeal to the supreme court, and the rendition of the decree in the supreme court dismissing the appeal, without revivor against his heirs, or against complainant, his widow; that in said answer they had also admitted the issuance of the writ of possession of July 23, 1894, from the chancery court, without revivor; that the application and granting of the order dissolving the injunction were after the filing of said answer; that, during the life of George Smith, the complainant assisted him in paying taxes on the lot, and that she has paid the taxes since his death; that S. A. McElwee was the attorney and solicitor of her husband in prosecuting said suit, and in defending the cross bill filed therein against him; and that he is the same lawyer who is now representing the defendants in their efforts to dispossess her of said lot; and charge that the decrees of March, 1894, and July 23, 1894, before referred to, are absolutely null and void, also the writ of possession, and that the sheriff has no authority to execute the writ. The prayer is for a reinstatement of the injunction, and

for a writ of restitution in case she should be dispossessed before the restoration of the injunction; also, that the decrees before referred to, of March 23, and July 23, 1894, be declared void; and that the writ of possession be perpetually enjoined. Upon the hearing, the chancellor dismissed the original bill, and the complainant has appealed, and assigned errors. The errors assigned are upon the dismissal of the bill, the refusal to allow the filing of the amended and supplemental bill, and the rejection of the evidence offered.

The first error assigned is as follows: "The court erred in dissolving the injunction, and in dismissing the bill, because (1) the order dismissing the appeal without revivor was, in effect, a decree against a dead man; (2) the process under that decree has no more validity than the decree itself; and (3) both the decree and the process are absolutely void, and no action is necessary to revoke it. It is void in itself."

The first question to be determined is whether the complainant has the requisite status to attack the decrees complained of. From the allegations of the bill admitted by the answer, it appears that the complainant is the widow of George Smith, who was the complainant in the proceedings attacked in the case of *George Smith v. Whitsett*; that she was left in possession of the property at the death of George Smith. It is insisted by the complainant that the widow, as successor in interest to the deceased husband, had the requisite status. We shall briefly examine this question. Prior to the assignment of dower, there is no privity between the husband and wife as to the husband's lands, so far as such privity is based upon the right of dower. The right of dower confers no title to any part of the husband's land after his death until assignment of dower is made. Until then the wife has no seisin or right of entry in any part of the husband's land, and the heir can well maintain his writ of entry against her, to which her claims of dower would constitute no defense. It is a mere right, which does not ripen into a title until some specific portion is set out and assigned as dower." *Marr v. Gilliam*, 1 Cold. 488, 505. Accordingly, where the husband and wife occupied land together, and an attempt was made to connect the possession of the two upon the death of the husband, it was said: "He occupied it during his life, not by right of his wife, but by virtue of his own act of disseisin, and that his wife could commit no act of disseisin till her coverture ceased by his death, and that the subsequent disseisin by her was her own separate act, unconnected with the previous disseisin of her husband." *Id.* We conclude, then, that the complainant has no status by reason of her dower claim, it not appearing that dower was ever assigned. "Persons who are neither parties nor privies to parties in interest, and who are only in-

cidentally affected by a decree, cannot institute proceedings to impeach the decree for matter dehors the record. Such a right belongs only to parties, persons who have become quasi parties, and their privies." *Allen v. Gilliland*, 6 Lea, 521.

Is there any privity by reason of the rights of a widow under the homestead law? This is a more difficult question, but we may dismiss it by saying that there is no such claim set up in the bill. The bill is wholly silent upon the subject, as, indeed, it is upon the subject of dower; nor, indeed, is there any direct charge in the bill that the husband was the owner of the land. The only statement contained in the bill upon that subject is by way of recitation of the contents of the bill in the case of *George Smith v. Whitsett*; that in that bill he claimed to be the real owner of the land; and that the deed had been made to his wife by fraud or mistake. We are of opinion, therefore, that the complainant can base no rights in this case under the laws governing the subject of homestead and dower.

But it is strenuously insisted by the complainant, in the brief of her counsel, that, being in possession, she can, at all events, protect herself against the defendants by interposing "the outstanding title" of the devisees under the will of *Isabella Smith*, in analogy to the rule upon that subject in ejectment cases. We do not think the requisite facts are in the record upon which to base this contention. The bill charges that the devisees survived the testatrix, these devisees being *Anna and George Smith and Thomas Shelby*, the latter alleged by the complainant to be a son of testatrix by a former husband. The answer denies that *George and Anna Smith* survived the testatrix, and denies that there was ever any such person as *Thomas Shelby*, son of *Isabella Smith*. There the matter rests. There is no proof upon the subject. It is contended by the complainant that the fact that the will devised the property to the persons named affords a presumption that there were such persons in existence at that time, and that the burden of proof would be upon the defendants to disprove their existence. We can conceive cases in which this might be true, but not where the question is presented as here. The complainant is actively asserting this alleged outstanding title, and, if she have the right to make such a question in this kind of a case (which we do not decide), the burden would rest upon her to make out the defenses fully. In the case as presented, or assuming the will to be valid, it is impossible to say where the title is. If the alleged devisees were dead at the making of the will, the property would belong to their issues. *Darden v. Harrill*, 10 Lea, 421; Code, § 3036. Was there such issue? Who are they? The record is silent. Under such a state of the record, we cannot base any rights upon the alleged outstanding title. The re-

sult is, the first assignment of error is disallowed.

The second assignment of error is based on the ground that the chancellor refused to allow the amended and supplemental bill to be filed, and the third assignment is based on the chancellor's refusal to permit the introduction of the evidence before noted, as having been offered and refused. We think there was no error in either instance, and disallow both assignments.

Let the decree of the chancellor be affirmed, with costs.

BARTON and WILSON, JJ., concur.

Affirmed orally by supreme court, March 12, 1896.

AMERICAN EMPLOYERS' LIABILITY INS. CO. et al. v. FORDYCE et al.

(Supreme Court of Arkansas. July 8, 1896.)

INSURANCE—AGAINST LIABILITY FOR DAMAGES—CONSTRUCTION OF POLICY—WAIVER OF PAYMENT OF PREMIUMS.

1. A policy promising to pay all damages with which the insured may be legally charged, or required to pay, or for which it may be legally liable, is not a contract of indemnity alone, but also a contract to pay liabilities; and a discharge of such liabilities by the insured is not a necessary condition precedent to its recovery thereon, the measure of recovery being the amount of the accrued liability.

2. A general state agent of an insurance company, with authority to make terms for insurance, to countersign and deliver policies, and collect premiums, may waive a condition requiring payment of the premium in money; and an unconditional delivery of a policy by such agent without requiring payment raises a presumption that a short credit was intended, and the contract will be binding on the company.

3. A policy of insurance against liability for damages was issued to a street-railway company by the general state agent of an insurance company, and accepted, no advance premium being required. Before demand for the payment of the premium was made, a liability under the policy accrued. The premium was not paid when demanded, and the policy was afterwards canceled by the insurer. *Held*, that the insured was entitled to recover the amount of any liability accruing under the policy between the time of its issuance and cancellation, less the premium earned for such time.

Appeal from circuit court, Pulaski county; Robert J. Lea, Judge.

Action by Fordyce and Johnson, receivers of the City Electric Street-Railway Company, against the American Employers' Liability Insurance Company and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

The American Employers' Liability Insurance Company issued its policy to the City Electric Street-Railway Company, which contained this clause: "That said company will pay to the insured or their legal representatives all damages with which the insured may be legally charged, or which the insured may be required to pay (not exceeding the amounts hereinafter limited), for or

by reason of any liability on account of injuries inflicted upon the person or property of any person or persons whomsoever while traveling on the railroad of the insured, or for which the insured may be legally liable." The policy was dated 1st of December, 1892, and was to be in force from the 9th of December, 1892, to the 9th of December, 1893. The consideration expressed in the policy was \$1,200. It was countersigned by "W. H. Parker & Co., General Agents," who were located at Pine Bluff. On the 8th of December, 1892, Parker sent the policy to the street-car company, through the mail. It was duly received, and the receipt of same acknowledged. Mrs. Meredith, a passenger on the City Electric Street-Railway Company, was injured by said company on the 27th day of December, 1892. She had recovered judgment for \$1,250 and costs against said company, and no appeal had been taken from said judgment. This suit was brought by appellees, as receivers of the City Electric Street-Railway Company, on the policy heretofore mentioned, to recover of appellants the amount of said judgment. The defenses were that the premium was not paid, and that the policy in suit was not to be delivered nor to take effect until the premium was paid in cash; that, if the cash premium was not a condition precedent to the delivery of the policy, the street-railway company had promised that said premium should be paid on or before the 10th day of January, 1893, which was not done; and that, therefore, the consideration having wholly failed, said policy was afterwards canceled, and became of no effect; that the street-railway company had agreed to execute three notes of \$400 each to cover premiums, due 30, 60, and 90 days, respectively, from 9th of December 1892; that said notes were never executed and tendered, and that, therefore, the consideration failed, and the policy was canceled; that Parker & Co. were agents with limited power only to deliver the policy sued on upon the payment of cash premium; and that they exceeded their authority in delivering policy without such payment. The insurance company, by way of counterclaim, set up that, if the policy were in force, the street-railway company was indebted to it in the sum of \$1,200, with interest from 9th of December, 1892, and judgment was prayed for said amount. The cause was submitted to the court sitting as a jury, which, from the evidence, found the following facts: "(1) That on the 8th of December, 1892, the defendant insurance company, by W. H. Parker, who was its general agent for the state of Arkansas, executed and delivered to the City Electric Street-Railway Company the policy sued on. (2) The said Parker was fully authorized to waive the payment of the premium in cash, and to give time for the payment thereof. (3) That said Parker did in fact waive the payment of the premium in cash,

and delivered said policy with the intention that the same should become operative according to its terms, although the premium was not then paid. (4) That after the delivery of the policy the defendant insurance company treated the same as in full force and effect until the 23d day of January, 1893. (5) That on the 27th day of December, 1892, one Callie A. Meredith, while a passenger on the cars of said street-railway company in the city of Little Rock, received personal injuries, for which she was entitled to recover damages from the said street-railway company. (6) That she recovered judgment against the said company for \$1,250, with interest from its date at 6 per cent., and the sum of \$33.50 costs. (7) That notice of the injury of the said Callie A. Meredith was given by the said street-railway company to W. H. Parker; and that neither the said Parker nor the said insurance company, in response to said notice, made any claim that the policy was not in full force and effect. (8) That no demand for the payment of the said premium was made upon the said railway company until the 9th day of January, 1893, after the injury of the said Callie A. Meredith. (9) That on the 23d day of January, 1893, the said insurance company gave notice that it had canceled the policy for nonpayment of the premium, and thereafter treated said policy as canceled. That the earned premium to the date of cancellation of the policy was the sum of — dollars." And the court, upon the foregoing facts, declared the law to be that the defendant railway company was not in default for nonpayment of the premium at the time when its cause of action upon said policy accrued, and that the plaintiff is entitled to recover the amount of the judgment in favor of the said Callie A. Meredith and against the said street-car company, including interest and costs, less the amount of the premium due upon the policy from the 9th day of December, 1892, to the 24th day of January, 1893, when the said policy was canceled, and that judgment should be rendered accordingly against both defendants, the insurance company and the Union Guaranty & Trust Company. Proper exceptions were saved to the court's findings of fact and its declaration of law. The defendants asked the court to find: (1) "That W. H. Parker & Co. only had authority, as agents, to deliver the policy sued on herein upon payment to them of the premium in cash; that they delivered it without such payment, and without authority, and they did not bind their principal by such delivery." (Which the court refused.) (2) "That the City Electric Street-Railway Company did not pay the premium on demand of Parker & Co., as agents, and a demand for a payment of the premium by Parker & Co. upon the insured was duly made about thirty days after the policy sued on was delivered; and that the same has never been paid." (Which

the court found.) (3) "That the insured, the City Electric Street-Railway Company, have never tendered payment of said premium according to their contract." (Which the court found.) (4) "That the facts are for the defendants on the whole case, and accordingly judgment should be for defendants." (Which the court refused.) The defendants presented requests for instructions, which the court refused to grant. Proper exceptions were saved to all the rulings of the court to which objection was made. Motion for new trial, presenting all the questions contended for by appellants, was overruled, and this appeal taken.

Blackwood & Williams, for appellants.
Rose, Hemingway & Rose and C. S. Collins, for appellees.

WOOD, J. (after stating the facts). The findings of fact are comprehensive and accurate. We do not discuss the evidence upon which these findings are based for the reason that objection is urged here, not to the findings of fact, but to the legal conclusions drawn from them.

1. Appellants asked the court to declare the law to be "that the insurance contract sued on herein is a contract of indemnity, and that no liability is incurred thereon until the insured suffers a loss, and that the loss in this case would be an actual payment of the judgment rendered in favor of Callie Meredith." The contract speaks for itself. It is couched in unequivocal language. The insurer binds himself to pay "all damages with which the insured might be legally charged, or required to pay, or for which it might become legally liable." This is plainly a contract to pay liabilities. But if it could be said that the meaning were left in doubt on account of any ambiguity in the language of the contract, the proof leaves no doubt that it was the intention to require the insurance company to pay to the street-railway company the damages for which it (railway company) should become liable. The insured insisted upon a contract to pay liabilities, and the insurer consented to make it that way, embracing this special feature by way of interlineation in writing upon a printed form of contract. After it was so written, the general agents, in a letter to the insured, in which they inclosed the contract, mentioned this special feature, saying, "We think, with this amendment to the policy, you have the best insurance issued." This is not simply a contract of indemnity. It is more; it is also a contract to pay liabilities. The difference between a contract of indemnity and one to pay legal liabilities is that upon the former an action cannot be brought, and a recovery had, until the liability is discharged; whereas upon the latter the cause of action is complete when the liability attaches. *Locke v. Homer*, 131 Mass. 93, and authorities cited; *Jones v. Childs*, 8 Nev. 121; *Association v. Miller*, 16 Nev. 327, 332; *Smith v. Railway Co.*, 18 Wis. 17; *Thompson v. Taylor*, 30 Wis.

68; *Rector, etc., of Trinity Church v. Higgins*, 48 N. Y. 532, and numerous other cases cited in appellees' brief. Also *Maloney v. Nelson* (N. Y. App.) 39 N. E. 82; *Solary v. Webster* (Fla.) 17 South. 846; *Gilbert v. Wiman*, 1 N. Y. 550, cited in brief of appellants. The measure of damages is the amount of the accrued liability. *Wicker v. Hoppuck*, 6 Wall. 94; *Churchill v. Hunt*, 3 Denio, 321; *Pierce v. Plumb*, 74 Ill. 326. Mrs. Meredith had recovered a judgment against the City Electric Street-Railway Company from which the company had not appealed. This judgment was a legal liability against the street-railway company, for which, under its contract with the insurance company, it was entitled to recover.

2. Appellant insists that Parker & Co. had no authority to deliver the policy without collecting the premium. This is not the law. "A general agent of an insurance company, whose business it is to solicit applications for insurance, and receive first premiums, has the right to waive the condition requiring payment in money, and to accept the promissory note of the applicant or of a third party in lieu thereof, or to undertake to make the payment to the company himself; and, when the cash payment is actually waived in either of these modes, the contract binds the company notwithstanding the recital in the policy that it is not binding until the first premium is paid in cash." This excerpt, quoted by counsel for appellees from *Insurance Co. v. Neyland*, 9 Bush, 430, is according to the consensus of modern authority. *Insurance Co. v. Booker*, 9 Helsk. 606; *Miller v. Insurance Co.*, 12 Wall. 285; *Boehen v. Insurance Co.*, 35 N. Y. 131; *Insurance Co. v. Colt*, 20 Wall. 560; *Golt v. Insurance Co.*, 25 Barb. 189; *Sheldon v. Insurance Co.*, 26 N. Y. 460; *Wood v. Insurance Co.*, 32 N. Y. 619; *Bragdon v. Insurance Co.*, 42 Me. 262; *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 18 Barb. 69; *May, Ins. § 134*, and other cases cited by counsel for appellees. The policy under consideration contains no provision requiring payment of the premium in cash as a condition precedent to the delivery of the policy and its taking effect. The court, however, evidently treated the matter as though such a condition existed, but found that it had been waived. The proof showed that Parker & Co. were general state agents, and had authority to make terms for insurance, to countersign and deliver policies, and collect premiums, and that they sometimes collected when the policy was delivered, sometimes at the end of the month, and sometimes took notes. They carried a general account with the company, and on the 10th of each month sent to it what was due upon a general balance. The policy having been delivered unconditionally, without a payment of the premium in cash, the court's finding that such payment had been waived, in view of this proof, and the law as announced supra, was clearly correct. The delivery of the policy without condition, and without exacting payment of the premium in cash, raised the pre-

sumption that a short credit was intended. *Behler v. Insurance Co.*, 68 Ind. 347, and numerous cases there cited; *Miller v. Insurance Co.*, 12 Wall. 303, *supra*; *Little v. Insurance Co.*, 38 Ohio St. 110.

3. The insurance and delivery of the policy to the assured for a valuable consideration agreed upon and expressed therein, and the acceptance of the policy by the assured, put said policy in force. See authorities already cited. By the express terms of the policy the insurance company was liable to the street-railway company for all damages occasioned by injury to its passengers for which it (street railway) was liable, from the 9th of December, 1892, until its policy was canceled. The policy was not canceled by the insurance company until the 23d day of January, 1893. The liability sued on had supervened in the meantime. While the insurance company had the right to cancel the policy for the nonpayment of the premium, as per the contract between the parties, it had no power to make this cancellation relate back, and avoid the policy ab initio. Had it not canceled the policy, but continued same in force one year, the assured would have been liable to the insurer for the entire premium. If the entire premium had been paid, and no liability had accrued between the time of the execution of the policy and the time of cancellation, the insurer might have canceled the policy under certain conditions therein contained by refunding the premium less the pro rata portion thereof for the time the policy was in force. If in the meantime a liability had accrued, cancellation, without the assent of the assured, could only take place by refunding the premium, less the pro rata for the time the policy had been in force, and also by the payment of the intervening liabilities. Now, in the present case, while the premium had not in fact been paid, credit had been extended, and before any demand had been made for the payment of the premium the liability accrued. The insurer also, a short time thereafter, canceled the policy, thus electing not to insist upon the payment of the premium. The liability of the insurance company to the street-railway company at the time of the cancellation of the policy and at the institution of this suit exceeded the entire amount of the premium. Under such circumstances the most that the insurance company could demand would be to have the amount of premium which had been earned while the policy was in force deducted from the amount of its liability to the assured. This the court did, and its judgment is correct. Affirmed.

HAMILTON v. STATE.

(Supreme Court of Arkansas. July 8, 1896.)

HOMICIDE—INDICTMENT—JURY—CONTINUANCE—EVIDENCE—REVIEW—INSTRUCTIONS.

1. The validity of an indictment found at a special term ordered to be held for the trial of the person indicted cannot be attacked on the ground

that, had the case been tried at such term, it would have interfered with the regular term.

2. Objection that one was not allowed to be present while the grand jury that found an indictment against him was being impaneled, and to challenge grand jurors, is waived by plea of not guilty.

3. An indictment alleging that defendant "did unlawfully, willfully, feloniously, and of his malice aforethought, and after deliberation and premeditation, kill and murder," need not, in addition, use the word "malicious."

4. Defendant in a homicide case is not entitled to a continuance for the absence of a witness who would testify that on one occasion deceased made an unprovoked assault on witness with a knife; it having no connection with the killing, and not being competent evidence of deceased's character.

5. Denial of continuance for absence of witness is not error, it not being shown that he was within the jurisdiction of the court, or that his testimony could have been procured by a continuance.

6. It is not an abuse of discretion to deny continuance, that defendant may have further time to prepare for trial; he having been in jail on the charge for several weeks, though he delayed employing counsel, and he being the only living witness of the homicide.

7. Excusal of a juror for ill health, or rejection of talesmen because they have formed opinions, is in the discretion of the court.

8. Permitting jurors to separate before the case is finally submitted, being within the discretion of the court (Sand. & H. Dig. § 2236), is not ground for new trial, it not being shown that defendant was prejudiced thereby.

9. Witnesses testifying as to footprints illustrated to the jury the position which they indicated that the man occupied when making them. There was no objection; no exception was saved; and the matter was not referred to on motion for new trial. *Held*, that the matter could not be reviewed on appeal.

10. Complaint cannot be made that sufficient definition of murder in the second degree was not given the jury, the statutory definitions of the different degrees of homicide having been read to them, and there having been given, in addition to instructions defining murder in the first degree and voluntary manslaughter, an instruction that, if they were satisfied that defendant was guilty of murder in some degree, but entertained a reasonable doubt as to the degree, they should convict only of murder in the second degree; and if they were satisfied he was guilty of some grade of criminal homicide, as explained in the instructions, but entertained a reasonable doubt as to whether it was manslaughter or some degree of murder, they should convict only of manslaughter; and if they entertained a reasonable doubt as to whether he was guilty of any degree of criminal homicide, explained in the instructions, they should acquit.

11. One desiring an instruction as to murder in the second degree to be read to the jury should present a correct instruction.

12. The jury came in of their own motion, after submission of the case, and requested that the instructions be repeated, which was done, and, in addition, two instructions, favorable to defendant, and in no way prejudicial, were given them, on the question of motive and the failure of defendant to flee. *Held* not error.

13. It is not error to charge the jury that they have the right, in considering defendant's testimony, to take into consideration his interest in the result, in order to determine the proper weight to be given to his testimony.

14. Error cannot be predicated of an insufficient definition of self-defense, there being no evidence on which to base such an instruction.

15. Defendant testified that deceased "told me to get out of his field, and pulled out his knife, and came at me with it, waving his hand, and saying he would tear me all to pieces. I told

him not to come, to stand back. * * * He kept coming at me. So I raised the gun, and fired. * * * There was no obstruction behind me, to keep me from retreating when the deceased was cutting at me with a knife. I stood there, and raised my gun, and shot him just as he was swaying around like this [showing how deceased swung his arm]. The deceased, as I raised my gun, had left the plow; * * * and I got mad when I saw he was coming at me; and, when I raised my gun, he swung around, and said, 'Look out there! What are you going to do there?' when I shot, my gun being in four feet of him." Held not evidence that defendant acted in self-defense.

16. Though the state proves that defendant, when he borrowed the gun with which he killed deceased, stated that he wanted it to shoot ducks, it may show that such statement was false.

Appeal from circuit court, Logan county; Jephtha H. Evans, Judge.

Charles Hamilton was convicted of murder, and appeals. Affirmed.

The appellant, Charles Hamilton, on the 2d day of December, 1895, in the Charleston district of Franklin county, killed A. C. McAbee, by shooting him with a gun. He surrendered himself, and was placed in jail at Ozark, in said county, to await the action of the grand jury. The day for the holding of the next regular term of the circuit court for the Charleston district, of said county, after said killing, was the first Monday in February, 1896; but the judge of the circuit court, on the 12th of December, 1895, issued an order for a special term of said court, to be held on the 30th day of December, 1895, for the trial of Hamilton. The special term convened on that day. A grand jury was impaneled, and soon afterwards returned an indictment against Hamilton, charging him with murder in the first degree. The body of the indictment alleged that "the said Chas. Hamilton, on the 2d day of December, 1895, in the county and district aforesaid, did unlawfully, willfully, feloniously, and of his malice aforethought, and after deliberation and premeditation, kill and murder one A. C. McAbee, by shooting him, the said A. C. McAbee, with a certain gun which the said Chas. Hamilton then and there had and held in his hands, the said gun then and there loaded with gunpowder and leaden bullets, against the peace and dignity of the state of Arkansas. Sam R. Chew, Pros. Attorney." The defendant filed a motion to quash this indictment, for the reason that the special term of court at which it was found was ordered at a time and under circumstances not authorized by law. The motion was overruled. The defendant thereupon filed a demurrer to the indictment, which was also overruled. A motion for continuance filed by the defendant was overruled, and then, on motion of defendant, the venue was changed to the Logan circuit court. On the 8th day of January, 1896, the case was called in the Logan circuit court. The defendant again filed a motion for a continuance, which was overruled, and the defendant placed on trial.

From the evidence adduced at the trial, the following facts appear: The deceased, McAbee, was a farmer, 53 years of age, who lived upon his farm, two miles distant from the town of Charleston, in Franklin county. The appellant, Hamilton, a young man, about 26 years old, and a cousin of the wife of McAbee, cultivated a crop on McAbee's place in 1895, but during the summer he left the place, and went to Texas. After remaining there two or three months, he returned to this state. On the morning of December 2, 1895, he called at McAbee's house, between 9 and 10 o'clock, and inquired for McAbee. Upon being told that McAbee was in the field, plowing, he walked over to the field. When Hamilton approached the field, McAbee was alone, plowing, and no one was present until after the killing except McAbee and Hamilton. What then took place was told by Hamilton himself on the witness stand, as follows: "I told him [McAbee] that I was going to Mazzard Prairie, to collect a debt, and that I had come by to get what he owed me for pitching up some hay. We stood there, and talked some time, and McAbee said it was too cold to stand there, and asked me to walk with him while we talked. So I walked several rounds with him, and finally McAbee said that he did not owe me anything, and would not pay me anything. I told him that he owed me \$5.75, but that I would give him \$2, and he could pay me \$3.75. But he said that he did not consider that he owed me anything, and would not pay me anything; that I owed him for board while I stayed there and was not at work; that if anybody was to pay money, that I ought to pay him for my board. So I left, and went back to the house, where I had left my horse. This was about 9 o'clock in the morning. I told Cousin Mary (Mrs. McAbee) that the old man would not pay me, and that I was going to town, and see what I could do with the law. I got on my horse, and rode back up in the field, and told Mr. McAbee that, if he did not pay me, I was going to town, and attach a stack of hay; and he plowed on, and told me to go on and do what I was going to do, that he did not care what I did, but not to come bothering him. So I went on." Hamilton then stated that, on the way to town, he saw some ducks in a branch, and that he borrowed a shotgun from a man named Dawson to shoot the ducks. When he returned, the ducks had gone, and, after looking for them a while, he went again to the field where McAbee was plowing. "McAbee asked me," said Hamilton, "what I was doing with that gun. I told him about being after the ducks, and said to him that we could settle our differences some other way than by going to law with it. McAbee told me to get out of his field, and pulled out his knife, and came at me with it, waving his hands, and saying he would tear me all to pieces. I told him not

to come, to stand back. At that time my gun was resting on the ground, on the butt end of the gun. He kept coming at me. So I raised the gun, and fired, when McAbee staggered, and fell backward. I then walked up in about two feet of him, and stood there a moment or so, and heard him groan a time or two. Then I walked back to where I left my horse, and went up to Mr. Dawson's, and put the gun up, and then rode over to my brother-in-law, Mr. House, about twelve miles, and told him about it, and we came back to Charleston that night about dark, and I gave myself up to Mr. Carter, the deputy sheriff." There was testimony tending to contradict some of the statements of defendant. After McAbee was killed, his body remained on the ground until late in the afternoon. It was then found by a boy sent to look for him. The horses were still standing hitched to the plow, which had fallen over, but apparently had not been moved. The body of McAbee lay face upward, the feet within a few inches of the plow handles. In his left hand was his pocket knife, loosely grasped, the blade open. On his feet were a pair of coarse, brogan shoes which he wore. Hamilton, on that day, wore a pair of sharp-toed shoes, about No. 6 or 7 in size. The witnesses testified that the tracks made by these shoes of Hamilton on the plowed ground when he approached and left the body could be plainly seen. At one place, about 75 yards from the body, the tracks of deceased were seen, where he had removed a loose stump from the plowed ground. With this exception, although the witnesses looked carefully, no other tracks of the deceased were found, except such as he made in the furrow following his plow, and at ends of the furrows when he turned his team. Dawson, the man from whom Hamilton borrowed the gun, testified that Hamilton asked him for his gun to shoot some ducks in the branch. "I told him," said Dawson, "that he could have the gun. * * * I got him some shells that I had loaded for bird shooting. The defendant said he wanted some larger shot, and asked me if I did not have some larger shot. I told him I thought so, and looked about in the closet, and found three shells that I had loaded last spring to shoot some geese. The shot were large duck shot. * * * I handed the defendant the shells, and he asked me for a gimlet, to draw the wads with, to see the size of the shot. I could not find the gimlet, and the defendant then took out his knife, and drew the wad, and looked in the shell, and remarked to me, 'These are the ones. These will do.' He took the gun, and left," etc. These were the main facts in evidence. Such other portions of the evidence necessary to notice are referred to in the opinion.

Rowe & Rowe, J. Frank Keith, and Robert J. White, for appellant. Sam R. Chew, Pros. Atty., and E. B. Kinsworthy, Atty. Gen., for the State.

RIDDICK, J. (after stating the facts). The learned counsel for defendant have set up many grounds why the judgment of the circuit court in this case should be reversed. We will now proceed to notice such of these grounds as seem to us necessary to consider here.

In the first place, the record shows the facts that gave the circuit judge power to hold the special term of circuit court ordered by him, and at which the defendant was indicted. It is said that, had the trial of Hamilton commenced at the special term, it could not have been concluded before the commencement of the regular term of the Logan circuit court, and that it would have interfered with that court. But whether, had the trial commenced at the special term, it could have been concluded before the time of the convening of the Logan circuit court, is a matter concerning which we need not speculate. The trial did not commence at the special term, and such special term did not in any way interfere with the Logan circuit court. The validity of the proceedings at such special term cannot be affected by the contention that, if something had occurred that did not occur, the special term would have interfered with the regular term. Enough for us to know on that point is that the special term did not interfere with any other term of the court. The motion to quash the indictment on this ground was properly overruled.

It is further said that the indictment should have been quashed for the reason that Hamilton was not allowed to be present while the grand jury that returned the indictment was being impaneled, and was given no opportunity to challenge grand jurors for cause. Appellant does not show that any grand juror was a prosecutor or witness against him, or that he was prejudiced by not being allowed the opportunity to challenge. Further, he did not make this a ground of his motion to quash in the circuit court, and it is too late to insist upon it now, for it was waived by the plea of not guilty. *Miller v. State*, 40 Ark. 492.

The demurrer to the indictment was properly overruled. When an indictment alleges that the defendant "did unlawfully, willfully, feloniously, and of his malice aforethought, and after deliberation and premeditation, kill and murder," etc., it is not necessary also to allege that the killing was "malicious," or to use the word "malicious" in addition to the words used. The indictment in this case contains every allegation necessary under our statute to constitute a sufficient indictment for murder in the first degree. *Turner v. Sate*, 61 Ark. 359, 33 S. W. 104.

It was not error to refuse a continuance on account of the absence of witness Felts, by whom defendant claimed that he could show that McAbee had on one occasion made an unprovoked assault upon said Felts with a knife. Such assault, if made, had no connection with the killing of McAbee, and was

not competent evidence of the character of McAbee, for it could not be shown that McAbee was a man of violent and uncontrollable passion by proof of particular acts of violence having no connection with the crime under investigation. *Campbell v. State*, 38 Ark. 508; 2 Bish. Crim. Proc. § 617. Again, there is nothing in the motion or evidence tending to show that Felts was within the jurisdiction of the court, or that his attendance or testimony could have been procured by a continuance of the case. Neither can we say that the court should have allowed defendant further time to prepare for his trial. It may be that the time allowed Hamilton to prepare for his defense was shorter than customary, but we cannot say that more time was necessary. The killing occurred in a neighborhood where both himself and McAbee were well known. No one besides McAbee and Hamilton was present at the killing. Hamilton was the only living witness of the tragedy, and it was largely a question of whether or not the jury would believe his version of the facts. So far as we can see, every fact tending to throw light on the transaction was presented to the jury. If counsel for defendant had little time after they were retained to prepare for trial, it was mainly the fault of defendant. He was arrested and confined in jail on this charge for several weeks before the court convened, and no reason is shown why he could not have employed counsel earlier than he did. It may be true that there was no urgent reason for calling a special term to try this case. As the regular term was near at hand, it might have been less expensive to the public, and as well in other respects, to have allowed the case to pass till that time; but that was a question within the discretion of the circuit judge, with which we see no reason to interfere. We must repeat the settled rule that motions for continuance are addressed to the sound discretion of the trial judge, and a refusal to grant such a motion is not ground for new trial, unless it clearly appears to have been an abuse of such discretion, and manifestly operated as a denial of justice. *Thompson v. State*, 26 Ark. 326; *Edmonds v. State*, 34 Ark. 726; *Jackson v. State*, 54 Ark. 244, 15 S. W. 607; *Price v. State*, 57 Ark. 167, 20 S. W. 1091.

Neither the dismissal by the circuit court of a juror from the regular panel on account of the feeble state of the juror's health, nor the rejection of two of the talesmen because they had formed opinions, requires any consideration here, for those matters were clearly within the discretion of the court. *Hurley v. State*, 29 Ark. 22; *Wright v. State*, 35 Ark. 641; *Mabry v. State*, 50 Ark. 498, 8 S. W. 823; *Vaughan v. State*, 58 Ark. 361, 24 S. W. 885.

It is said that the court, against the objection of the defendant, permitted the jurors to separate before the case was finally submitted to them. This also was a matter within the discretion of the court. *Sand. & H. Dig. § 2238*. But in *Johnson v. State*, 32 Ark. 309,

it was remarked by this court that "such discretion should be exercised, especially in trials for felony, with the utmost caution." The great interest usually taken by the public in trials for offenses punishable by death, and the danger that either the state or defendant may suffer prejudice from such separation of the jurors, make it, in our opinion, rarely prudent for a court to permit such separation in trials for capital offenses, when either the counsel for the state or defendant objects. It is not always easy in such a case to ascertain the influences to which a separation has subjected the jurors. For this reason, as the defendant objected to the separation of the jurors, we believe that it would have been better to have kept them together. But as the statute leaves this matter to the discretion of the circuit court, and as there is nothing to show that the defendant was prejudiced by the separation, the exception must be overruled, and a new trial on that ground refused.

Another contention is that the court wrongfully permitted witnesses, who described the appearance of certain tracks made by some one near where the body of deceased lay, to state that these tracks appeared to have been made by a man while squatting, and to indicate opinions as to the position of the man at the time he made the tracks. It is said that these witnesses got off the stand, squatted, extended their arms and hands, and held themselves in position as if firing a gun; thus intimating to the jury their opinion upon a material point in the case. But the record does not support this contention. It is true that after the testimony of several of the witnesses about these tracks follows this statement, in parenthesis, "Here witness demonstrated to the jury;" but what or how he demonstrated is not shown. The record does not show that the defendant or his counsel made any objection to these demonstrations. No exceptions were saved, nor is the matter referred to in the motion for new trial, and it cannot be considered here. *Johnson v. State*, 43 Ark. 391; *Werner v. State*, 44 Ark. 122.

The contention that the presiding judge did not, in his charge to the jury, sufficiently define murder in the second degree, cannot avail. He read the statutory definitions of the different degrees of homicide, and the punishment therefor. In addition thereto, he gave instructions defining murder in the first degree and voluntary manslaughter, and the following instruction: "If you are satisfied beyond a reasonable doubt that defendant is guilty of murder in some degree, but entertain a reasonable doubt as to the degree, you will convict only of murder in the second degree. If you are satisfied beyond a reasonable doubt that defendant is guilty of some grade of criminal homicide, as explained in these instructions, but entertain a reasonable doubt as to whether it is manslaughter or some degree of murder, you will convict only of manslaughter. If you entertain a reasonable doubt as to whether defendant

is guilty of any degree of criminal homicide, explained in these instructions, you will acquit the defendant." As the circuit judge had defined the crime of murder in the first degree, it is clear that, had the jury entertained a reasonable doubt as to whether defendant was guilty of that degree of homicide, they would have returned either a verdict of some lower degree of homicide, or of not guilty. If there was any defect in the charge on this point, we think that no prejudice resulted to the defendant. In addition to this, it may be said that neither of the instructions requested by defendant contained a satisfactory definition of murder in the second degree. He should have presented a correct instruction if he desired one to be read to the jury on this point.

The contention that the presiding judge, some time after the jury had retired, recalled them, and read to them a single instruction, defining murder in the first degree, is not supported by the record. The record does show that, after the case was submitted, the jury came in on their own motion, and requested the judge to repeat the instructions, which he did, and also added two other instructions, touching on the question of motive and the failure of the defendant to flee. Both of these instructions were favorable to defendant, and not in any way prejudicial.

It is further contended that the presiding judge erred in telling the jury that they had the right, in considering the testimony of the defendant, to take into consideration his interest in the result of the verdict, in order to determine the proper weight to be given to his testimony. It is unnecessary to set out this instruction, for it is admitted that it states the law correctly, and it is a copy of one given in *Vaughan v. State*, 58 Ark. 353, 24 S. W. 835. But it is said that the defendant was prejudiced by being thus singled out from the other witnesses. We think that this contention is not tenable. In the first place, a defendant on trial is already singled out by the indictment and the fact that he is on trial and directly interested in the result. His position in the trial has already singled him out, and for this very reason it may be necessary in some cases to give an instruction on this point. To illustrate, let us suppose a case in which an attorney for a defendant, who has testified, argues to the jury that the defendant, of all men, best knows the motives that prompted the act under investigation, and that the greatest weight should be attached to his testimony. Let us suppose that the attorney for the state, looking at the matter from another standpoint, argues for his side that a defendant accused of a high crime, especially one accused of a capital offense, and whose life depends to some extent on his own testimony, has such a strong inducement to protect himself, if necessary, at the expense of the truth, that his testimony is en-

titled to little, if any, weight, and that the jury should disregard it entirely. This is no far-fetched supposition. Attorneys have the right to argue the weight to be attached to the testimony of witnesses, and such arguments are often heard in the trial courts. What is the presiding judge to do in such a case? Is he to sit silent, and allow the jury to adopt the advice of that attorney in whom they have the most confidence, or whose views they feel most inclined to follow? We do not think so. It is the duty of the judge to instruct the jury in the rules of law by which the testimony is weighed and its credibility tested. These rules are simple, and can be easily stated in a way to prejudice no one. The defendant has the right to testify, and the jury should give his testimony the same impartial consideration that they accord to the testimony of other witnesses. They should not arbitrarily disregard what he testifies, simply because he is the defendant; nor, on the other hand, are they required blindly to receive a fact as true because he says that it is true; but they are to consider his testimony in connection with the other facts in proof, in order to determine whether his statements are true and made in good faith, or made only to avoid conviction. The jury are the exclusive judges of the weight of such testimony. In considering the degree of credit to be given it, they may take into consideration his appearance and manner while testifying, the reasonableness or unreasonableness of his statements, and his interest in the result of the verdict. After a due consideration of his testimony in connection with the other evidence in the case, they should give it such weight as they may deem it entitled to receive, their sole object being to ascertain the truth. We do not see that an instruction on this point would prejudice either the state or defendant, but, as jurors are not always highly intelligent, it might in some cases avoid confusion in their minds, and tend to promote the ends of justice. Take the case at bar: The defendant was the only eyewitness of the killing. Was it not proper for the jury to understand clearly that, although no other witness saw or could give the details of that tragedy, yet that they were not bound to take his statements as true, and that it was their duty to determine whether such statements were true or false after a careful consideration thereof in connection with the whole evidence? If it was necessary for them to have this information, it was then not improper for the judge to give it to them. It is true that the judge should be careful not to intimate an opinion as to the weight of the testimony. Such an instruction should be both carefully drawn and read; otherwise, prejudice may result. A high and important trust is imposed by the law upon our circuit judges in this as in many other respects,—that, under all circumstances, they secure to the defendant, as

well as the state, a fair and impartial trial, without favor or prejudice. Of each of them, as of Lord Chief Justice Holt, it should be truly said that the criminal before him knew that "his judge would wrest no law to destroy him, nor conceal any that would save him." But while, above all men, the judge presiding at a criminal trial should be impartial, yet great injury may be done by restricting his powers too closely. The law must be enforced. "If," says Judge Dillon, "we are to expect satisfactory verdicts, the presiding judge must, in his charge, make the way of the jury plain and clear, and he must have the power, as well as the legal ability, to do this." Dill. Laws Eng. & Am. 127. While it may be possible to draw an instruction on this point in language more apt than the one given in this case, yet that instruction is copied from one given in the case of *Vaughan v. State*, 58 Ark. 362, 24 S. W. 885, which was held not erroneous. The same ruling was made in *Jones v. State*, 61 Ark. 102, 32 S. W. 81. Although some doubts as to the propriety of such an instruction were expressed in *Vaughan v. State*, still we all agree that no error was committed by giving such instruction, while a majority of the judges are of the opinion that it was proper and right to give such an instruction in this case. The decided weight of judicial opinion, as we believe, supports this conclusion. *Jones v. State*, 61 Ark. 102, 32 S. W. 81; *People v. Calvin*, 60 Mich. 123, 26 N. W. 851; *People v. Knapp*, 71 Cal. 10, 11 Pac. 793; *State v. Sterrett*, 71 Iowa, 386, 32 N. W. 387; *State v. Maguire*, 69 Mo. 202; cases cited in *Vaughan v. State*, 58 Ark. 365, 24 S. W. 885; also, 2 Thomp. Trials, § 2445, and cases cited.

It is urged that the court did not sufficiently define the right of self-defense. But we need not discuss that question, for there is no evidence to show that defendant acted in self-defense, and nothing upon which to base such an instruction. The defendant, who testified in his own behalf, was the only witness of the killing; but he does not say that he killed McAbee to protect himself, or anything from which that fact can be inferred. On this point, he said, in his direct examination: "McAbee told me to get out of his field, and pulled out his knife, and came at me with it, waving his hand, and saying he would tear me all to pieces. I told him not to come, to stand back. At that time my gun was resting on the ground, on the butt end of the gun. He kept coming at me. So I raised the gun, and fired, when Mr. McAbee staggered, and fell backward. I then walked up in about two feet of him, and stood there a moment or so, and heard him groan a time or two." On cross-examination, he said: "There was no obstruction behind me, to keep me from retreating when the deceased was cutting at me with a knife. I stood there, and raised my gun, and shot him just as he was swaying around like this

[here defendant showed how deceased swung his arm around]. The deceased, as I raised my gun, had left the plow eight or ten feet; and I got mad when I saw he was coming at me; and, when I raised my gun, he swung around, and said, 'Look out there! What are you going to do there?' when I shot him, my gun being in four feet of him." It is to be presumed that defendant stated the facts as favorably to himself as the truth would warrant. But it is plain from his own testimony that McAbee was not at any time within striking distance of him, and that McAbee, by waving his hand and knife at defendant, was not endeavoring to cut him, but only to intimidate him, and get him to leave the field where McAbee was at work. This act of McAbee aroused the anger of Hamilton. "I got mad," he says, "when I saw he was coming at me." The most favorable view of the facts that can be taken for defendant is that he had no premeditated intention of killing McAbee, but shot him under the influence of a fit of anger, suddenly aroused by the acts and threats of McAbee in rudely ordering him from the field. Under no reasonable view of the facts could the jury have found that this killing was justifiable.

Finally, it is said that the evidence was not sufficient to support the verdict. It is argued that the state, having proved the statements of Hamilton made at the time he borrowed the gun from Dawson to the effect that he wanted it to shoot ducks, cannot now assert that those statements were false, but is bound by such statements. It is clear that this is not the law. Such statements go to the jury in connection with all other facts and circumstances in proof, and it is for them to decide whether they were true or not, and what conclusions to draw from them. The evidence, we think, was amply sufficient to support the verdict. The defendant, Hamilton, was a young man, 26 years of age. McAbee was over twice as old, with a right hand so badly crippled that it was of little use. The evidence shows that Hamilton went to McAbee's field, where McAbee was plowing, and there killed him, under circumstances which justified the jury in finding that the killing was not only unnecessary, but that it was intentional and premeditated.

Counsel for defendant say that he owned no property except 100 bushels of corn, upon which the state claimed a lien; that, on account of the penniless condition of defendant, every step taken by them was under the most adverse circumstances. The question of the right of defendant to use this corn to pay the expenses of his defense is not raised in the record or before us for decision, but we willingly bear testimony to the fidelity and energy with which counsel for defendant have striven to save the life of the unfortunate man. That their efforts in that direction have been thus far ineffectual

is, in our opinion, due to the fact that the evidence is such as to leave no question of his guilt. We are convinced that the judgment is right, and it is therefore affirmed.

**Ex parte FT. SMITH & VAN BUREN
BRIDGE CO.**

(Supreme Court of Arkansas. June 6, 1896.)

TAXATION—ASSESSMENT—EQUALIZATION.

Const. art. 16, § 5, provides that all property shall be taxed according to its value, "that value to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform," and that "no one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value." Sand. & H. Dig. §§ 6498, 6499, require assessors to assess all real property "at its true market value in money." Sections 6526 and 6530 declare that the board of equalization shall raise the valuation of such tracts as have been returned by the assessor below their true value, and may reduce the valuation of such tracts as have been returned above their true value, "as compared with the average valuation of the real property of the county." *Held*, that the real property in the county having been assessed at one-half its market value, with but few exceptions, and the board having refused relief, the court, on appeal to it from the board, should reduce the valuation of the other real property to the same basis, though it had not been valued at more than its actual value.

Appeal from circuit court, Crawford county; Jephtha H. Evans, Judge.

The Ft. Smith & Van Buren Bridge Company appeals from a judgment refusing to reduce the valuation of its property for taxation. Reversed.

L. F. Parker and B. R. Davidson, for appellant. E. B. Kinsworthy, Atty. Gen., for appellee.

BATTLE, J. The Ft. Smith & Van Buren Bridge Company owns a bridge over and across the Arkansas river, one half of which is in Sebastian, and the other in Crawford, county. The assessor assessed the half of it in Crawford, for the year 1895, at \$150,000. The bridge company then complained to the county board of equalization of excessive valuation, and asked that the assessment be reduced to \$75,000; and the board reduced it to \$125,000, and refused to make any further reduction. The bridge company then appealed to the county court, and it refused any relief, and then appealed to the circuit court, and, it refusing to reduce the valuation, appealed to this court.

The evidence adduced at the trial in the circuit court proved the facts we have stated, that \$240,000 or \$250,000 was a fair market price for the entire bridge, and that the basis on which the board of equalization of Crawford attempted to equalize the assessment of all real estate in that county for 1895 was 50 per cent. of its actual value; that is to say, made the assessed or taxable value of such property one-half of what it was actually

worth. Appellant contends that, under the circumstances, the assessment of one-half of the bridge should have been reduced, according to its request, to \$75,000.

The theory of our constitution is that the burden of the support of the government should be borne by common contributions. Taxation is the principal means provided for this purpose. To make this burden equal, all property subject to taxation is required to be taxed according to its value, "that value to be ascertained in such manner as the general assembly shall direct, making the same equal and uniform throughout the state"; and the constitution provides that "no one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value." Const. art. 16, § 5.

To carry into effect the constitution in this respect the general assembly has enacted statutes making it the duty of the assessors of the counties in this state to assess all real estate "at its true market value in money" (Sand. & H. Dig. §§ 6498, 6499), and to prevent unjust discrimination, and to make the burden of taxation equal and uniform, enacted statutes which require the appointment of a board of equalization for every county in this state, whose duty it is to hear complaints of property owners, and to equalize the valuation of all property, personal and real. In the discharge of this duty the board is required to observe the following rules:

"First. It shall raise the valuation of such tracts and lots of real property as in the opinion of the board have been returned [that is, by the assessor] below their true value to such price or sum as may be deemed to be the true value thereof, agreeably to the requirements of this chapter in regard to the valuation of real property. Said board may actually enter upon and view property when they are not fully satisfied of its true value.

"Second. It may reduce the valuation of such tracts or lots as in the opinion of the board have been returned above their true value, as compared with the average valuation of the real property of such county, having due regard to the relative situation, quality of soil, improvements and natural and artificial advantages." Sand. & H. Dig. §§ 6526, 6530.

According to the first of these rules, it is the duty of the board to raise the valuation of all real property, which has been undervalued, to its true value; and, according to the second, it is authorized to reduce the valuation of that which has been "returned above its true value, as compared with the average valuation of the real property of the county." From the two it is apparent that the board has no authority to discriminate against one tract or lot of real estate in favor of all other property of the same kind in the county. All property of the same class should be valued according to the same standard, and that should be the market value. But in the event the assessor has not done this, and the board

finds that he has made exceptions to his rule of valuation, and assessed the real estate of a few higher than that of the majority of the property owners, the statute authorizes it to reduce the assessment of the few by valuing their property according to the rule by which such property of the majority was assessed. Whether the statute, in this respect, is constitutional, it is not necessary at this time to determine. One thing is clear, however; and that is, the assessor and board have no right to make discriminations in the assessment and equalization of the valuation of property.

The real property of Crawford county, with few exceptions, was assessed, it appears, for 1895, at one-half of its market value. The bridge of appellant was one of the exceptions. The board refused relief against this wrong, and its owner appealed to the county court. Was it entitled to relief? It may be said that, inasmuch as its property was not assessed above its true value, it had no right to complain. But this is not true. It had the right to demand that no unequal burden be imposed upon it by taxation. *Investment Co. v. Charlton*, 32 Fed. 194. The duty to contribute to the support of the state government by the payment of taxes is imposed upon all persons owning property subject to taxation. The constitution provides that this burden shall be apportioned among them according to the value of their property, to be ascertained as directed by law. When, therefore, the property of a few is taxed according to its value, and of all others at one-half its value, then the few are required to contribute double their portion of the burden. This is manifestly a wrong, and justice demands that it be redressed whenever it can be done conformably to the laws.

When the Ft. Smith & Van Buren Bridge Company, in the exercise of the right conferred upon it by the statute, appealed from the board, the county court, to which it appealed, thereby acquired jurisdiction over the valuation or assessment of the bridge, and the authority to grant any relief to which the company may be entitled. Was it entitled to any?

Judge Cooley says: "For a merely excessive or unequal assessment, where no principle of law is violated in making it, and the complaint is of an error of judgment only, the sole remedy is an application for an abatement, either to the assessors, or to such statutory board as has been provided for hearing it. The courts, either of common law or of equity, are powerless to give relief against the erroneous judgments of assessing bodies, except as they may be specially empowered by law to do so. * * * The grounds on which one should have an abatement are not such as arise on a consideration of his assessment, considered by itself; but they may include the assessment of others, so far as, by reason of their not being what they should be, they affect him injuriously. One may therefore justly claim an abatement of an assess-

ment which, considered by itself, is not too high, if those of others are relatively and purposely made too low." *Cooley, Tax'n* (2d Ed.) pp. 748, 751.

But can one be entitled to an abatement of an assessment which, considered by itself, is not too high, under any circumstances, when the constitution and statutes require all property to be assessed and taxed at its true value? "In *Cummings v. Bank*, 101 U. S. 153, it appeared that the officers of Lucas county, Ohio, charged with the valuation of property for the purposes of taxation, adopted a settled rule or system by which real estate was estimated at one-third of its true value, ordinary personal property about the same, and moneyed capital at three-fifths of its true value. The state board of equalization of bank shares increased the valuation of them to their full value. Upon a bill brought by the Merchants' National Bank of Toledo against the treasurer of the county in which the bank was established, to enjoin him from collecting taxes assessed on the shares of the stockholders, payment of which was demanded of the bank under the law, it was held that the rule or principle of unequal valuation of the different classes of property for valuation adopted by the board of assessment was in conflict with the constitution of Ohio (article 12, § 2), which declares that 'laws shall be passed taxing by a uniform rule all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and, also, all the real and personal property according to its true value in money,' and worked manifest injustice to the owners of shares in national banks, and that the bank was therefore entitled to the injunction against the illegal excess, upon payment of the amount of the tax which was equal to that assessed on other property. That decision was rendered upon a disregard by the assessing officers of a rule prescribed by the constitution of the state." *Stanley v. Supervisors of Albany*, 121 U. S. 551, 7 Sup. Ct. 1234; *Bank v. Kimball*, 103 U. S. 732; *Cooley, Tax'n* (2d Ed.) 784.

In *Cummings v. Bank* the court did not deny relief because the plaintiff's property was assessed at its true value, but relieved it of the unequal burden imposed upon it contrary to the constitution, by enjoining the collection of so much of the tax as was in excess of the amount of that assessed on other property of the same value. The relief granted was equivalent to superseding, before the levy of taxes, so much of the assessment as rendered it unequal, for without the assessment the tax is void. The right to grant the other relief is based on the same principle. For the same reason that the injunction was granted in *Cummings v. Bank*, the equivalent can be granted in a proper case by a court of competent jurisdiction, the object of the two remedies being the same.

In this case the county court acquired jurisdiction, by the appeal of the bridge company,

to grant relief from the illegal, erroneous, or unequal assessment of appellant's property, but did not acquire the right or authority to make the valuation of all real property in the county, for the purposes of taxation, in all cases in which it had not been done, the true value, by raising it, or to change the valuation of any property except the bridge. The assessment of no property can be increased without notice first given to the owner by the board of equalization. Sand. & H. Dig. § 6520; Pulaski Co. Board of Equalization Cases, 49 Ark. 518, 6 S. W. 1. How, then, was the county court to afford relief to appellant? The only relief it could have afforded was to reduce the valuation so as to make it conform to the standard adopted in the valuation of the other real property in the county, or the average valuation of such property. Why should not this relief be granted? The valuation of property is only a constitutional means adopted for the purpose of making the burdens of government bear upon each taxpayer in proportion to the value of his property. The relief suggested accomplishes that end in this case. By granting it a constitutional right will be enforced, and by denying it will be withheld, because the means devised for its enforcement were not adopted. By pursuing the latter course the constitution will be made the means of defeating itself, by the imposition of unequal burdens. To avoid this result, the relief should be granted.

In assessing and equalizing the value of bridges, buildings, structures, and improvements on lands, the assessors and boards are governed by the same rules; they being real property, as defined by the revenue laws of this state. Sand. & H. Dig. § 6401.

As the assessment of the real property of Crawford county for 1895 was purposely equalized at one-half of its market value, so the valuation of one-half of the bridge of appellant should have been reduced by the county court to \$75,000, as the owner requested; that being fully as much as, or more than, one-half of its market value.

The judgment of the circuit court is therefore reversed, and the cause is remanded, with directions to reduce the valuation of the bridge, for assessment for 1895, to \$75,000, and for other proceedings.

MARTHALL v. STATE.

(Court of Criminal Appeals of Texas. Dec. 12, 1894.)

ASSAULT WITH INTENT TO RAPE.

A conviction of assault with intent to rape cannot be sustained on evidence that defendant, with person exposed, stepped in front of prosecutrix, and said to her, as she undertook to return home, "No, you don't," and that he then followed her as she turned back, he being at no time nearer than four steps from her, and having no other means than his hands by which to make an assault; Pen. Code, § 489, subd. 3,

declaring that one who is so great a distance from the person assailed that he cannot reach her person by use of the means employed is not guilty of an assault.

Appeal from district court, Erath county; J. S. Straughan, Judge.

George Marthall appeals from a conviction. Reversed.

N. L. Cooper, for appellant. R. L. Henry, Asst. Atty. Gen., for the State.

DAVIDSON, J. This conviction was for assault with intent to rape. About 1 o'clock in the evening, while en route to a neighbor's, the prosecutrix was passing a bluff of the creek, when appellant suddenly approached her, with his person exposed. She ran a short distance, turned, and sought to return home, when appellant stepped in front of, and said to her, "No, you don't." They were four steps apart. She then pursued her journey in the direction of and to her neighbor's residence. Appellant followed slowly, until she approached some timber. As she reached the timber, she ran, and was rapidly pursued until she reached and entered the inclosure of Mrs. Ridgway, where appellant stopped. At this point he approached within about six steps of the prosecutrix. When she reached the timber she was about 100 yards in advance of her pursuer. He displayed no arms, and the only means by which he could have made an assault was his hands. His defensive theories were alibi and mistaken identity, and his contention here is, the want of sufficient testimony to sustain the conviction.

This appeal hinges primarily upon the sufficiency of the evidence to show that an assault was committed. Where an attempt is made to execute an intention which falls short of its consummation, a crime is committed. Upon this proposition the authorities are practically unanimous. This is true also under our Penal Code. As this issue was not submitted under the charge on the trial, we pretermitt a discussion of the question. The testimony excludes the idea that a battery was inflicted. Do the facts show an assault? We think not. An assault, under our Code, is "any attempt to commit a battery, or any threatening gesture showing in itself, or by words accompanying it, an immediate intention, coupled with an ability to commit a battery." Pen. Code, art. 484. In order to constitute his acts an assault, appellant must have been within such distance of the prosecutrix as to place it within his power to commit a battery upon her by the use of the means with which he attempted it. Pen. Code, art. 489, subd. 2. If he was at such a distance from her as that he could not reach her person by use of the means employed, he is not guilty of an assault. Pen. Code, art. 489, subd. 3. Now, what were the means employed by appellant? The record is silent upon the question. He was at no time nearer her than four steps. He stepped in front

of, and said to her, as she undertook to return home, "No, you don't." He did not even then seek to take hold of her, though nothing prevented his doing so. He could not have possibly reached her person with any portion of his body. We are not to be misunderstood as holding that, if he had been in a position to commit the battery, he would not be guilty of assault to rape. In order to constitute the offense of assault with intent to commit the crime of rape, it is essential that an assault be made, and this must be coupled with an intent to ravish. It has been held that the chasing by a man of a woman who is alone in a private place does not necessarily raise an inference of an intent to rape. *State v. Donovan*, 81 Iowa, 369, 16 N. W. 206. It has been held in this state that where the accused entered the room of the prosecutrix, and called her by her given name, and, when she screamed, fled, this was not sufficient to support a conviction for an assault with intent to rape. *Carroll v. State*, 24 Tex. App. 366, 6 S. W. 190. And this court recently held that where the defendant entered the bedroom and touched the foot of the prosecutrix, and, being discovered, fled, it was not sufficient to constitute this crime. *Mitchell v. State*, 33 Tex. Cr. R. 575, 28 S. W. 475. See, also, *Steinke v. State*, 33 Tex. Cr. R. 65, 24 S. W. 909, and 26 S. W. 237; *Fields v. State* (Tex. App.) 24 S. W. 907. It is beyond our province to deal with moral turpitude when not constituting a crime, and we have no offenses in this state other than as prescribed by the Penal Code. However outrageous or shocking to the more refined sensibilities of our nature the conduct may be, such facts do not constitute crime, and are not the subject of legal punishment unless denounced by the lawmaking power as being criminal, and a punishment therefor has been prescribed. Offenses, in this state, are the result of legal enactment, and not of violated moral ethics. The judgment is reversed, and cause remanded. Reversed and remanded. Judges all present and concurring.

KENNEY v. LANE.

(Court of Civil Appeals of Texas. Dec. 12, 1894.)

MASTER AND SERVANT—VICE PRINCIPAL—MISFEASANCE—LIABILITY TO EMPLOYEE.

An agent in charge of the repairing of a bridge, who, with notice of the danger, authorized iron pillars to be rolled on rollers resting on pieces of timber stretched over the crossbeams before the floor was laid, was liable to an employé as to whom he was a vice principal, and who had no notice of danger, for injuries sustained by one of the rollers slipping out, and falling through the crossbeams upon him while working beneath.

Appeal from district court, Tarrant county; P. S. Greene, Judge.

Action by C. W. Kenney against C. R. Lane

for personal injuries. From a judgment for defendant, plaintiff appeals. Reversed.

R. J. Boykin and W. Erskine Williams, for appellant. W. B. Ford, for appellee.

HEAD, J. The Lane Bridge Company had a contract to repair a bridge for the city of Ft. Worth, and appellee was its agent, having full charge of the work. Appellant was an employé engaged upon the work under appellee. The bridge where the work was being done had crossbeams about two feet apart, but no floor; and the iron pillars were being rolled upon wooden rollers along two pieces of timber laid across these beams, when one of the rollers slipped out, and fell upon appellant, who was working immediately beneath, and inflicted upon him serious personal injuries, for which he sues appellee. It was dangerous to undertake to do the work without a floor upon the bridge, and, on the day before the accident, appellee's attention was called to this by one of the hands, but he refused to allow the defect to be remedied, and required the work to proceed as before. The court below concluded that the above facts did not render appellee liable for the injuries to appellant.

It is very generally held that an agent is not liable to third persons for his mere nonfeasance or omissions of duty in the course of his employment, but is liable for his misfeasance or acts of commission. *Labadie v. Hawley*, 61 Tex. 177; *Mechem*, Ag. §§ 569, 571; *Wood, Mast. & Serv.* §§ 324, 325a. It is, however, frequently quite difficult to determine whether the facts of a given case place it in the one or the other of these classes. Upon this subject, Mr. Mechem, in his work on Agency (section 572), says: "Some confusion has crept into certain cases from a failure to observe clearly the distinction between nonfeasance and misfeasance. As has been seen, the agent is not liable to strangers for injuries sustained by them because he did not undertake the performance of some duty which he owed to his principal, and imposed upon him by his relation, which is nonfeasance. Misfeasance may involve also, to some extent, the idea of not doing; as where the agent, while not engaged in the performance of his undertaking, does not do something which it was his duty to do under the circumstances,—does not take that precaution, does not exercise that care, which a due regard for the rights of others requires. All this is not doing, but it is not the not doing of that which is imposed upon the agent merely by virtue of his relation, but of that which is imposed upon him by law as a responsible individual, in common with all other members of society. It is the same not doing which constitutes actionable negligence in any relation. Upon this distinction the language of Chief Justice Gray may be noticed to advantage: 'It is often said in the books that an agent is responsible to third persons for

misfeasance only, and not for nonfeasance. And it is doubtless true that if an agent never does anything towards carrying out his contract with his principal, but wholly omits or neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But, if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance, doing improperly." The language of Chief Justice Gray quoted by the author is taken from the opinion in *Osborne v. Morgan*, 130 Mass. 102. In the case at bar it will be noted that appellee actually entered upon the performance of the work for his employer, and it was by reason of his negligence in refusing to adopt proper precautions for the protection of those under him that the injuries were received. As to the appellant, he was the vice principal in actual charge of the work, and we think his failure and refusal to guard against this accident after the danger was called to his attention must be classed as an act of misfeasance, for which he should be held responsible. The court below, therefore, erred in holding otherwise.

We have, however, had some hesitation about reversing this case on account of the failure of the record to show a want of notice on the part of appellant of the manner in which this work was being done prior to the time he received his injuries. If he had such notice, it would seem clear, under the other evidence, that he could not recover. *Railway Co. v. Bradford*, 66 Tex. 732, 2 S. W. 595. In *Railway Co. v. Barrager*, 14 S. W. 242, our supreme court said: "The burden was upon him [the servant] to show that the company had been negligent in not supplying safe cars, and that he did not know of the alleged defects." Also, see *Railway Co. v. Crowder*, 76 Tex. 501, 13 S. W. 381, and *Id.*, 63 Tex. 503, for similar language. Without approving this statement as to the burden of proof in its application to all cases, we incline to the opinion that in view of the fact that, in making out his case, appellant disclosed that at the time of the injury he was working in close proximity to the alleged defect, and leaves the inference that it was patent and open to common observation, he should have gone further in his evidence, and relieved himself from the presumption that he had assumed the risks therefrom; and, had this been given as one of the grounds of its decision by the lower court, we would have affirmed the judgment. The point is not, however, made in the presentation of the case to

us, and it may be that the statement of facts was only prepared with the view of presenting the points decided by the trial judge; and we have therefore concluded to order a reversal. Reversed and remanded.

PRITCHETT v. NASHVILLE TRUST CO. et al.

(Supreme Court of Tennessee. Sept. 2, 1896.)
CORPORATE STOCK—REQUEST FOR LIFE—RIGHT TO STOCK DIVIDENDS.

Stock dividends, declared from net earnings, made after the death of testator, who bequeathed the stock on which the dividends were declared, for life, belong to the life tenant as income, not to the remainder-men as part of the corpus.

Appeal from chancery court, Davidson county; Thomas H. Malone, Chancellor.

Suit by Ann Pritchett against the Nashville Trust Company and others. From a decree of the court of chancery appeals reversing a decree of the chancellor for defendants, defendants appeal. Affirmed.

John Allison and E. H. East, for appellants. C. D. Berry and Vertrees & Vertrees, for appellee.

CALDWELL, J. Samuel Pritchett died, testate, at his residence, in Davidson county, on the 21st day of September, 1891. The second item of his will is in the following language: "I will, devise, and bequeath to my wife, Ann Pritchett, all the real estate I die seised and possessed of, for and during her natural life; also, one-fourth of all the balance of my estate, not including what is herein given her absolutely, for her life; and at her death the real estate and the said one-fourth of the balance of my estate is to be divided between my two sons, H. C. Pritchett and Samuel Pritchett, Jr., and my grandchild, Annie P. Draughan, only child of my deceased daughter, Nettie P. Draughan, share and share alike. All my household furniture, carriage, buggy, and horses are willed to my wife absolutely." One item of that part of the testator's property designated by him as "the balance of my estate" was \$100,000 of stock in the Nashville Gaslight Company; and therefore "one-fourth," \$25,000 of that stock, passed to his widow "for her life," with remainder to his two sons and his granddaughter. The will was promptly probated, and thereupon \$25,000 of the stock was transferred, by consent, to the Nashville Trust Company, to hold as trustee for the parties entitled under the second item of the will. On the 29th of June, 1892, the directors of the gaslight company declared "a cash dividend of 5%," and "a stock dividend of 10%," on the capital stock of the company, such dividends to be paid July 1 and July 15, 1892, respectively; and on the 19th of June, 1893, they declared "a stock dividend of 25%," by preamble and resolution in the following words: "Whereas,

a large amount of the net earnings of the company has been used in making permanent betterments and additions to its plant, and such profits have been withheld from the stockholders for that purpose, instead of distributing them among the stockholders as dividends; and whereas, there has been accumulated and permanently added to the value of the assets and capital of the company more than 25% of the amount of the present capital stock: Therefore, be it resolved that a stock dividend of 25% be declared payable, and distributed on July 1st, 1895, among the stockholders of the company, of record of that date, in proportion to their holdings." The first two dividends, like the third one, were declared from the "net earnings" or "profits" of the company; and each of the three dividends was based entirely upon "net earnings," or "profits" made after the death of the testator. The cash dividend upon the \$25,000 of stock, set apart for the beneficiaries of the second item of the will, was paid to the widow; and the two stock dividends thereon were turned over to the Nashville Trust Company, which held the \$25,000 of original stock, as trustee. The first of the stock dividends amounted to \$2,500, being 10 per cent. on \$25,000; and the second one amounted to \$6,875, being 25 per cent. on \$27,500 (\$25,000 plus \$2,500), the amount of the original stock with first stock dividend added. The two stock dividends aggregated \$9,375, and the certificates or shares issued therefor constitute the subject-matter of the present litigation. The widow claims to own those certificates or shares absolutely, as a part of the income of the \$25,000 of stock bequeathed to her for life; and the remainder-men claim to own them as capital, and say that she is entitled only to receive cash dividends thereon as on the \$25,000 of original stock. In view of this controversy, the Nashville Trust Company refused to surrender the stock dividends to the widow; and, upon that refusal, she brought this suit in equity against all proper parties. The chancellor ruled in favor of the remainder-men, and decreed "that said two stock dividends go to the corpus, and that the life tenant will be entitled to all cash dividends upon the stock thus increased." The court of chancery appeals reversed the decree of the chancellor, and adjudged the stock dividends to be the absolute property of the life tenant, as a part of the income of her life estate in the original stock.

The precise question is this: Which of the two, the life tenant or the remainder-man of corporate stock bequeathed, is the ultimate owner of stock dividends, declared from net earnings, made after the respective rights of the two persons attached to the original stock? Do such dividends belong absolutely to the life tenant as income, or do they form a part of the corpus, and pass to the remainder-man as such? This question, in one form and another, has perplexed the courts for a century;

and numerous adjudged cases are found in support of either view. The learned chancellor followed one line of decisions, and the learned court of chancery appeals followed the other, both recognizing the irreconcilable conflict of authority. This case, as we believe, is relieved of much difficulty when it is considered that the controversy is solely between the life tenant and the remainder-men, and that no prerogative of the gaslight company is involved. The question is one of ownership merely, and concerns only those claimants. The corporation is not a party to the suit, and cannot be affected by the result. If the purpose of the bill were to compel the corporation to undo what it has done, and disburse in cash the net earnings represented by the two stock dividends, instead of using them to increase its capital stock, the complainant would have no standing in court; for a corporation, so long as it acts in good faith and within its charter powers (and there is no claim that this corporation has done otherwise), is rightfully allowed to decide such matters for itself without let or hindrance from any source. Undoubtedly, the action of the gaslight company in converting net earnings into capital stock gave them that character and status for all corporate purposes. But did it have any legal effect beyond that? Does it follow that they were converted into technical corpus as between the life tenant and the remainder-men, owning a portion of the original stock? We think not. When property is given to one person for life, with remainder to another, the former is entitled to the use for the period limited, and the latter to the corpus after that time. Neither may encroach upon the right of the other. The life tenant may not diminish the corpus, nor the remainder-man the use; and what they may not do themselves others may not do for them. The life tenant may not be deprived of the use to augment the corpus, nor the remainder-man of the corpus to augment the use. The right to the use of the property entitles the life tenant to its net income. As applied to land, it entitles him to the crops or rent; as applied to money or bonds, it entitles him to the interest; and, as applied to corporate stock, it should, upon the same reasoning, entitle him to the net earnings. If the life tenant may not be deprived of crops or rents to make the land better, or of interest to enlarge the corpus of money or bonds, why should he be deprived of net earnings of corporate stock, covered by stock dividends, to augment the remainder estate? It does not seem to us a sufficient answer to say that the corporation in the latter case has seen fit, in the due exercise of its power, to capitalize such earnings, rather than pay them out in cash dividends. What has the capitalization of the earnings to do with their ownership as between life tenant and remainder-man, or how can the change of form affect the title of those persons? Can the corporation, after earnings have been made and ascertained,

give them to one person by this procedure, or to another by that procedure? Certainly not. Though endowed with the largest discretion in the honest management of its business, and allowed, at pleasure, to convert its net earnings into capital stock through the medium of stock dividends, a corporation cannot by that act, in our opinion, turn any portion of those earnings from the life tenant to the remainder-man of original stock. The life tenant of corporate stock is entitled to the undiminished benefit of its net earnings in any and every contingency. Less than that would not allow him the full use of the life estate. He has, at least, an inchoate interest and title in and to such earnings from the inception of his estate, and that interest and title reaches full maturity and becomes absolute when the corporation sees fit, in the course of its affairs, to cover those earnings by dividends, in whatever form. If the dividends be paid in cash, he takes that, and, if in stock, he takes that. Why should not this be so? It is certainly just to the persons interested, and fair to the corporation. By it the prior rights of the former are not altered, the business processes of the latter are not interrupted. The remainder-man was entitled in the first instance to the enjoyment of the corpus of the original stock in due season. He is still entitled to that without diminution. And the life tenant has only the net earnings.

The testator did not disclose any specific intention in respect of the particular matter involved in this controversy. He did not even mention the \$25,000 of corporate stocks, or the dividends to accrue thereon. Nevertheless, it is conceded that he disposed of both, and we think it hardly to be doubted that the disposition herein indicated is the one in accord with his general intention. He employed the most general terms to create a life estate, with remainder over, disposing of both real estate and personal property in the same sentence, by the same words, and without condition or qualification. The measure of the life tenant's interest in the realty devised is the same as that of her interest in the personalty bequeathed, and vice versa. Nothing is excepted, nothing reserved, from either. It follows, as a matter of law, that she is entitled to the full use of each, according to its nature, so long as she may live; and no impairment of that use should be sanctioned by the courts in the one case or the other. Present enjoyment is the very essence of a life estate. Without it the gift would be meaningless and worthless. Special words were not necessary to vest the life tenant in this case with a right to stock dividends. The general bequest had that effect. Special words would have been necessary to deprive her of them, just as special words would have been required to deprive her of income on realty devised. Had the testator lived, these stock dividends would, unquestionably, have been income to him upon his investment in the original shares. Having died, they were, for the same reason, in-

come to his estate, as owner of the same investment. The income of that part of his estate during her life was bequeathed to his widow. Hence she, as life tenant, became the owner of these dividends, in as full a sense as he would have owned them.

Notwithstanding the impossibility of harmonizing the conflicting decisions upon any common ground, so as to discover an agreed principle upon which to rest this case, it may be well to mention some of the leading authorities.

The earlier English cases seem to have turned upon the question as to whether the controverted dividend was usual and ordinary, or unusual and extraordinary. If the former, it was given to the life tenant; if the latter, to the remainder-man. The earliest of those cases is that of *Brander v. Brander*, 4 Ves. 800, decided in 1799. It there appeared that the Bank of England had paid out £1,000,000 for the public service, and received therefor £1,125,000 5 per cent. annuities, which annuities were, by resolution of the bank, divided proportionately among the proprietors of the stock of the bank. Of the annuities so divided, £1,000 were assigned to stock bequeathed to one person for life, with remainder to another. The lord chancellor adjudged the annuities to be "an accession to the capital," and allowed the life tenant only "the benefit of the dividends" thereon. *Id.* 801, 802. That case was soon followed by *Irving v. Houstoun*, 4 Paton, App. 521. The English judges themselves confess much difficulty in discovering "the principle" upon which those decisions were made. *Paris v. Paris*, 10 Ves. 189; *Bouch v. Sproule*, 12 App. Cas. 393. In *Paris v. Paris*, supra, the Bank of England declared two cash dividends in the same month, one for £3. 10s. per cent., and the other for £5 per cent., upon the capital stock of the bank. The first dividend was the usual and ordinary one for the half year. The second was unusual and extraordinary, although made from a part of the same profits. The latter, because unusual and extraordinary, was by the court considered as capital, and not the absolute property of the tenant for life. It was suggested in argument that there was an important difference between dividends in stock and dividends in cash, and, therefore, that the case in hand should not be controlled by the ruling in *Brander v. Brander*, supra, and *Irving v. Houstoun*, supra. To this suggestion, Lord Eldon replied: "As to the distinction between stock and money, that is too thin; and if the law is that this extraordinary profit, if given in the shape of stock, shall be considered capital, it must be capital if given as money." 10 Ves. 190. In *Bouch v. Sproule*, supra, decided in 1837, the *Consolidated Iron Company, Limited*, was shown to have accumulated a large "reserve fund" and an "undivided profit fund," from which combined it declared "a bonus dividend," which, according to the company's scheme,

the holders of existing shares invested in new shares, issued concurrently with the payment of the dividend. The estate of William Bouch owned 600 of the existing shares, and, by the process mentioned, became the owner of 200 new ones. The 600 existing shares had been bequeathed to the widow of William Bouch for life, with remainder over. After her death, a controversy arose between her executor and the remainder-man as to the ownership of the 200 new shares. The case finally reached the house of lords, and was there decided against the estate of the tenant for life. Lord Herschell, though confessing the question to be one "of very considerable difficulty," after reviewing prior decisions, said: "I quite agree with the court below that, apart from the authorities to which I have alluded, the general principle for the determination of such a question as that before us, and, in my opinion, the only sound principle, is that which is well expressed in the judgment of Lord Justice Fry: 'When a testator or settlor directs or permits the subject of his disposition to remain as shares or stocks in a company which has the power either of distributing its profits as dividends, or of converting them into capital, and the company validly exercises this power, such exercise of its power is binding on all persons interested under the testator or settler in the shares; and consequently what is paid by the company as dividend goes to the tenant for life, and what is paid by the company to the shareholder as capital, or appropriated as an increase of the capital stock in the concern, inures to the benefit of all who are interested in the capital.'" And, finally, interpreting the transaction out of which the new shares arose, he added: "Upon the whole, then, I am of opinion that the company did not pay, or intend to pay, any sum as dividend, but intended to, and did, appropriate the undivided profits dealt with as an increase of the capital stock of the concern." 12 App. Cas. 397-399. We entirely agree that the authorized action of the company in respect to the disposition of its profits "is binding on all persons interested" in its shares, but are unable to see that it follows as a consequence that the tenant for life does not own new shares, paid for with capitalized profits of his or her estate. The company must have full liberty in the conduct of its own affairs; hence all persons interested are bound by its authorized action. But the company does not intend to say by an increase of capital from profits that the new shares shall belong to the remainder-man as corpus, rather than to the life tenant as income. It has no possible interest in that question, and no power, in our opinion, to control or influence title and ownership. Beyond the matter of corporate policy and expediency, the power of the company does not extend.

The latest of the numerous English cases examined by us was decided in 1890. In that case the Kempton Park Race-Course Compa-

ny, Limited, declared and paid in money a "dividend," a "bonus," a "special bonus," and an "interim dividend," partly from yearly profits, and partly from "reserve fund." The court adjudged the names of the distributions, and the fact that they were made partly from "reserve fund," to be wholly unimportant, and gave the life tenants that part of the whole amount divided which was apportioned to the shares settled upon them. In re Alsbury (Sugden v. Alsbury), 45 Ch. Div. 237. This case affirmed the soundness of the decision in Bouch v. Sproule, supra, upon its own facts, but the two cases were distinguished upon the ground that the profits of the company had actually been capitalized in the one case, and not in the other.

The American adjudications may be ranged in two lines, one favorable to the remainder-man, and the other favorable to the life tenant. The leading, though not the oldest, case of the former line, is that of Minot v. Paine, 99 Mass. 101, which is headnoted as follows: "If a fund held in trust to pay the income to one until his death, and then convey the capital to another, includes shares in the stock of a corporation, shares of additional stock distributed to the trustees as a lawful dividend thereon accrue as capital, although they represent net earnings of the corporation." In the course of the opinion it was observed: "The court do not regard the fact that the dividends were made from the net earnings of the roads as material." And, again: "A simple rule is to regard cash dividends, however large, as income, and stock dividends, however made, as capital." 99 Mass. 106, 108. Undoubtedly, the rule thus suggested possesses the merit of being plain and easily applied; yet it may in some cases be an instrument of great injustice. We think its application will do injustice in every instance where net earnings accruing after the creation of the trust estate are converted into stock dividends, or original capital into cash dividends; since, in our opinion, such earnings, whenever distributed in stock or cash, belong absolutely to the life tenant, and such capital, whenever returned in the form of cash dividends, belongs to the remainder-man. The former course is frequently pursued; the latter, now and then. A forcible illustration of the injustice of the rule in the latter view is found in the case of Heard v. Eldredge, decided four years later by the same court (109 Mass. 258); and, in an opinion by the same learned judge, its injustice, as applied to the facts of that case, was recognized, and the dividend, though in cash, was denied the life tenant, and given to the remainder-man, as should have been done. The headnote, which sufficiently states the decision, is: "Money paid to compensate a corporation, whose property consisted of a wharf and dock, for part of its real estate taken by right of eminent domain, if distributed as a dividend to the shareholders, belongs to the capital, and not to income of a trust fund in-

vested in the shares." 109 Mass. 258. *Rand v. Hubbell*, 115 Mass. 461, is very similar in its facts to the English case of *Bouch v. Sproule*, supra, there being a cash dividend from net earnings, and a concurrent issue of new shares therefor in each case. The result reached in both is the same. In this one the court said: "When a distribution of such earnings is made by the corporation among its shareholders, the question whether such distribution is an apportionment of additional stock, or a division of profits, depends upon the substance and intent of the action of the corporation, as shown by its votes." 115 Mass. 474. Practically the same rule as that announced in *Minot v. Paine*, supra, seems to prevail in *Maine* (*Richardson v. Richardson*, 75 Me. 570); in *Rhode Island* (*Petition of Brown*, 14 R. I. 371); in *Connecticut* (*Brinley v. Grou*, 50 Conn. 66; *Spooner v. Phillips*, 24 Atl. 524); and in *Georgia*, by statute (*Millen v. Guerrard*, 67 Ga. 292). The principle stated by Lord Herschell in *Bouch v. Sproule*, supra, and quoted herein, met the approval of the court of appeals of New York, in *Re Kernochan*, 104 N. Y. 629, 630, 11 N. E. 149.

One of the most instructive cases of this line, and that which has caused us much hesitation on account of its high authority, is *Gibbons v. Mahon*, 136 U. S. 549, 10 Sup. Ct. 1057. Mrs. Smith bequeathed 280 shares of stock in the Washington Gaslight Company, in trust, with direction that "the dividends" accruing thereon be paid to her daughter Mary Ann Gibbons, "during her lifetime, without percentage of commission or diminution of principal," and that upon her death the shares go to her other daughter, Mrs. Mahon. The total stock of the company was \$500,000 when the testatrix died. It was subsequently increased, by authority of congress, to \$1,000,000, and new shares were issued for the old ones and for the increase. The trustee accordingly received 560 new shares. The increase of capital stock was made entirely from "net earnings, income, and profits" of the company, accruing and invested partly before and partly after the death of the testatrix. The life tenant was held to be entitled to the dividends on the whole 560 shares, and nothing more. A transfer of the 280 representing increased capital was refused her. Mr. Justice Gray, who delivered the opinion of the court, among other things, said: "Money earned by a corporation remains the property of the corporation, and does not become the property of the stockholders, unless and until it is distributed among them by the corporation. The corporation may treat it and deal with it either as profits of its business, or as an addition to its capital. Acting in good faith, and for the best interests of all concerned, the corporation may distribute its earnings at once to the stockholders as income; or it may reserve part of the earnings of a prosperous year to make up for a possible lack of profits in future years; or it may retain portions of its

earnings, and allow them to accumulate, and then invest them in its own works and plant, so as to secure and increase the permanent value of its property. Which of these courses shall be pursued is to be determined by the directors, with due regard to the condition of the company's property and affairs as a whole; and, unless in case of fraud or bad faith on their part, their discretion in this respect cannot be controlled by the courts.

* * * Reserved and accumulated earnings, so long as they are held and invested by the corporation, being part of its corporate property, it follows that the interest therein, represented by each share, is capital, and not income, of that share, as between the tenant for life and the remainder-man, legal or equitable, thereof." 136 U. S. 558, 10 Sup. Ct. 1058. Though concurring in all that goes before, we dissent from the conclusion expressed in the lines we have italicized. That seems to us to be a non sequitur. There can be no doubt that reserved and accumulated earnings, held and invested by the corporation, are corporate property. Nevertheless, we are unable to see how that fact determines or affects the question of interest therein as between life tenant and remainder-man of shares. Those persons acquire their interests under the will or deed, and not through any action of the corporation. The learned justice said further: "A stock dividend really takes nothing from the property of the corporation, and adds nothing to the interests of the shareholders. Its property is not diminished, and their interests are not increased. After such a dividend, as before, the corporation has the title in all the corporate property. The aggregate interests therein of all the shareholders are represented by the whole number of shares; and the proportional interest of each shareholder remains the same. The only change is in the evidence which represents that interest, the new shares and the original shares together representing the same proportional interest that the original shares represented before the issue of the new ones." 136 U. S. 559, 10 Sup. Ct. 1059. Obviously, this change "in the evidence" of the shareholder's interest separates his income on the investment from his capital invested, the new shares representing his income, and the old ones his capital; and it would seem that a separation of the combined interests of life tenant and remainder-man is wrought by the same process, the new shares standing for income of the trust estate, and the old ones for its capital, at least to the extent that the new capitalization includes net earnings made since the trust took effect. The trustee has made no new investment. He has only received new shares representing profits of the investment made by the founder of the trust. How can the facts that net earnings are made capital to the company, and that the issuance of stock dividends thereon do not diminish corporate property, prevent such dividends from being income to the holder of

old shares, whether that holder be absolute owner or only tenant for life?

The leading case of the other line is *Earp's Appeal*, 28 Pa. St. 368. It there appeared that a stock company had issued new stock upon a large "surplus fund," accumulated from the profits of its business, through a period of years partly before and partly after the death of the testator; and it was decided that life tenants of 540 shares of old stock were entitled, as absolute owners, to such portion of the certificates of new shares as represented profits accumulated after the death of the testator, but not to that portion representing profits accumulated before his death. In the opinion, the court observed: "In the case before us the testator has not made a bequest of the stock itself to the appellants. On the contrary, he has given them only the 'income' of it for life. Their interests commenced after the death of the testator. They have no right whatever to claim the 'income' which had accumulated before his death. If they may go back of that event, for a single day, to seize upon 'income, rents, or interest' which had accumulated in his lifetime, they may ransack the transactions of his whole life, and end by showing that his whole fortune consisted of 'rents, interest, and income,' arising from a very small capital, which has since been lost. It is equally clear that the profits arising since the death of the testator are 'income,' within the meaning of the will, and should be distributed among the appellants. These profits amounted, at the time of the issue of new certificates of stock, to the sum of \$40,500, exclusive of the current semiannual dividends which had been previously declared and paid. That sum is the rightful property of the appellants. The managers might withhold the distribution of it for a time, for reasons beneficial to the interests of the parties entitled; but they could not, by any form of procedure whatever, deprive the owners of it, and give it to others not entitled. The omission to distribute it semiannually, as it accumulated, makes no change in its ownership. The distribution of it among the stockholders in the form of new certificates has no effect whatever upon the equitable right to it." 28 Pa. St. 374. The controlling principles underlying this decision have been recognized in other cases in the same state (*Wiltbank's Appeal*, 64 Pa. St. 256; *Biddle's Appeal*, 99 Pa. St. 282; *Vinton's Appeal*, Id. 440; *Smith's Estate*, 140 Pa. St. 344, 21 Atl. 438); also, in *Kentucky* (*Hite v. Hite*, 93 Ky. 257, 20 S. W. 778); in *Maryland* (*Thomas v. Gregg*, 78 Md. 545, 28 Atl. 565); in *New Hampshire* (*Lord v. Brooks*, 52 N. H. 72; *Peirce v. Burrough's*, 58 N. H. 302); in *New Jersey* (*Van Doren v. Olden*, 19 N. J. Eq. 176; *Ashhurst v. Field's Adm'r*, 26 N. J. Eq. 11; *Van Blarcom v. Dager*, 31 N. J. Eq. 793); and in *South Carolina* (*Cobb v. Fant*, 14 S. E. 959). In the *Kentucky* case, which was decided in 1892, the

court said: "Since the testator's death, certain stock dividends, based upon earnings and profits, have been declared upon some of the stocks. It is claimed by the remaindermen that they belong to the principal of the estate, while the life tenants assert they are entitled to them as income. The question is beset with difficulties. It is urged by the former that the mere declaration as 'a stock dividend' by the company is conclusive in their favor; that, being stock, it must be treated as a part of the capital; and that the conclusion of the company to turn all their profits into capital is a matter in its discretion, and conclusive upon the courts. As between the company and the shareholder, the action of the directors in determining whether the earnings shall be capitalized in stock dividends, or paid out in cash, is conclusive; but when once declared, although in the form of stock, it is the province of the law to determine whether they belong to the corpus of an estate, and are to benefit the remainderman, or whether they shall go to the life tenant as income. * * * Where a dividend, although declared in stock, is based upon the earnings of the company, it is in reality, whether called by one name or another, the income of the capital invested in it. It is but a mode of distributing the profit. If it be not income, what is it? If it is, then it is rightfully and equitably the property of the life tenant. If it be really profit, then he should have it whether paid in stock or money." 93 Ky. 264-266, 20 S. W. 779. It should be noted that it is stated in another part of this opinion (page 265, 93 Ky., and page 779, 20 S. W.), contrary to the rule announced in *Earp's Appeal*, that "dividends, whether of stock or payable in money, are nonapportionable, and must be considered as accruing in their entirety as of the date when they are declared." Otherwise the two cases are in full accord. The *Maryland* case is the latest one we have seen, having been decided in 1894. As well presented in the syllabus, it is as follows: "A testator bequeathed in trust, for the sole and separate use and benefit of his daughters during their lives, and at their death to their issue, stock in a railroad company which, after the death of the testator, which occurred on the 11th of February, 1890, passed a resolution reciting that for the three fiscal years ending 30th of September, 1891, the net earnings of the company had amounted to a specified sum; that they had been used, among other things, for the permanent improvement of the railway, and for new construction; and that, therefore, a dividend of twenty per cent. be declared for said period, 'payable in common stock of the company.' Held, that the dividend was income, and not capital, and the daughters were entitled to that earned after the death of the testator." 78 Md. 545 (28 Atl. 565).

Most of the late text writers who have considered the subject lend the weight of their

approval to the rule laid down in the case of *Earp's Appeal*, supra, some of them characterizing it as the Pennsylvanian or American rule, as contradistinguished from the rule of *Minot v. Paine*, 99 Mass. 101, which is sometimes called the Massachusetts rule. 1 Mor. Priv. Corp. § 468; 1 Spell. Priv. Corp. § 457, note 2; 1 Cook, Stock, Stockh. & Corp. Law, § 554; 2 Beach, Priv. Corp. § 600; 2 Thomp. Corp. § 2192. Mr. Thompson says, in the section cited, that "instead of attempting to lay down a hard and fast rule on the subject, which shall be applicable to all cases,—and herein lies the chief mistake which the courts have made in dealing with it,—it should be determined upon the consideration of the actual nature of the dividend in each particular case." We understand that what is called the Pennsylvania rule requires a "consideration of the actual nature of the dividend in each particular case," and hence that this author, by this language, approves that rule. In criticism of the Massachusetts rule, he says: "The Massachusetts doctrine seems to be a rule of mere convenience, and not a rule of justice. It loses sight of the real question under consideration, what is capital of the estate disposed of by the will, and not what is capital of the corporation; and it goes entirely beyond tenable ground where it allows this question to be determined, not by the judicial courts, upon a view of the real substance of the case, but by a board of directors,—that is, by a committee of persons entirely foreign to the will,—in passing a resolution declaring a dividend." *Id.* § 2222.

Affirm the decree of the court of chancery appeals, and direct the delivery of the stock dividends to the complainant.

RUSSELL, Sheriff, v. STATE.

(Court of Criminal Appeals of Texas. May 8, 1896.)

COURT OF CRIMINAL APPEALS—JURISDICTION.

The court of criminal appeals, having no appellate jurisdiction save in criminal causes (Const. art. 5, § 5), has no jurisdiction of an appeal from a judgment rendered on a motion by a district attorney, against a sheriff and the sureties on his bond, to require the payment to a certain county of money collected by the sheriff on execution to satisfy a forfeited recognizance, and paid by him to another county.

Appeal from district court, Mason county; W. M. Allison, Judge.

Proceeding by the state against R. R. Russell, sheriff of Menard county, on his official bond. From the judgment, said Russell appeals. Dismissed.

A. W. Moursund and Marshall Fulton, for appellant. J. T. Stapleton, Dist. Atty., for the State.

DAVIDSON, J. One Treadwell was indicted in Menard county. The cause was, on

change of venue, sent to Mason county, where his recognizance was forfeited, and final judgment ultimately rendered. Execution issued to Menard county, and the full amount called for was collected. The sheriff, after satisfying costs, etc., paid the remainder to the treasurer of Menard county. Motion was made by the district attorney against the sheriff and the sureties on his bond in Mason county, and he was ordered to pay over said money in said county, and judgment entered to that effect; hence this appeal.

The question at issue in the trial court was, which county, Menard or Mason, was entitled to the money collected on the execution? Motion is here made to dismiss this appeal, because this is a civil, and not a criminal, action. As before stated, this is a contest over money collected under execution. This is not a criminal action, as we understand that term. "A criminal action," as used in this Code, means the whole and any part of the procedure which the law provides for bringing offenders to justice; and the terms "prosecution," "criminal prosecution," "accusation," and "criminal accusation" are used in the same sense. Pen. Code, art. 26. "An offense is an act or omission forbidden by positive law, and to which is annexed, on conviction, any punishment prescribed in this Code." Pen. Code, art. 53. And these "offenses are divided into felonies and misdemeanors." Pen. Code, art. 54. A suit over money collected by virtue of an execution issued by authority of a judgment final, on a forfeited recognizance, is not a criminal action in this state. Under the constitution (article 5, § 5), this court has no appellate jurisdiction save in criminal causes; hence none in this case. The appeal is dismissed.

EVANS v. BENTLEY et al.

(Court of Civil Appeals of Texas. Jan. 30, 1895.)

APPEAL—REHEARING.

Where a judgment, as modified on appeal, allows a plaintiff all she is entitled to under the allegations of her petition, and neither party asks that the cause be remanded, a rehearing will not be granted her on the ground that the special verdict did not find the facts on which the judgment, as modified, rests.

On motion for rehearing. Denied.

For former opinion, see 29 S. W. 497.

HEAD, J. It is contended that we erred in reforming the judgment of the court below, because the question as to whether or not Mrs. Bentley had abandoned her contract of purchase was neither passed upon in that court, nor assigned as error in this court. Waiving the question as to whether or not the seventeenth assignment of error, copied on page 54 of plaintiff in error's brief, is sufficient to present the issue in this court, we have concluded that the judgment rendered

by us is as favorable to defendants in error as they were entitled to under the allegations of their petition; and they are therefore in no position to complain, even if it be conceded that the special verdict did not directly find the facts upon which our decision is made to rest. From defendants in error's petition, it will appear that their suit is one in equity to recover from their vendor the amount for which it is alleged he had sold their land above what was due him from them thereon. It is alleged that the original sale by Evans to the plaintiffs was made in August, 1874; that the purchase price was \$725, of which \$500 was paid in cash, and a note for \$225, payable in six months, was executed for the remainder; that the vendor expressly reserved a lien in the deed to secure this deferred payment; that in 1878, this note being still unpaid, the vendor instituted suit thereon, and attempted to foreclose his lien, but failed to make the wife, in whose name the deed was made, a party to the suit; that this suit was prosecuted to judgment against the husband, and the lot was sold thereunder during that year (1878), and at this sale the original vendor became the purchaser; that in 1884 the vendor resold the land as his own (it in the meantime having greatly enhanced in value) for the sum of \$5,500; that in 1891 this suit was instituted by the vendee (who is not shown to have made any effort for 14 years to pay the amount promised by her) to recover the balance of this \$5,500 and interest, after deducting the amount due on her note, basing her right upon the ground that she was not made a party with her husband in the foreclosure suit brought by the vendor. We are of opinion that this petition does not make a case in equity which entitles the vendee to recover of the holder of the superior title the enhanced value for which he had sold this lot, and doubt if it stated facts which entitled her to recover even her cash payment, for which we gave her judgment with interest; and therefore, no matter what the verdict may have been, she should not have been given judgment for more than she was entitled to receive under her allegations. Plaintiff in error does not complain of the judgment rendered by us, and we think defendants in error recovered all, if not more than, they are entitled to; and, while, it might have been more regular for us to have remanded the cause, we see no good to be accomplished thereby, and, as neither of the parties ask that this be done, the motion for rehearing will be refused. Refused.

UNION ELEVATOR CO. et al. v. KANSAS CITY SUBURBAN BELT RY. CO.

(Supreme Court of Missouri. July 15, 1896.)

EMINENT DOMAIN—COMPENSATION—LEVEES—EXPERT TESTIMONY.

1. Where three blocks are used in connection with an elevator, for one common purpose

and as one property, and the elevator cannot be operated successfully without the use of all of the blocks, two of which are used for storing cars, in estimating the damages for the appropriation of a portion of one block for the right of way for a railway, it is proper to estimate the damages to the property as a whole, though the blocks are separated by streets across which the owner has laid tracks without permission of the city. 33 S. W. 926, affirmed.

2. An elevator company laid a track on a public levee to connect its elevator with a railroad. Besides using this track as a connection, it placed thereon a number of cars at a time, and pulled them back and forward as occasion required. The track of another railroad being laid across such connecting track did not interfere with its use for connecting purposes, but only with standing and shifting cars thereon. Held that, the elevator company not having the right to shift and stand cars on such connecting track, even if it had the right to make the connection on the levee, it was error to give the misleading instruction that the elevator company could recover for the interference of the other railroad, so far as it affected the working capacity of the elevator as to loading and unloading cars in a speedy, reasonable, usual, and proper way.

3. The right of an elevator company, if any, given it by deed, to cross a public levee with a railroad track, not being exclusive, the crossing of such track by a railroad is not, as to the elevator company, a taking or damaging of private property.

4. An elevator company, by laying a track on a public levee to connect with a railroad, and by using the same 10 to 14 years, does not exercise such an exclusive and adverse use as to confer on it the exclusive right to the part of the levee occupied by the track.

5. Though it is the better rule that, on the question of damages from the construction of a railroad, witnesses should only state the facts, and leave entirely to the jury the question of the amount of damages, still it is not reversible error to allow witnesses to testify to the amount. 33 S. W. 926, modified.

6. Residents of a city, testifying that they are acquainted with property therein, across which a railroad has been constructed, and know its value, are qualified to testify as experts in an action for damages by reason of such construction. 33 S. W. 926, affirmed.

On rehearing. Modified.

For former opinion, see 33 S. W. 926.

BURGESS, J. The court, over defendant's objection and exception, instructed the jury as follows: "(1) While defendant had the right to construct—in the manner in which it was constructed—its railroad across block 1, and over the railroad track connecting the elevator and the railroad running along and near the river bank, yet it became liable for the damages, if any, it caused to the property and interests of the plaintiffs by reason of so doing; and in this case you will estimate the plaintiffs' damages, if any, in this way: First. By allowing them the actual market value of that portion of block 1 which was actually taken and appropriated by defendant for railroad purposes. Second. The depreciation, if any, in the value of the remaining portion of block 1 after the taking of that portion appropriated by defendant for railroad purposes, provided block 1 was separate from, and not used and occupied as a part of, a whole elevator property on blocks 1, 3, and 7. But if

blocks 1, 3, and 7 were used and occupied as an entirety, and as a whole elevator property, then plaintiffs are entitled, in addition to the land taken, to the depreciation, if any, in the value of the entire elevator property on blocks 1, 3, and 7 remaining after the appropriation of said part of block 1, caused by the taking of the portion of block 1, considering the manner in which the defendant's railroad was constructed thereon. Third. If blocks 1, 3, and 7 were used and occupied as an entirety, and as a whole elevator property; if connected therewith was a connecting railroad track, running from a track at the easterly side of the elevator to the railroad track running along and near the river bank; if such connecting track was a valuable right to connect with, and necessary to the use of, the elevator property situated on blocks 1, 3, and 7; if defendant's railroad crossed such connecting track on the land called 'Levee' in such a manner as to diminish the working capacity of the elevator in a proper, speedy, usual, and reasonable way in loading and unloading cars, and thereby depreciated the value of the entire elevator property on blocks 1, 3, and 7 in a sum additional to any that might be found under the circumstances mentioned in paragraph 2 hereof, and the manner in which the defendant's road was constructed on block 1 prevented plaintiffs making a reasonable, practicable connection with the track running along and near the river bank, —then plaintiffs are entitled to the amount of such further depreciation, and from the total damages, if any, defendant is entitled to have deducted the special and peculiar benefits, if any, to the elevator property on blocks 1, 3, and 7, caused by the construction of defendant's road in the manner in which it was constructed; and the plaintiffs' damage, if any, cannot exceed the sum of fifty thousand dollars. (2) The facilities, if any, for the transportation of grain from the property, and a railroad connection, if any, with the elevator, and facilities therefor, if any, were property rights which belonged to the plaintiffs; and if either was injured by the construction of defendant's railroad over block 1, if blocks 1, 3, and 7 were used and occupied as a whole, this would be a damage to the remaining property, for which plaintiffs should be compensated, in ascertaining the damages, if any, in the circumstances mentioned in paragraphs 2 and 3 of the foregoing instruction No. 1. (3) While it is true that if the railroad crossing made by defendant over what, in these instructions, has been called the 'Connecting Track,' damaged the interests of plaintiffs in the elevator property, the cost of making any reasonable, practicable change of the crossing and connection, to the extent it would lessen such damage, would measure the damage, if any, for the crossing, yet if a change of such connection was not reasonably practicable and reasonably sufficient, or if such change would not have lessened the damage, then the damage, if any, on account of the crossing,

should be measured by the depreciation, if any, caused thereby in the value of the property on blocks 1, 3, and 7 by diminishing the working capacity of the elevator in loading and unloading cars in a proper, speedy, usual, and reasonable way, if it did so, and if these blocks were used and occupied as a whole property. (4) In considering the question of values, benefits, and depreciation in values, if any, the jury will consider them as of April 11, 1892, and consider any use to which the property was actually put, and to which it was naturally adapted. The word 'value,' as used in these instructions, means the fair market value as shown by the evidence."

Among other instructions given on behalf of defendant were the following: "(8) The court instructs the jury that there is no evidence showing that the plaintiffs had any right to use the track of the Missouri Pacific Railroad Company, which lies north of the defendant company's track, for storing or standing cars upon. (9) The court instructs the jury that the building, construction, and operation of the defendant railroad company's track and road, and the crossing by defendant company with its track and road, over the switch running from the north side of the Union Elevator to the Missouri Pacific track on the north of defendant's track and road, does not in any wise interfere with nor deprive plaintiffs of any rights or benefits which they have or had under and by virtue of the contract introduced in evidence between Kersey Coates and C. G. Hopkins, executor of the will of W. D. Hopkins, deceased, to the Missouri Pacific Railroad Company, under date 29th of March, 1876, and which has been identified and marked 'Exhibit T.'"

The following instructions asked by defendant were refused, and exceptions duly saved: "(10) The court instructs the jury that in determining what, if any, damages you will allow the plaintiffs, you cannot take into consideration the fact that the defendant company crosses the switch running from the Missouri Pacific track in the southwesterly direction through the north side of the Union Elevator, and you cannot allow plaintiffs any sum or amount on account thereof. (11) The court instructs the jury that the plaintiffs have not shown by any evidence any right to connect any railroad tracks, spurs, or switches with the Missouri Pacific Railway Company's track on or across the northeast corner of block 1. (12) The court instructs the jury that there is no evidence showing that plaintiffs have any right to construct, maintain, or operate any spur, switches, or railroad tracks over, across, or upon that part or parcel of land marked and designated on the plat as 'Levee,' except that they have the right to run out from the north side of block 1, a short distance east of the northwest corner of said block, over on the edge of the levee, and run a short distance east on the south side of the levee; thence crossing back, and returning again to block 1,—

as shown by the red [shaded] strip with blue line through the center upon the plat contained in the abstract, and introduced in evidence, and being the plat referred to in the deed which conveyed block 1 from Coates & Hopkins to the Union Elevator Company.

(13) The court instructs the jury that in determining the amount, if any, you will allow plaintiffs, you cannot take into consideration any damage, if any there be, which may have been done to the elevator business, or to blocks 3 and 7, or either of them, nor to any buildings or property situated on said blocks 3 and 7, or either of them, but your inquiry must be confined to block 1. (14) The court instructs the jury that in determining what, if any, damages you should allow the plaintiffs, you will first determine the market value of the land actually taken, on the 11th day of April, 1892, and you should also determine what, if any, damages were done to the remainder of block 1 by reason of the taking and appropriation of the land taken, and add that damage, if any there be, to the market value of the land taken; and from this you should deduct the value of any peculiar or especial benefits, if any there be, which the property in question derives from the location and construction of the defendant company's railroad, and if the value of the land taken, and damages, if any there be, to the remainder of block 1, exceed the amount or value of the peculiar benefits, if any, which the property receives from defendant company's line of road, then such difference will be the amount plaintiffs are entitled to recover; and if the peculiar benefits, if any, which inure to the property are equal to or exceed the amount of the value of the land taken plus the amount of the damages sustained by reason of the taking, if any there be, then plaintiffs will not be entitled to recover anything, and your verdict should be for the defendant. (15) The court instructs the jury that in estimating the amount of plaintiff's damages, if any, you cannot take into consideration, or allow anything on account of, any interference, if any there be, of hauling, handling, or moving of cars upon the Missouri Pacific track north of the defendant company's track."

The court, of its own motion, over the objection and exception of defendant, instructed the jury as follows: "(1) The court instructs the jury that in estimating the amount of plaintiffs' damages, if any, you cannot take into consideration, nor allow anything on account of, any interference, if any there be, of hauling, hauling, or moving of cars upon the Missouri Pacific track, north of the defendant company's track, except so far as such interference may affect the working capacity of the elevator, as to loading and unloading cars in a speedy, reasonable, usual, and proper way, and in that way reduces its market value."

Defendant's first contention is that blocks 1, 3, and 7, being separated by public streets,

are separate tracts, and, plaintiffs' occupation of Hopkins street being without authority, it was unlawful, and gave them no right to have the blocks considered as one tract. It appeared from the evidence that all three of the blocks of land in question were used in connection with the elevator for one common purpose, and as one property, and that the elevator could not be successfully operated without the use of all of said blocks. Under such circumstances, the jury were properly instructed to estimate the damages to the property as a whole, notwithstanding the blocks were separated by streets. Where a tract of land, although in different townships, ranges, or counties, is used as a whole, and as one entire tract, the location of a public highway through it has not the effect of making or dividing it into separate tracts. *Lewis, Em. Dom. § 475; Railway Co. v. Merrill, 25 Kan. 421.* So it has been held that intervening streets do not, under the circumstances which exist in this case, have the effect of dividing the land into separate tracts. *Bridge Co. v. Schaubacher, 57 Mo. 582; Sherwood v. Railway Co., 21 Minn. 127; Carrie v. Railroad Co., 52 N. J. Law, 381, 20 Atl. 56.* No question was involved in these cases as to the right of the owners of the lots to make use of the alley and streets in connection with the use of the lots, in which respect they differ from the case at bar. Counsel for defendant insist that the cases cited are predicated on the fact that the owners of the lots in question in those cases owned to the center of the alley or street, while in this case the fee of the streets was dedicated to the county of Jackson in trust for the public. Coates & Hopkins' addition to the city was platted, and the plat filed in the recorder's office of said county, on the 7th day of January, 1876. By it Henning and Hopkins streets were dedicated to the public, and the fee therein vested in the city for public purposes. *Gen. St. Mo. 1865, c. 44, § 8.* By that statute it is not meant that an absolute fee in the streets is vested in the city, with the right of disposal by deed, but simply the right of their control for the use of the public. Whatever may be the ruling in other jurisdictions under similar conditions, the law as announced in this state is that the owner of land adjoining a street or alley owns the fee to the center of such street or alley, as the case may be, subject to an easement in the public. *Bridge Co. v. Schaubacher, supra; Snoddy v. Bolen, 122 Mo. 479, 24 S. W. 142, and 25 S. W. 932.* We are of the opinion that plaintiff showed no legal right to construct its tracks across the streets, or to occupy any part of Hopkins street by buildings or tracks, and that such use is unlawful; but it does not necessarily follow that defendant can escape the payment of damages to the property as a whole in consequence of the want of authority in plaintiffs to occupy Hopkins street, when, in the absence of such occupancy, there would be

no connection between the blocks, and no continuity of use. The city has control over its streets, and may sue in ejectment for land dedicated for a street. *City of California v. Howard*, 78 Mo. 88; *McCarty v. Clark Co.*, 101 Mo. 179, 14 S. W. 51. The defendant however, occupies a different position, having no interest in the streets in question other than that which is enjoyed by the general public. The city may never complain of their improper use by plaintiffs, and defendant should not be permitted to do so. It is no part of defendant's mission to protect the streets against improper uses, nor could it properly assert, in its own interest, rights possessed by the city which it may not choose to insist upon. The manner of their occupation was before the jury, and doubtless considered by them in passing upon the question of damages. Defendant should respond in damages to the property as it was when it appropriated a part of it, and thereby damaged the remainder, and not as it may or may not be used in the future.

With respect to the right of plaintiffs to use the track of the Missouri Pacific Railroad Company, which lies north of the defendant's track, for the purpose of storing or standing cars thereon, they showed no such right; and the court so instructed the jury, by instruction No. 8 given at the instance of defendant. And by defendant's ninth instruction the jury were told the building of defendant's track, deprived plaintiffs of no right under the contract between Coates & Hopkins and the Missouri Pacific Railway Company. Yet, by instruction No. 1 given of its own motion, the court told the jury that "In estimating the amount of the plaintiffs' damages, if any, you cannot take into consideration, nor allow anything on account of, any interference, if any there be, of handling, hauling, or moving of cars upon the Missouri Pacific track, north of the defendant company's track, except so far as such interference may affect the working capacity of the elevator as to loading and unloading cars in a speedy, reasonable, usual, and proper way, and in that way reduces its market value." It seems that, by reason of the erection of the elevated railroad structure on block 1, it was impossible to change the track so as to make a connection on that block; hence their most convenient connection with the Missouri Pacific track was on the levee, at a point north of the northern terminus of Hopkins street. And although this connection was on public property, and without authority, the jury were authorized by the instruction given by the court of its own motion to consider the depreciation in value caused to plaintiffs' property by the diminution in the working capacity of the elevator in a proper, speedy, usual, and reasonable way in loading and unloading cars, by reason of the interference by defendant's road in the handling and moving of cars by plaintiffs on said tracks. This was, in effect, ruling that, while

plaintiffs were not entitled to damages for the interference, they were entitled to recover for any damages flowing to them by reason of such interference. The court had already declared that there was no evidence showing that plaintiffs had any right to use this track for storing or standing cars upon it, and that the building of defendant's track deprived them of no rights under the contract between Coates & Hopkins and the Missouri Pacific Railway Company; and it is inconceivable how they could recover in this action for damages flowing from an act, when they could not recover damages occasioned by the act itself. The levee is as much public property as the streets, is of the same character, and its conveniences and inconveniences are shared in common by the public. Upon this question the case comes clearly within the rule announced by this court in *Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co.*, 97 Mo. 457, 10 S. W. 826. There is no difference in principle. This case is clearly distinguishable from *Railway Co. v. McGrew*, 104 Mo. 282, 15 S. W. 931. In that case the defendant's coal mine was connected by rail with a switch of the Wabash Railway Company on its own land, and in a condemnation proceeding by the plaintiff for right of way this connection was interfered with, and it was held to be a valuable property right, for which defendant should be compensated. Under this ruling, plaintiffs' facilities to connect their track with the Missouri Pacific track on block 1, of which they claim to have been deprived by reason of the elevated construction of defendant on its road, was a proper subject to be considered by the jury in estimating the damages to which plaintiffs are entitled, but does not justify the contention that they were entitled to damages for interference with the working capacity of the elevator in loading and unloading cars, in consequence of being deprived by defendant of the use of the Missouri Pacific track for shifting and standing cars thereon. The right to connect on the levee, even if conceded, did not confer the right to shift and stand cars on the track, but only conferred upon them the right to deliver on or receive cars from it. Plaintiffs' mode of utilizing this track was by having placed thereon a number of cars, and by pulling them backward and forward by means of a car puller, as occasion might require,—a different use than that made of the track to switch cars upon to and from the Missouri Pacific tracks. It seems that defendant's track cut off one or two car lengths of this connecting track, which in no way interfered with plaintiffs' right to use the track for connecting purposes, but did for standing and shifting cars thereon. The interference by defendant, in so far as standing and shifting cars on this track by plaintiffs were concerned, was not an element of damages to be considered by the jury; and plaintiffs' instructions, and especially the third

paragraph of their first instruction, and instruction No. 1 given by the court of its own motion, were, in the language used in each of said instructions, to wit, "diminishing the working capacity of the elevator in a proper, speedy, usual, and reasonable way in loading and unloading cars," misleading, and should not have been given. In *Massachusetts Cent. Ry. Co. v. Boston, C. & F. R. Co.*, 121 Mass. 124, the damages claimed were not for any change required in the condition of the land of the complaining company, or in the structures thereon, but for the expenses of maintaining a flagman alleged to be necessary to guard against the greater liability to accidents, and it was held that it was not entitled to damages for the interruption and inconvenience occasioned to its business by reason of the construction of a diagonal road. The use of the track in question for standing and shifting cars thereon might be dispensed with at any time, and could not, in any event, affect the measure of damages in a case of this character.

Plaintiffs claim the right to use the levee for a connection with the Missouri Pacific Railroad by virtue of a deed from Coates and the executor of Hopkins to the Union Elevator Company dated August 1, 1876. In platting the addition, Coates & Hopkins reserved to the Missouri River, Ft. Scott & Gulf Railroad Company the right to maintain and operate a railroad track with switches from the same along and over Railroad street, and to themselves the right to lay, or cause to be laid, and permit and grant to any railroad company or companies or individuals the right to lay, maintain, and operate, one or more railroad tracks and switches on, over, along, and across the levee. The deed from Coates & Hopkins to the elevator company was made subject to the conditions and reservation specified in said deed, as follows: "The right to lay, operate, and maintain a railroad track over and across a strip of ground thirteen feet wide in block one of said Coates & Hopkins' addition, and on land in part north of said block one of said addition; said track to be laid in the middle of the said strip of ground, as indicated by a line marked in blue ink upon the map or plat hereto attached, which is hereby made a part hereof. The said middle line of said strip of ground hereby granted is more particularly described as follows: Beginning at a point twenty-three feet south of the northeast corner of said block one; thence north, 66 deg. 1 min., two hundred and thirty-five and four-tenths ($235\frac{4}{10}$) feet; thence, on a 12-deg. curve, two hundred and nine and four-tenths feet, more or less, to the west line of said block one. Also, the right to lay, operate, and maintain railroad tracks as hereinafter specified upon and over the following described strip or parcel of land in blocks three and seven of said addition, which is hereby granted to said party of the second part, its

successors and assigns, for said use, to wit: Beginning at a point in said block three on the west line of ground owned by said party of the second part, and upon which its elevator building is erected, said point being forty-one feet northerly from the north line of Railroad street, on the west line of said elevator lot; thence, in a southwesterly direction, on a 12 deg. 10 min. curve, one hundred and fifty-six and four-tenths feet, to a point thirteen feet north, 29 deg. 50 min. west, from the north line of said Railroad street; thence westerly, on a line parallel with the north line of Railroad street, and ——— feet distant therefrom, to the west line of said block three; thence southerly on the west line of said block three to the north line of said Railroad street; thence easterly on said north line of said street to the west line of said elevator lot; thence northerly along the west line of said lot to the place of beginning. And it is hereby agreed and understood that such tracks shall be laid, operated, and maintained over the last above described strip of ground as follows, to wit: One to be a continuation of the track now laid over and across the south side of said elevator lot, and shall be laid as indicated in blue ink upon the map or plat hereto attached, which lines indicate the rails of said track. Also, the right to lay, operate, and maintain as aforesaid a railroad upon and over a strip of ground thirteen feet in width off the south side of said block seven; the northerly rail of said track to be laid not nearer than four feet to the north line of said strip of ground, as indicated upon the plat attached hereto. And it is hereby further agreed by and between the parties hereto that the railroad tracks now laid on said Railroad street shall be so changed and relaid as to make them conform to the lines designating the same on said plat: provided, however, that the outside of the south rail of the south track shall not be nearer than four feet to the south line of said Railroad street. And it is hereby expressly understood that all of the rights and privileges herein granted are upon the express condition that the said party of the first part, and their assigns, shall at all times have the right—which said right is a further consideration of this grant—to make switch connections with all or any of the tracks aforesaid, or to cross any of said tracks with switches or tracks; the meaning and intent hereof being that the grounds in blocks one, three, and seven of said addition, belonging to said party of the first part, shall hereafter have and possess all needed railroad facilities to accommodate all such business as may hereafter be established thereon."

At the time of the execution of this deed the elevator company owned the 250 feet of block 3 upon which the elevator stands, and Coates & Hopkins the remainder of said block, and all of blocks 1 and 7. The reser-

vation extends no further than to give the grantors and their assigns the right to cross and connect at any point or points they might see proper with tracks to be constructed by the elevator company upon the rights of way conveyed by said deed. Nothing said in the deed can reasonably be construed as conveying a right of way over the levee, other than at the point where the right of way leaves the north side of block 1, running thence along the levee, returning again to said block. Nor were any additional rights passed to the elevator company by the deeds from Coates & Hopkins, and are the heirs of Hopkins to the company, made in 1882. They are simply quitclaim deeds to the property, the title to which had already passed from Coates & Hopkins, and are no broader in their scope and meaning than the deed made August 1, 1876. The right to lay railroad tracks on the levee was not appurtenant to said blocks; hence no such right passed by either of said deeds. But even if the right did pass to plaintiffs by said deeds, or in any other way, it was not exclusive, and defendant having acquired a similar right from the heirs of Coates & Hopkins, by deed dated April 4, 1892, the crossing of plaintiffs' track on the levee by defendant's track is not a taking or damaging of private property, within the meaning of article 2, § 21, of the constitution. *Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co.*, supra; *Massachusetts Cent. R. Co. v. Boston, C. & F. R. Co.*, 121 Mass. 124.

But it is asserted that it is "idle to say that the rule which applies to public streets is applicable to a crossing on the levee, but that the case is precisely the same as if the crossing had been on private property." We are not prepared to give our assent to this position. We have already said that the right to lay what are called by plaintiffs railroad tracks on the levee, for their own private use, never passed to them, by reason of the deeds under which they claim title to lots 1, 3, and 7; nor did they, by simply laying the tracks on the levee, and by its use from 10 to 14 years, exercise such an exclusive and adverse use of it as to confer upon them the exclusive right to that part of the levee occupied by the track.

With respect to plaintiffs' right to damages by being prevented from making a connection with the Missouri Pacific Railway Company's tracks at the northeast corner of block 1, it was not shown that they had any such right by contract or otherwise. They had no right, nor could they obtain the right, to cross Hopkins street with their track; nor had they a right of way around the end of said street from Coates & Hopkins, or their heirs. Nor could they force a connection of their track with the track of the Missouri Pacific Railway Company at that point, or compel that company to operate the switch after the connection should be made, for the reason that plaintiffs' tracks are private property, used for their own exclusive use and benefit. This

court, in *State v. Smith*, 114 Mo. 180, 21 S. W. 493, expressly held the Union Elevator to be a private warehouse. Such tracks cannot be laid upon the public levee or streets, which are for the use and benefit of the general public, because to do so would be a perversion of their proper and legitimate use.

As block 1 touched the river for some distance, and the elevated structure on defendant's road is on this block, and interferes with plaintiffs' access to the river, thereby diminishing the value of their property, this was an element for the consideration of the jury. *St. Louis, K. & N. W. Ry. Co. v. St. Louis Union Stock-Yards Co.*, 120 Mo. 541, 23 S. W. 399, and authorities cited. But, if the structure is on the levee, then it is not a proper element for the consideration of the jury, unless plaintiffs sustained damages by reason thereof peculiar to themselves, and not shared by the general public.

Witnesses should not have been allowed, over the objection of defendant, to testify as to the amount of damages to the property by reason of the construction of defendant's road. The authorities are in much conflict, even in this state, as to whether witnesses should state the facts, and leave it to the jury to determine the amount of damages in such cases, or whether witnesses may give their opinions as to the amount, and thus usurp the province of the jury. The better rule is as stated in *Spencer v. Railway Co.*, 120 Mo. 159, 23 S. W. 126; that is, that witnesses should only state facts, and leave entirely to the jury the question as to the amount of the damages. However, the judgment should not be reversed upon that ground alone. *Roberts v. Railway Co.* (N. Y. App.) 28 N. E. 486; *Doyle v. Railway Co.*, 128 N. Y. 488, 28 N. E. 495; *Gray v. Railway Co.*, 128 N. Y. 499, 28 N. E. 498.

It is also insisted by defendant that a number of witnesses who testified in behalf of plaintiffs as to the value of the property in question were not qualified to testify thereto as experts. These witnesses were residents of the city, and, without exception, stated that they were acquainted with the property, and knew its value. This was all that was necessary to qualify them as experts. The weight to be given to their testimony was for the jury, to be measured by the intelligence of the witnesses, and their ability to pass upon such values. *St. Louis, K. & N. W. Ry. Co. v. St. Louis Union Stock-Yards Co.*, supra. In *Lewis, Em. Dom.* § 437, it is said: "This is a question the determination of which is left mostly to the discretion of the trial judge. * * * It is not necessary that the witnesses should have been engaged in the real-estate business. Intelligent men, who have resided a long time in the place, and who are acquainted with the land in question, and say they know its value, are competent, although they are merchants or farmers, and have never bought or sold land in the place. * * * The value of such opinions depends

upon the intelligence of the witness, and the knowledge and experience which he possesses in such matters. It is in all cases a question for the jury." This objection is untenable. The judgment is reversed, and the cause remanded to be tried in accordance with the views herein expressed.

GANTT, P. J., and SHERWOOD, J., concur.

WESTERN UNION TEL. CO. v.
HARGROVE.¹

(Court of Civil Appeals of Texas. June 13, 1896.)

TELEGRAPH COMPANIES—LIABILITY FOR NONDELIVERY.

A telegraph company is liable for failure to deliver a message which it received, with the pay therefor, to be delivered three miles beyond S., though the agent receiving it for transmission was mistaken in supposing the company had an office at S.

Appeal from district court, Tarrant county; W. D. Harris, Judge.

Action by Mrs. T. J. Hargrove against the Western Union Telegraph Company. Judgment for plaintiff. Defendant appeals. Affirmed.

Stanley, Spoonts & Thompson, for appellant. Bowlin & Bowlin and Parker & Harris, for appellee.

HUNTER, J. This suit was brought by appellee to recover damages from appellant for failing to deliver the following message: "March 18, 1893. To Mrs. T. J. Hargrove, Smithfield, Texas: Daniel is very sick. Come at once. Maggie." Maggie, the sender of the message, was the wife of Daniel Hargrove; and the Daniel referred to in the message was her husband, and a son of the addressee, Mrs. T. J. Hargrove. Daniel Hargrove was then dangerously ill with pneumonia on his farm, about 2½ or 3 miles from Granbury, in Hood county, Tex., and continued to grow worse until on the morning of the 23d of March, 1893, he died. His mother, the addressee, resided at her home in the country, about three miles from Smithfield, in Tarrant county, Tex. Smithfield is a small station on a railroad leading out from Ft. Worth, about 10 or 12 miles east of Ft. Worth; but the appellant, at the date of said message, had no telegraph office at said station. The message was delivered to the appellant's agent and manager at Granbury, in Hood county, Tex., a distance of about 40 miles southwest from Ft. Worth; but the sender of the message lived in the country, on her farm, 2½ or 3 miles from Granbury. Appellant's said manager at Granbury received the telegram from James Pilkinton, to whom Mrs. Maggie Hargrove, the sender, delivered

it; and the manager testifies, and we find, that the man who delivered it told him that "Mrs. T. J. Hargrove lives two or three miles from Smithfield, in Tarrant county, Texas, and that he wanted the message delivered to her at her residence; that he paid him 50 cents for the transmission of the message, and \$2.50 for special delivery of the same from Smithfield to her home in the country." He says: "I advised him that this would be about the amount required to secure a special delivery of the telegram. At the time I received the telegram, I was under the impression that the Western Union Telegraph Company had an office at Smithfield, Texas; but, after the party who left the telegram at the office to be sent had gone, we received a message from Ft. Worth informing us that the company did not have any office at Smithfield at all; and I immediately went out into town, to see if I could find the party who left the message at the office for transmission and delivery, as I desired to inform him of the fact that the Western Union Telegraph Company had no office at Smithfield, and therefore I could not send the telegram. I inquired of quite a good many people as to who the man was, but was unable to ascertain either his name, or for whom he acted, or for whom he was sending the telegram, and was unable to advise him of the fact that we had no office at Smithfield, and was unable to return him the tolls which he had left with me. I did not know the party who left the telegram, he being a perfect stranger, and I have never seen him since. I held the money which I had received from him for some time, and then forwarded it to the treasurer of the Western Union Telegraph Company, at New York." On cross-examination he stated: "I had a book in the office when I received the telegram which contained the names of all the Western Union Telegraph offices in the United States at the time said book was issued. * * * I could have ascertained by looking in that book whether there was such a telegraph office on the line of the Western Union Telegraph Company as Smithfield, if it had been in existence at the time the book was published; but I did not do so, as I was very busy, and the telegram was handed me addressed to Smithfield, and I naturally supposed we had an office at that point. * * * It was a mistake on my part. I did not attempt to inquire of the party who left the telegram as to his address, or where he could be found, or as to the purpose of the telegram which he was sending. He simply told me that he wanted the telegram sent to T. J. Hargrove, at Smithfield, Texas," and paid what was required for sending and delivering it. "The man who brought the telegram never told me there was any office at Smithfield. I made no inquiry of him as to who Maggie or Daniel (the names mentioned in the message) were, or where they lived, and did not care to know. I had all the information I wanted. The man never refused to tell me, and

¹ Rehearing denied September 18, 1896.

I never asked him anything about it." The message was never delivered to the addressee, nor was the sender ever notified of the failure to deliver, or that the company had no office at Smithfield. It was transmitted to Ft. Worth, when that office returned answer that the company had no office at Smithfield, and no further effort was made to deliver the message to the addressee. The manager of the company's office at Ft. Worth testified, and we find, that neither the Western Union Telegraph Company, nor any other telegraph company, had an office at Smithfield, in Tarrant county, Tex., at the date of the message, and that it was impossible to transmit the message by electricity, and there was no telephone connection with Smithfield; that Smithfield was 10 or 12 miles from Ft. Worth; that a railroad runs from Ft. Worth to Smithfield; that a person could have gotten on the train at Ft. Worth, and carried the message to Smithfield in an hour or two; that it would have cost about 75 cents to have made the trip; that he could have sent it through the country, but it was not addressed to Ft. Worth, and the manager therefore concluded that the company was under no contract duty to send it from Ft. Worth and deliver it from there; that the company did deliver telegrams outside of the free-delivery limits, sending them out in the country from Ft. Worth, but that is done only when the telegram itself is addressed to Ft. Worth, and a special delivery charge is collected to pay for such special delivery beyond free-delivery limits. He knew where Smithfield was; had passed through it once on the train. The record also discloses that Grapevine is one of appellant's telegraph stations in Tarrant county, and that it was about five miles from the addressee's residence. It is also shown that James Pilkinton and Daniel Hargrove were well known in Granbury, and that, by proper inquiry, either could have been easily found, and the message and money returned. If this had been done, Mrs. Daniel Hargrove could and would have sent her mother-in-law information of her husband's dangerous illness by other means. She could have written her, or could have sent a telegram to Grapevine, to James Hargrove, another son of Mrs. T. J. Hargrove, who lived at Grapevine. She did send a message to him the morning her husband died, and he it was who let the mother know of Daniel's dangerous illness, when she started immediately to see him, but arrived after his death, in time, however, to be at his funeral, as it was delayed for her arrival. If the telegram had been delivered, the appellee would have gone at once to her son, and would have been with him during three or four days before his death. He was conscious until the last day, and often called for "Mother." Her grief and mental anguish caused by her failure to be at his bedside during his last days on earth were very great,—so much so that the amount of the verdict,

of \$600, is sustained by the evidence, if the appellant is liable at all for more than the toll paid to it.

The appellant complains of the charge of the court, in its first and second assignments of error, which are as follows: "First. The court erred in that portion of its charge wherein it instructed the jury that, in the event the defendant ascertained that it could not deliver the telegram by the exercise of ordinary care and diligence, it was the duty then to promptly notify the sender of the message of such inability, and that if the jury found that the defendants failed to do so, and that on account of such failure the plaintiff was not informed of her son's illness, and was deprived of being present at the last sickness and death of her son, it would be the duty of the jury to find for the plaintiff. Second. The court erred in the following portion of its charge to the jury: 'The fact that the agent of the defendant was of the opinion, or supposed, that there was a telegraph office at Smithfield, at the time he received the message, when in fact there was none at said place, and did not discover his mistake until after it had been received, would not excuse or relieve the defendant from the exercise of ordinary care, caution, and diligence to transmit and deliver the message to plaintiff; but the fact, if you believe it was a fact, that the agent was mistaken, and the fact that there was no office at Smithfield, may be considered by the jury, together with the other evidence in the case, in determining whether or not the defendant was guilty of negligence in not delivering the message to the plaintiff.' " The third assignment of error complains of the refusal of the court to give the following charge asked by appellant: "You are instructed by the court that the defendant is not required by law to transmit and deliver messages to points not reached by its lines, or where the defendant cannot, by its agents and appliances, make delivery. If you believe from the evidence that the message in question was delivered by the sender to the defendant's receiving office at Granbury, to be transmitted by telegraph to Smithfield, Texas, and there delivered to the person to whom it was addressed, by special messenger, and that the sender of the said message, and the agent or employé of the defendant who received said message for transmission, believed at the time that there was a telegraph line and delivery office, and facilities for the transmission of messages by telegraph from Granbury to Smithfield, and the contract for transmission and delivery was entered into with this belief and understanding, and if the evidence shows that there was not in fact any such delivering office then at Smithfield, and no means or facilities available to the defendant for transmitting such message by telegraphic means to Smithfield, Texas, and that the defendant and sender were ignorant of the fact, and that said con-

tract to transmit and deliver would not have been entered into if it had been known that there were no means for delivery by telegraph at Smithfield, and no delivering office or facilities at Smithfield, you are instructed that such mistake of fact will and does excuse the failure of the defendant to transmit and deliver said message to plaintiff, and you will find for the defendant."

Appellee alleges in her petition that, in consideration of three dollars paid to appellant, it undertook and agreed to deliver the message in question, which it then and there accepted, to her, at her home, three miles from Smithfield, in Tarrant county, Tex., and that it failed to do so, and that by reason thereof she was damaged, etc. Appellant seeks to avoid liability by alleging and proving that it had no office at Smithfield, of which fact its agent was ignorant, and that its agent entered into the contract by mistake, and that he had no authority to accept the message, and undertake to transmit it, unless it was addressed to a place where it, or some other connecting telegraph company, had an office; that, while it sometimes delivers messages in the country beyond its free-delivery limits, yet it was not organized nor is it equipped for doing so; that it was organized to transmit messages by electricity, and that it would have cost it over \$1,000 to erect poles and a wire, and deliver this message in that way; that its agent diligently sought and inquired for the man who delivered the message to it, and the sender thereof, but could not ascertain who they were, nor their whereabouts, and hence could not inform them of its inability to deliver the message. We are of opinion that the contract to deliver the message to Mrs. Hargrove, at her residence, three miles from Smithfield, in Tarrant county, was a valid contract, and one that was binding on the company, and it makes no difference whether it had an office at Smithfield or not. It was its duty to know, and to keep its agents informed of, the places where it had offices, and its agent should have informed the sender that it had no office at the place addressed; but, instead of this, its agent misled the sender, by accepting the message and agreeing to deliver it, and then failed to correct the mistake, which he could have done in ample time to have avoided the injury. The fact that the agent did not know the sender, or where to find her, is no excuse for its failure to notify her of its declination to perform its contract. It was his duty to inquire of the party delivering the message, and obtain from him the necessary information to enable the company to do its duty fully in the particular case, and his failure to do so was culpable negligence. In *Telegraph Co. v. Harding*, 103 Ind. 511, 3 N. E. 176, the supreme court of Indiana uses this language: "It might well be that in a case where a message was delivered which showed upon its face the importance of speedy transmission, and other

means of making the communication were available to the sender, which might be resorted to if he was informed that the one chosen was ineffectual, or his conduct might otherwise be materially controlled thereby, the company would be bound, at its peril, to ascertain and disclose its inability to serve him, or render itself liable to respond in damages." As to the duty of the company's agent to make inquiry and obtain information, we cite the opinion of our supreme court, as expressed by Judge Henry in the case of *Telegraph Co. v. Adams*, 75 Tex. 535, 12 S. W. 859, where the following language is used: "When the general nature of the communication is plainly disclosed by its terms, instead of requiring the sender to communicate to the unwilling ears of the busy operator the relationship of the parties concerned, a more reasonable rule will be, when the receiver of the dispatch desires information about such matters, for him to obtain it from the sender, and, if he does not do so, to charge his principal with the information that inquiries would have developed." But we are clearly of the opinion that it was the duty of the appellant to deliver the message. It had no right to return it and decline to deliver. It had received the consideration, and undertook to deliver it. The contract was completed, the minds of the parties had met, and it was fully performed on one side. It remained for the company to perform its part. It is true, it seems, that the agent was mistaken about his principal having an office at Smithfield; but it cannot escape the liability incurred by its agent's mistakes of this character, when his mistake was due to his negligence in not being informed about the details of his principal's business. *Kerr, Fraud. & M. pp. 405, 406; 2 Pom. Eq. Jur. § 839; Telegraph Co. v. Buchanan*, 35 Ind. 429. It was not impossible for it to perform its part of the contract, for it had two offices in Tarrant county,—one within 10 or 15 miles of the residence of the addressee, and the other within 5 miles of her residence. But we do not base our decision upon the ground that it could have easily, quickly, and cheaply delivered the message, but upon the ground that it had contracted to deliver it by special delivery to the addressee at her residence in Tarrant county, three miles from Smithfield; and we can see no reason why it should not, in law and justice, be held to the strict performance of its contract, just the same as is required of other persons. *Telegraph Co. v. Broesche*, 72 Tex. 654, 10 S. W. 734. We are therefore of opinion that the charge complained of in the second assignment of error was correct, while the one asked by appellant was not, and was correctly refused by the court; and, while we do not all fully approve the charge complained of in the first assignment of error, the evidence so clearly establishes liability of the appellant that no other verdict could, in our opinion, have been sustained, than the one found by the jury, even

under a perfectly proper charge. Finding no reversible error in the judgment, we order that the same be in all things affirmed.

WILSON et al. v. ZAJICEK.

(Court of Civil Appeals of Texas. July 3, 1896.)

VENDOR AND PURCHASER—DEFECTIVE TITLE—RIGHT TO RESCIND.

A vendor who has sold land, representing that he had a good title, and agreed to furnish an abstract so showing, cannot compel the purchaser to accept a deed which, as shown by the abstract, would convey but an undivided interest; and an offer to indemnify the purchaser against the claims of the owners of the outstanding interest, and to bring an action against them to quiet his title thereto, on the ground of adverse possession, is immaterial.

Appeal from district court, Wichita county; George E. Miller, Judge.

Action by J. F. Zajicek against L. F. Wilson & Co. Judgment for plaintiff, and defendants appeal. Affirmed.

F. E. Dycus, for appellants. James & Sherrod, for appellee.

HUNTER, J. This suit was brought by appellee to recover from appellants \$715 cash deposited with them to be applied as a payment on the purchase of 271½ acres of land. The land was sold to appellee by the agents of appellants, V. L. Vodica and W. B. McCrory, at \$10 per acre; and this cash payment was required in advance, and the balance was to be secured by five promissory notes of \$400 each, payable in one, two, three, four and five years, with interest, etc. The title to the land was represented by the agents to be good, and, according to appellee's evidence, perfect, and an abstract thereof was to be delivered to appellee at once; and when examined by his attorney, if the title was found to be as represented, the appellant was to make the deed with covenants of general warranty, and the five notes were to be executed and delivered by appellee. If found otherwise, the \$715 was to be returned. The abstract of title was delivered as agreed, and it was found that appellants' title was not good and perfect to all the land, but that an undivided one-ninth interest was outstanding in some heirs of the original grantee; and appellee refused to take the land, and so notified appellants, demanding the return of his money, which was refused. Appellants concede that this one-ninth interest is outstanding in said heirs, but claim title by limitation against them, and also offer to bring suit against said heirs, who are nonresidents of the state, and settle and quiet the title to said interest, and to execute a good bond to indemnify appellee against all loss which may result by reason of such defective title. This issue was submitted to the jury, and no complaint is made either of the charge or verdict. The offer to clear and quiet the title by a suit,

and the offer to give a bond of indemnity, was of no consequence whatever. The appellee was entitled to a good title to all the land, one about which no litigation could successfully arise, and one shown to be good by the abstract of the title; and, unless such a title was tendered by appellants, appellee was entitled to recover back the money paid. The title here tendered was imperfect, and appellants' interest was only an undivided interest in the 271½ acres, of eight-ninths, and appellee was not bound to accept it; and the judgment of the lower court in his favor was correct. Finding no error in the judgment, it is affirmed.

EDWARDS v. EDWARDS et al.¹

(Court of Civil Appeals of Texas. June 20, 1896.)

EQUITY—JURISDICTION TO PROTECT PERSONS UNDER MENTAL DISABILITY—INSTRUCTIONS.

1. A court of equity has jurisdiction to entertain an action brought by next friends, in the name and behalf of a person of weak mind, who is mentally incapacitated by disease, decrepitude, or other infirmity, though not in such a condition as to be adjudged a lunatic by the special tribunal provided by law for such purpose, to set aside conveyances, and to protect such person from the undue influence and fraud of others, though the nominal plaintiff denies the incapacity, and repudiates the acts of those bringing the suit.

2. In such action the court may appoint a receiver, and may make proper allowances to the next friends, for their expenses and the payment of their attorneys, out of the estate.

3. In an action to set aside a conveyance of land from a mother to her son, on the ground of undue influence, where the evidence clearly showed that the mother was old and unlettered, and dependent on others in business matters, and that the son had been her agent and adviser for many years, an instruction that the jury must find that the son knew of the confidence reposed in him by his mother, to be chargeable with its abuse, was without prejudice; such knowledge being an irresistible inference from the other facts shown.

Error from district court, Tarrant county; S. P. Greene, Judge.

Action by Elizabeth Edwards, by Ambrose and Martha Creswell, as her next friends, against C. O. Edwards and others. From the decree, Elizabeth Edwards, by her guardian ad litem, and Ambrose and Martha Creswell bring error. Affirmed.

C. R. Bowlin and A. M. Carter, for plaintiffs in error Ambrose and Martha Creswell. Stanley, Spoons & Thompson and F. B. Stanley, for plaintiff in error Elizabeth Edwards. Stanley, Spoons & Thompson, for defendants in error.

STEPHENS, J. In 1849 Lemuel J. Edwards and Elizabeth Edwards, his wife, settled in Tarrant county, Tex., where in the course of 20 years they accumulated a valuable estate, consisting of both personal and real property. In 1869 Lemuel J. Edwards

¹ Rehearing denied September 18, 1896.

was killed by his son-in-law, James Creswell; leaving Elizabeth, his widow, and C. O. Edwards, Martha Creswell, and other children, surviving him. An inventory and appraisal of this community estate was returned by the survivor, in accordance with the statute then in force. C. O. Edwards, being the oldest son, was mainly relied on by his mother, after his father's death, "to guide and direct her in nearly all of her business affairs." October 18, 1889, Ambrose and Martha Creswell, with others, instituted a proceeding in the county court of Tarrant county to have Elizabeth Edwards adjudged of unsound mind, and a guardian of her estate appointed, which culminated in a verdict and judgment on 25th of October, 1889, adverse to their contention. Four days thereafter they, with still others, instituted suit in the district court of Tarrant county against Elizabeth Edwards, C. O. Edwards, and L. J. Edwards, Jr., alleging a conversion of the personalty belonging to said community estate, which resulted in a judgment, December 8, 1892, against Elizabeth Edwards, in the sum of \$1,819.54; but nothing was recovered against the other defendants. A partition of the real property belonging to said estate had already been made before these proceedings were instituted, and the several tracts of land involved in this controversy, which were included in said inventory, had become the property of Elizabeth Edwards. By deeds made in 1883, 1889, and 1892, she divested herself of all of said lands, conveying them either to C. O. Edwards, or Crawford Edwards, his minor son. This suit was instituted on the 21st day of June, 1893, by Ambrose and Martha Creswell, as next friends of Elizabeth Edwards, to have these conveyances set aside on the ground of fraud and undue influence on the part of C. O. Edwards, in taking advantage of the feeble and helpless condition, mental and physical, of his mother, to strip her of all her property, which was of considerable value. The petition charged that she was an illiterate person, of unsound and feeble mind, over 80 years old, weak and trembling from palsy, nearly deaf and nearly blind; that her mind was almost totally ruined by disease and old age, so that she was but a mere child, and unable to comprehend her rights, or manage her affairs, etc.; and that C. O. Edwards had taken advantage of this condition, and defrauded her out of all her property, and had her entirely under his influence and control. A motion and plea sworn to by Elizabeth Edwards, denying her want of capacity, or that she had been defrauded as alleged, and charging that Ambrose and Martha Creswell were her enemies, and not her next friends, and praying that the suit be dismissed, was presented to the court, and filed August 28, 1893, by attorneys subscribing themselves as her attorneys, who were also attorneys for C. O. Edwards. The case was tried in March and April, 1895; and the court directed the

jury to determine this issue first, which they did as follows: "We, the jury, find that at the filing of this suit (June 21, 1893), at the date of the motion to dismiss (August 28, 1893), and the present time, the mind of Mrs. Elizabeth Edwards was impaired to the degree as specified in the issue submitted by the court, which issue is as follows, to wit: "Was the mind of the said Elizabeth Edwards so impaired, by age, disease, or otherwise, as to render her, under the circumstances surrounding her, as shown by the evidence, incapable of understanding and appreciating her property rights, to such an extent as to render her unable to exercise her free and unbiased will with respect to the same, either at the date of the filing of this suit, to wit, June 21, 1893, or at the date of filing said motion to dismiss, to wit, August 28, 1893, or at this date; and, if so, at which of said times?" The extent and effect of this finding will be better understood when the charge, which submitted this issue quite fully, is read in the light of the evidence; but, as only a question of jurisdiction is raised on this branch of the case, enough is stated for the disposition of that question. Having determined this preliminary inquiry in favor of plaintiff below, the jury, under charges submitting the issues as to the validity of the several conveyances made by Elizabeth Edwards, found against those made in 1892, and sustained all others. A recovery of a few thousand dollars in money was also had against C. O. Edwards by plaintiffs below, in behalf of Elizabeth Edwards. The court approved the verdict, and of his own motion, on the ground of its being made to appear that the mind of Elizabeth Edwards was so impaired as to render her incapable of managing her own affairs and protecting the property so decreed to her, appointed a receiver to take charge of the real estate, collect the rents, hold the money collected on the judgment, etc., subject to the further orders of the court, and until a duly-qualified person should apply for the same. Thereafter, during the same term of court, an allowance was made to the next friends and their attorneys for reasonable expenses and attorney's fees on account of the prosecution of this suit to judgment, which the receiver was directed to pay out of the first moneys coming to his hands. The motion for this allowance was resisted by an attorney appointed by the court as guardian ad litem for that purpose, who was also one of the attorneys for C. O. Edwards. Plaintiffs below moved for a new trial as to so much of the verdict as upheld the conveyance made in 1889 of the north half of the George Shields survey, situated near Ft. Worth, known in the record as the "McCart Land," and sued out a writ of error to this court, assigning errors to that part of the judgment only. A writ of error was also sued out in the name of Elizabeth Edwards by the attorneys who presented her plea and motion in the trial court, and by her

guardian ad litem, one of said firm of attorneys. The questions raised under this writ will be first considered.

It is insisted that the district court had no jurisdiction in the premises, and that it erred in refusing to dismiss the suit upon the sworn plea and motion of Elizabeth Edwards. The question thus raised has been considered by the courts, and discussed by the text writers; and it seems to be the general consensus of opinion that equity jurisdiction is maintainable in cases like this, where the person of weak mind has not been, or cannot be, adjudged a lunatic by the special tribunal provided by law for that purpose, and yet is so far incapacitated by disease, decrepitude, or other infirmity, as to require the protection of a court of equity against the undue influence and fraud of others. The most satisfactory statement of this doctrine we have been able to find is made by Mr. Beach, in section 49 of his work on Modern Equity Practice, where the authorities are cited in the footnotes. *Holzheiser v. Railway Co.*, 33 S. W. 887, decided by the Galveston court of civil appeals, is an instance of its application. *Howard v. Howard*, 87 Ky. 616, 9 S. W. 411, is to some extent a precedent for the course pursued in this case, where the alleged incompetency was disputed by the person in whose behalf the alleged next friends purported to sue.

It is also insisted that the court had no power to appoint a receiver, or to make allowances, to be paid out of the estate, to the next friends or their attorneys, to cover reasonable attorney's fees, and other necessary expenses of the litigation. But this power would seem to be but an incident of, and included within, that just considered. The protection of the court, through a receiver, who is but an arm thereof, seems as requisite in the last instance as the original decree of cancellation and recovery was in the first. See *Railway Co. v. Stuart*, 1 Tex. Civ. App. 642, 20 S. W. 962. Besides, it is not perceived how any harm could result from such appointment of a receiver to take care of the property pending further litigation, since, when it is at an end, if there is no authority or occasion for the further continuance of the receivership, it may then be terminated, on motion made in the trial court. So as to the allowances: If litigation of this class must be undertaken by a next friend at his own expense, a court of equity being denied the power of doing full justice to all parties by its decree, such next friend would likely be deterred from often undertaking so kindly and costly a service for an unfortunate victim of infirmity and fraud. *Voorhees v. Polhemus*, 36 N. J. Eq. 456, and authorities there cited. It was perhaps irregular for the attorneys to move for this allowance in their own names, instead of those of the next friends; but no objection is so urged to the method of procedure in this respect, or to the amount of

the allowance, as to require us to pass thereon. It is the fact of the allowance—or, rather, the power of the court to make it—that we are called upon to determine. We therefore overrule all the assignments of error submitted in the brief of attorneys and guardian ad litem for Elizabeth Edwards.

We pass next to the issue raised by Ambrose and Martha Creswell, under their writ of error, as to the validity of the conveyance from Elizabeth to C. O. Edwards of the McCart land, dated October 31, 1889, which they failed to have set aside. This tract, of about 160 acres, owing to its proximity to the city of Ft. Worth, was then of the estimated value of \$40,000 or \$50,000. The deed recited a consideration of "\$4,000, to be paid by said C. O. Edwards, without interest and on demand, and the further consideration that said C. O. Edwards should faithfully comply in all things with the terms of a certain contract entered into at the same time between C. O. Edwards and Elizabeth Edwards," and expressly reserved a vendor's lien to secure the payment of said note, and compliance with the terms of said written contract, which is as follows: "State of Texas, Tarrant County. Know all men by these presents, that I, C. O. Edwards, of the county of Tarrant and state of Texas, as a part of the consideration for the land this day conveyed by my mother, Elizabeth Edwards, said land being a part of the George Shields 320 acres in Tarrant county, Texas, do hereby agree and bind myself, my heirs and legal representatives, that I will care for, maintain, and support my said mother, and furnish her everything necessary for her comfort and convenience, so long as she may live. Witness my hand, this October 31, 1889. C. O. Edwards." The note of even date with the deed, and reciting that it was given for the land, bore interest at 8 per cent. per annum, and provided for 10 per cent. attorney's fees, in case it should be sued upon, etc. From the date of this transaction up to the trial, Elizabeth Edwards lived with, and, it seems, continues to live with, C. O. Edwards, who has so far complied with the terms of the written undertaking quoted above. The note, however, had not been paid, but was more than four years past due, at the trial below. After the argument of the cause the court permitted C. O. Edwards, against the objection of Ambrose and Martha Creswell on the ground that it came too late, to make a written tender of the amount then due upon the note, for which judgment was finally entered against him. The Creswells conclude the statement of the evidence in their brief as follows: "We do not insist that Elizabeth Edwards did not have mental capacity to make a valid deed in October, 1889, but that she was then old, ignorant, weak-minded, and nearly blind." There was evidence from which the jury might have found, not only that she had the

requisite capacity to make the deed, but also that she made it understandingly, and without the constraint of any undue influence.

The first error is assigned to the charge, and complains of the qualification of the several paragraphs submitting the issue of undue influence on the part of C. O. Edwards, growing out of the relation of confidence between him and his decrepit mother, to the effect that he must have been aware that such trust was reposed in him, before that ground of recovery would be available. The assignment contains this statement: "The evidence clearly showed that plaintiff was an old, illiterate woman, nearly deaf and nearly blind; that C. O. Edwards had been her agent to attend to nearly all of her business for many years; that she never refused, during all these years, to trust him, or to do as he requested her." Now, could he, who was a thrifty and successful business man, in the prime of life, when so long trusted by his unlettered and dependent mother, have been ignorant of that fact? We think not. If the condition of confidence was shown, knowledge thereof on the part of C. O. Edwards was an irresistible inference. It follows that the qualification of the charge, if abstractly erroneous, could have done no harm, when applied to the facts of this case. We therefore overrule this assignment.

The next complains of the court's refusal to give a special instruction to the effect that the failure of C. O. Edwards to pay the \$4,000 note was itself a forfeiture of his title to the land. In view of what has already been stated, and what follows, this position is so manifestly untenable that it need not be discussed. Nor does the assignment which complains that the tender of the purchase money came too late show any reversible error. The petition did not claim a forfeiture for non-payment of purchase money, and does not seem to have been drawn with that in view, which probably explains the delay complained of.

The other assignments, except the eighth, complain of the court's refusal to grant a number of special instructions. After carefully reading these several refused charges in connection with the charge given, we are of opinion that in so far as they contained correct propositions applicable to the case, and were not charges upon the weight of the evidence, they were included in the main charge, which was quite full, and not to the prejudice of those now complaining.

The eighth and last assignment in the brief complains that there was no evidence to sustain the verdict in the six or seven particulars therein mentioned. But the testimony set out in the first part of the brief contradicts this assignment. For instance, C. O. Edwards testified that his mother wanted to give him this land, and wanted him to take care of her; that he told her at the time the land was worth at least \$50,000; and that

she said she didn't care if it was worth \$100,000,—she would do as she pleased with it. He further testified: "When this first case—this insanity suit—was instituted against her, she said then she was going to do something with this piece of land, if I consented, or she would arrange with somebody else; she was going to have a place to stay; she wasn't going to be aggravated the balance of her life. I told her to do as she pleased with it; didn't care whether she gave me anything or not; didn't ask for anything, unless she wanted to. I told her to use her own pleasure about it. That was the McCart land, as it is called." He entirely denied that any influence had been brought to bear on her to induce the making of the deed, and the circumstances tended, at least, to show that the conduct of the daughters and sons-in-law in harassing her with lawsuits caused her to seek shelter with her oldest son, and give him the land. The assignment, then, that there was no evidence to support the verdict, is not sustained. We are not called upon by this assignment to determine the sufficiency of the evidence to support the verdict. *Railway Co. v. Raney*, 86 Tex. 363, 25 S. W. 11. Judgment affirmed.

STEPHENS et ux. v. TAYLOR et ux.¹
(Court of Civil Appeals of Texas. July 3, 1896.)

**TENANCY IN COMMON—RECOVERY OF RENTS—EX-
EMPLARY DAMAGES FOR EVICTION.**

1. The right of a tenant in common to recover rents from his co-tenant, who has excluded him from possession, is not affected by the fact that, but for the inclosure of the land by the tenant in possession, it would not have produced any rents.

2. A tenant in common cannot recover exemplary damages from his co-tenant for evicting him from the land by means of an action of forcible entry and detainer brought in a court of competent jurisdiction.

Appeal from district court, Bosque county; J. M. Hall, Judge.

Action by C. W. Taylor and wife against W. C. Stephens and wife. Judgment for plaintiffs, and defendants appeal. Modified.

S. H. Lumpkin and J. A. Gillette, for appellants. Davis & McKoy, for appellees.

STEPHENS, J. The north half of 640 acres of land in Bosque county, granted to the heirs of Joseph L. Wilson, is the land in controversy. Mary G. Taylor, joined by her husband, C. W. Taylor, sued appellants in trespass to try title, and prayed for partition in the event of appellants being entitled to any part of the land. By the death of Joseph L. Wilson without issue, descent was cast on his father, Joseph Wilson, from whom it passed, through death without issue of his surviving children, to their three surviving

¹ Rehearing denied September 18, 1896.

half-sisters and their descendants. In June, 1856, one G. W. Outler recovered judgment in the district court of McLennan county against the heirs of Joseph Wilson, who died about 1852, for an undivided half of the 640-acre tract. Appellee Mary G. Taylor, by inheritance from her mother, Aby Jones, to whom it had been conveyed by mesne conveyances from Outler, and by deeds from the other heirs of Aby Jones, became and was the owner at the institution of this suit of the interest so recovered by Outler. In 1892 the descendants of two of the three half-sisters above referred to conveyed their one-third undivided interest in the land in controversy, which was two-thirds of a half of the north half, to appellant W. C. Stephens, who conveyed same to his wife in May, 1893. Through a partition proceeding had in 1884 of the whole 640 acres, appellee Mary G. Taylor, who, with R. W. and Thomas W. Jones, were plaintiffs therein, acquired the interest of the other half-sister, who had previously thereto conveyed by mesne conveyances to the defendants therein, Barefoot et al., more than her interest in the land, namely, the south half thereof; the north half (in controversy) being set off to said plaintiffs, and the south half to defendants. It thus appears that appellees, Taylor and wife, became entitled to recover two-thirds of the north half, and appellants the other third, and so the judgment was rendered. The several objections to the court's charge, then, in so far as it related to the issue of title to the land, fail to show available error. Nor is there any merit in the contention that the court should have granted the verbal motion to continue for want of necessary parties, made upon the ground that the evidence disclosed that there were other Wilson heirs, not before the court, who had an interest in the land. We agree with the district judge that the evidence did not warrant that conclusion. The ruling complained of, in permitting appellees to read from the deed records of Bosque county the McLennan county judgment, is sustained by the judge's explanation appended to the bill of exceptions. These conclusions lead to an affirmance of the judgment as to the land.

We next consider the issue of rents. Appellant W. C. Stephens and others owned the adjacent lands, and as a result of their several inclosures the land in question became inclosed, and Stephens had the actual possession thereof. In December, 1892, Taylor and wife took possession of, and put in cultivation, about 40 acres of the land, entering by permission through the inclosure of one of the adjacent proprietors. After they had built a house and planted their crop, in the spring of 1893, Stephens caused them to be ejected under judgment in an action of forcible entry and detainer, and thence to the trial, in the latter part of August, 1895, held the exclusive possession. That one tenant in common may recover from his co-tenant, who has ex-

cluded him from the joint possession of the common property, the value of the use of that of which he has thus been wrongfully deprived, is well settled. The contention, however, seems to be that, as without the inclosure the land would have had no rental value, the evidence did not warrant the recovery. But the land was inclosed, and appellees had equal right with appellants, to the extent of their interest (which was two-thirds), to the use of the land as it was. Had Stephens inclosed the land at his own expense, it would not have given him the right of exclusive possession. He might, perhaps, have claimed an allowance or deduction on that account, but no such defense was interposed. The recovery of two-thirds of the value of the use and occupation of the land as it stood we therefore approve. The complaint that judgment against the wife was erroneous is not sustained by the record. It did not award execution against her separate estate, and hence was not to her prejudice.

It only remains to determine whether the recovery of \$50 as exemplary damages can stand, and we are of opinion that it cannot. The right of Stephens to eject Taylor and wife for a forcible entry was an issue of which the justice court had jurisdiction, and we have no disposition, if we had the power, to review its decision. Merely because Stephens instituted that suit to gain an advantage in this would not render him liable for vindictive damages. The judgment in that respect will therefore be reversed, and here rendered for appellants; but in all other respects it will be affirmed, with costs of appeal taxed against appellees, Taylor and wife.

We will add, however, that the very dim and closely typewritten briefs of appellants, covering nominally seven pages, but really containing the matter of about twice as many pages of properly written manuscript, are wholly inadmissible under the rules, and, but for the near approach to the end of the term, would not be tolerated. See amended rule 53, 87 Tex. xli., 31 S. W. vii.

DUNN et al. v. HUGHES.

(Court of Civil Appeals of Texas. June 6, 1896.)¹

SUMMONS—STATEMENT OF DATE OF FILING PETITION—SERVICE—SUFFICIENCY OF RETURN.

1. Under Rev. St. 1895, art. 1214 (Rev. St. 1879, art. 1215), requiring a citation to state the date of filing of the petition on which it is issued, a judgment by default entered on a citation which misstates the date of filing the petition is erroneous.

2. An officer's return on a citation to E. T. Stevens, which shows personal service by delivery to "E. T. Stephen," is sufficient to show service on the defendant named in the writ.

Error from Wichita county court; Edgar Scurry, Judge.

¹ Rehearing denied September 18, 1896.

Action by P. L. Hughes against J. C. Dunn and others. Judgment for plaintiff by default, and defendants bring error. Reversed.

Stine, Chesnut & Hurt, for plaintiffs in error. R. Cobb, for defendant in error.

Reasons for Reversal.

HUNTER, J. The petition alleges a cause of action against E. T. Stevens and others named, arising on a promissory note, and was filed January 10, 1895. The citation commands the sheriff to serve E. T. Stevens, and the others named, to answer the petition of plaintiff, which it describes by correct number, names of parties, cause of action, etc., but misdescribes as to date of filing, which is stated to be January 14, 1893, which is the same date of its issuance. The sheriff's return on the citation showed that the writ was served "by delivering to E. T. Stephen, the within-named defendant, in person, a true copy of this writ." Judgment by default final was rendered against all the defendants. All prosecute this writ of error, complaining that the return of the sheriff fails to show that E. T. Stevens had been served with citation, and also complaining that the citation failed to comply with the statute, in that it failed to correctly state the date of the filing of the petition, but misdescribed it.

The proceedings are defective in the misdescription of the date of filing the petition, which, as required by article 1214, Rev. St. 1895 (article 1215, Rev. St. 1879), must be strictly complied with, to authorize a judgment by default. *Railway Co. v. Erving*, 2 Wilson, Civ. Cas. Ct. App. § 122; *Kirk v. Hampton*, Id. § 719. But we are of opinion that the return of the officer sufficiently showed that he had simply misspelled the defendant's name, for while he spells it "Stephen," instead of "Stevens," he further shows that he delivered the writ, which contained defendant's correct name, to the party named in the writ, and this part of the return made it certain as to whom he served with citation. *Townsend v. Ratcliff*, 50 Tex. 148. But, for the error named, we are constrained to reverse the judgment herein, and remand this cause, which is done accordingly.

ROBERTS et al. v. AMERICAN BUILDING & LOAN ASS'N.

(Supreme Court of Arkansas. July 8, 1896.)

BUILDING AND LOAN ASSOCIATIONS—FORECLOSURE OF MORTGAGE—RULE FOR COMPUTING AMOUNT DUE—FINES.

1. The equitable rule for ascertaining the amount due on a building association loan, on default of the borrower, and a foreclosure and cancellation of his stock, is to ascertain the amount of stated dues and interest which will become due in the future, to the time of the maturity of the stock, as estimated. The principal which, with interest for the supposed time, will amount to the dues and interest so calculated, will be the present value of the anticipat-

ed payments; and to this the arrearages due, and the fines for the time between the date of the default and the entry of the decree of sale, should be added.

2. The monthly fines provided for by the by-laws of a building and loan association are not by way of penalties, but are to be considered as liquidated damages, fixed by consent of the parties, for the loss sustained by the association by reason of the failure of the defaulting member to make prompt payment; and such payments being essential to the success of the plan of the association, and for the interest of its members as a whole, the fines will be enforced, independently of statutory provisions, if reasonable in amount and equitable in their application.

3. A provision in the by-laws of a building association imposing on its stockholders a fine of "ten cents per share, to be imposed for each and every month that payment is not made," is reasonable.

Appeal from circuit court, Carroll county; Edward S. McDaniel, Judge.

Action by the American Building & Loan Association against Mary A. Roberts and Leonidas G. Roberts for foreclosure. Decree for plaintiff, and defendants appeal. Affirmed.

The appellee brought this suit to foreclose a mortgage which was given to secure the following note, to wit: "\$2,000.00. Minneapolis, Minn., Dec. 11th, 1888. For value received, on or before nine years from date I promise to pay to the order of the American Building and Loan Association, at its home office in Minneapolis, Minnesota, the sum of two thousand dollars, with interest at the rate of six per cent. per annum on the sum of one thousand dollars, payable monthly. It is understood that this note is given for a loan obtained on twenty shares of stock of said American Building and Loan Association, and if the maker hereof fails to make any monthly payments on the said stock, or to pay any installment of the interest, for a period of six months after the same is due, then the whole amount of this note shall at once become due and payable. But if the maker hereof shall pay all installments of the interest which become due hereon, and all fines and monthly payments which become due on said stock, until said stock becomes fully paid in, and of the value of \$100 per share, and before any of said installments of interest or monthly payments shall have been past due for a period of six months, then, upon the surrender of said stock to said association, this note shall be deemed to be fully paid and canceled. This note is understood to be made with reference to, and under, the laws of the state of Minnesota. [Signed] Mary A. Roberts. Leonidas Roberts." On the margin of the face of the note is the following: "If this note is paid before seven years from date, there shall be allowed such rebate from the amount of the premium as the board of directors of said association shall deem equitable. Premium, \$1,000.00. Loan, \$1,000.00." The mortgage executed at the same time by appellants recites that the conveyance of the land therein described is upon a consideration of \$2,000

paid to appellants by the appellee. The mortgage contains the following conditions, viz.: "This mortgage being given to secure a loan made on twenty shares of stock in said American Building and Loan Association, the monthly payments of which amount to \$12.00 per month, said party of the first part does further covenant and agree to make the said monthly payments on said stock as they shall become due, until said stock shall become fully paid in." "Provided, nevertheless, that if the said party of the first part," etc., "* * * shall pay to the party of the second part, at its home office, one thousand dollars and interest, according to the conditions of one certain promissory note, bearing even date, payable after three years from, and before nine years from, date, for the sum of one thousand dollars, with interest on the same at 6 per cent. per annum before and after maturity, until paid, interest payable monthly, then this deed shall be null and void, otherwise to remain in full force and effect. But if default be made in the payment of said sum or sums of money, or of any installment of interest thereon, or of any monthly payment on said stock, for a period of six months after the same shall fall due, or any part of either, * * * or in any condition in this mortgage contained, then in either or any such case the whole principal sum or sums secured by this mortgage, and the interest thereon accrued up to the time of such default, shall, at the election of said second party, its successors or assigns, or his or their agent, become thereupon due and payable immediately upon said default; and the said party of the first part does hereby authorize and empower the said party of the second part, its successors or assigns, the owner hereof, its agent and attorney, at its or their election, and without notice of such election, to foreclose at once this mortgage for the whole of said principal sum or sums and accrued interest, as herein provided, or to foreclose for such sum or sums and interest and money paid as may be due and payable by the terms of said note hereby secured, and sell the said hereby-granted premises at public auction, and convey the same to said purchaser in fee simple,—agreeably to the statutes in such case made and provided, and out of the moneys arising from such sale to retain the principal and interest then accrued, on the sum or sums so elected to be foreclosed for, together with any and all costs and charges of such foreclosure, including one hundred dollars attorney's fees for foreclosing this mortgage; paying the overplus, if any, to the said party of the first part," etc. The complaint alleged that the by-laws of the association provide that each member should pay his shares of capital stock in monthly installments of 60 cents upon each share, beginning 30 days from the date of his certificate of stock, and that every member neglecting to pay such installment when due and payable should forfeit and pay to the association 10 cents per month, as a

fine, for each share of stock so owned by him, and so in default. The breaches of the condition of the mortgage alleged were that the monthly installment of dues on said 20 shares of stock due and payable on the 11th day of May, 1890, and for each subsequent month, amounting to \$84, and the installments of interest for the same period, amounting to \$35, and the fines accruing for the same period, amounting to \$14, had not been paid. The amount claimed to be due at the institution of the suit was \$2,000, with interest on \$1,000 at 6 per cent. per annum from the 11th day of April, 1890, and an attorney's fee of \$100; and plaintiff elected to claim for the \$2,000, with interest at 6 per cent. on \$1,000, and for \$100 attorney's fee, and asked judgment accordingly, and for sale of 20 shares of stock to satisfy same, and for sale of property mortgaged, and the proceeds to be applied to the payment of the remainder of said judgment, if any, after application of proceeds of sale of stock. The bill was filed the 18th of November, 1890. The answer admitted the execution of a note for \$1,000, but denied that a note of \$2,000 was executed. It admitted the execution of the mortgage, but alleged that it was to secure the note for \$1,000. The execution of the note sued on is denied. Usury, and a failure to comply with the law authorizing foreign corporations to do business in the state, were set up, but these defenses have been abandoned here. The case was tried upon the pleadings, exhibits, and depositions of witnesses, and the court found the issues for the plaintiff, and that the note sued on was executed, and the mortgage also, for the purpose of securing $\frac{1}{2}$ according to its terms; that monthly dues to the amount of \$264 had been paid; that interest on the advancement had been paid to April 11, 1890, and that \$84 in monthly dues, \$35 in interest to November 11, 1890, and \$14 in fines, were in arrears at the institution of the suit; that there had been default in the payment of monthly installments for more than six months; that appellee was entitled to monthly dues on stock for nine years, amounting to \$1,296, less \$264 paid thereon, leaving a balance of \$1,032, with interest on the advancement from April 11, 1890, to November 18, 1890, amounting to \$36.15, and \$14 in fines, making an aggregate of \$1,082.15 due at the institution of the suit. To this sum was added interest at 6 per cent. from November 18, 1890, the time of the institution of the suit, to August 17, 1893, the date of the decree, and judgment was rendered for \$1,260.70. Appellants were allowed 30 days to pay off and satisfy the decree, surrender their stock, and have mortgage satisfied and canceled. Upon failure to do so, the equity of redemption was foreclosed, and sale of the property ordered. From the decree this appeal was taken.

Charles D. James, for appellants. L. H. McGill, for appellee.

WOOD, J. (after stating the facts). 1. The appellee was duly incorporated under the laws of Minnesota. Its articles of incorporation and by-laws show that it is a mutual building and loan association, having the same plan or scheme as that in general use by such associations. For a description of such associations, see note by Freeman in *Robertson v. Association*, 69 Am. Dec. p. 151. The purpose of this association was to exact of appellant an obligation equal to the advancement which it had made to her, together with the premium which she had bid for same, the whole amount being equal to the par value of her 20 shares of stock at maturity. And this purpose it carried out, as appears from the face of the note itself and the mortgage, as well as from the testimony of witnesses. While there is testimony to the contrary, it is improbable and unreasonable. The ruling of the trial court upon the issue of non est factum was correct. This issue however, is immaterial; for although the note specifies that in case of default the "whole amount of the note is at once due and payable," and although the mortgage gives appellee, in case of default, "the election to foreclose for the whole of said principal sum," still a court of equity would not decree for the full amount of the advancement and interest, together with the premium. Such a decree would be tantamount to enforcing a penalty for breach of contract. *Hagerman v. Association*, 25 Ohio St. 205, 206. The evident design of the parties to this contract was to have the debt discharged according to the system peculiar to building and loan associations. This contract, then, binds the appellant to pay monthly installments of interest on the advancement, monthly dues on stock until its maturity (not to exceed a period of nine years), and fines assessed for failure to make stock payments or dues as specified. Default having been made for more than six months in the payment of the installments of interest and monthly dues, foreclosure proceedings were begun, and the only real question here is as to the amount of the decree. The lower court charged the borrower with the whole amount of dues for nine years, and added to this sum the interest and fines in arrears at the institution of the suit. From this sum was deducted the amount of dues already paid on stock, and to the balance was added 6 per cent. interest per annum from the institution of the suit to date of the decree, making the sum of \$1,260.70, for which decree was entered. Was this correct? The rule for determining the amount which we think most nearly enforces all the contract obligations is to ascertain the amount of stated dues and interest which will become due during the future existence of the corporation, as estimated. Then find the principal which, with interest for the supposed time, will amount to the dues and interest already calculated. This will be the present value of the anticipated payments.

To this principal add the arrearages due, and the fines for the time between the date of default and the entry of the decree of sale. It was in proof, by the actuary of the association, that the stock would have matured in 98 months. The date of the certificate of stock was June 11, 1888. The date of the decree was August 17, 1893. The time, therefore, for the stock to run before maturity from date of decree, was $35\frac{4}{5}$ months. Dues, interest, and fines were in arrears from April 11, 1890, or 40 months and 6 days. Then, from this data, applying the above rule, we have the following:

Dues $35\frac{4}{5}$ months at \$12 per month	\$429 60
Interest on \$1,000 (advancement) for $35\frac{4}{5}$ months at \$5 per month.....	179 00
Total	\$608 60

Now, the principal which will amount to this sum in $35\frac{4}{5}$ months, at 6 per cent. interest, is \$516.20, which is ascertained by dividing the \$608 by \$1.179, the principal and interest on one dollar, at 6 per cent. for $35\frac{4}{5}$ months. The present value of the anticipated payments then is \$516.20. To this add arrearages:

Dues 40 months at \$12.....	\$ 480
Interest 40 months at \$5.....	200
Fines 40 months at \$2.....	80
—Total, \$1,276.20.	

This sum represented the amount for which the mortgage should have been foreclosed. But the court rendered judgment for \$1,260.70, making a difference in favor of appellant of \$16.20. So it is clear that she has not been prejudiced by the decree. The above rule is that announced by the superior court of Cincinnati. *End. Bldg. Ass'ns*, § 386. The rule as announced in a leading case in Maryland is: "Ascertain by proof the probable duration of the society. Then estimate the aggregate amount of the weekly and monthly installments payable during that time, from that sum rebate a just amount of interest, and add thereto the arrearages due, after allowing for payments made to the society. And the sum thus ascertained is the amount which the mortgagee is entitled to receive in present satisfaction of the mortgage." *Robertson v. Association*, 10 Md. 397, 69 Am. Dec. 145, and cases cited in note. The application of this rule to the facts of this record would give substantially the same result as above. Either of these would be just to the borrowing member, and to the association. But we prefer the former, because it gives a simple, certain, and accurate method of arriving at the amount, whereas by the latter rule the amount of interest to be rebated is not fixed, but such as the chancellor may deem just. The rule we have approved is announced upon the basis of a final and complete foreclosure by sale of the property mortgaged, and a termination of appellant's membership in the association. There is no intimation anywhere in the record that appellant desires or would be willing to continue her membership in the association. She

repudiated the contract as a real building and loan contract, insisting that it only binds her to repay the amount advanced, at 6 per cent. interest, and that the mortgage only secured that amount, i.e. that the contract was for a straight loan.

2. The amount of the decree, under the rule announced, as well as the rule adopted by the trial court, includes fines for failure to make monthly payments. The by-laws authorize a fine of "ten cents per share to be imposed for each and every month the payment is not made." The success of the building and loan association scheme depends upon the certainty and regularity with which members pay their dues. Fines, strictly as such, imposed merely by way of punishment for a breach of contract, a court of equity would not enforce. But what is usually designated as fines in a genuine building and loan association are intended for, and do subserve, a different purpose. They are treated by the best authorities as liquidated damages, fixed by consent of the parties, to indemnify the association for the loss it has sustained by reason of the failure of the defaulting member to make prompt payments. *Shannon v. Association*, 36 Md. 383; *Association v. Thomson*, 52 Ga. 427; 2 Am. & Eng. Enc. Law, p. 620, and authorities cited. Dues being the vitalizing principle in the whole plan, and the measure of the prosperity of the whole depending upon the promptness with which each member discharges his obligation to every other to pay them, it is but just that each delinquent may contract as far as possible to make good the loss occasioned by him. In most of the states the legislature, recognizing that some such power is indispensable to preserve the equality of burdens, while each is sharing equally in the profits, has enacted laws providing for the imposition of fines. But, in the absence of such statutes, it is within the province of a court of chancery to enforce such an essential regulation, when adopted by the association. Those who become members or stockholders of an association having such a by-law, of course, approve and accept same, and should be bound thereby, provided said by-law be reasonable. *End. Bldg. Ass'ns*, § 415; *Shannon v. Association*, supra. Mr. Endlich, speaking of a member who defaults in the payment of dues, says: "He will be getting an advantage over and above his fellows. He will have had the use of his subscription money for a longer period than they had theirs, and, besides, he will have his proportionate share of the gains made upon all their prompt payments, whilst he will lose only the trifling amount that would have come to him as his proportionate share of the profits, which, if he had paid his dues properly, would have accrued from such payment in the interval between the day when it was his duty to make it, and that upon which he did make it. It follows that the society is, in

good conscience, entitled to be made whole for the injury resulting from tardy payments." *End. Bldg. Ass'ns*, § 412. In *Goodman v. Association* (Miss.) 14 South. 146, Chief Justice Campbell said: "What is called a fine (merely an agreed sum as liquidated damages) is imposed for every default in payment, as a spur to prompt payment, so as not to derange the process of compounding, which must fall if there is want of payment as agreed, and failure of which would cause failure of the scheme. We see nothing wrong in members of full age, and compositis, mutually binding themselves to so beautiful a scheme for reciprocal advantage, and being held to the performance of what they had agreed." Mississippi, like Arkansas, has no statute on the subject. We are aware that some courts regard fines as penalties, and will not lend their aid to enforce them, independent of statutory enactment. *Association v. Graham*, 7 Neb. 173; *Association v. Benjamin*, Id. 181; *Jarrett v. Cope*, 68 Pa. St. 67; *Link v. Association*, 89 Pa. St. 15. But the rationale of the doctrine of fines for the nonpayment of dues is that they are essential to the proper exercise of the express powers conferred upon building and loan associations in their incorporation. And therefore they have the right to impose them, whether any express warrant is found for it in the statute under which they are incorporated or not. They have such power by implication. *End. Bldg. Ass'ns*, § 417; *Goodman v. Association*, supra. It has been suggested that the menace of foreclosure, which overhangs the borrower in case of default, is a sufficient stimulus to promptness, and that, therefore, the by-law imposing fines is unnecessary, and should not exist. But the investor has no such stimulus to enforce punctuality on his part. The imposition of fines for nonpayment of dues must apply to every member alike,—the investor as well as the borrower. The power to impose fines, however, if unrestrained, might be abused, and thus cause injustice and oppression. Therefore courts of equity, operating with or without the sanction of the statute, will see that fines are reasonable in amount, and equitable in every respect, having in view the object to be attained by them. They must be prescribed by the charter or by-laws, in precise and unequivocal terms, so as to be readily understood by the members. *End. Bldg. Ass'ns*, §§ 419-422; *Association v. Sullivan*, 62 Cal. 394; *Davis, Bldg. Soc.* p. 36; *Mulloy v. Association*, 2 McArthur, 594. The by-law under consideration conforms to these requirements.

Since the decree is for a sum less than it might have been under the rule announced, it is unnecessary for us to determine whether the small interest on fines included in the decree is error. If so, it was not prejudicial. Affirm.

IRVINE v. SHRUM.

(Supreme Court of Tennessee. Sept. 23, 1896.)

MORTGAGE—LIMITATION—MERGER.

1. A trust deed creating an express and not an implied lien, an action to foreclose it may be maintained, though an action for personal judgment on the notes thereby secured is barred by limitation.

2. The purchase, by the owner of lands subject to a homestead interest, of outstanding purchase-money notes, secured by a trust deed which is superior to the homestead right, does not operate to merge and extinguish the lien of the trust deed.

3. A purchaser under a second mortgage, which does not convey the homestead interest of the mortgagors, may lawfully supplement his title by a purchase of a debt secured by a prior trust deed which is superior to the homestead right, and by a further purchase of the property at a sale thereunder.

Appeal from chancery court, Hamilton county; T. M. McConnell, Chancellor.

Bill by Allean Irvine against S. W. Shrum. Decree for defendant, and complainant appeals. Affirmed.

Dodson & Dodson, for appellant. D. S. Anderson and W. T. Frierson, for appellee.

WILKES, J. E. H. Irvine and wife, Allean Irvine, executed a deed of trust upon certain real estate to one Gifford, to secure a debt due from the husband to defendant, Shrum. The wife's name was signed to the deed, but it did not appear in the body or conveying part of the instrument. The trust deed was foreclosed, and Shrum became the purchaser. Thereupon the wife filed her bill in chancery enjoining him from taking possession of the property and claiming homestead therein. While this suit was pending Shrum learned that there was a debt for purchase money upon the land, and a deed of trust to secure the same. Shrum thereupon bought the purchase-money notes, and caused the mortgage to secure them to be foreclosed, and bought under the foreclosure sale, and took deed from Montague, the trustee. He thereupon, by leave of the court, filed a cross bill, alleging the purchase under both trust deeds, and asked that title be decreed to him free of all homestead or rights in Irvine and wife, or either of them. This was demurred to on the grounds that Montague's right to enforce the trust for the purchase money was barred by the statute of limitation, inasmuch as his notes were barred, and that the legal and equitable title to the property had become merged in Shrum, and the purchase-money debt had been satisfied, and the lien discharged thereby. This demurrer was overruled, and answer was made, and proof taken, and a decree was rendered fixing the right of Shrum to the land superior to the right of homestead, and awarding a writ of possession, and from this decree the complainant appealed. The case has been heard by the court of chancery appeals, and the decree of the chancellor affirmed, and complain-

ant has appealed to this court, and assigned errors raising the same question already passed upon.

We see no error in the decrees of the chancellor and court of chancery appeals. The right of Montague to sell under his deed of trust was not barred by the statute of limitation, even though, as to the notes secured thereby, the statute may have run, so as to bar the recovery of any personal judgment on them. The trust and lien of the mortgage is an express, and not merely an implied, one. *Fisher v. Fisher*, 9 Baxt. 71; *Lincoln v. Purcell*, 2 Head, 143; *Gudger v. Barnes*, 4 Heisk. 570; *White v. Blakemore*, 8 Lea, 62; *Smith v. Goodlett*, 92 Tenn. 230, 21 S. W. 106; *Harris v. Vaughn*, 2 Tenn. Ch. 483.

Neither was there a merger of the legal and equitable titles, so as to extinguish the debt and cancel the lien. When Shrum bought under the Gifford trust, he became the owner of the reversionary interest in the land; that is, the owner of the land subject to the homestead interest. By purchasing the mortgage notes he did not acquire any equitable title or interest in the land. Montague, under his mortgage, held the legal title to the land, superior to the homestead right, but, for the purpose of securing the purchase-money notes only. Shrum did not become vested with this legal title or right, but simply held the debt, which was an incumbrance on the land, and had only the right to call upon the trustee, Montague, to sell the land for the extinguishment of such lien. This he did, and bought at the sale, and became thus vested with all the right which Montague could confer under the power contained in his deed of trust. It is true that, when an equitable estate vests in the same person in whom is the legal title to the same premises, the usual rule is that the equitable merges into the legal estate. But, in order to merge, the two estates must be co-extensive as to the same property. And the doctrine is not a favorite with the courts, and will not be applied against the intention and interest of the holder of the legal title. *Moore v. Luce*, 72 Am. Dec. 629; 15 Am. & Eng. Enc. Law, 313 et seq.; 2 Pom. Eq. Jur. §§ 738-791; *Jones, Mortg.* 848; *Insurance Co. v. Murphy*, 111 U. S. 744, 4 Sup. Ct. 679. Here the effort is to merge the greater estate, held by Montague, into the more limited or less estate in remainder or reversion, obtained under the Gifford trust and conveyance. We can see no valid reason why Shrum should not buy under the Montague foreclosure, and obtain all the rights which he could under that trust, in order to protect the title he already had, or to enlarge his estate in the premises; and this he might do pending the action to determine his right under the Gifford trust, and without leave of the court in which that action was pending. We have been cited to no authority, and can see no reason, why Shrum should not in good faith justify the

title he already had, or buy in an additional assurance or independent interest.

It is finally said that, if any right existed to foreclose the mortgage,—the trust,—it could only be exercised by making the sale under the orders of the chancery court, and not by mere motion of the trustee out of court. It is the purpose of such deeds of trust to furnish an easy means of foreclosure without the aid of the court. It is true the party foreclosing is not precluded from going into court, if there should arise or exist any complication which the aid of the court is required to remove; but, unless there is some reason therefor, the proper practice is to sell without incurring the cost of a court proceeding. *Clark v. Jones*, 93 Tenn. 642, 27 S. W. 1009. We can see no error in the decrees of the chancellor and court of the chancery appeals, and they are affirmed, with costs.

SWEET v. CHATTANOOGA ELECTRIC LIGHT CO.

(Supreme Court of Tennessee. Sept. 19, 1896.)

LIMITATION OF ACTIONS—SUSPENSION OF STATUTE—COMMENCEMENT OF ACTION IN COURT WITHOUT JURISDICTION.

The commencement of an action in a court not having jurisdiction to try it does not suspend the running of the statute of limitations, under the provision of Mill. & V. Code, § 3449, that if an action is commenced within the time limited, but judgment is rendered against the plaintiff on any grounds not concluding his right of action, he may bring a new action within a year thereafter.

Error to circuit court, Hamilton county; John A. Moon, Judge.

Action by Hiram B. Sweet against the Chattanooga Electric Light Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Case & Case, for plaintiff in error. Shepherd & Frierson, for defendant in error.

WILKES, J. This is an action for damages for personal injuries caused by the bursting of the fly wheel of defendant's engine on June 23, 1893. On June 22, 1894, plaintiff began suit against defendant and its receiver for such damages in the United States district court at Chattanooga. The declaration in this case alleges that the suit was dismissed by the Chattanooga court for want of jurisdiction. This suit was then brought on the 15th day of May, 1895. Demurrer was interposed setting up the statute of limitation of one year (Mill. & V. Code, § 3469) and alleging that the action in the federal court was really no action in the sense of the statute, inasmuch as the court in which it was brought had no jurisdiction, and the action was not therefore saved by the provision of section 3449, Mill. & V. Code, which provides that if the action is commenced within the term limited by the statute, but judgment is rendered against the plaintiff upon any grounds not concluding his

right of action, etc., a new action may be brought within one year after the reversal or dismissal. The demurrer was sustained, and suit dismissed, and plaintiff has appealed and assigned errors. We think the demurrer was properly sustained, and the suit properly dismissed. An action commenced in a court having no jurisdiction to entertain it is no action, in the sense of the statute. The matter stands the same as if no suit had been brought or attempted to be brought, and the limitation runs from the date of the injury. If the action is brought in a court without jurisdiction, the whole proceeding is void and of no effect; and if it should proceed to judgment, the judgment likewise is void and without validity. In *Anderson v. Bedford*, 4 Cold. 464, it is said: "In no case of which we are advised, when the failure of the action is due to the default, wrong, or laches of the plaintiff, has it been held sufficient to authorize the bringing of another suit, under the exception of the statute, within one year after the termination of the first." In that case the original suit was dismissed for champerty. We see no error in the judgment of the court below, and it is affirmed, with costs.

MATTSON v. ALBERT.

(Supreme Court of Tennessee. Sept. 19, 1896.)

LIBEL—PRESUMPTION OF MALICE.

Untrue statements of facts which upon their face are calculated to injure and defame the character of an individual being libelous per se, the law presumes malice from their publication.

Error to circuit court, Hamilton county; John A. Moon, Judge.

Action by P. R. Albert against E. W. Mattson. Judgment for plaintiff, and defendant brings error. Affirmed.

Shepherd & Frierson, for plaintiff in error. Daniels & Garvin, for defendant in error.

WILKES, J. This is an action for libel. There was a trial before the court and jury, and a verdict and judgment for \$300; and defendant has appealed, and assigned only one error. Plaintiff was the manager of the Chattanooga Opera-House Company, and defendant was the publisher of a newspaper at Chattanooga, called the "Chattanooga Press." Publications were made in the newspaper in regard to certain shows advertised to appear at the opera house. The publications contained statements made by the New York Clipper, a publication devoted largely to theatrical matters; also, certain statements in addition, made by the Chattanooga paper, and some quite severe and caustic criticisms upon the management, calculated to injure the business. There was a general plea of not guilty, but no plea of justification. There was an additional plea that the publications were conditionally privileged, and made in good faith and without malice. On the trial of the case it appeared from the evidence

that there was a bad state of feeling between the publisher of the paper and the manager of the opera house, and ill-tempered criticism was indulged in by the newspaper. This was repeated, with some quite caustic comments, after the paper had been notified of the falsity of the statements. It clearly appeared that some statements made, to the effect that the prices of admission had been raised by the opera company, were not true. Such statements, of course, were calculated to injure the patronage of the opera company, and its business, and the comments were calculated to make the public believe that it was being imposed upon by the opera company by its advertising certain companies to appear which were elsewhere with their shows. The charge of the court is not excepted to, save upon a single point. Upon the question of privileged communications it was not objected to, but was conceded to be correct. In connection with its charge upon what constitutes a privileged communication, the court said: "If a statement is shown to be libelous per se, then the malice which is necessary to support an action is presumed as a matter of law." It is insisted that this is error,—that the question of malice, expressed or implied, should be left to the jury; and if the statements were false and injurious, yet made in good faith, the malice necessary could not be presumed. In *Saunders v. Baxter*, 6 Heisk. 369, 382, it was held that malice may be shown, not only by extrinsic evidence, but from the evidence of it, which may appear on the face of the publication, and in this latter case the privilege is lost. It has also been held that words which, upon their face, and without the aid of extrinsic proof, are injurious, are libelous per se. *Bank v. Bowdre*, 92 Tenn. 736, 23 S. W. 131; *Fry v. McCord*, 95 Tenn. 678, 33 S. W. 568. The law always presumes malice from the publication of an article which is libelous upon its face. See the authorities cited in 13 Am. & Eng. Enc. Law, 426, note 6. It presumes a malicious motive for making a charge which is both false and hurtful when no other motive appears; and in such case it is not necessary for the plaintiff to introduce any evidence from which malice may be inferred, other than the libelous article itself. 13 Am. & Eng. Enc. Law, 427, note 1. It is true that, in privileged communications, express malice must be proved, and, when once proved, the privilege, unless absolute, is lost. *Id.*; *Newell, Defam.* p. 391, § 7. But untrue statements of facts which upon their face are calculated to injure and defame the character and standing of an individual are libelous, and cannot be considered as privileged communications. The court below in effect so instructed the jury, and in connection therewith used the language now criticised in the assignment of errors, and we can see no error in the charge. See, also, *Byam v. Collins* (N. Y. App.) 2 Lawy. Rep.

Ann. 130 (19 N. E. 75), and note; *Allen v. Press Co.* (Minn.) 41 N. W. 936. The judgment of the court below is affirmed, with costs.

McKAMY v. McNABB et al.

(Supreme Court of Tennessee. Sept. 23, 1896.)

PROMISSORY NOTE — USURIOUS AGREEMENT FOR EXTENSION — RELEASE OF SURETY — PAYMENT BEFORE MATURITY — LIMITED ADMINISTRATOR.

1. An agreement between the payee and principal on a note for its extension on payment of usurious interest is without legal consideration, is not enforceable, and does not release sureties on the note from liability.

2. A payment made on a note on or after the date when it became due by its terms, though before the expiration of the days of grace, is not made before maturity, so as to support an agreement for an extension.

3. A limited administrator may be appointed for an intestate for a special purpose, such as to represent the estate in certain litigation; and if he becomes a party to the litigation, the estate is legally represented, and a judgment will be binding on a general administrator.

Appeal from chancery court, Hamilton county; T. M. McConnell, Chancellor.

Action by W. H. McKamy against A. McNabb and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Cooke, Frazier & Swaney and J. B. Frazier, for appellants. Pritchard & Sizer, for appellee.

WILKES, J. This is a suit upon a note against the principal, A. McNabb, and his sureties, N. McNabb and J. A. Greene. There was judgment in the court below against all parties for the amount of the note and interest, and the surety defendants appealed, and assigned errors. The cause has been heard by the court of chancery appeals, and the decree of the chancellor affirmed, and the same parties defendant have appealed to this court, and assigned substantially the same errors as have been passed upon by the court of chancery appeals.

The defense made by the sureties is that, on maturity of the note, an extension of one year's time was granted the principal upon the note, which had the effect to release them, in law and equity, from liability upon it. There is no question but that the extension was granted. It is claimed by complainant that it was done with the assent and approval of the sureties. The sureties deny this, however, and the court of chancery appeals has not passed upon this question of fact. That court finds, however, that there was no legal consideration for the extension, and hence no valid agreement to that effect. It appears, from their finding, that, when the note fell due, the principal defendant, A. McNabb, paid, within the three days of grace, \$60, the legal interest upon the note, and in consideration of delay for a year he paid the further sum of \$36, and it was held that this was usury, and not a legal consideration for

the delay, and there was therefore no valid binding agreement for delay. This is assigned as error. We think it is not error. Delay granted or promised upon a usurious consideration is not based upon a valid enforceable contract, and will not serve to release the sureties. *Howell v. Sevier*, 1 Lea, 360; *Wilson v. Langford*, 5 Humph. 320.

It is said that the payment both of the \$60 and \$36 was before the maturity of the note, and must be treated, therefore, as a payment on the principal, and therefore a sufficient consideration for the delay. This is based on the idea that, payment being made before the three days of grace have expired, it is therefore before maturity. We think this is not true, and the defense too technical for any real merit.

During the progress of the cause defendant Greene, one of the sureties, deceased. His son, Luther Greene, went before the county court and had himself appointed special administrator to defend this suit, and for no other purpose, and the order of court appointing him so recites. He was brought before the court as such administrator, and filed an answer, and made defense without objection. In the court of chancery appeals he assigns this action as error, and insists that the appointment, being limited to a special purpose, was void, and the revivor against him as administrator was unauthorized, and would not support a decree or judgment against his father's estate. No such objection was made in the court below. It appears that the said Luther Greene was the only heir and next of kin of the deceased, J. A. Greene, and that he left no widow. In the case of *Jordan v. Polk*, 1 Sneed, 430, it was held that such limited administration may be granted, either as to certain specific effects of the deceased or for a certain specific purpose, such as filing a bill or carrying on proceedings in chancery, and, if such limited administrator is made a party to the suit, the estate of the deceased is thereby properly represented, and a decree against such limited administrator will be binding on a general administrator, but will not prevent a grant of general administration, and the two administrations may well subsist together. See, also, *McNairy v. Bell*, 6 Yerg. 302; *Smith v. Pistole*, 10 Humph. 205; *Crozier v. Goodwin*, 1 Lea, 368; *Pritch. Wills*, § 564.

We can see no error in the decree of the court of chancery appeals, and it is affirmed, with costs.

JOHNSON v. MAYOR, ETC., OF CITY OF CHATTANOOGA.

(Supreme Court of Tennessee. Sept. 19, 1896.)

INTOXICATING LIQUORS—SUNDAY LAWS.

An ordinance making it a misdemeanor to sell, deal out, or give away malt, vinous, or other liquors on Sunday, or to keep open on Sunday any place where liquors are sold, is violated by a proprietor of a saloon who invites others to

his saloon on Sunday, unlocks the door, and admits them, and gives them beer, which they drink therein.

Error to circuit court, Hamilton county; John A. Moon, Judge.

The mayor and aldermen of Chattanooga prosecuted A. O. Johnson for violation of a liquor ordinance. Defendant was convicted, and brings error. Affirmed.

Dodson & Dodson, for plaintiff in error.
Daniels & Garvin, for defendants in error.

CALDWELL, J. Section 7 of article 1 of Ordinance No. 253 of the mayor and aldermen of the city of Chattanooga, as amended by Ordinance No. 821, makes it a misdemeanor, punishable by a fine of not less than \$10 nor more than \$25, to sell, deal out, and give away, on Sunday, any malt, vinous, fermented, or other intoxicating liquors, or to keep open on Sunday any place in which liquors are sold or dispensed; certain exceptions being made in favor of druggists and the keepers of restaurants and eating houses. A. O. Johnson was arrested upon the recorder's warrant, charging him with having violated that law, by keeping his saloon open on Sunday, and also by "selling or dispensing" the prohibited liquor on Sunday. Upon his trial before the recorder, he was convicted and fined \$25. Thereupon he appealed to the circuit court, and was there tried, found guilty as charged, and fined \$5. Being still dissatisfied, he has appealed in error to this court, and here contends that his conviction is not sustained by the evidence.

The witness Silas Spencer testified as follows: "In August, 1894, and on Sunday morning about 9 or 10 o'clock, I was on the corner of Ninth and Market streets in the city of Chattanooga, Tenn., and there met the defendant. The defendant is owner and proprietor of a liquor saloon on Market street, and near to where I was standing. His saloon is in the corporate limits. The defendant said to me that everything was closed up that day, and that 'we cannot get anything to drink anywhere else,' and asked me to come with him to his saloon and take a drink. From two to four other men were present at the time, and all of us went together by the invitation of defendant to his saloon, and the defendant opened his front door on Market street from the sidewalk. It was locked, and he unlocked it, and he and I and the others with us all went in through the front door, and he gave to us a glass of lager beer, and took one himself. We remained there about ten minutes talking, and the defendant opened the same front door, and we all went out onto the sidewalk on Market street, and the defendant came out with us, and locked the door after him. We stayed there on the sidewalk for some time, and the defendant again asked us to go in with him and take another drink. He again opened the front door, we all went in, and

he gave to each one of us another glass of lager beer, and he took one himself. We stayed inside for some time, then went out again through the front door onto the sidewalk, and he closed and locked the door after we had passed out. The party of us then walked down the street together, and sauntered along talking, and after awhile walked up towards the saloon, but in the meantime two or three of the party had gone, and two or three different men had joined us. When we got back near the defendant's saloon, he again invited all of us to take another drink, and we stopped in front of his saloon, and he unlocked the door, and we all went in, and he closed and locked it after us. He then gave to each of us a glass of lager beer, and took one himself. And then we all stayed in there some time, and he again opened the door, and let us out onto the sidewalk, and then we went away. The door was closed and locked all the time, except when opened by defendant for the parties to go in and out. No liquor of any kind was sold. The defendant gave each present on each occasion a glass of lager beer, and took one himself. He wanted us again, and we refused." The testimony of this witness is corroborated by that of two other witnesses, Price and Rope, who say they saw him and Johnson and the other parties going into and coming out of the saloon as detailed by him. No other witnesses were examined.

In our opinion, this proof abundantly justifies the conviction. Indeed, it established a twofold violation of the ordinance. It shows a keeping open of a saloon and also a giving away of a prohibited drink, on Sunday. The saloon was not kept open all day, half the day, or an hour; but that was not necessary to constitute the offense of keeping open on Sunday. The saloon was opened and kept open long enough for persons other than the owner and proprietor to pass in and out, and it was so opened and kept open, short though the time may have been, for the purpose of affording drinks to those persons. That is sufficient. The object of the provision against keeping open on Sunday was to prevent people from visiting saloons on that day, and to remove the opportunity they give for Sunday drinking. Certainly that object was disregarded, and for a portion of the day defeated, by Johnson. The violation of the law would have been more flagrant and defiant, but not more distinct and positive, if he had kept the saloon open all day. As has already been said, the provision against giving away certain liquors on Sunday was also violated. That Johnson gave away one of the prohibited liquors on Sunday is not controverted, but he contends that he is not charged with that offense. About this he is mistaken. The warrant charges him with keeping open, and also with "selling or dispensing" on Sunday. He did not "sell," but he did "dispense." To dispense is to deal out, to distribute, to give. Hence, giving

away liquors is included in the charge of "dispensing" liquor.

The trial judge erroneously fixed the fine at \$5, the minimum fine prescribed by the ordinance being \$10. The ordinance provides that offenders, upon conviction, "shall be fined not less than \$10 nor more than \$25." This is the law applicable to the case, and the court had no power to impose a fine not authorized thereby. This court, rendering the judgment he should have rendered, changes the fine from \$5 to \$10. Affirm, with this change, and let Johnson pay all costs.

HUGHES BROS. MANUF'G CO. v.
CONYERS et al.

(Supreme Court of Tennessee. Sept. 23. 1896.)

MORTGAGES — FORECLOSURE — USURY — ALLOWING
REDEMPTION ON APPEAL—PRACTICE.

1. In a foreclosure proceeding, brought by a junior lienholder who contests the validity of prior liens and makes the holders parties, it is proper to decree a sale of the property and an application of the proceeds to all the liens according to priority.

2. The fact that a clause of a mortgage provides for interest at more than the legal rate on sums that may be advanced by the mortgagee in payment of taxes or insurance on the property does not render the mortgage usurious, so as to prevent a recovery of what is legally due thereon.

3. Where so much only of a decree of foreclosure as directs a sale of the property free from the right of redemption is reversed, on appeal by the mortgagor, it is proper to permit the sale already made to stand, giving time thereafter for redemption, when it is not claimed that the sale was for an inadequate price.

Appeal from chancery court, Hamilton county; T. M. McConnell, Chancellor.

Action by the Hughes Bros. Manufacturing Company against J. F. Conyers and others to enforce a lien. Decree of foreclosure and sale, which was modified by the court of chancery appeals on appeal by defendant Conyers, and he appeals from the decree of that court. Affirmed.

Dodson & Dodson, for appellant Conyers. Barton & Chapin, for appellee Hughes Bros. Manuf'g Co. Thomas & Elder, for appellee National Home Building & Loan Ass'n.

WILKES, J. Complainant in this cause has a furnisher's lien upon certain real property belonging to defendant Conyers, and filed a bill against him and others to collect the debt by sale of the property. One Martin and the National Home Building & Loan Association were made defendants, and it was alleged that Martin was claiming a debt against the property, but in fact had none, that was superior to complainant's; and that the building and loan association held debts of about \$9,000, evidenced by notes and mortgage, but the justice of same was not conceded; and the rights of the parties were asked to be fixed, and a sale of the property had. The cause was referred to the master to report

the debts. Complainant's debt was reported as \$340.79, and the debt due the association about \$10,000, and a debt due the City Savings Bank of about \$636.50. Exceptions were filed and overruled, and decree entered for sale, and the property was sold to the building and loan association for \$9,000, and the sale was confirmed to it. The building association was decreed to have priority, and after it the City Savings Bank and complainant. The defendant Conyers appealed, and assigned errors. The cause was heard by the court of chancery appeals, and the decree of the chancellor affirmed, except that so much of his decree as ordered sale to be made free from the right of redemption was reversed and modified, and defendant was given two years from the date of confirmation in the court of chancery appeals to redeem the property. The defendant Conyers has appealed to this court, and assigned errors.

First, that the court should not have decreed the foreclosure of the mortgages of the National Building & Loan Association, except upon a cross bill, filed by that association as defendant, praying for such foreclosure. The complainant was claiming a furnisher's lien upon the property, while the defendant loan company was claiming prior mortgages on the same property. Under these circumstances, it was entirely proper to have the loan association, as well as all other parties claiming liens or incumbrances on the property, brought before the court, the rights and priorities of the parties fixed, and the property sold for the satisfaction of the debts. It was not, in the strict sense of the word, a foreclosure of the mortgages, but a sale by the court, the proceeds to be applied as the priorities of the parties might dictate. The building and loan association was not contesting this right, but only claiming its priority. *Simonton v. Porter*, 1 Baxt. 213, 215.

It is next assigned as error that the court of chancery appeals did not find that the mortgages to the building and loan association were usurious upon their face, and hence not enforceable, and therefore refuse any relief. It is provided on the face of the mortgage that if the association was compelled to pay any taxes or insurance it might recover them back, with 8 per cent. interest; and this is the only provision which, upon the face of the mortgage, would render it usurious. It is sufficient to say that in this case the building and loan association is not a complainant seeking relief upon its mortgage, but a defendant; and, even if the provision were usurious, it would not vitiate the deed, so as to prevent a recovery for the amount actually due, and it is not claimed that any usury was actually included in the estimate of the amount due the association.

It is next insisted that the court erred in refusing to order a resale of the property, but, instead, confirmed the sale already made, giving the defendant Conyers two years from the date of confirmation in the court of chan-

cery appeals to make such redemption. The sale was made upon a credit of 6, 12, 18, and 24 months, in bar of the right of redemption. There is no question or contention made that it did not bring a full and fair price. A portion of the mortgages waived the right to redeem, but one—the largest one, for \$5,000—did not. The prayer of complainant's bill is that the land be sold on a credit, free from the right of redemption. The court of chancery appeals, following the rule laid down in *Hodges v. Copley*, 11 Heisk. 332, directed the sale to stand, and that defendant have two years from confirmation in that court in which to redeem. In the absence of any allegation in the complaint that the property did not sell for its full value, we can see no error in this action of the court of chancery appeals to the prejudice of appellant, and we therefore affirm the decree of that court.

BLUE SPRINGS MIN. CO. et al. v. McILVEIN et al.

(Supreme Court of Tennessee. Sept. 19, 1896.)

NOTES—BONA FIDE HOLDER—CONSIDERATION—WARRANTY—WAIVER.

1. H., a mining expert, had for several years bought furnaces of plaintiffs, and sold them to others in connection with an apparatus of his for smelting ores. Plaintiffs did not give him credit, but required either cash or took the note of one buying from H. directly to themselves. *Held*, that defendant's note so taken by plaintiffs, on such a purchase being made by defendant of H., was not taken in payment of a pre-existing debt of H. to plaintiffs.

2. Defendant bought of H. a furnace and an attachment thereto, which together H. warranted would successfully smelt lead ores. The furnace, which was manufactured by plaintiffs for iron smelting, was sold by them to H., but delivered directly to defendant; they requiring of H. that the notes in payment be made directly from defendant to them. They made no representations or express warranty. The attachment was an invention of H., which he claimed adapted the furnace to the smelting of lead ores. *Held*, that there was no implied warranty by plaintiffs that the furnace, with or without the attachment, would successfully smelt lead ores.

3. Had there been any representation by plaintiffs which would have entitled defendant to relief against them on the note given by him to them, it was waived by his promising to pay the note, after being apprised of the defects in the machinery for which it was given, and asking and receiving extension of time on such promise.

Appeal from circuit court, Hamilton county; John A. Moon, Judge.

Action by McIlvoin & Spelgle against the Blue Springs Mining Company and another. Judgment for plaintiffs. Defendants appeal. Affirmed.

White & Martin, for appellants. Pritchard & Sizer, for appellees.

WILKES, J. This is an action upon two notes given the plaintiffs, McIlvoin & Spelgle, by the defendant mining company and S. W. Divine, security, for \$400 each. It was commenced before a justice of the peace, ap-

pealed to the circuit court of Hamilton county, when there was judgment for the plaintiffs. The case was tried by the judge without a jury, and defendants appealed, and have assigned errors.

It is insisted that there is a failure of consideration of the notes; that they were given for a smelting furnace that utterly failed to do the work for which it was sold, and was worthless, and caused damage to the defendants, instead of proving a benefit to them. The proof shows that the sale was made by Hartsfeld, and that he represented and warranted that the furnace would cheaply and successfully smelt the lead ores of the company, and that it failed to meet the representations and warranty; and the rights of the defendants as against him are not disputed. But the plaintiffs claim that they made no representations or warranty, and are innocent holders of the notes; for value, and are not affected by the conduct or representations of Hartsfeld. The circuit judge took this view of the case.

Without going into full details of the transactions between the defendant company and Hartsfeld, we come to the conclusion from the record that plaintiffs were manufacturers of furnaces, boilers, tanks, etc., and that Hartsfeld used and sold their furnaces in connection with a condensing apparatus for which he claimed to have a patent, and which was represented by him to be specially adapted to smelting lead ores. Whether this apparatus was made by plaintiffs or others does not fully appear. Hartsfeld was not in good credit, and the plaintiffs retained the title to the furnaces manufactured by them until they were sold and paid for. The furnace was sold while it was at plaintiffs' place of business, but the representations as to what it would do in connection with the attachment were made by Hartsfeld. The notes were made payable to plaintiffs, and a cash payment of \$150 was also made to them by the defendant company; and they shipped the furnaces to the company. Hartsfeld had examined the ores of the company, and represented that his apparatus would smelt them more successfully and economically than any other. He personally took charge of the operation of the smelter after it was put up, and the agreement with him was that the company was not to pay for it until it was proven a success. He was not able to use it satisfactorily, and as a lead smelter it proved a failure. The furnace was made by plaintiffs about a year before it was sold to the company, and Hartsfeld had been selling their furnaces for a number of years. It appears that they were furnaces for iron smelting, but the Hartsfeld apparatus, it was claimed by him, adapted them to smelting lead ores. It appears, also, that, when Hartsfeld sold to the company, he consulted plaintiffs as to whether the terms of sale would be satisfactory to them, and, being assured they would be, he made the sale.

It is insisted that the court erred in not finding that the furnace was expressly warranted by plaintiffs to smelt the company's ores, and also in not finding that there was an implied warranty that it would do the work for which it was bought, and that plaintiffs were not bound by or responsible for such warranties; that the court further erred in not finding as a fact that the plaintiffs took the notes in payment of a pre-existing debt from Hartsfeld, and in not holding that Hartsfeld was their agent, and they were bound by his representations, and that they were the real vendors of the furnace, and not innocent holders of the notes. There was no demand for a written finding of the law and facts, or either of them, and there is none in the record, but simply a general finding and judgment for the plaintiffs, without showing the grounds.

Quite elaborate briefs and argument have been presented on behalf of the company and its surety, and a full discussion made of the law as to warranties, innocent holders of negotiable papers, etc. We think that the law and facts of the case lie in a very narrow compass. We are satisfied from the record that there was sufficient evidence to warrant the trial judge in the conclusion that Hartsfeld alone made the representations and warranties as to what the furnace would do, and that the plaintiffs had no connection therewith, except simply to furnish the furnaces and apparatus ordered by Hartsfeld, and get the proceeds of sale when it was effected. When the company executed their notes to plaintiffs, and paid the cash, it was evident that it was willing to look to Hartsfeld for the successful performance of the furnace, and did not expect the plaintiffs to make good his representations or warranties. No such demand was made of them, and there was no such understanding or agreement. The plaintiffs did not manufacture this furnace to be used as a smelter of lead, but as an iron furnace. The condensing apparatus was Hartsfeld's patent, and manufactured for him; and the plaintiffs cannot be held to have made any implied warranty that the furnace and apparatus or either would successfully smelt lead ore. The mill company did not trust to their skill and knowledge as manufacturers to furnish a smelter to do a special work, but they bought a specific article upon the representation and warranty of a third person. The testimony of S. W. Divine, the president of the company, who bought the furnace for the company, is to the effect "that he had no negotiations with plaintiffs, but bought of Hartsfeld, and relied alone on his representations that the furnace would do the work." This is further borne out by his letters to the plaintiffs, one in January, 1894, about three months after the sale was made, the cash had been paid, and notes given, in which he (Divine), for the company, requested an extension of time, and used this language: "We will pay you re-

gardless of consequences, as we understand you are in no way responsible or connected with the responsibility of the guaranty." And in a subsequent letter, of May 10, 1894, Divine, after stating his numerous complaints against Hartsfeld, adds: "I understand we have no recourse on you, and I am not trying to evade your claim; but we are not in condition to pay you, and ask for an extension until such time that Mr. Hartsfeld can get the furnace in working order." We think the record abundantly shows that the company did not rely upon any warranty or representations of plaintiffs, for none are shown to have been made by them; neither was there an implied warranty, for the company did not rely upon the superior knowledge and skill of the plaintiffs, as manufacturers, to furnish a furnace and apparatus suitable for a special purpose; but it ordered a specific article, through a third person, upon the representation of such third person that it would do the work. The distinction is marked between the two classes of cases. *Manufacturing Co. v. Kerr*, 165 Pa. St. 529, 30 Atl. 1019; *Morris v. Fertilizer Co.*, 28 U. S. App. 87, 12 C. C. A. 34, and 64 Fed. 55.

We are of opinion that plaintiffs cannot be considered as having accepted the notes in question in payment of a pre-existing debt. The proof is clear that the plaintiffs manufactured furnaces. Hartsfeld, who was a mining expert and specialist, bought and sold them, to be used with his attachment, for a specified price; but, inasmuch as Hartsfeld was not in good credit, plaintiffs required cash if the furnaces were sold by Hartsfeld to third persons, or they took the notes of the purchaser direct to themselves. The indebtedness of Hartsfeld to plaintiffs arose when he sold the furnaces, and, when this was done, the cash was to be paid, and notes to be executed, to the plaintiffs. There is no proof that the furnaces were unfit for the purposes for which they were manufactured, which was the smelting of iron; but the defect appears to have been in the condensing attachment furnished by the expert Hartsfeld, and, as to this, he alone made warranties and representations. But if there had originally been fraud and misrepresentation on the part of plaintiffs, which would have entitled defendants to relief as against plaintiffs, it was clearly waived by the act of defendants in promising to pay the notes, after being apprised of the defects in the machinery, and in asking and receiving an extension of time upon such promises. *Smith v. Greaves*, 15 Lea, 459. There is no error in the judgment of the court below, and it is affirmed, with costs.

ROGERS v. BEDELL.

(Supreme Court of Tennessee. Sept. 19, 1896.)

CHECKS—EVIDENCE AS TO INDORSEMENT.

Evidence that delivery of a check after its dishonor was under an agreement that the party

delivering it should not be bound on it because of an indorsement previously made is admissible to set aside the effect of the previous indorsement.

Appeal from circuit court, Hamilton county; John A. Moon, Judge.

Action by H. F. Rogers, assignee, against C. A. Bedell. Judgment for defendant. Plaintiff appeals. Affirmed.

Chambliss & Chambliss, for appellant. Trewwhitt & Stanfield, for appellee.

WILKES, J. This is an action commenced before a justice of the peace. On appeal to the circuit court, there was a verdict of a jury, and judgment for the defendant, and plaintiff appealed and assigned errors. The suit is brought upon a check signed by "H. Whiteside, Special," payable to the order of C. A. Bedell, and indorsed by him in blank. It was originally indorsed and delivered to the Chattanooga Brewing Company, but, on presentation at the bank, was not paid for want of funds, and was then taken up by Bedell. Subsequently, it was paid to plaintiff by Bedell in extinguishment of an account held against defendant by plaintiff. Defendant insists that, when he delivered it to plaintiff's agent, it was agreed that he was not to be bound by the indorsement; but that plaintiff took it upon the assurance of Mr. Whiteside that he could pay it or have it paid. Plaintiff objected to this testimony, on the ground that the indorsement in blank had the legal effect to bind the indorser in case demand and protest should be made, and that this legal effect could not be altered by parol evidence. The reception of this testimony to contradict the legal effect of the blank indorsement is assigned as error, and it is also assigned that the court erred in charging the jury that, if the check was delivered to plaintiff after it had been refused at the bank for want of funds, then plaintiff need not make presentment, demand, and protest, but that the parties might agree that no liability should arise out of the indorsement, and, if the jury should find such agreement, then defendant would not be held liable.

We think there is no error in the admission of the evidence, nor in the charge of the court. It is not necessary to decide whether the effect of the blank indorsement could be contradicted by parol evidence of what transpired when it was made. That is not the case. This check had been dishonored, and it was competent to show that it subsequently was delivered to plaintiff's agent, under an agreement that the party delivering it should not be bound upon it because of an indorsement previously made; and such evidence, of a subsequent agreement and contract, was clearly competent to set aside the effect of an indorsement previously made. *Meacham v. Herndon*, 86 Tenn. 368, 6 S. W. 741; *Bryan v. Hunt*, 4 Sneed, 544. The judgment is affirmed, with costs.

PRATT v. GILLESPIE.

(Supreme Court of Tennessee. Sept. 19, 1896.)

APPEAL—RECORD—EVIDENCE.

In the absence of a bill of exceptions showing the evidence submitted below in an action on a note, it must be held that it was sufficient to justify the judgment.

Appeal from circuit court, Hamilton county; John A. Moon, Judge.

Action by William Gillespie against M. A. Pratt and another. From the judgment for plaintiff, defendant Pratt appeals in error. Affirmed.

Dodson & Dodson, for appellant. Thomas, Elder & Thomas, for appellee.

CALDWELL, J. William Gillespie sued E. W. Jenkins and M. A. Pratt before a justice of the peace, the warrant reciting that the action was based upon a promissory note. The justice of the peace rendered judgment against both of the defendants, and Pratt appealed to the circuit court. The presiding judge of the latter tribunal tried the case without a jury, and pronounced a judgment against Pratt for \$275.65 and costs. Pratt has appealed in error to this court. He insists upon a reversal of the judgment below because, as he contends, "the note sued on is not signed or indorsed by him, nor is there anything in the record to connect him with it in any way." If it be true that Pratt neither signed nor indorsed the note, and that he was not otherwise connected with it, he ought not to be required to pay it. But what the real facts in that behalf are this court is unable to learn, there being no bill of exception in the case. It is true that what seems to be a note made by E. W. Jenkins and Mattie Jenkins to William Gillespie, and with which Pratt does not appear to have any connection, is copied into the transcript before us; yet we cannot consider it, because it is not made a part of the record by bill of exceptions. *Bank v. Lowe*, Meigs, 225; *McKeel v. Bass*, 5 Cold. 151. To the same effect are the later cases of *Railway Co. v. Foster*, 88 Tenn. 671, 13 S. W. 694, and 14 S. W. 428; *Marble Co. v. Black*, 89 Tenn. 119, 14 S. W. 479; *State v. Hawkins*, 91 Tenn. 140, 18 S. W. 114, and other cases therein cited. The case of *Stadler v. Hertz*, 13 Lea, 318, is not in conflict. The court held in that case that a note made the basis of a bill in equity, and filed as evidence, became a part of the record without a bill of exceptions; but that holding was expressly placed upon a rule of chancery practice, which has no application in a court of law. In the absence of a bill of exceptions showing the evidence submitted in the court below, this court presumes conclusively that it was sufficient to justify the judgment of the trial judge. *Kincaid v. Bradshaw*, 6 Baxt. 102; *Phillips v. Phillips*, 5 Lea, 451; *Scruggs v. Helskell*, 93 Tenn. 455, 32 S. W. 386.

Affirmed.

RIDEN v. GREMM et al.

(Supreme Court of Tennessee. Sept. 19, 1896.)

INTOXICATING LIQUORS—SALE TO HABITUAL DRUNKARD—CIVIL DAMAGES—PLEADING.

1. For a saloon keeper to sell liquors to an habitual drunkard after being served with notice by the drunkard's wife not to, in violation of Act March 16, 1889, declaring it a misdemeanor so to do, is negligence, rendering the saloon keeper liable for damages suffered by the wife in consequence thereof.

2. In an action by a wife against a saloon keeper for damages resulting from the sale of liquors to plaintiff's husband, after she had notified him not to, in violation of Act March 16, 1889 (declaring it a misdemeanor for one to furnish a husband, who is an habitual drunkard, intoxicating liquors, after being served with a written prohibitory notice thereof, signed by the wife of said husband, and providing that said notice shall be served, and a due return thereof made to the clerk of the county court by the sheriff), the complaint need not set out the notice and return thereof, but it is enough to allege that defendant was duly and lawfully served with a written notice not to sell to plaintiff's husband.

Appeal from circuit court, Hamilton county; John A. Moon, Judge.

Action by Mary L. Riden against Gremm Bros. Judgment for defendants. Plaintiff appeals. Reversed.

Case & Case, for appellant. H. M. Wiltse, for appellees.

WILKES, J. This is a suit for damages sustained by the plaintiff in the death of her husband. Defendants demurred to the declaration filed, which was sustained, and the suit dismissed, and plaintiff has appealed and assigned errors.

The declaration alleges that defendants were saloon keepers and retail dealers in liquors in Chattanooga; that her husband, W. H. Riden, had become an habitual drunkard, and this fact was well known to defendants; that on the 29th of May, 1894, the defendants were duly and lawfully served with written notice not to sell W. H. Riden anything to drink in their saloon, and were forbidden by her to do so; that, in violation of said notice, the defendants, in May, June, and July, 1894, in Chattanooga, sold, gave, furnished, and procured for her husband large quantities of intoxicating liquors, in violation of the prohibition and of the statute relating thereto, to the injury of her husband, and from the effects of which he sickened, was paralyzed, and died, August 11, 1894, and she was deprived of the support, society, and maintenance of her husband, to her damage \$20,000. The demurrer states several grounds of insufficiency, which may be summarized as follows: That no cause of action is stated; that the suit is not brought for the statutory penalty, and that no right of action exists for such penalty except in the state; that there is no common-law liability that the declaration does not show a compliance with the statute in the notice by the wife; and that it does not allege a return of the notice

indorsed by the sheriff, as the law prescribes.

The law under which the suit is brought is the act of March 16, 1883, entitled "An act to prevent the selling, giving, furnishing to, or procuring for, any husband who is an habitual drunkard, of any intoxicating liquors," and reads thus:

"Section 1. Be it enacted by the general assembly of the state of Tennessee, that it shall be unlawful for any person engaged regularly, or otherwise, in the manufacture or sale of any spirituous, vinous, malt, or mixed liquors, their employes, agents, or servants, or any person for them, to sell, give, furnish to, or procure for any husband who is an habitual drunkard, any intoxicating liquors after having been served with a written prohibitory notice thereof, signed by the wife of said husband.

"Sec. 2. Be it further enacted, that said notice shall be served, and a due return thereof made to the clerk of the county court by the sheriff, or any constable of the county wherein such person is engaged in the manufacture or sale of said liquors.

"Sec. 3. Be it further enacted, that any person or persons violating the provisions of the first section of this act shall be guilty of a misdemeanor, and upon conviction shall be fined not less than ten, nor more than two hundred dollars."

The principal question presented under the demurrer is that, for the acts complained of, there is no common-law liability, and that the statute simply makes them a misdemeanor, and prescribes a penalty, which the state alone can enforce, but confers no right of action for damages upon the wife. The principle involved in this cause is the same as that involved in *Queen v. Iron Co.*, 95 Tenn. 458, 32 S. W. 461. In that case a minor had been employed to work in a mine, contrary to the prohibition of the statute which made such employment a misdemeanor. The minor brought civil suit for personal damages sustained while so employed, and this court held that the employment of the infant in the mine, in violation of the statute forbidding such employment, and declaring it a misdemeanor, made it per se such negligence as rendered the employer liable for all injury sustained by the infant in the course of the employment. "The breach of the statute is actionable negligence whenever it is shown that the injuries were sustained in consequence of the employment." It is also actionable negligence whenever it is shown that the breach of the statute inflicts or results in the damage or injury complained of. In *Bish. Noncont. Law*, § 71, it is said that a civil wrong and a criminal wrong are legally distinct things, though both may proceed from one act of the offender. If the injury is of a nature falling on the entire community, one individual, suffering it only as others do, can maintain no action against the wrongdoer, even should it in a degree casually press more heavily upon him than upon

others. But he who suffers a special damage may have his suit, though, by reason of the public harm, the defendant is also indictable. See, also, *Egbert v. Greenwalt*, 44 Mich. 245, 6 N. W. 654; *Mahady v. Railroad Co.*, 91 N. Y. 148; *Gifford v. McArthur*, 55 Mich. 535, 22 N. W. 28; *Larson v. Furlong*, 63 Wis. 323, 23 N. W. 584; *Potter v. Menasha*, 30 Wis. 492.

It is insisted that the plaintiff's declaration does not sufficiently allege a compliance with the requirement of the statute, because it does not set out the notice and sheriff's return of the same to the county court, as the act prescribes. The declaration alleges that defendants were duly and lawfully served with a written notice not to sell to plaintiff's husband. This is sufficient. The wording of the notice, the manner in which the legal service was made, and what return was made and indorsed, are matters to be shown in proof so far as they are material; and the allegations of due and legal service in the declaration are sufficient. Whether there would not be ground of liability in the entire absence of notice or return need not be considered in the present aspect of the case. The judgment of the court below is reversed, and the cause remanded for trial. Appellees will pay the costs of the appeal.

MORRIS et ux. v. LOWE.

(Supreme Court of Tennessee. Sept. 19, 1896.)

BAILMENT—REPLEVIN—LIMITATIONS—DEATH OF BAILER—ADMINISTRATION.

1. In replevin the source of the title or possession of the property cannot be inquired into, so as to defeat the defense of adverse possession for the statutory period, under Mill. & V. Code, § 3470, providing that actions for conversion or detention of personalty must be brought within three years from accruing of the cause of action.

2. A gratuitous bailment ceases on the death of the bailee, and no trust follows the property into the hands of the bailee's widow.

3. The administrator of a bailee has no right to possession of the bailed property unless the bailment be in such situation that it is necessary for him to take possession in order to discharge some legal duty which the bailor has a right to require.

4. A widow who takes possession of property bailed to her husband, and claims it as her own and not as administratrix, and pays his debts out of her own property, is not his administratrix de son tort.

5. While, perhaps, a widow cannot claim, as her own, property bailed to her deceased husband, till his estate has been administered, as against an administration, if the administrator for any cause had a right to demand the property, this is not so as against the bailor.

Appeal from circuit court, Hamilton county: John A. Moon, Judge.

Action by Wilburn Morris and wife against Mrs. S. B. Lowe. Judgment for defendant. Plaintiffs appeal. Affirmed.

Rutledge & Murry, for appellants. Eakin & Dickey and Eakin & Goree, for appellee.

WILKES, J. This is an action of replevin for certain furniture. It was heard in the court below without the intervention of a jury, and judgment rendered for the defendant, and plaintiffs have appealed, and assigned errors.

The furniture was placed in the custody and possession of defendant's husband, S. B. Lowe, before her marriage to him, and about 1882. It was simply held by him, without hire or compensation, until his death in April, 1891. After his death his widow held possession of it until this suit was brought, February 6, 1895, claiming it as her own. There was no administration upon the estate of S. B. Lowe, but the defendant, his widow, paid his debts out of insurance money upon his life, which, under the statute, was hers. Mr. Lowe, shortly before his death, agreed with the plaintiffs to send the furniture to them, and recognized their right to it; but this appears to have been unknown to Mrs. Lowe. She now claims the property under the operation of section 3470, Mill. & V. Code, which provides that actions for the conversion or detention of personal property must be brought within three years from the accruing of the cause of action.

It is insisted, however, that this property was impressed with a trust derived from the holding of it by the husband as a bailee, and hence defendant cannot avail herself of the statute until after she notified the owner that she disclaimed his title and held for herself. It is well settled that the source of the title or possession cannot be inquired into in such actions, and that the adverse possession of the holder, claiming for herself, for three years, vests the absolute estate with the possession. *Garrett v. Vaughan*, 1 Baxt. 113, and numerous cases there cited. Besides, the bailment in this case was gratuitous, and with the death of Mr. Lowe the bailment ceased and ended, and no trust followed it into the hands of the widow. *Story, Bailm. § 277*; 2 Kent, Comm. §§ 643, 644. Even if there were an administrator, he would have no right to the possession of the property, or concern in the bailment, unless the matter be in such situation that it is necessary for him to take the possession in order to discharge some legal duty which the bailor has the right to require. *Story, Bailm. § 202*; 2 Kent, Comm. §§ 643, 644.

It is said that Mrs. Lowe became administratrix de son tort by paying her husband's debts, and hence she held this property in that capacity, and not in her own right. It is sufficient to say that the proof shows she claimed the property as her own, and not as administrator, and that she paid her husband's debts out of her own money, and did not in any way meddle with her husband's property for that purpose, and she is not therefore administratrix de son tort.

Again, it is said that she could not claim the property as her own until there was administration on her husband's estate. This might

be true, as against an administrator, if the administrator for any cause had the right to demand the property; but the principle does not apply in this case. The defendant in this case does not represent the husband. The fact that she is his widow, while it may have given her the opportunity to gain the possession of the property, did not vest her with any right to it, nor charge her with any duty in regard to it.

There is no insistence that the personal property in controversy was the separate estate of Mrs. Morris. The record shows that it was given to her by her father, and, not being impressed with the features of a separate estate, so far as the record discloses, it would, like any other personal property, belong to her husband. There is no error in the judgment of the court below, and it is affirmed, with costs.

CLINE v. STATE.

(Court of Criminal Appeals of Texas. July 9, 1896.)

CRIMINAL LAW—CONSTRUCTION OF STATUTE—DEPOSITIONS IN CRIMINAL CASES—CONSTITUTIONAL LAW.

1. Code Cr. Proc. 1879, art. 774, providing that "the deposition of a witness taken before an examining court, or a jury of inquest, and reduced to writing and certified according to law, in cases where the defendant was present when such testimony was taken, and had the privilege afforded him of cross-examining the witness, may be read in evidence as is provided in the two preceding articles for the reading in evidence of depositions," authorizes the use only of "depositions" taken as described in that chapter, and does not authorize the reading in evidence by the state of "testimony" given by a witness on the hearing before an examining court, on a showing that the witness is dead.

2. The provision of section 10 of the bill of rights, that in all criminal prosecutions the accused shall be confronted with the witnesses against him, refers to the prosecution by "public trial" before the "impartial jury," also guaranteed him by the same section; and under that provision, and the declaration of section 29 that "everything in this bill of rights shall forever remain inviolate and all laws contrary thereto * * * shall be void," the reading in evidence against the accused on his trial of testimony given by witnesses on another hearing, or on preliminary examination, cannot be legally authorized.

Appeal from district court, Gonzales county; T. H. Spooner, Judge.

Marshall Cline was convicted of murder in the second degree, and appeals. Reversed.

George Burgess, for appellant. Mann Trice, for the State.

DAVIDSON, J. This conviction was had for murder in the second degree. The state, over appellant's objection, introduced before the jury the written evidence of one Monroe, taken on the examining trial of appellant under a charge for the same offense of which he was in this case convicted. As a predicate for the introduction of this testimony, the death of the witness was proved. The ob-

jection urged, was that the accused "shall be confronted with the witnesses against him," as guaranteed by section 10 of the bill of rights of the state constitution. The testimony was admitted, presumably under the provisions of article 774 of the Code of Criminal Procedure (1879), which reads as follows, to wit: "The deposition of a witness taken before an examining court, and reduced to writing, and certified according to law, in cases where the defendant was present when such testimony was taken, and had the privilege afforded him of cross-examining the witness, may be read in evidence as is provided in the two preceding articles for the reading in evidence of depositions." In regard to examining trials, article 267, Code Cr. Proc., provides that "the testimony of each witness examined shall be reduced to writing by the magistrate or some one under his direction, and shall be read over to the witness, or he may read it over himself, and such corrections shall be made in the same as the witness shall direct, and he shall then sign the same by affixing his name or mark. All the testimony thus taken shall be certified to by the magistrate taking the same." All judges of the supreme court, court of criminal appeals, district courts, county courts, or justices of the peace, are magistrates, and when holding such examining trials are called "examining courts." Code Cr. Proc. arts. 42-63. With reference to depositions, the Code of Criminal Procedure (article 757) enacts that, "when an examination takes place in a criminal action before a magistrate, the defendant may have the depositions of any witness taken by any officer or officers hereafter named in this chapter; but the state, or person prosecuting, shall have the right to cross-examine the witnesses, and the defendant shall not use the depositions for any purpose unless he first consent that the entire evidence or statement of the witness may be used against him by the state on the trial of this case." "Depositions of the witnesses may also, at the request of the defendant, be taken in the following cases: (1) When the witness resides out of the state. (2) When the witness is aged or infirm." Code Cr. Proc. art. 758. "Depositions of witnesses within the state may be taken by a supreme or district judge, or before any two or more of the following officers: The county judge of a county, notary public, clerk of the district court and clerk of the county court." Id. art. 759. "The deposition of a witness taken before an examining court may be taken without interrogatories; but whenever a deposition is so taken, it shall be done by the proper officer or officers, and there shall be allowed both to the state and to the defendant full liberty of cross-examining." Id. art. 768. Such depositions may be taken without interrogatories, and the manner and form of taking and returning same shall conform to and be governed by the rules prescribed for taking depositions in civil causes. Id.

arts. 762, 763, 768, 769. "And when taken in such examining court, the deposition shall be sealed up and delivered by the officer or officers, or one of them, to the clerk of the county having jurisdiction to try the offense." Id. art. 771. In order, then, to constitute this character of evidence a "deposition," the provisions of the statutes authorizing same must be complied with, for it is only by virtue thereof that such "depositions" can be taken.

It will be seen that there are essential differences between taking "evidence" or "testimony" and returning same in an examining trial, and taking a "deposition" before an examining court. These differences are creatures of statute. "Evidence" on an examining trial is taken when the truth of the accusation is being inquired into, and to determine the question of bail, and by the magistrate alone, unaided by any of the officers enumerated in article 759 of the Code of Criminal Procedure. A "deposition" is taken at the instance of the accused, and in pursuance of different statutes from those prescribed for examining trials, and under entirely different rules of procedure. This will plainly and easily be seen by a casual reading of the cited statutes. "Testimony" taken on the examining trial is certified by the magistrate only, not as required in civil cases where depositions are taken, but in a different manner, and is filed with the district clerk for purposes stated in the statute. "Depositions" are taken for the purpose of being used in future trials, when the proper predicate is laid. Code Cr. Proc. arts. 772, 773. Examining trial evidence could always be taken by the state, under the statute, but "depositions" never, until 1879, by virtue of article 774. In fact, the evidence taken in examining trials was never authorized by statute to be used in this state by either the accused or the prosecution until 1866, and then it was confined expressly to the accused, and by him, then, only when it was shown that the witness giving the said testimony was dead. This right or privilege has never been accorded the prosecution, unless by virtue of article 774, supra. In *Kerry's Case* it was held that the word "deposition," in article 774, was by mistake used for the word "evidence" or "testimony"; and by this construction the right to use "examining trial testimony" was accorded the state, upon predicate laid, as provided in article 772, Code Cr. Proc. And this construction, it was said by the court, "is put beyond all question by reference to the original act of 1866, from which article 774 was taken." *Kerry v. State*, 17 Tex. App. 178, 182. Other cases in this state follow and support this case. The act of 1866 reads as follows: "In all criminal prosecutions, when the testimony of a witness has been reduced to writing, signed and sworn to before an examining magistrate, or before any court, and the witness has died, since giving his testimony, the testimony so taken and reduced to writing

may be read in evidence by such defendant, as proof of the facts therein stated, and upon any subsequent trial for the same offense: provided, however, that in all other respects, the testimony of such deceased witness shall be subject to the established rules in criminal cases. In every case the death of the witness must be established to the satisfaction of the court." This statute, it will be seen, has no reference whatever to a "deposition," provided for in articles 757 to 771, and absolutely excludes the idea that such "testimony" is a "deposition." When the statute was repealed, as was done by the Revised Statutes in 1879, this privilege was withdrawn from even the defendant. Article 774 was added to the Code of Criminal Procedure, upon the recommendation of the revisers, in the following language, to wit: "Title 8, chapter 8. Of Depositions, etc. No material changes are made, except in the addition of article 774." Wilson's Cr. Proc. p. 13, at bottom of page (Report of Commissioners). This title and chapter have reference exclusively to "depositions." Can it be gathered from this recommendation that the revisers intended to substitute article 774 for the act of 1866 (2 Pasch. Dig. art. 6005), or that the legislature did in fact substitute it for said act, by carrying the recommendation of the revisers into effect? I think not. The language of the revisers is free from ambiguity, and clearly conveys the idea that article 774 was an addition to the chapter, relating only and exclusively to depositions. The word "deposition" has a well-ascertained meaning as used in the Code of Criminal Procedure, and excludes the idea that "testimony" taken in an examining trial, under article 267, supra, was intended to be, or is, included within that meaning. In using the term "deposition" in article 774, it was intended to confer upon the state the privilege of taking the character of testimony mentioned, in the same manner and under the same forms and procedure as conferred upon the defendant in similar cases. It employs language only appropriate to this end, and for this purpose. In requiring the deposition, under said article 774, "to be certified according to law," it evidently meant that the deposition should be taken and certified as when taken by the accused; that is, by the officer or officers mentioned in article 759, and in accordance with other requirements of the other statutes in regard to depositions. The reasons for this conclusion would be equally as cogent, if not stronger, should it be conceded that the act of 1866 was repealed by substituting therefor article 774, because the latter act employs language and terms totally at variance with the former, and excludes the idea that the examining trial evidence provided for in the former act was meant or could have been intended by the terms of the latter act. The word "deposition" has not been used to mean "examining trial evidence" in any legislative act in the Code of

Criminal Procedure, in its history, so far as I have been enabled to ascertain. For the first time in this state, article 774 permitted the state to take depositions in a criminal case for the purpose of using same on some subsequent trial thereof, and it was by virtue of this statute alone that this practice was sought to be introduced into the criminal jurisprudence of Texas by legislation. Depositions in criminal causes were unknown to and unauthorized at common law. Therefore we could not look to that source for such a rule. *Johnson v. State*, 27 Tex. 765; *People v. Restell*, 3 Hill, 289, 296; 3 Russ. Crimes, 464. The "testimony" taken in an examining trial, under the provisions of article 267, supra, was not a deposition authorized to be taken under the provisions of article 751, 771, or 774. I have discussed article 774 as being within the legitimate creative power of the legislature, and not an infringement of the constitutional provision requiring the accused to "be confronted with the witnesses against him." I therefore think the decision in the *Kerry Case*, supra, is erroneous in holding that the word "deposition" means "testimony" taken on an examining trial, and if this character of evidence can be used by the state at all, it must be taken as a "deposition." In this connection I may further say that this court has not been settled in its opinions in regard to this matter. In reviewing the right of the state to use examining trial evidence of witnesses who, at the time of the final trial of the case, were beyond the limits of the state, this court said: "The admission of this character of testimony rests solely upon necessity, and the rule as to its admission is an innovation upon the constitutional guaranty that in all criminal cases the accused shall have the right to be confronted with the witnesses against him." *Steagald v. State*, 22 Tex. App. 464-490, 3 S. W. 777. Authorities cited: *Johnson v. State*, 1 Tex. App. 333; *Sullivan v. State*, 6 Tex. App. 319, 342. If this be true, such testimony was admitted as a "necessity," and not under article 774. The doctrine of these cases would eliminate said article 774, whether the *Kerry* decision be right or wrong, because that statute would be "an innovation upon the constitutional guaranty that in all criminal cases the accused shall have the right to be confronted with the witnesses against him"; and the rule would exist by necessity, "judicial necessity," and not by virtue of the said article. If "deposition" and "examining trial evidence" mean the same thing, and are "innovations" upon the constitutional inhibitions or guarantied rights, it must follow that the statute is void.

I have discussed this statute upon the hypothesis that it is not a violation of the tenth section of the bill of rights, and the legislature is authorized to ingraft exceptions upon the provisions; and, having done so, the state must pursue the procedure set out in

the statute; and, having failed to do so, the evidence was inadmissible. But I do not believe the legislature is empowered to enact any law authorizing the state to reproduce the evidence of a witness under any state of case, unless the accused has waived his right in some way, because it would be a violation of the constitution. Section 10 is as follows: "In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself. He shall have the right of being heard by himself or counsel, or both; shall be confronted with the witnesses against him; and shall have compulsory process for obtaining witnesses in his favor. And no person shall be held to answer for a criminal offense, unless on an indictment of a grand jury. * * *" To render this still more emphatic, the constitution further ordained, by section 29, that, in order "to guard against transgressions of the high powers herein delegated, we declare that everything in this bill of rights is and shall forever remain inviolate, and all laws contrary thereto, or the following provisions, shall be void." When antagonistic to "these rights," no law or rule of evidence can rightfully stand, and where there is a doubt of the constitutionality of the law, impinging these rights, or apparently impinging them, that doubt should be solved by holding the law unconstitutional. *Lynn v. State*, 33 Tex. Cr. R. 153, 25 S. W. 779. And this rule is well settled, and has been followed in this state with singular tenacity, except when the accused is to be confronted with the witnesses against him. Three of these "rights" are enumerated in the same sentence, included between the same grammatical periods, to wit: "He [the accused] shall have the right of being heard by himself or counsel, or both; shall be confronted with the witnesses against him; shall have compulsory process for obtaining witnesses in his favor." The courts have thus far religiously interfered with any and all encroachments upon the first and third of these rights, but have found many excuses for upholding violations of the other. I am unable to appreciate these reasons, though they have the sanction of great jurists and exalted courts. The principal reasons given in the decisions seem to be based on necessity, the rules of evidence known to the common law; and, having been once confronted with the adverse witnesses, the constitutional requirement has been complied with, and the accused can be thereafter confronted with examining trial evidence, or the oral testimony of such witnesses, reproduced through the mouths of others who may have heard them testify. There are many decisions sustaining one or more of these judicial exceptions. I do not purpose examining these decisions in detail. I have neither the time nor

the inclination to do so. They are familiar to the profession. I shall only notice these questions in a general way.

The bill of rights declares that, "in all criminal prosecutions, the accused shall have a speedy public trial by an impartial jury. He shall have the right of being heard by himself or counsel, or both; shall be confronted with the witnesses against him; and shall have compulsory process for obtaining witnesses in his favor. * * *" Who is to be tried? The accused. When? In "all criminal prosecutions." What is the character of this trial? "A speedy public trial." By whom is he to be tried? "An impartial jury." Can there be any want of certainty as to these propositions? I think not. It is too plain for discussion that these "prosecutions" are to be had before a jury,—"an impartial jury." Whatever else this provision may mean, it does mean a trial before a jury. Otherwise, these provisions of the constitution are meaningless, and have an occult or hidden meaning not apparent on the face of the language employed, and which must be sought elsewhere. It is as clear, as positive, as certain, as definite, that the accused "shall be confronted with the witnesses against him in all criminal prosecutions," as it is that he shall have his trial before "an impartial jury," or that he shall have "compulsory process" for his witnesses, or be heard "by himself or by his counsel, or both," or to be tried on an "indictment" preferred "by a grand jury." The "criminal prosecutions" pertaining to one of these rights applies with equal force and cogency to any and all the others. If one right can be satisfied by the accused having once enjoyed it, then I see no reason why each cannot be satisfied in the same way and for the same reasons. "An impartial jury" is not an "examining court." It is not a habeas corpus proceeding, nor is it a rule of evidence known to the common law. To give this expression the meaning intended by the constitution, the provision under discussion should read as follows: "In all trials before a jury in all criminal prosecutions, the accused shall be confronted with the witnesses against him." The other two clauses in regard to compulsory process for the witnesses of the accused, and his right to be heard by himself and his counsel, are taken in this sense. Speaking of this section of the bill of rights, this court said: "Evidently these matters all relate to proceedings in the trial court." *Tooke v. State*, 23 Tex. App. 10, 3 S. W. 783. This can mean nothing less than that, on the trial in a criminal prosecution, before a jury, the accused shall be confronted with the witnesses adverse to him. It is unquestioned that "he shall be present" at the trial to confront the witnesses. Why, with equal cogency, are not the witnesses required to confront the accused on that trial? The word "confronted" applies as well to the witnesses as to the accused. Under that

term the presence of the accused is required, and there is no apparent reason why it should have a different meaning when applied to the witnesses. How can it be held to require the presence of the accused, and excuse the attendance of the witnesses against him? There must be an accused, and there must be witnesses to confront him. If the accused be absent, and the witnesses present, there could be no trial. There might be a forfeiture of a bail bond, but not a trial of the accused in the "prosecution." If the accused presents himself at the trial, and there are no "witnesses against him," there would still be no trial. Not only so, but an examination of the witnesses cannot be had, even if the accused be only temporarily absent during the trial. *Bell v. State*, 32 Tex. Cr. R. 436, 24 S. W. 418, and cited authorities; *Rudder v. State*, 20 Tex. App. 262, 15 S. W. 717. The constitution demands the presence of both the accused and the witnesses. The legislature seems to have had the same conception of this provision, for it enacted that "the defendant upon a trial shall be confronted with the witnesses, except in certain cases provided in this Code, when depositions have been taken." Code Cr. Proc. art. 25. I am assuming that the "trial" specified in this statute (article 25), means a trial before a jury, and the "witnesses" mentioned are those "against him," though this must be arrived at by intendment and construction. It is not so stated in the statute, nor is this meaning anything like so clear as that shown by the constitution. The "trial" of the constitution is a trial "by an impartial jury," and it is clear to my mind that the law-making power so understood it, if the statute (article 25) means a trial before a jury by the expression "upon a trial." A "trial" before a "jury" is not a trial before an examining court, or under the writ of habeas corpus. If it be true that the statute refers to jury trials, how much stronger and more cogent is it that the constitution means a "jury trial." If the expression "by an impartial jury" be supplied by intendment in the statute to convey the idea that a jury trial is there meant, how can the expression "by an impartial jury" be stricken from the constitution, by interpretation, in order to deprive the accused of the right of being confronted with the state's witnesses? It would, indeed, be a strange rule of interpretation that would permit the elimination of the plain meaning of terms and words used in the constitution, and yet supply a similar meaning to language in the statute, not so certain in its significance and meaning. I see no room for construction as to the constitutional provision, for it uses words which convey a plain purpose or object. Again, the witnesses alluded to in the statute are not specifically designated; in the constitution, they are. By intendment it may be held that the witnesses against the ac-

cused are meant in the statute, but it is not so written in terms. We can only hold it so by construction, and thus be enabled to reach the conclusion that such was the intention of the legislature. If this is correct, the constitution and the statute mean the same thing.

One word with regard to the expression, "Except in certain cases, provided for in this Code, where depositions have been taken." What does this mean? By referring to articles 757-771, inclusive, we find that it means only to authorize the accused to take depositions in an "examining court," or where the witness is absent from the state, or is aged and infirm, under circumstances there specified. When so taken, the accused is required to consent that the state may use the depositions, and the prosecution has the right of cross-examining the witnesses whose depositions are taken. Then, it seems to be clear that the "evidence" taken by a justice of the peace on an examining trial is not a deposition. Code Cr. Proc. arts. 267, 757-771. Such "evidence" is, therefore, not only prohibited by the constitution, but excluded by the statute. Depositions were unknown to the rules of common law. Therefore we cannot look to that source for any light. *Johnson v. State*, 27 Tex. 765; *People v. Restell*, 3 Hill, 289, 296; 3 Russ. Crimes (9th Ed.) 464. But, if they were, they would be excluded by the statute, because it expressly confines such testimony to depositions taken under provisions of the Code. Code Cr. Proc. art. 25. The language of article 25 is exclusive, and requires the accused to be confronted with the witnesses "on the trial," except in cases where depositions are taken under the provisions of the Code. It does not recognize depositions provided by English statutes. Our statute provides: "The rules of evidence known to the common law of England, both in civil and criminal cases, shall govern in the trial of criminal actions in this state except where they are in conflict with the provisions of this Code, or of some statute of the state." Code Cr. Proc. art. 725. There is no provision of law in our Codes recognizing English statutory depositions. We are confined to common-law rules of evidence when not in conflict with our procedure. It is also enacted that "the rules of evidence prescribed by the statutes of this state, in civil suits, shall, so far as applicable, govern also in criminal actions, when not in conflict with the provisions of this Code or of the Penal Code." Code Cr. Proc. art. 726. It is further provided by statute that, "whenever it is found that this Code fails to provide a rule of procedure in any particular state of case which may arise, the rules of the common law shall be applied and govern." Code Cr. Proc. art. 27. Then it would follow that no matter of procedure or rule of evidence known to the common law would have any standing in this state, in criminal cases, when our Codes have provided rules in regard to

the particular question. If the rule be the same under the statute as at common law, then the statute occupies the territory, and it is a rule in law, as in physics, "that two bodies cannot occupy the same space at the same time," and for this reason the statute must prevail. If they be antagonistic, then, of course, the statute expressly excludes the common law. So, in either case, the common law must yield. Neither the statute nor the common law can in any event supplant the constitution. This constitutional provision excludes all rules of evidence, statutory as well as common law, if antagonistic to its letter, meaning or intent. A rule of evidence "known to the common law of England" cannot supplant the statute. Much less can it override and annul the bill of rights, even if the legislative power had sought to accomplish that purpose. But this has not been, nor sought to be, done by legislative enactment, as I understand the statute. The error lies in judicial construction. We have our own examining courts; and if testimony taken before these courts are "depositions," then they are admissible, if at all, only under the statute; and if not depositions, they are excluded by article 25. Authorities above cited.

As I understand the history of legislation in this state, examining trial evidence was never admissible for the state by statutory enactment. In 1866 an act was passed authorizing the use of such evidence by the accused, but then only by proof of the death of the witness who gave it. Pasch. Dig. art. 6806. But this act was repealed in 1879, and now is but a historical reminiscence, even the defendant being debarred this right or privilege. Therefore I cannot see how it can be held that "examining trial evidence" is admissible, even under the statute. But I have discussed this previously. The right to be confronted with the witnesses against him is a right guaranteed by the constitution to the accused,—is not a rule of evidence. This right begins with and continues throughout the "prosecution," whenever the accused is placed on trial before a jury, as to his presence during every stage of that trial, and is co-extensive with his right to have compulsory process for his witnesses, to be tried upon indictment in felony cases, and to be heard by himself and counsel. These are continuing rights, and cannot be obliterated because once made operative in the course of a given prosecution. That hung juries, new trials, or reversals do not satisfy these requirements, if the accused is again placed on his trial under the same indictment, is conceded as to all other rights save the one at issue, and this by all the authorities. Then, why not so as to this provision? If it is otherwise in this instance, and this provision be an exception, it should have been specially so provided in the constitution. But it was not. Then the scope, duration, and authority of these provisions are the same, and cannot be otherwise, if we

adhere to the plain terms and positive language employed in setting forth this right. If a necessity exists to set aside this right, or any of these rights, in any emergency, it is found outside and beyond the terms of the constitution, and not in any language therein set forth. It must come from some higher source, to be supplied by the interpreting power. Whence cometh it? It is said that it originated in and comes from necessity; that it is inherited from the common law, and from the fact that the accused has once been confronted with the witnesses against him. Some courts adopt one of these theories; others, another; and some adopt all three, and superadd the matter of public policy, as a sort of "roseleaf to the brimming goblet." "Necessity" has afforded a broader ground, perhaps, than the other reasons for the decisions admitting this class of evidence. It has its origin, of course, in the idea that the constitution must be relaxed in some way in order to admit this character of evidence. Necessity that is higher than the constitution can safely have no place in American jurisprudence. That principle is necessarily vicious in its tendency, and subversive of the constitution. It should be, and is, limited by the constitutional inhibitions. This is the settled rule in this state, except perhaps in regard to confronting the accused with the witnesses for the prosecution. *Lynn v. State*, 33 Tex. Cr. R. 153, 25 S. W. 779; *Ex parte Garza*, 28 Tex. App. 381, 13 S. W. 779; *Ex parte Sundstrom*, 25 Tex. App. 133, 8 S. W. 207; *Bohmy v. State*, 21 Tex. App. 597, 2 S. W. 886; *Flood v. State*, 19 Tex. App. 534. The exception referred to is supported by *Johnson v. State*, 1 Tex. App. 333, *Black v. State*, Id. 363, *Steagald v. State*, 22 Tex. App. 464, 3 S. W. 771, and other cases. These decisions sustain this exception principally upon the broad ground of necessity, but admit that this "necessity" is an innovation upon the constitutional guaranty "that in all criminal cases the accused shall have the right to be confronted with the witnesses against him." *Steagald v. State*, 22 Tex. App. 468-490, 3 S. W. 777. In *Sullivan's Case* it was admitted on the ground of "judicial necessity." 6 Tex. App. 319-342. Why should the necessity exist as to this, and not as to the other provisions? The reasons are not obvious. But, if correct, these decisions establish the proposition that there is a necessity higher than and beyond the constitution, and out of which this rule must come. Being correct, that necessity must govern and control the constitution. If it in fact exists, the judiciary, legislature, and executive owe it allegiance, and must conform to its behests. As its boundaries have not been and cannot be settled, because of a want of controlling authority, it follows that each department may exercise its high functions as may seem to it proper, guided alone by its own will, or its determination of the emergency which may call it into existence. The judiciary may

take one view of it, the legislature another, and the executive still another, and each antagonistic to and subversive of the other. Thus each of these co-ordinate departments may find "necessities" outside the organic law, destructive of the authority of the other two and of that law itself. If this "necessity" exists, the constitution ceases, and the necessity usurps its place and functions, and becomes a "higher law," to be exercised at the pleasure of the department assuming the existence of the necessity. If the courts can assume it for one reason, they may do so for any number of reasons, and until all of the provisions of the constitution are nullified, and its existence terminated; and hence the extinction of the courts themselves, or the establishment of their complete and absolute autonomy, independent of the constitution. The power to create a necessity superior to the constitution necessarily implies and carries the authority to supersede it. The constitution, and a controlling necessity antagonistic to its requirements, cannot exist. One must yield, and this, of course, must be the necessity, though some decisions hold the other way. These decisions, in my judgment, are erroneous, and should not be permitted to stand. But this character of evidence is said to have been admissible at common law, and therefore admissible with us. If it be conceded that it was permitted at common law, it does not follow that it is so here. While the English practice may have admitted depositions in criminal cases, this seems to have rested on statutes, and it cannot be easily shown from the cases that parol evidence of what was sworn on a previous trial was used upon a subsequent trial. *People v. Sligh*, 48 Mich. 54, 11 N. W. 783, and authorities cited. In that case it was further said: "It must be confessed, also, that although the English practice has always been to allow depositions of deceased witnesses in ordinary criminal cases, a contrary rule seems to be recognized in treason cases, upon the ground that there the statutes provide—as they nowhere else provide, but as our constitution provides in all cases—for confronting prisoner and witnesses on the trial." See, also, 1 Hale, P. C. 306, 586; 2 Hale, P. C. 286; 3 Russ. Crimes (9th Ed.) 437, and note a; *Post. Cr. Law*, 236, 328. This practice, in England, is founded and rests upon statutes.

Those who maintain a common-law rule assert that, if the accused has once been confronted, the evidence of the witness may be reproduced, if he is dead, insane, kept away by the adverse party, or is too infirm to be able probably ever to attend the trial. If this proposition is correct, this clause of the constitution should read as follows: "The accused shall be confronted with the witnesses against him, except where he has once been so confronted, and the witnesses have died, become insane, have been kept away by the adverse party, or are too infirm to probably ever be able to attend the trial." If

such is the meaning of the constitution, very singularly inappropriate language was employed to convey that meaning, and we must seek elsewhere than the terms of that instrument for its meaning. I am cited to the recent decision by the United States supreme court in the *Mattox Case*, 15 Sup. Ct. 340, in which it is said: "We are bound to interpret the constitution in the light of the law as it existed at the time it was adopted; not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject,—such as his ancestors had inherited and defended since the days of Magna Charta. Many of its provisions, in the nature of a bill of rights, are subject to exceptions, recognized long before the adoption of the constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected." This exception announces some propositions which to my mind are not in harmony with the "spirit" of our government and constitution, and certainly not found in the "letter" of that instrument. I do not understand how our constitution, a novelty in governmental experience and science, wholly unknown to the common law, or the "law as it existed," could be interpreted by that law. It is not clear how "many of its provisions, in the nature of a bill of rights, are subject to exceptions, recognized long before the adoption of the constitution," when there was no bill of rights to which these "exceptions" could relate. There must be an existing law before there can be exceptions to it. Not only so, but our theory of government is constructed upon a basis fundamentally at variance with the principles of the British government, and is constructed upon the theory that citizenship is the creative power of government, that all governmental authority and power in the states is derived from the people, and that there is no power above the constitution, except the people who created it. In other words, ours is a constitutional government, in the states ordained by the people, and the federal constitution one of delegated authority. How, it may be asked, can the delegated authority of the federal government be inherited by that government as a British subject? The federal authority, in all its bearings and extent, is exercised alone by virtue of the terms of the federal constitution, and that constitution is the act of the states. It inherited nothing. Its powers are conferred. It is the creature of the states, not the child of the common law, nor was ever the subject of the British government.

Again, the common law, or "the law as it existed at the time" our constitution was brought into existence, never conceived of a constitution such as inaugurated in the states or for the federal government. It would be much more plausible to construe away the freshly-acquired rights of the English "subjects," wrung from King John, and embodied

in Magna Charta, by "the law as it existed at that time," than to interpret away, by common law, those rights reserved by our people in their respective bills of rights and constitutions. As Magna Charta reached out for "new guaranties of the rights of the citizen," secured in that memorable struggle of the English people for their liberties, so our constitution was "reaching out for new guaranties of the rights of the citizen," after the great struggle which gave the American people in the 13 colonies their independence. Not satisfied with the Magna Charta of English liberty and rights, the American people ordained and instituted a Magna Charta of their own rights and liberties, in the form of written constitutions, and in them made a forward movement in guaranties of reserved rights, some of which were unknown to the "law as it existed at the time" of their adoption. Allegiance "as British subjects" was renounced, and those rights were declared which conformed to the views of the American people as an independent people. They did not subordinate themselves to the laws of the country from which they had so recently forcibly separated themselves. There is nothing on the face of the federal constitution, or that of this state, recognizing the rule of inheritance "as British subjects."

Again, if it be granted that the rules of evidence known to the common law were left in vogue at the time of its adoption by a failure of the federal constitution to speak of them, then may it not be said that, when the sixth amendment was added to that instrument, it excluded those rules by requiring the "accused to be confronted with the witnesses against him," without qualification or exception? The inclusion of the "confronting clause," minus the four exceptions said to exist at common law, would exclude those exceptions. *Sligh's Case*, supra; 3 Russ. Crimes (9th Ed.) 437, and note a. Texas, however, could not have inherited as a British subject. She came from another source. Her inheritance, if a successful revolutionary child can be forced to take an incumbrance against its will, came from the civil-law source. What of the common law we have is by adoption, not by inheritance, and its standing with us is solely by legislative enactment.

Again, it has been decided that, if the accused has once been confronted with the witnesses against him, this satisfies the constitutional demand, and thereafter their testimony may be reproduced without such confrontation. In this event it may be relevant to ask what becomes of the "rules of evidence known to the common law," as well as the rule of "necessity." In regard to this rule it is said, in the *Mattox Case*, that "the substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and in subjecting him to the ordeal of a cross-examination. This the law says

he shall under no circumstances be deprived of." This same law, which says "he shall under no circumstances be deprived of meeting the witness face to face," draws no distinction between the first trial and subsequent trials. It guaranties that right in all criminal prosecutions "before an impartial jury." The rights are none the less sacred because there has been one trial. The law does not select the first trial as the place and time of the confronting of the accused with the witnesses. This is judicial selection. Why is this? If once "confronted" means a compliance with the demands of the constitution in regard to this right, why not apply the same rule of interpretation to those other provisions of section 10 of the bill of rights? What occult reason is there for this difference in the force and operation of those provisions? Why not, upon a subsequent trial, try the accused before the court without a jury, in private, without indictment, deny him process for his witnesses, refuse him the right to be heard by himself and counsel, and try him in his absence? Why were not the "substance" of these constitutional rights preserved to the accused in the advantage of having once enjoyed them, as well as in once seeing the witness "face to face"? The law draws no line of demarkation, but places them on the same plane, and declares they all shall "forever remain inviolate." If the accused's being once confronted by the adverse witness meets the constitutional demand, then it would be unnecessary to bring that witness again to another trial. His evidence could be proved by another who had heard him testify, though the witness then sat in the court room. Why? Because the constitution has "once" been complied with, and its demand met, and has no further operation in the given case. This is the legitimate outcome of the doctrine under discussion as maintained by those decisions.

At common law, and until Queen Anne's time, the accused in felony cases was not entitled to produce witnesses in his behalf, nor was he permitted to have counsel for his defense. "It is a settled rule at common law," says Mr. Blackstone, "that no counsel shall be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated." 4 Bl. Comm. § 355. Again, he says, "it was an ancient and common received practice that as counsel was not allowed to any prisoner accused of a capital crime, so neither should he be suffered to exculpate himself by the testimony of any witnesses." 4 Bl. Comm. § 359. "The prisoner was not even permitted to call witnesses, though present, but the jury were to decide on his guilt or innocence, according to their judgment, upon the evidence offered in support of the prosecution." 1 Chit. Cr. Law, 624, 625. The accused, therefore, at common law, could have no compulsory

process for witnesses in his favor. *Reynolds v. State*, 33 Tex. Cr. R. 143, 25 S. W. 786; *Kidwell v. State* (decided at Tyler term, 1895) 33 S. W. 342.

No decision that I am aware of has yet laid down the rule that, if the accused has once been heard by himself or counsel, or has had compulsory process for witnesses in his favor, these constitutional rights were for this reason inapplicable to subsequent trials of the same case. Yet these demands are of no higher standing than that which requires the accused shall be confronted with the witnesses against him, or that, having been once enjoyed, the supposed common-law rule refusing them could be invoked. Such a ruling would not be in accordance with the due process of law. No rule can be due process of law which ignores legal justice, or which clearly sets at naught the plain letter of the law. We cannot reach the ends of legal justice by setting at defiance those rules prescribed for attaining it. We cannot hope to enforce and preserve the constitution by setting aside and overriding its plainly written requirements, and violating its imperative demands. It is not right to do wrong, and the constitution is not maintained by overturning it. The three grounds by which it is said testimony of witnesses can be reproduced upon a subsequent trial, without confronting the accused with the adverse witnesses, are at variance with each other. If either be correct, the others, it would seem, cannot be. "Necessity" knows no exceptions, save those imposed by the dispensing power. The common law is said to be limited by four exceptions, and having once confronted the accused with the adverse witnesses fully satisfies the constitutional demand; hence, it ceases to be operative. In some cases, notably the *Mattox Case*, all of these rules are sanctioned, inconsistent as they are. All of them are outside, and beyond, and antagonistic to the constitution, as well as to each other. The rule of interpretation adopted in the *Mattox Case* is at variance with that followed by our courts, coeval with the existence of the judicial system of our country with reference to the interpretation of the plainly-written terms of constitutions.

Be it remembered that the interpretation of constitutions is peculiarly a phase of American jurisprudence. It originated with us. It had no existence elsewhere. It is not subject to "the law as it existed before"; neither, indeed, can be. We get but little light elsewhere, and this is derived from the rule by which written contracts are construed. The common law cannot furnish us the rule, for it did not deal with an American constitution. Such an instrument was never within the purview of, or contemplated by, its rules,—was a stranger to its growth, development, economy, and its philosophy. Mr. Cooley says: "In American constitutional law, the word 'constitution' is used in a

restricted sense, as implying the written instrument agreed on by the people of the Union, or of any one of the states, as the absolute rule of action and decision for all departments and officers of the government in respect to all of the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or regulation of any such department or officer, or even the people themselves, will be altogether void." Const. Lim. p. 5. The rule of its interpretation seems to be the same as that applicable to a written contract, and, when the language is plain, direct, and certain, its terms alone should be looked to, and resort to extraneous matters should be excluded. This rule of interpretation has obtained, as I understand it, from the inception of our government. Mr. Story says: "When the words are plain and clear, and the sense perfect and distinct arising on them, there is generally no necessity to have recourse to other means of interpretation." Story, Const. §§ 182-184. "The general principle, on which we have heretofore insisted, that the meaning of a written law is to be found in its terms, and that we are not at liberty to resort to extrinsic facts and circumstances to ascertain what the framers might have intended, has frequently been declared to apply to the constitution." Sedg. St. Const. Law (2d Ed.) p. 552. In *Sturges v. Crowninshield*, Chief Justice Marshall said: "It is well settled that the spirit of a constitution is to be respected no less than its letter; yet that spirit is to be collected from its words, and neither the practice of legislative bodies nor other extrinsic circumstances can control its clear language." 4 Wheat. 202, 203. In *Newell v. People*, 7 N. Y. 9, it was said: "Whether we are considering an agreement between parties, a statute, or a constitution, with a view of interpretation, the thing which we are to seek is the thought which it expresses. To ascertain this, the first resort in all cases is to the natural significance of the words employed, in the order of grammatical arrangement, in which the framers of the instrument have placed them. If, thus regarded, the words embody a definite meaning, which involves no absurdity and no contradiction between the different parts of the same writing, then that meaning apparent on the face of the instrument is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither legislatures nor courts have a right to add to or take away from that meaning." This rule was again declared by the supreme court of the United States in *Lake Co. v. Rollins*, 130 U. S. 652, 9 Sup. Ct. 652; hence, has an unbroken array of authority supporting it. In that case the court say:

"We are unable to adopt the constructive interpolations ingeniously offered by counsel

for defendant in error. Why not assume that the framers of the constitution, and the people who voted it into existence, meant exactly what it says? At first glance, its reading produces no impression of doubt as to the meaning. It seems all sufficiently plain, and in such case there is a well-settled rule which we must observe. The object of construction, applied to a constitution, is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument. To get at the thought or meaning in a statute, a contract, or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement, in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it. *Newell v. People*, 7 N. Y. 9; *Hills v. City of Chicago*, 60 Ill. 86; *Denn v. Reid*, 10 Pet. 524; *Leonard v. Wiseman*, 31 Md. 201-204; *People v. Potter*, 47 N. Y. 375; *Coley. Const. Lim.* 57; *Story, Const. § 400*; *Beardstown v. Virginia*, 76 Ill. 34. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction. *U. S. v. Fisher*, 2 Cranch, 358, 359; *Doggett v. Railroad Co.*, 99 U. S. 72. There is even stronger reason for adhering to this rule in the case of a constitution than in that of a statute, since the latter is passed by a deliberative body of small numbers, a large proportion of whose members are more or less conversant with the niceties of construction and discrimination, and fuller opportunity exists for attention and revision of such a character, while constitutions, although framed by conventions, are yet created by the votes of the entire body of electors in a state, the most of whom are little disposed, even if they were able, to engage in such refinements. The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption. Such considerations give weight to that line of remark of which *People v. Purdy*, 2 Hill, 31-36, affords an example. There, *Bronson, J.*, commenting upon the danger of departing from the import and meaning of the language used to express the intent, and hunting after probable meanings not clearly embraced in that language, says: 'In this way the constitution is made to mean one thing by one man and something else by another,

until in the end it is in danger of being rendered a mere dead letter; and that, too, when the language is so plain and explicit that it is impossible to make it mean more than one thing, unless we lose sight of the instrument itself, and roam at large in the boundless fields of speculation.' For one, I dare not venture upon such a course. Written constitutions of government will soon come to be regarded as of little value, if their injunctions may be thus lightly overlooked; and the experiment of setting a boundary to power will prove a failure. "Words are the common signs that mankind make use of to declare their intention to one another; and, when the words of a man express his meaning plainly, distinctly, and perfectly, we have no occasion to have recourse to any other means of interpretation." For additional authorities, see 3 Am. & Eng. Enc. Law, p. 679, note 1.

I have thus liberally quoted from this decision because it presents the rule of interpretation applicable to the provision of the constitution under discussion in the case under consideration. The rule in the *Mattox Case* is inappropriate in a case where the meaning is plain on the face of the instrument. Rules of construction should never be resorted to, nor rules of interpretation invoked, unless a necessity exists therefor; and *Vattel* says: "It is not allowable to interpret what has no need of interpretation." Again, the proposition is a sound one that courts, in the interpretation of constitutions, have nothing to do with the argument *ab inconvenienti*, and should not "bend the constitution to suit the law of the hour." *Greencastle Tp. v. Black*, 5 Ind. 557, 565; *Oakley v. Aspinwall*, 3 N. Y. 547, 568. That inconvenience may and will arise from an adherence to the constitution may be conceded, but this affords no reason for construing away its provisions. It is not for the courts or legislatures to supply these defects. This is for the people who made that instrument. As was said by *Bronson, C. J.*: "If the legislature or the courts may take that office upon themselves, or if, under color of construction, or upon any other specious ground, they may depart from that which is declared, the people may well despair of ever being able to set any boundary to the powers of government. Written constitutions will be more than useless. Believing, as I do, that the success of free institutions depends upon a rigid adherence to the fundamental law. I have never yielded to considerations of expediency in expounding it. There is always some plausible reason for latitudinarian constructions which are resorted to for the purpose of acquiring power,—some evil to be avoided, or some good to be obtained, by pushing the powers of government beyond their legitimate boundary. It is by yielding to such influences that constitutions are gradually undermined and finally overthrown. My rule has ever been to follow the fundamental law as it is written, regardless of

consequences. If the law does not work well, the people can amend it; and the inconveniences can be borne long enough to await that process. But if the legislature or the courts undertake to cure defects by forced and unnatural constructions, they inflict a wound upon the constitution which nothing can heal. One step taken by the legislature or the judiciary in enlarging the powers of government opens the door for another, which will be sure to follow; and so the process goes on until all respect for the fundamental law is lost, and the powers of government are just what those in authority please to call them." *Oakley v. Aspinwall*, supra. The evils of such a rule are too obvious to require enumeration or discussion at my hands, and courts should set upon it the seal of judicial disapprobation. Let the people who made the constitution remedy its defects, as they alone have the right to do. But I do not admit the constitution is defective in the matter under discussion. The rule of *stare decisis* has but little application in criminal jurisprudence, and ought to have none, when wrong, and tending to overturn the plainly-written law. May it not be said correctly, in criminal law, in this connection, that adjudicated error, persisted in, cannot make truth of that error? Can any question truthfully be said to be settled until it has been correctly settled? Courts may declare it settled, but those rulings will be questioned and assailed until they are overturned, and the truth is made to prevail. This is right, and it should be so. In criminal jurisprudence, the courts are largely unincumbered with "rules of property rights" involved in the rule of *stare decisis*. It is error to say that the provision of the constitution under discussion is a "rule of evidence," and subject to exception, if to be judged by the ordinary rules of interpretation applicable to contracts, couched in plain and unambiguous language and terms. This provision is not a rule of evidence, announces no rule of evidence, but is prohibitory of all rules of evidence contrary to its terms, as well as all matters of procedure violative of its requirements. If this provision of the bill of rights means anything, and article 25, supra, of the Code of Criminal Procedure is a valid law, then the "testimony" taken on an examining trial cannot be used as original evidence on a final trial of the case, or any subsequent trial thereof. The witnesses against him must confront the accused, or, in a proper case, the "depositions" authorized by the statute can be used; and neither the constitution nor the statute authorizes the admission of examining trial evidence, but both prohibit its introduction. If such evidence can be admitted at all, under any rule, it would constitute an excuse for not confronting the accused with the witnesses against him. Inability of the state to comply with the law can constitute no excuse for its vio-

lation, much less would it authorize an overturning of the constitutional inhibitions. Those cases which hold this character of evidence admissible on the ground that the rules pertaining to the introduction of testimony in civil and criminal cases are identical, in my opinion, are not correct. The constitution does not require the production of witnesses in open court, in civil suits, as it does in criminal prosecutions, and the statute excludes rules of evidence in civil cases, if in conflict with those prescribed by the Code of Criminal Procedure for the trial of criminal actions. Code Cr. Proc. art. 726.

In view of the fact that the reasons for confronting the accused with witnesses against him have been so often discussed, it would seem useless to enter that field and rediscuss them. For an able exposition of these reasons, see the strong dissenting opinion of Judge Ryland, in the case of *State v. McO'Brien*, 20 Mo. 402, and the very able and exhaustive brief of Mr. Wright, of counsel for the appellant in said cause. I do not see how the jury are fully enabled to pass upon the weight to be attached to the evidence and credibility of the witnesses, unless they have had the opportunity of seeing them face to face, and hearing them detail their testimony. A just verdict in this respect is incidental to the accused being confronted by said witnesses, and seeing and hearing them is necessary to a correct weighing of their evidence. The manner of testifying, appearance, expressions of countenance, evasion, candor, sudden confusion when detected in a fabricated tale or false statement, are as potent in the minds of the jury, and often more so, than the words used by the witnesses; and yet these things cannot be reproduced before the jury, and, if sought to be reproduced, would be excluded, because they would but form the basis for the opinion of the reproducing witness. An intelligent and safe conclusion by the jury as to the credibility of the absent witness would therefore, in such state of case, be impossible; and a fair verdict on the weight of his evidence precluded. It is in all human probability absolutely impossible to reproduce the testimony of an absent witness, for his excluded demeanor, during the time he is testifying, is as much a part of his testimony as the language he uses in detailing his knowledge of the facts stated by him.

I have not intended to discuss the rules applicable to the admission of dying declarations, *res gestæ*, nor what might be a waiver by the accused of the presence of the witnesses against him, nor where the accused has kept away from his trial those witnesses who are adverse to him.

HURT, P. J., concurs, and will file opinion.
HENDERSON, J., dissents, and will file opinion.

McFALLS et ux. v. BROWN et al.

(Court of Civil Appeals of Texas. Sept. 16, 1896.)

HOMESTEAD—CONVEYANCE—PRIVY ACKNOWLEDGMENT OF WIFE—COSTS.

1. A wife may recover a homestead conveyed by her and her husband, without refunding any of the purchase money, except such as she received, or as was applied to the use of herself and family; the statute regulating privy acknowledgment by the wife not having been substantially complied with, and she not having been guilty of any fraud, and not having represented that the recitals in the certificate of acknowledgment were true, though she expressed herself satisfied with the transaction.

2. Where plaintiffs claim land under a deed from defendants (husband and wife), but have judgment only for the purchase price, as to part of which there is no complaint, and defendants have judgment for cancellation of the deed, it not having been privily acknowledged by the wife, though the land was defendants' homestead, the court cannot be held to have abused its discretion in taxing all the costs against defendants.

Error from district court, Wichita county; George E. Miller, Judge.

Action by C. A. Brown and another against S. G. McFalls and wife. From the judgment rendered, defendants bring error. Reformed and affirmed.

L. H. Mathis, for plaintiffs in error. Carignan & Hughes, for defendants in error.

KEY, J. This suit involves the title to 200 acres of land, and the terms upon which S. G. McFalls and his wife may have a decree canceling a deed executed by them, purporting to convey the land to C. A. Brown and A. F. Fassett. The plaintiffs, Fassett and Brown, claimed the land under the deed referred to. There is no statement of facts in the record; and the jury, passing on special issues, found that at the time the deed was executed the land was the homestead of S. G. McFalls and his wife; that S. G. McFalls was then insane, but that fact was not known to Fassett and Brown; that the consideration was inadequate; that, at the time of the acknowledgment of S. O. McFalls to the deed in controversy by George A. Geddings, she was not examined privily and apart from her husband; that said deed was not fully explained to her by said Geddings; that she did not willingly sign said deed; that she did not acknowledge to said George A. Geddings that she had signed said deed for the purposes and considerations therein expressed, and that she did not wish to retract it. The jury also found that part of the consideration paid by Fassett and Brown was \$600, of which amount \$293 were paid to S. G. McFalls, and \$206 were paid to S. G. McFalls and his wife, S. O. McFalls, jointly. It was further found that, of the \$600 so received, about \$172 were applied to the payment of the community debts of the McFallses. As to how the balance was used, the record is silent. The district court rendered judgment for McFalls

and his wife for the land, and canceling the deed from them to Fassett and Brown, and rendered judgment for Fassett and Brown, against the McFallses, for cancellation of a deed executed by them as part consideration for the land in suit, and for \$600, making said sum a charge against the land in controversy, and directing a sale thereof if the \$600 were not paid within 90 days after the court adjourned. The case is presented to us on the following assignments of error: (1) The court erred in rendering judgment against the defendant Mrs. S. O. McFalls for \$600 and interest and in issuing an order of sale of the land in controversy in said cause, to secure the payment of said sum, because, the jury having found that Mrs. McFalls had received the benefit of only \$468 of the money paid by plaintiffs, the judgment against her and the order of sale should have been for only that amount. (2) The 200 acres of land in controversy having been gained by the defendants, the costs of the case should have been taxed against the plaintiffs and there is no good cause shown or stated in the record for allowing the plaintiffs in the cause to recover the costs of the suit against the defendants.

As we understand the prevailing doctrine in this state, a deed purporting to convey the homestead of a husband and wife is not valid and binding on the wife unless she and her husband be sane at the time of its execution, and the deed be executed and acknowledged in the manner prescribed by statute. *Heidenheimer v. Thomas*, 63 Tex. 287; *Pearson v. Cox*, 71 Tex. 246, 9 S. W. 124. And when the statute regulating the privy acknowledgment of the wife has not been substantially complied with, and she has been guilty of no fraud, she may sue for and recover the homestead, or invoke any other judicial remedy for its protection, without refunding the purchase money, unless the same has been applied to her use or benefit. *Berry v. Donley*, 26 Tex. 737; *Eckhardt v. Schlecht*, 29 Tex. 130; *Fitzgerald v. Turner*, 43 Tex. 79; *Williams v. Ellingsworth*, 75 Tex. 480, 12 S. W. 746; *Stone v. Sledge* (Tex. Civ. App.) 24 S. W. 697; *Looney v. Adamson*, 48 Tex. 619; *Stallings v. Hullum* (Tex. Sup.) 35 S. W. 2. Applying this latter rule to the case in hand, we find that, although the certificate of acknowledgment may have been in due form, in fact the statute was not complied with, and Mrs. McFalls' acknowledgment was not taken in the manner required thereby. Nor does it appear she was guilty of any fraud. It is not shown that she told the plaintiffs that the facts stated in the certificate of acknowledgment were true, nor that they did not know that they were false. The certificate was not made by her, and would not operate as an estoppel against her. It is true that she did not voluntarily disclose to the plaintiffs her husband's mental condition, but it is not shown that any question was asked her on that subject, or that she knew that his

sanity was essential to the validity of the deed. Hence her mere allience was not an act of fraud. It is also true that Mrs. McFalls expressed herself as satisfied with the transaction, but this expression did not constitute such a misrepresentation as will prevent a married woman from recovering her homestead without refunding the purchase money, when she has signed and delivered, but not properly acknowledged, a deed purporting to convey the same. *Johnson v. Bryan*, 62 Tex. 623, and authorities above cited. Rulings in conflict with these cases may perhaps be found in other jurisdictions, but we will follow the doctrine so often announced by our own court of last resort. This case is distinguishable from *Pearson v. Cox*, 71 Tex. 246, 9 S. W. 124. In that case the wife had signed and properly acknowledged the deed, and the consideration had been used for the benefit of her and her children; and it was held (the husband, who also signed the deed, being insane) that the deed was merely voidable, and the land chargeable with the consideration received and applied to the benefit of the wife and children. In the case at bar, Mrs. McFalls' acknowledgment was not taken; and it was not shown that the \$132 involved in this appeal was received by her, or applied to her use, or to the use of her family. We therefore sustain the first assignment of error.

The plaintiffs having recovered \$468, as to which no complaint is made, we cannot hold that the court abused its discretion in taxing all the costs against the defendants, although they recovered the land. The judgment of the court below will be reformed so as to limit the recovery against Mrs. S. O. McFalls, and the charge against the land, to \$468, and as thus reformed it will be affirmed. The costs of this writ of error will be taxed against Brown and Fassett, the defendants in error. Reformed and affirmed.

TEXAS & P. RY. CO. v. BIGHAM.¹

(Court of Civil Appeals of Texas. June 27, 1896.)

NEGLIGENCE — PROXIMATE CAUSE — DAMAGES —
PLEADING AND EVIDENCE — CONTRIBUTORY
NEGLIGENCE — INSTRUCTIONS.

1. A shipper, having put cattle for shipment in a stock pen provided by the carrier for the purpose, was fixing the gate thereof (which the carrier had negligently permitted to remain out of repair), to prevent escape of the cattle, when they, being frightened by a passing train, broke through the gate, which they could not have done but for its defective condition, injuring themselves and him. *Held*, that the negligence in permitting the gate to remain out of repair was the proximate cause of the injuries.

2. A petition alleging that plaintiff sustained internal and external injuries, that his right arm is disabled for life, that since the injury his health has remained continually impaired, and that the injuries to his person have disabled and unfitted him to perform manual la-

bor and to follow his previous occupation, in the absence of exception thereto, justifies the admission of testimony as to the extent of plaintiff's diminished capacity to perform labor, due to the injuries, and the lessened value of his services on account of the injuries.

3. In an action for injury to cattle, caused by defendant's negligence, plaintiff may prove the extent of the damage, though he has not alleged the market value of the cattle, or the measure of damages, there having been no exception to the complaint.

4. Plaintiff, having pleaded that injuries inflicted on him were permanent, may show his reasonable expectancy of life, in connection with proof, founded on averments in his petition, showing the extent of his diminished earning capacity.

5. In an action for personal injuries resulting from the escape of plaintiff's cattle through the gate of defendant carrier's cattle pen, which gate defendant had negligently permitted to remain out of repair, the complaint having negatived the existence of the defense of contributory negligence by averring that the stampede of the cattle, with its consequent effects, "occurred instantaneously, and while plaintiff was yet fastening the gate, and before he could retreat to a place of safety," and contributory negligence not being shown *prima facie* by plaintiff's evidence, any contributory negligence in plaintiff's conduct is a matter to be pleaded by defendant, and supported by evidence tending to establish it, in order to necessitate an instruction on the subject.

6. Failure to give a more specific instruction, in an action for injuries to cattle, than that, in case defendant was liable, the jury should award plaintiff such amount as would reasonably compensate him for the loss sustained as the direct and natural result of the injuries inflicted on his cattle, is not error, in the absence of a special request.

Appeal from district court, Taylor county; T. H. Conner, Judge.

Action by W. R. Bigham against the Texas & Pacific Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

B. G. Bidwell, for appellant. J. H. Beall, for appellee.

Conclusions of Fact.

TARLTON, C. J. On November 25, 1892, the appellee, in accordance with a prearrangement made with the agent of the appellant, a common carrier, for the shipment of his cattle from Merkel to Waxahachie, Tex., had penned the cattle (about 100 head) in the stock pens of the appellant provided by it for that purpose. The gate which admitted entrance into the pen was out of repair, and had been for some months, as the appellant knew. The appliances for fastening it were defective. Its condition was due to the negligence of the defendant company. In order to prevent the escape of the cattle intended for shipment, the appellee was in the act of fastening it by means of a rope which he had secured for that purpose, when the noise of a passing freight train so frightened the cattle as to reduce them to a condition of panic. They plunged towards the gate and upon it, the one upon the top of the other; and, before the appellee could escape, they hurled him some 20 feet upon the ground, where he fell unconscious from the violence of the contact.

¹ Rehearing denied September 18, 1896.

The plaintiff hence sustained serious bodily and internal injuries, to such an extent, in fact, that damages for these injuries were awarded him in the sum of \$1,800, not complained of as excessive. He also suffered loss in injuries inflicted upon the cattle in their fright, falling the one upon the other, to the extent of \$70, also awarded him, and not complained of as excessive. But for the defective condition of the gate, the cattle would not have escaped.

Opinion.

The question first presented arises upon the action of the court in overruling a special exception to the plaintiff's petition. It is therein urged that the petition, which alleges the cause of the injury as hereinabove stated, fails to disclose a cause of action, in that the negligence of the defendant in permitting the gate to remain out of repair was the remote, and not the proximate, cause of the injuries sustained. There is some plausibility in this contention, due to the difficulty and confusion arising upon accurately defining the distinction between what constitutes a proximate, and what a remote, cause. We have concluded, however, that the action of the court was correct. In the case of *Gonzales v. City of Galveston*, 84 Tex. 3, 19 S. W. 234, cited by the appellee, the city had negligently permitted a pile of lumber to be placed and to remain upon one of its streets. The vehicle of a passing drayman came in contact with the pile of lumber. The plaintiff, a child, was on the side of the lumber opposite to the drayman, and unseen by him. As a consequence of the contact between the dray and the lumber, heavy pieces of the lumber were thrown upon the child, severely injuring her. Our supreme court, through Judge Collard, discussing the question of proximate cause, uses this language: "It is true, if the drayman had not run his load against the lumber the accident would not have occurred; and, on the other hand, if the lumber had not been in the street it would not have occurred. Dispense with either of these facts, and there would have been no injury. The liability cannot be tested in this manner, nor by comparing the negligence of the two, if both were guilty of negligence. If the presence of the lumber pile in the street was at the time chargeable to the negligence of the city, and such negligence, together with the act of the drayman, caused the injury, it would be in part the proximate cause. This view is in accord with the decisions of our supreme court." After quoting from the opinion of Justice Henry in *Railway Co. v. Clark*, 81 Tex. 48, 16 S. W. 631, in support of his statement of the law, the learned judge proceeds as follows: "By 'proximate cause' we do not mean the last act of cause, or nearest act to the injury, but such act, wanting in ordinary care, as actively aided in producing the injury, as a direct and existing cause. It need not be

the sole cause, but it must be a concurring cause, such as might reasonably have been contemplated as involving the result, under the attending circumstances;" citing authorities. See, also, *Railway Co. v. Mussette*, 86 Tex. 719, 26 S. W. 1075; *Railway Co. v. Sweeney*, 6 Tex. Civ. App. 178, 24 S. W. 947. The petition sufficiently ascribed the injuries complained of to the negligence of the defendant, as a proximate cause.

The plaintiff, over the objection of the defendant, was permitted to state the extent of his diminished capacity to perform labor, due to the injuries which he sustained, and the lessened value of his services on account of these injuries. The ground of objection to his testimony is that his pleading does not justify the admission of such evidence. The petition alleges that the plaintiff sustained internal and external injuries; that his right arm is disabled for life; that since the injury his health has remained continuously impaired; that the injuries to his person have disabled and unfitted him to perform manual labor, and to follow his previous occupation. No exception, general or special, was addressed to these allegations. We think they were sufficiently broad to cover the evidence complained of. *Railway Co. v. Burnett*, 80 Tex. 536, 16 S. W. 320. Besides, another witness, *McMillan*, testified without objection to the extent of the appellee's diminished capacity to labor.

With reference to the injuries to the cattle, the petition alleges that by reason of the fact that they passed through the gate, running over and trampling each other, killing one head, and escaping from the pens, requiring that he hunt them up again, and causing him to incur extra expense and loss of time, plaintiff has been actually damaged in the sum of \$85. It appeared that the cattle were to be shipped to Waxahachie. Over the objection of the defendant, the plaintiff was permitted to prove the amount of damage done to such cattle as were not shipped on account of the injuries, and which were injured on account of the escape from the defendant's pen. This testimony was objected to on the ground of the want of an averment in the petition of the market value of the cattle at Merkel and at Waxahachie. The objection is without merit. In the absence of exception, we can discern no reason for requiring the plaintiff to allege the market value of the cattle, or to plead the measure of damages, in order to prove the extent of the damage. Having pleaded that the injuries inflicted upon him were permanent, the plaintiff was correctly permitted to show his reasonable expectancy of life, in connection with proof founded upon averments in his petition showing the extent of his diminished earning capacity. *Railway Co. v. Cooper*, 2 Tex. Civ. App. 42, 20 S. W. 990.

The court did not err in failing to charge upon the question of contributory negligence. No suggestion of such a defense was made

by a plea, motion, instruction, or otherwise. The petition negatived the existence of such a defense, in that it is averred that the stampede of the cattle, with its consequent effects, "occurred instantaneously, and while plaintiff was yet fastening the gate, and before he could retreat to a place of safety." Nor can we say that in developing his case by the evidence the appellee disclosed acts prima facie of contributory negligence. If there was any element of contributory negligence in his conduct, we think that it entered as a separate and distinct defense; that it hence became defensive matter, and as such should have been alleged, resting upon testimony tending at least to establish it, in order to justify an instruction by the court. *Murray v. Railway Co.*, 73 Tex. 2, 11 S. W. 125; *Mitchell v. Telegraph Co.*, 5 Tex. Civ. App. 531, 24 S. W. 550; *Railway Co. v. Allbright*, 7 Tex. Civ. App. 21, 26 S. W. 250.

It is urged that the court erred in failing to charge specifically the measure of damages with reference to the cattle injured. The court, in effect, instructed the jury that in case of liability they would award the plaintiff such an amount as would reasonably compensate him for the loss sustained as the direct and natural result of the injuries inflicted upon his cattle. The failure to give a more specific instruction was one of omission, which should have been supplied by a requested charge on the part of the defendant. *Railway Co. v. Harmonson* (Tex. Civ. App.) 22 S. W. 764.

The charge complained of in the eighth assignment of error, to the effect that the jury would award such sum as they should find under the evidence would reasonably compensate the plaintiff for the disability, if any, which resulted as a proximate or natural consequence of the negligence and injuries complained of in the matter of performing the ordinary labors of his occupation, rests upon allegations in his petition, and evidence tending to support them. The judgment is in all things affirmed.

DANIEL et al. v. MASON.¹

(Court of Civil Appeals of Texas. July 3, 1896.)

CONVEYANCE BY FEME COVERT AS FEME SOLE—
BONA FIDE PURCHASER.

Where conveyances to a married woman, and by her, do not show that she is covert, but her deed and acknowledgment are such as prescribed for a feme sole, a purchaser from her vendee, without knowledge of her coverture, will be protected as an innocent purchaser.

Error from district court, Tarrant county; S. P. Greene, Judge.

Action by Rowena M. Mason against Nora Daniel and others. Judgment for plaintiff, and defendants bring error. Affirmed.

The conclusions of fact and second conclusion of law found by the trial court are as follows:

"First. That the common source of title in and to the property in controversy is E. L. Cunningham. Second. I find that E. L. Cunningham conveyed the land in controversy to James Coffey and wife, Margaret Coffey, by warranty deed, duly executed, acknowledged, and delivered, of date July 9, 1877, reciting a valuable consideration. This deed was duly recorded in the office of the county clerk of Tarrant county, Texas, on July 1, 1877, and is still of record. Third. I find that James Coffey and wife, Margaret Coffey, conveyed the land in controversy, by proper warranty deed of conveyance, of date 11th day of November, 1881, to Nora Daniel, the consideration recited therein being five hundred dollars, and with no words or expression used in said deed to show that the same was conveyed to her separate use and behoof. This deed was duly recorded in office of county clerk of Tarrant county, Texas, in which county said land is situated, November 14, 1881, and is still of record. Fourth. I find that the said Nora Daniel, the grantee of the said James Coffey and Margaret Coffey, was at the day and date of the conveyance last aforesaid, and at the date of her conveyance to John T. Mason, hereinafter set out, a married woman, the wife of Thomas J. Daniel, one of the defendants herein. Fifth. I find that Nora Daniel on the 2d day of August, 1882, conveyed the land in controversy, by general warranty deed, to John T. Mason, who paid a valuable consideration therefor, to wit, the sum of two hundred and fifty dollars (said consideration was paid in good faith, said John T. Mason fully believing that said Nora Daniel had a right to convey the title to said land), and that this deed was duly recorded in the office of the county clerk of Tarrant county, Texas, June 9, 1883, and is still of record. Sixth. I find that the said deed of the said Nora Daniel was executed and acknowledged in the city of St. Louis, Missouri, to John T. Mason, and was delivered to James Coffey, to be delivered by him to John T. Mason, and the same was so delivered to the said John T. Mason by James Coffey. Seventh. I find that the said deed to John T. Mason was signed by said Nora Daniel, and acknowledged by her in the ordinary form required by the statute of Texas for a single person, or a feme sole, and that she authorized James Coffey to deliver the same to John T. Mason. Eighth. I also find that there was nothing in the deed from Nora Daniel to John T. Mason to indicate that the said Nora Daniel was either a single or married woman, beyond the fact that the deed and acknowledgment were such as are prescribed by law for a feme sole; there being no express recital either in the deed or the acknowledgment that the said Nora Daniel was either a feme covert or feme sole, the deed simply indicating that she was

¹ Rehearing denied September 25, 1896.

a female. Ninth. I find that the said Nora Daniel, by executing, acknowledging, and delivering her deed as aforesaid, permitted and allowed and intended the said deed to be filed and recorded in the office of the county clerk of Tarrant county, Texas, in the records of deeds. Tenth. I find that thereafter John T. Mason, for a consideration of nine hundred and fifty dollars, did, on the 13th day of May, 1884, execute and deliver a general warranty deed, the same being duly recorded, to the plaintiff herein, conveying the land in controversy. Eleventh. I find that plaintiff paid the consideration in good faith, and had no actual notice of the marriage relation existing between the said Nora Daniel and Thomas J. Daniel at or before the execution and delivery of the deed from John T. Mason to the plaintiff herein, and was in possession of no fact to put her upon inquiry as to the existence of said marriage relation, but fully believed that she was getting a good and perfect title to said land, as shown on the face of the records of deeds, and fully relied on said records and evidence of title, and her belief and reliance were occasioned by the recorded deed of said Nora Daniel, as well as the other evidences of title shown by the records. Twelfth. I make no finding as to the allegations of plaintiff's petition as to the trusteeship of said Nora Daniel for James Coffey, there being no competent evidence on such issue. Thirteenth. I find that said Nora Daniel died intestate on — day of —, 1892, and that the minor defendants are her only children, and the defendant Thomas J. Daniel her surviving husband."

Conclusion of law: "Second. I find that the said Rowena Mason, being unaffected by actual notice of the coverture of Nora Daniel, or of any fact that would put her upon inquiry as to the truth of said Nora Daniel's disability, and having paid value for the land, had a right to rely upon the record as to the condition of the title of the property she was purchasing, and the right to assume that the said Nora Daniel was *sui juris*, and competent to contract; and in consequence the said Rowena Mason is an innocent purchaser, and entitled to protection as such."

Sidney L. Samuels, for plaintiffs in error.
Seth W. Stewart, for defendant in error.

STEPHENS, J. The conclusions of fact, as well as the second conclusion of law, upon which the judgment in this case rests, we adopt. The question decided is that a purchaser in good faith, and for value, from one who appears, from the chain of title and deed records, to have a perfect legal title to land in Texas, will be protected, though a person through whom the title purports to have passed before it reached the immediate vendor of such purchaser was a feme covert, who took and conveyed title as if discover; there being nothing on the face of the title, or

the record thereof, to indicate such coverture. To illustrate, the name of Nora Daniel so appeared in the chain of title in this case, and at the time of the conveyance to and from her she was under coverture; but that fact was not suggested by any recital contained in either the deed or the acknowledgment thereof. Her sex was indicated by the pronoun, and possibly by the name used, but the form of the acknowledgment was that sulted to a feme sole. We are of opinion that this was not sufficient to suggest to a purchaser of ordinary prudence any defect in the apparent title of the immediate vendor. Such purchaser will be charged with notice of a discoverable defect in the title only when the circumstances are such that inquiry becomes a duty, which it does not where they indicate that he is purchasing from the owner. The conclusion reached seems to be sanctioned by a line of comparatively recent decisions in this state, which are too numerous and well considered to be now called in question. *Hill v. Moore*, 62 Tex. 610; *Edwards v. Brown*, 68 Tex. 329, 4 S. W. 380, and 5 S. W. 87; *Patty v. Middleton*, 82 Tex. 586, 17 S. W. 909, and cases cited; *Hensley v. Lewis*, 82 Tex. 595, 17 S. W. 913; *Key v. La Pice*, 88 Tex. 209, 30 S. W. 867. The judgment will therefore be affirmed.

HUNTER, J., disqualified, and not sitting.

SOUTHERN PAC. CO. v. WELLINGTON.

(Court of Civil Appeals of Texas, June 24, 1896.)

PLEADINGS—AMENDMENT—NEW CAUSE OF ACTION—MASTER AND SERVANT—NEGLECT OF MASTER—PROOF OF CONTRACTUAL RELATION—PRESUMPTIONS—EVIDENCE—DUTY OF MASTER TO ISSUE RULES—SUFFICIENCY OF RULES—CONTRIBUTORY NEGLIGENCE.

1. The original petition alleged that plaintiff was run over by a car, while a car repairer for defendant railroad, through the failure of the yard master and brakeman to obey one of defendant's rules. An amended petition set out the injury in the same way, but averred that it occurred through defendant's failure to establish rules for giving warning to employes of the approach of cars, and that the brakeman and yard master were negligent and incompetent. *Held* not a new cause of action.

2. A servant seeking to recover from the master for injury caused by the latter's negligence must show that the contractual relation existed when the injury occurred.

3. Where a servant, in an action to recover for injury caused by the master's negligence, proves that he was employed by defendant several years prior to the accident, the presumption is that the contractual relation existed at the time of the injury.

4. The averments of the original petition, after the amendment has been filed, are not evidence against plaintiff.

5. Where defendant railroad, in an action by an employe for personal injuries, alleged that it operated the road under a lease which had expired at the time of the injury, and that the relation of master and servant did not, therefore, exist, it was error to reject a notice of the surrender of the lease, given before the accident,

and a time-table issued by the owner of the road previous to that date.

6. In such case, tickets and lists of officers, agencies, and stations purporting to have been issued by defendant, together with the folders, and the words, marks, and signs on bulletin boards, were all competent as tending to prove that the contractual relation existed at the time of the injury.

7. In an action by a servant to recover for personal injuries caused by the alleged failure of the master to issue rules for the guidance of employes, it is for the court to determine whether the nature of the business is such as to require rules.

8. The sufficiency of rules provided by a master for the protection of his servants is for the jury.

9. A car repairer who crosses a track in the yards, carrying a plank, 12 inches wide, edge-wise on the shoulder next to certain stationary cars, so as to hide a view thereof, and is injured by the sudden moving of the cars, is not guilty of contributory negligence, as a matter of law, if he had reason to believe, from the presence of a blue flag on said cars that they would not be moved.

Appeal from district court, El Paso county: W. M. Coldwell, Judge.

Action by W. C. Wellington against the Southern Pacific Company to recover for personal injuries. Judgment for plaintiff, and defendant appeals. Reversed.

Davis, Beall & Kemp, for appellant. Peyton F. Edwards and Millard Patterson, for appellee.

FLY, J. On August 20, 1891, appellee filed his suit to recover damages for personal injuries, alleging that he had been employed as a car repairer by appellant in its shops at El Paso; that the lumber and materials used by the workmen were across a side track from the workshop, and on a certain day it became necessary for appellee to cross over said track to obtain a certain sand board; that in returning, and while crossing the side track, an engine propelled some freight cars against him, catching him between two cars and seriously injuring him. In the original petition it was alleged that the injury occurred through the failure of the yard master and brakeman to obey a rule furnished by appellant. On November 14, 1894, appellee filed his first amended original petition, in which pleading the injury was alleged as in the original petition, but that the injury was caused by a failure on the part of appellant to establish rules for giving warning to employes of the approach of cars. It was also alleged that the yard master and brakeman were negligent and incompetent. The amended petition was excepted to because it set up a new cause of action, which was barred by limitation; because it showed that appellee was injured by his own negligence, or that of his fellow servants; and because the charge of incompetency and carelessness against the yard master and brakeman was too general. The last exception was sustained; the others, overruled. The cause was tried, and resulted in a verdict and judgment in favor of appellee for \$4,000.

The first assignment complains of the action of the court in overruling the first exception to the petition, and it is contended that the amended petition set up a new cause of action, different from, and independent and contradictory of, that alleged in the original petition, and that the same was barred by limitation. We do not think the contention well founded. The cause of action in the original petition was the injury inflicted by the negligence of appellant upon appellee, and this was retained in the amended pleading. *Railway Co. v. Mitten* (Tex. Civ. App.) 36 S. W. 282; *Railway Co. v. Frazier* (Tex. Civ. App.) 34 S. W. 664. Appellee alleged that he was an employe of appellant, and that he had been injured through the negligence of appellant in failing to promulgate proper rules for the protection of its employes from cars in motion in its yards at El Paso. To recover, it became necessary for appellee to show that the relation of master and servant existed between him and appellant at the time of the injury, and that it controlled the yards at El Paso, and the duty devolved upon it to make rules for the protection of its employes. The relation of master and servant arises out of a contract, express or implied, between the master, on the one hand, and the servant, on the other; and it follows that, to hold the master liable for injuries to his servant, the contractual relation must be established. *Wood, Mast. & Serv. § 4*; *Railway Co. v. Oulberson*, 72 Tex. 387, 10 S. W. 706. The facts presented in the case under consideration are very peculiar, and we have not seen any one similar to it. In 1886 or 1887 appellee was employed by the Southern Pacific Company as a car repairer in the shops in El Paso, and he continued to labor in the same shops until he was injured, in 1891. He testified that he had no notice of a change of masters, and believed that he was working for the Southern Pacific Company until he was injured. Appellee having established the fact that he had been employed by the appellant in 1886 or 1887, the presumption, under the facts, would arise that the relation of master and servant existed between them in 1891, and the burden rested upon appellant to show that it had been severed prior to the time of the accident. To this end, testimony was introduced to show that in 1886 and 1887 appellant was the lessee of the road, equipment, shops, etc., of the Galveston, Harrisburg & San Antonio Railway Company, but that on July 1, 1889, the lease was canceled, and the owner of the road and its appurtenances took possession of the same, and had since been in control of it. The cancellation of the lease therefore became an important point in the case. If the lease was in reality abrogated and annulled, and the owner of the road was in possession of it at the time of the infliction of the injury, under the allegations of the petition appellant was not liable; but if the cancellation of the lease had not been

made, or was a subterfuge on the part of appellant for any purpose, then it would be liable for negligence in connection with its employés. Any circumstance that tended to show that appellant had not surrendered its lease, and was the master of appellee, and had charge of the yards at El Paso, was admissible. We are therefore of the opinion that the tickets and the lists of officers, agencies, and stations purporting to have been issued by appellant, and the folders, and the words, marks, and signs on the bulletin boards, were admissible, as tending to show that appellant was the master of appellee at the time of the injury. It has been held that the fact that several lines of road connect with each other, and sell tickets and contract for freights through and over all the several lines,—there being a diversity of fares of the several roads, with coupons of tickets representing the same,—would not constitute an employé on one of such lines an employé of another thereof, or of the whole. 2 Ror. R. R. p. 1204; Carroll v. Railway Co., 13 Minn. 30 (Gil. 18). We are not, however, passing on the sufficiency of the testimony to establish the fact desired, but simply upon its competency.

The averments in the original petition did not bind appellee after his amendment, and it was not error to reject it as evidence. Coats v. Elliott, 23 Tex. 606. This decision seems to be in conflict with Coles v. Perry, 7 Tex. 141, in which the opinion was rendered by a special court.

Appellee depended upon circumstances to prove that appellant was the master of appellee as alleged, and we are of the opinion that it was error to refuse to admit in evidence a notice issued in July, 1889, which announced the fact of the cancellation of the lease on the railroad held by appellant. This proof not only would tend to corroborate the testimony of witnesses to the surrender of the lease, but might tend to show that appellee did have notice of it. The time-table issued by the Galveston, Harrisburg & San Antonio Railway Company in 1890 was also proper testimony, and it was error to reject it.

"When the nature of the business is such as to require it, it is the duty of the master, which the law imposes upon him, as due to his servants engaged therein, to exercise reasonable care and diligence in making and promulgating rules which, if faithfully observed, will give them reasonable protection from injury. It may be a question whether the business is of that character and magnitude that this duty devolves upon the master, and in case of doubt this question should be determined by the jury." Bailey, Mast. Liab. Serv. p. 72. It is held in this state that it is for the court to determine whether the facts show the business to be of such a nature as to require rules. When the court has decided that rules should have been made by the master, if there be proof that rules were provided, the question of their sufficiency

should be submitted to the jury. Railway Co. v. Echols, 87 Tex. 339, 27 S. W. 60, and 28 S. W. 517. In the case we are considering the material used by the car repairers was in a shop across the railroad repair track, and, in getting it, it would follow that the employés must cross the track, and thus be exposed to danger from sudden movement of trains. It was shown that there was a rule that required servants, if their duties compelled them to go around, under, or on the cars on any track, to protect themselves with blue signals. Such a rule has been held sufficient in New York. Corcoran v. Railway Co., 126 N. Y. 673, 27 N. E. 1022. But, as stated above, the sufficiency of the rule is a question of fact, to be determined by a jury, in Texas. The testimony showed that a blue flag was on the cars to protect employés, but was disregarded, either through the orders of the yard master, or the negligence of the switch engineer, which is not disclosed by the record.

It is insisted by appellant that appellee was clearly guilty of contributory negligence, in placing a plank, 12 inches wide, edgewise on his shoulder next to the cars that were moved, so as to cut off his vision and deaden his sense of hearing. This was a question for the jury, in view of the fact that appellant had been thrown off his guard by the flag on the cars, and had good reason to believe the cars would not be moved.

The evidence does not show through whose negligence the cars were moved, and does not raise the question of fellow servants.

We do not agree with appellant that proof of the adoption of the resolution of the board of directors had the effect, not only to annul the lease, but to show beyond a doubt that appellant did not have control of the road. If in fact it held control of the road after July 1, 1889, it would be liable to the employés, in spite of any number of resolutions. The evidence tended to show that after July 1, 1889, there was no change in management, officers, or employés, and there were other circumstances that indicated that there was no change of masters. The question of who controlled the road and its employés at the time of the injury was one of fact, to be determined by the jury.

There are no other assignments requiring notice. For the reason that the notice of surrender of the lease, and the time-table, were not admitted in evidence, the judgment is reversed and the cause remanded.

COMMONWEALTH v. COMPTON.

(Court of Appeals of Kentucky. Sept. 24, 1896.)

PERJURY—INDICTMENT—NECESSARY AVERMENTS.

An indictment which alleges that defendant, on the trial of a cause in justice court, stated under oath that he had never done certain acts, and avers that such statement was knowingly false and untrue, etc., is defective for fail-

ing to negative the truth of defendant's testimony by alleging specially that he did do the acts which he swore he did not do.

Appeal from circuit court, Pike county.
"Not to be officially reported."

William Compton was indicted for perjury, and from a judgment sustaining a demurrer to the indictment, and dismissing the prosecution, the commonwealth appeals. Affirmed.

W. S. Taylor and J. P. Marrs, for the Commonwealth.

GUFFY, J. The grand jury of Pike county returned an indictment against William Compton, charging him with the crime of perjury. The circuit court sustained a demurrer to the indictment, and dismissed the prosecution. From that judgment this appeal is prosecuted. The only question to be decided is as to the sufficiency of the indictment. The indictment reads as follows: "The grand jury of Pike county, in the name and by the authority of the commonwealth of Kentucky, accuse William Compton of the crime of perjury, committed as follows: The said defendant, William Compton, on the 10th day of November, 1895, in the county and circuit aforesaid, did unlawfully, willfully, and feloniously, and corruptly, and knowingly swear and state, as a witness in his own behalf in a trial then pending in the Pike justice court of Pike county, Ky., before J. M. Miller, a justice of the peace of Pike county, in an action wherein the defendant William Compton was plaintiff and William B. Mitchell and J. C. B. May were defendants, he having first been duly sworn by J. M. Miller, a justice of the peace of Pike county, who was legally authorized to administer an oath, and did then and there, while on the witness stand, state that he never had called on Mat Damron for an order to Thomas May as pay on his log job with the defendants Mitchell and May, and also stated, while on the witness stand, that he never received from Mat Damron an order on Thomas May for goods or money as pay on his log job with Mitchell and May, which statements so made and charged by said Compton were knowingly false and untrue, and so known by said Compton, and were material points at issue on said trial,—against the peace and dignity of the commonwealth of Kentucky. R. S. Booton, Commonwealth's Attorney." It is the well-settled law of this state that an indictment must negative the truth of the statements of the defendant alleged to be false. *Com. v. Kane*, 92 Ky. 457, 18 S. W. 7; *Com. v. Still*, 83 Ky. 275. The indictment in this case is defective because it fails to show as false that defendant did call on Mat Damron for an order to Thomas May as pay on his log job with defendants Mitchell and May, or in like manner to allege that he did do the other acts which it is alleged that he swore he did not do. Judgment affirmed.

LOWRY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Sept. 24, 1896.)

LOCAL OPTION—SPECIAL ACT—REPEAL BY GENERAL LAW—MISDEMEANOR—NECESSITY FOR INDICTMENT.

1. Act June 10, 1893 (St. § 1893), passed pursuant to Const. § 142, declaring that the jurisdiction of justices shall be equal and uniform throughout the state, does not repeal section 1 of the local option law of Logan county (2 Acts 1889-90, p. 92, c. 549), in so far as the latter act confers jurisdiction to try offenses under said act upon any court of inferior jurisdiction to the circuit court, but merely operates to repeal any special act (like the one applicable to Logan county) which conferred a jurisdiction upon justices inconsistent with the general law of 1893.

2. As Const. § 12, declaring that "no person for an indictable offense shall be proceeded against by information, except," etc., applies only to offenses which were indictable at common law, St. § 1073 et seq., providing that, when the circuit court is not in session, persons charged with misdemeanors, and lodged in jail in default of bail, shall be tried by the county judge, etc., are not in conflict with said constitutional provision.

3. The local option law of Logan county (2 Acts 1889-90, p. 92, c. 549) is not repugnant to the new constitution, nor to the general act passed thereunder.

Appeal from circuit court, Logan county.
"Not to be officially reported."

James Lowry was convicted of a violation of the local option law of Logan county, and appeals. Affirmed.

S. R. Crewdson, for appellant. W. S. Taylor, for the Commonwealth.

DU RELLE, J. Under the local option law of Logan county (2 Acts 1889-90, p. 92, c. 549), the appellant was arrested on a warrant charging a violation of the law, and, after an examining trial before the county judge, held to bail for his appearance at the next term of the circuit court, and, in default of bail, committed to the Logan county jail. All the steps taken were in accordance with the act. Being unable to give bond, he was brought before the county judge, in accordance with sections 1073-1076, St. Ky., tried, convicted, and fined \$100. From that judgment he appealed to the circuit court, where he was again tried, convicted, and fined, and has now appealed to this court.

It is urged in behalf of appellant that the county judge had no jurisdiction to try the case and render the judgment appealed from, and, in support of this contention, the case of *McTigue v. Com.* (Ky.) 35 S. W. 121, is relied on, as deciding that section 1 of the act of 1890 (the Logan county local option law) has been repealed in so far as it attempts to confer jurisdiction to try offenses under the act upon any court of inferior jurisdiction to the circuit court, and that such offenses can be prosecuted only by indictment in the circuit court of Logan county. The opinion in the *McTigue* Case does not support this contention. What was there decided was that the general act, passed in conformity with section 142 of the constitution, providing an

"equal and uniform" jurisdiction of justices of the peace throughout the state, operated to repeal any special act, like the one applicable to Logan county, which conferred a jurisdiction upon justices of the peace inconsistent with that general law.

It is further objected that section 1073 et seq. of the Kentucky Statutes are in conflict with section 12 of the present constitution, in so far as they provide for the trial before the county judge of an indictable offense before any indictment has been found in the circuit court. The provision of the statute was enacted for the benefit of the defendant, in order to give him a speedy trial if he should be unable to give bail, and it enacts that in such event, when the circuit court is not in session, the case shall be tried by the county judge in all respects as if tried in the circuit court. It is a general law conferring jurisdiction on the county judge. It is not in conflict with section 12 of the constitution, providing that "no person, for an indictable offense, shall be proceeded against criminally by information, except in cases arising in the land or naval forces," etc. That section of the constitution was taken bodily from the old constitution, and has been held to apply only to offenses which were indictable at common law. Misdemeanors created by statute, for which no infamous punishment is provided, may be tried in such manner as the legislature shall provide. *Com. v. Avery*, 14 Bush, 625; *Williamson v. Com.*, 4 B. Mon. 146.

It is further contended by appellant that this court, in the *McTigue* Case, held that the special act applicable to Logan county is repugnant to the new constitution, and to the general act passed thereunder, and has been repealed thereby, and, if not, that the penalty of the Logan county act has been repealed. This contention cannot be sustained by reference to the opinion in that case. On the contrary, it was said in that opinion that "in localities where the vote is against the sale, the penalties theretofore denounced by special prohibitory laws are still to be inflicted," until the expiration of six years after the adoption of the constitution. Judgment affirmed.

BELKNAP v. CITY OF LOUISVILLE et al. (Court of Appeals of Kentucky. June 13, 1896.)

MUNICIPALITIES—ISSUE OF BONDS—SUBMISSION OF QUESTIONS TO VOTERS—GENERAL ELECTION—REQUISITE VOTE.

1. Const. § 147, requiring elections to be by secret official ballot, declares that the word "elections" shall include the decision of questions submitted to the voters, as well as the choice of officers by them. Section 148 provides that not more than one election in each year shall be held in any town, county, etc., except as otherwise provided in the constitution, and that all elections of state and municipal officers shall be held on the first Tuesday after the first Monday in November. *Held*, that the

question of issuing municipal bonds in excess of the yearly revenue must be submitted to the voters at the general election in November, there being no special provision to the contrary. *Landes, J.*, dissenting. *Fidelity Trust & Safety-Vault Co. v. City of Morganfield*, 29 S. W. 442, 96 Ky. 564, overruled.

2. Const. § 157, declaring that no county, town, etc., shall be authorized to become indebted to an amount exceeding in any year the revenue provided for that year, without the consent of two-thirds of the voters voting at an election to be held for that purpose, requires the assent of two-thirds of the electors actually voting at a general election at which such question is submitted, and not merely two-thirds of those who vote upon the question.

Appeal from chancery county, Jefferson county.

"To be officially reported."

Action by W. R. Belknap against the city of Louisville and others to enjoin said city from issuing bonds for park purposes. From a judgment for defendants, plaintiff appeals. Reversed.

R. H. Blain, for appellant. H. S. Barker and Humphrey & Davie, for appellees.

DURELLE, J. This suit was brought for an injunction to restrain the city of Louisville from issuing \$1,000,000 of bonds for park purposes. There were two grounds alleged for the injunction, the first and main ground urged being that at the election of November 6, 1894, the question of the issue of bonds was submitted to the voters of the city, and that the proposition to issue did not receive the assent of two-thirds of the voters thereof, within the meaning of section 157 of the constitution, and section 2854 of the Kentucky Statutes. It appears that at the election there were cast in the city of Louisville a total of 32,425 votes, and that on the question of the issue of park bonds there were cast only 9,204 votes, of which 6,483 were cast in favor of the issue, and 2,721 against it. Section 157 of the constitution provides that "no county, city, town, taxing district, or other municipality, shall be authorized or permitted to become indebted in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose; and any indebtedness contracted in violation of this section shall be void." It is contended for appellants that, the total number of votes cast at the election in favor of the bond issue being less than two-thirds of the whole number cast at the election, the bond issue failed to carry, upon the ground that the section referred to requires that two-thirds of the total vote cast at the election shall be cast in favor of the issue. Appellees contend that the words, "two-thirds of the voters thereof voting at an election to be held for that purpose," restrict us to the consideration of the total number of votes cast for and against the question of issuing bonds, and that, therefore, more than two-thirds of

the votes of those voting "for that purpose" were cast in favor of the bond issue. In other words, appellees' contention is that, in the "election held for that purpose," only the votes cast for that purpose—for and against the bond issue—can be considered, and that no account can be taken of votes cast for other purposes, such as the election of officers, although cast on the same day.

Great stress was laid by appellees' counsel upon the argument that the legislature might have provided for the submission of the question of the bond issue at a special election, held on a different day from the regular annual election, and at which no other question or election was determined; and as at such special election only the votes cast upon the bond issue could be considered, though the vote might, and probably would, be much less than the vote cast at the regular annual election, therefore "a question submitted to the voters" is not in any way dependent on or connected with an election of officers, although submitted on the same day and by means of the same ballots; and, as the constitution left it to the legislature to determine whether the question should be submitted on the day of the general election or on some other day, the action of the legislature in fixing the submission for the same day as the general election did not commingle or make them interdependent. In support of this contention the case of *Fidelity Trust & Safety-Vault Co. v. City of Morganfield*, 96 Ky. 564, 29 S. W. 442, is relied on. In that case it was held that the submission of an issue of bonds for municipal purposes might be upon a different day from that of the general election. After careful consideration by a full bench, a majority of the court are unable to adhere to the doctrine laid down in that opinion. Section 147 of the constitution, requiring elections by the people to be by secret official ballot, provides that "the word 'elections' in this section includes the decision of questions submitted to the voters, as well as the choice of officers by them." Section 148 provides that "not more than one election in each year shall be held in this state or in any city, town, district, or county thereof, except as otherwise provided in this constitution. All elections of state, county, city, town, or district officers shall be held on the first Tuesday after the first Monday in November." It is otherwise provided as to elections for school trustees by section 155, which excepts those elections from the provisions of sections 145 to 154, inclusive, and as to elections for taking the sense of the people of a county, city, etc., as to whether liquors shall be sold therein, by section 61, which provides: "All elections on this question may be held on a day other than the regular election days." In this section the word "election" is used in the sense provided in section 147, and this provision indicates clearly that the word is used in section 148 to include questions submitted to the

people, for otherwise there would be no need for the permission given by section 61. By section 152 vacancies in the general assembly may be filled at a special election. It seems clear that the provision of section 148, that not more than one election each year shall be held in this state, or in any city, town, district, or county thereof, except as otherwise provided in the constitution, applies to questions submitted to the voters; and the only provision otherwise in the constitution, in reference to such questions, is the one in regard to the submission of questions as to the sale of liquor. When it is considered that the manifest purpose of the framers of the constitution, and of the people who ratified and gave it effect, was to put limitations upon the power of the local authorities in the matter of incurring debts which would result in oppressive taxation, and even to limit the power of the people themselves imprudently to authorize the assumption of such obligations, the wisdom of the restriction of such elections to the day of the general election is evident. Not only is a much larger vote usually brought out on the occasion of the general election, but the people at large are usually better informed of the matters upon which they are entitled to vote, by reason of the greater interest taken, and the fuller discussion of such matters.

We come now to the main question presented in this record. By section 157 of the constitution it is provided: "No city * * * shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two thirds of the voters thereof, voting at an election to be held for that purpose." The object of this provision was to limit the power of the local authorities and the people to burden themselves and their posterity with taxation, except upon full consideration, and by the assent of the people, given understandingly. In order to effect that object it was provided that no city should be authorized to become indebted in excess of the current year's revenue, without the assent of two-thirds of the voters thereof, voting at an election to be held for that purpose. It was sought to protect the people from their own improvidence and that of their local officials, and such a construction must be given to the constitution as will give effect to its manifest purpose. There could be but one election in the year except in the cases specially provided for. This question was to be submitted to the people at that election. It was one election, though held for several purposes, and was in no sense a collection of elections held on the same day. One of the purposes of the election was to determine this question, which, under authority of the constitution, the statute, and the ordinance passed in accordance therewith, was to be submitted to the voters of the city. It was required that two-thirds of the voters

of the city voting at such election should give their assent to the bond issue. Assent implies action, and is not mere failure to dissent. At the election held for the purpose of electing various officers, and for the additional purpose of determining the question of the bond issue, there were cast 32,425 votes, and of all those voters, voting at the election held for those purposes, but 6,483, less than one-fifth of the total number, gave their assent to the proposition to impose on the city of Louisville the burden of an additional debt of a million of dollars. The authorities which to a greater or less degree bear upon this question are numerous and conflicting. It may be conceded that, under a provision like the one under consideration, it is not necessary that two-thirds of those entitled to vote should actually vote in favor of the proposition, and that, as was said by the supreme court of the United States, in *Carroll Co. v. Smith*, 111 U. S. 565, 4 Sup. Ct. 544, "the words 'qualified voters' as used in the constitution must be taken to mean, not those qualified and entitled to vote, but those qualified and actually voting. In that connection, a voter is one who votes; not one who, though qualified to vote, does not vote." To the same effect are many authorities cited by appellees, and the reason of the rule is well stated in *People v. Wiant*, 48 Ill. 263, as follows: "It was held, in *People v. Warfield*, 20 Ill. 160, that to give this provision of the constitution a practical operation we must presume that it was the intention of the framers of that instrument that the voters would all vote, and that the majority of those voting should determine the question. To give it a different construction would involve an inquiry whether there were other voters of the county who had, from any cause, abstained from voting; and this would lead to interminable inquiry, and invite contests in such elections which would be embarrassing and baneful, if it did not destroy all the practical benefits of laws passed under these provisions of the constitution."

But we are met with a very different question when the question is required to be submitted at a general election, is one of the purposes for which that election is held, and is required to receive the assent of two-thirds of the voters of the city voting at that election. In such case the result depends on a majority of all the votes cast at the election being cast for the proposition, and not merely a majority of the votes cast on the particular question. In the case of *People v. Wiant*, 48 Ill. 263, the constitution required that a majority of the voters should vote in favor of the removal of a county seat, and the court held, referring to the case in 20 Ill. 160: "In *Warfield's Case* there was no vote taken at that election, except upon the question of the removal of the county seat, and that vote was adopted as the means of ascertaining the number of legal voters of the county, and whether the majority was in favor of or against removal. In this case, how-

ever, there was, at the same time, an election held for circuit judge, which was a regular election. We therefore have, in this case, additional means of ascertaining the whole number of voters of the county. If the return of the various poll books of the county showed a larger number of votes cast for circuit judge, or other officer, than were cast for and against removal of the county seat, then that should be taken as the number of voters of the county; and it should appear that a majority of the voters at that election had cast their votes in favor of removal before the county seat could be changed. It is not the vote cast upon that single question that is to govern, where it appears that any other election was held at the same time; but it must appear that a majority of all the votes cast at that election were in favor of removal. When there is no other election held at that time, the returns of the officers of votes on that question will govern." So in *People v. Brown*, 11 Ill. 478, a case of mandamus to compel township organization, under a constitutional provision that "the general assembly shall provide by general law for a township organization * * * whenever a majority of the voters of such county at any general election shall so determine," the court said: "The language is clear and explicit, and admits of but one meaning. It does not mean a majority of those voting on the question to be submitted, but a majority of all the legal voters in the county." In *Everett v. Smith*, 22 Minn. 53, the constitution provided that the question should be "submitted to the electors of the county at the next general election after the passage thereof, and be adopted by a majority of such electors"; and it was held that the provision required a majority of the electors voting at the election, and not a majority of those voting on the question. So in *Ohio (Bryant v. Hanover Tp.)*, 25 Ohio St. 618, the legislature had authorized the levy of a tax, with this proviso, that the levy should not be made "until a majority of the electors of said township at some regular election shall vote in favor of said levy"; and it was held that a majority of all the votes cast at the regular election was required, and not a majority of those voting on the question. And in *State v. Foraker*, 46 Ohio St. 677, 23 N. E. 491, a provision of the constitution, that "if a majority of the electors voting at such election, shall adopt such amendments, the same shall become a part of the constitution," was held not to be complied with by a majority of the votes cast on the amendment. The Ohio constitution had another provision requiring the adoption of amendments which had been agreed upon by conventions "by a majority of those voting thereon," and the court called attention to the difference in language, saying that, "if the framers had had the same intention in framing section 1 as in framing section 3, as to how the majority for the adoption of an amendment should be ascertained, they would

have provided in that section, as in section 3, that it should be a majority of those voting thereon, instead of a majority of the electors voting at such election." This is directly in point in the consideration of the case at bar, for in section 256 of the Kentucky constitution we find it provided that the passage of an amendment to the constitution shall be determined by "a majority of the votes cast for and against an amendment," and in section 64 it is provided that no county shall be divided, etc., "unless the majority of all the legal voters of the county voting on the question shall vote for the same." So that, in two other sections of the instrument, the convention was at no loss for apt words with which to limit the decision to the determination of those only who should vote upon the question. In *State v. Lancaster Co.*, 6 Neb. 474, the constitution provided for a township organization "whenever the majority of the legal voters of such county, voting at any general election shall so determine"; and it was held that, as the affirmative vote on the question submitted was less than a majority of those voting at the election, the proposition was defeated. In *State v. Winkelmeyer*, 35 Mo. 103, authority was claimed under a legislative grant of power, "whenever a majority of the legal voters" authorized the same, and the majority of those voting on the question were in favor of the grant; but the court said: "It is evident that a vote of 5,000 out of 13,000 is not the vote of a majority." The case of *Hogg v. Baker* (Ky.) 31 S. W. 726, was under section 64 of the constitution as to the removal of a county seat, which requires "two-thirds of those voting" to decide. That case, however, was decided largely on the ground that the voters were misled, and nothing appears in the record of the case at bar to show that the voters of Louisville were misled, except as it may be argued inferentially from the language of the statute and the ordinance and the smallness of the vote cast upon the question.

Little weight can be given the argument drawn from the fact that at a general election candidates for various offices may be elected, notwithstanding other candidates for other offices may have received more than twice as many votes. The statute of elections provides the person receiving the highest number of votes for any office shall be declared elected to that office, and the election is decided by a plurality of votes. Moreover, it may well be considered that there is an essential difference between the action of electors in voting for a candidate for office, and in assenting to the creation of a municipal debt. The former is the exercise of a political privilege, the mere selection of a person to perform official duties which have been annexed to a particular office; and it is fair to presume that those who do not participate in the election consent to be governed by those who do. But the latter is the authorization of a contract by which the people of the

locality incur obligations, and bind their property to the payment of a debt; and it is natural to expect that the language used in relation to it will be different, that definite action will be required of a majority of the voters, and that it will be required that their assent thereto shall be expressed. And so we find it in the constitution and the statute. If the submission were permitted to be, and were, in fact, submitted at an election at which no votes were cast except upon the proposition, it might very well be concluded that the words "two-thirds of the voters of the city" meant two-thirds of those who see fit to exercise their privilege, and that the ballot box is the only test to be applied. *Louisville & N. R. Co. v. Davidson Co.*, 1 Sneed, 637. In this case the test of the ballot box shows that only one-fifth of the voters who voted at the election gave their assent to the proposition.

There were many authorities cited on both sides of this question, but it would be unprofitable to review them in detail. A very interesting analysis of a large number of them is given in *City of South Bend v. Lewis* (Ind. Sup.) 37 N. E. 986. It will be found that they have turned, in some cases, upon the settled policy of the constitution which was under consideration, as in the case of *Metcalfe v. City of Seattle* (Wash.) 25 Pac. 1010, which at first blush appears to be directly in point against the conclusion reached by this court. In most of the cases, the courts' conclusions were reached by considering, not only the language of the provision in question, but all other relevant sections of the instrument, as well as its general intent. These differ in the different cases, and it is not surprising that the courts have apparently differed in the weight which they have attached to the arguments drawn from them. Several of the cases cited have been doubted or qualified in subsequent cases. One of them (*Gillespie v. Palmer*, 20 Wis. 544), much relied on by counsel for appellees, has since been referred to by the chief justice of the Wisconsin court as one of a number of cases "which have long been a reproach to the court," as "judgments proceeding upon policy rather than upon principle." *Bound v. Railroad Co.*, 45 Wis. 543. In all of the cases the object sought was the intent of the instrument.

In the case at bar not much consideration has been given to the debates of the convention, though the members who spoke appear to have given section 157 the same construction with this court; "for, as the constitution does not derive its force from the convention which framed it, but from the people who ratified it, the intent to be arrived at is that of the people. and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed."

Cooley, Const. Lim. (6th Ed.) pp. 80, 81. "Its terms must be taken in the ordinary and common acceptation, because they have been so understood by the framers and the people who adopted it." *State v. Lancaster Co.*, 6 Neb. 474. These considerations have led us to reject the construction contended for by appellees, of which it may be said, 'in the language of the Ohio court in *State v. Foraker*, 23 N. E. 402: "But one of the most obvious objections to this construction is that it requires to be demonstrated by such a labored process of occult reasoning upon the meaning of words and phrases so different from the apparent meaning as to warrant the belief that it never occurred, either to the framers of the constitution or to the people who adopted it." And in this case we cannot believe that any considerable number of the voters who read section 157 of the constitution before voting for its adoption thought for a moment that that provision, upon its face restrictive of the power to create additional indebtedness, could be so construed as to authorize the creation of a \$1,000,000 debt, upon the vote of some six thousand out of thirty-odd thousand voters actually at the polls. We are not unmindful of the need for parks in a great city, and the benefits of a park system such as the one proposed and in part instituted in the city of Louisville, but the people who are to bear the burden must give their assent to the creation of the debt to be incurred for the purpose.

There is another ground upon which this conclusion might be rested. The constitutional provision is restrictive. It forbids the creation of the debt unless upon the assent of two-thirds of the voters, etc. Had section 157 provided, as in section 64, that it should not be authorized unless two-thirds of the voters of the city "voting on the question shall vote for the same," that would not have required the legislature to authorize the submission of the question, nor the city authorities to submit it. So, as the right to submit might have been denied altogether, it might be given with additional restrictions, as the requirement of a three-fourths vote; and when the city council, by ordinance, provided for the submission to the vote of the people, it might have imposed an increased restriction. So that, if we were of opinion that the constitution required only two-thirds of those voting on the question, we must still look to the act and the ordinance to find if they, or either of them, require any additional prerequisite to the bond issue. The statute is as follows: "Sec. 2854. For the purpose of raising money for the purchase or improvement of lands for park property, the general council of a city may, by ordinances, submit to the qualified voters of the city the question as to whether the city shall issue bonds, with interest coupons attached, to the amount and of the character set forth

in such ordinances; and when such ordinance is passed, it shall, at the next November election, be submitted to the qualified voters of the city; and if it receives assent of two-thirds of those voting, the bonds so voted shall be issued by the city, and delivered to the board of park commissioners." This requires the proposition to be submitted at the November election to the qualified voters of the city, "and if it receives assent of two-thirds of those voting, the bond so voted shall be issued," etc. What is meant by those voting? Clearly, those voting at the November election. The ordinance is still more explicit. It provides: "Sec. 5. At the November election of 1894, there shall be submitted to the qualified voters of the city of Louisville, the question as to whether the city shall issue said bonds, and the said bonds shall not be issued unless at said election, two-thirds of those voting shall vote in favor of the issuing of said bonds as herein provided. In the event that two-thirds of those voting at said election shall vote in favor of issuing said bonds, then the fact that they have done so shall be certified to by the mayor, upon said bonds, and the said bonds shall then, but only in that event, be issued by the city, and delivered by the mayor to the board of park commissioners of the city of Louisville, to be by the said board of park commissioners used and disposed of for the improvement of lands for park property as provided by law." This requires the submission at the November election of 1894, and provides that the bonds shall not be issued "unless at said election [i. e. the November, 1894, election] two-thirds of those voting shall vote in favor of issuing said bonds. * * * In the event that two-thirds of those voting at said election [the November election] shall vote in favor of issuing," etc. It is obvious that both the statute and the ordinance require the favorable vote of two-thirds of those voting at the general election.

LANDES, J., dissents from that part of this opinion which holds that questions submitted to the people must be submitted at the regular election, being of opinion that the provision in section 157, requiring the assent of two-thirds of the voters "voting at an election to be held for that purpose," requires that there shall be a special election held "for that purpose," and that such special election cannot be held on the regular election day, the words quoted being a mandatory provision otherwise within the meaning of section 148. LANDES, J., concurs, however, in the other principles stated in the opinion.

The other questions raised in the record need not be considered. For the reasons given, the judgment is reversed, with directions to sustain the demurrer to the first paragraph of the answer, and for further proceedings consistent with this opinion.

EMBRY v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. Sept. 17, 1896.)

RAILROADS—[INJURY TO TRESPASSER.]

Plaintiff, being a trespasser on the right of way of defendant's railroad at a point where there was no public crossing, while under the influence of liquor, sat down on the end of a cross-tie beside the track, and fell asleep, and, while so sitting, was struck by a passing train, and injured. No negligence was shown on the part of those in charge of the train after plaintiff was discovered. Held that, in an action to recover damages for the injury, a verdict for defendant was properly directed.

Appeal from circuit court, Hardin county. "Not to be officially reported."

Action by John Embry against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Sprigg & Cheef, for appellant. W. H. Marriott, for appellee.

LANDES, J. The appellant sought, by this action in the Hardin circuit court, to recover from the appellee damages for injuries inflicted upon him by being struck by a locomotive drawing a fast freight train of the appellee, at a point near the town and station of Sonora in Hardin county, on the right of way of appellee, along which the people of the neighborhood for many years had been in the habit of passing in going to and from the town. It was alleged in the petition that the accident occurred "while the plaintiff was at and near a crossing over and along said defendant's railroad track, which crossing was frequently and continually used as a footway by the citizens of the neighborhood, by and with the consent and knowledge of the defendant,"—the agents or servants of the defendant in charge of the train of cars having failed to give "any warning to the plaintiff," or to exercise "ordinary care for the safety of the plaintiff"; and that, "through the gross and willful neglect of its agents and servants in charge of one of its freight trains," the said train was run "against the plaintiff," by reason of which the injuries complained of were inflicted. A demurrer to the petition was filed by the appellee, which was overruled. The answer, filed simultaneously with the demurrer, contained—First, a traverse; and, second, an averment that the injuries complained of were the result of contributory negligence on the part of the appellant. The case was submitted to a jury, and, at the conclusion of the testimony introduced by the appellant, the court, on the motion of counsel for appellee, and over the objections of counsel for the appellant, instructed the jury "to find for the defendant"; and, the verdict having been so returned by the jury, judgment was rendered dismissing the petition at the cost of the appellant, and this appeal is prosecuted to reverse that judgment.

The only question to be decided relates to the propriety of the peremptory instruction,

in pursuance of which the jury returned a verdict adverse to the appellant, and this may well be ascertained by referring to the petition. There was no statement in the petition that showed that the appellant had any right to be on the appellee's track or right of way, or that he was other than a trespasser, when he was struck by the locomotive; and it contained no allegation that the agents or servants of the appellee who were in charge of the train saw him on the track before they "ran said train against" him, or showing that they owed him any duty whatever in handling the train at that place and time. These were necessary allegations, and without them the petition would not have sustained a verdict and judgment against the company in the action; for it is well settled that a railroad company, or an engineer in charge of one of its trains of cars, is not required to keep a special lookout for trespassers on its track, and is under no obligation to act for the safety of trespassers until they are actually discovered. Railroad Co. v. Vaughan, 93 Ala. 209, 9 South. 468; Masser v. Railway Co., 68 Iowa, 602, 27 N. W. 776; Burg v. Railway Co. (Iowa) 57 N. W. 600; Brown v. Railroad Co. (Ky.) 30 S. W. 639, and cases there cited. It follows that the substantial rights of the appellant were not prejudiced by the peremptory instruction.

But, if the petition had contained all of these necessary allegations, and if it had been in all respects sufficient, still, on examining the testimony introduced by the appellant, as reported in the bill of exceptions, we find that it was not sufficient to sustain the claim of appellant for damages against the appellee. It did not show that the appellant, or the people of the neighborhood generally, had acquired any right whatever from the company to use its railroad track as a pass-way. The statement in the petition that it had been so used for many years, "with the consent and knowledge of the defendant," cannot be construed to import an express consent to such use, so as to have made it the duty of the appellee, or its servants in the charge of its trains, to keep a special lookout for persons on the track at that point. But this allegation is denied, and, according to the testimony, the use of the railroad track or right of way there was at most merely permissive, and did not establish a license for the people of the neighborhood to use it for that purpose, or for any other purpose. It showed that the crossing referred to in the petition, "at and near" which the appellant alleged he was when he was injured, was a private crossing, and that, instead of being "at and near it," he was no less than 100 yards from it. It further showed that the appellant, at the time of the accident, was not walking on the track or right of way, and thus using it "as a footway," as he claimed the right to do under the alleged consent to and knowledge of such continual use by the appellee; but that, being under the influence

of intoxicating liquor, of which, according to his own testimony, he had freely partaken, he sat down on the end of a cross-tie, and fell asleep, his elbows resting on his knees, his body leaning forward and away from the track, and his head in his hands, in which condition and position he was when the engine struck him and knocked him over. It was also shown that the alarm whistle was sounded just before the accident occurred, at a distance varying in the testimony from 20 steps to 40 yards; but what the alarm was given for the testimony did not clearly reveal. It may be inferred that the engineer discovered the appellant ahead, and that the alarm was sounded as soon as he saw him; and this is probably true, and, if true, it is all that he was required to do to avoid the accident. But, after the accident occurred, the train was stopped, and backed to where the appellant was lying, and he was placed in the caboose, and taken to his home, a short distance north of the station. After this was done, and while the engineer and conductor were returning to the train, a witness was permitted to testify, against the objections of counsel for the appellee, that in a conversation with the witness the engineer stated that he saw the appellant on the track ahead, but that he was "afraid to ring the bell or blow the whistle for fear plaintiff would straighten up, and we would kill him,—the cylinder would hit and kill him." This testimony was not admissible, because it was hearsay testimony, and not a part of the res gestæ; but, if true, it seems to us that a good reason was given for not sounding the alarm, if it was not done, and it may be that to this failure the appellant owes his life. The evidence did not show any failure of duty on the part of the appellee's servants and agents in charge of the train, but it was sufficiently clear from the evidence that the appellant's injuries resulted from his own negligence; and, the appellant having failed to allege, or to prove, a state of case fixing liability on the appellee for the injuries sustained by him, it was proper for the court below to instruct the jury to find for the appellee. There being no error, the judgment must be affirmed.

MEGUIER v. WALSH.

(Court of Appeals of Kentucky. Sept. 17, 1896.)

SALE—DUTY OF PURCHASER OF PROPERTY CHARGED WITH LIEN.

Where a lot of wool owned by a woolen-mill company had been set apart for the payment of a note for money which certain stockholders had borrowed for the corporation, one of such stockholders, who purchases the stock of another, taking with it the seller's interest in the wool so set apart, must look to the property for the payment of the note, and cannot charge the seller with payment of his proportion of it.

Appeal from circuit court, Simpson county.
"Not to be officially reported."

Action by John Walsh against A. F. Me-

guler. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward W. Hines and Geo. C. Harris, for appellant. Thomas H. Hines and Goodnight & Roark, for appellee.

HAZELRIGG, J. Appellant and appellee, with two others, were the incorporators and managers of the Franklin Woolen-Mill Company, and, needing money for the company, with which to pay off its overdrafts and buy wool, executed their joint note to the banking house of McElwain, Meguire & Co., for the sum of \$5,000, the proceeds of which were placed to the credit of the company. The corporate name was not used in the transaction because the limit of indebtedness allowed under the charter had been reached already. As indemnity the signers of the note had some 20,000 pounds of wool weighed and set apart in the rooms of the mill. Shortly thereafter the appellee became dissatisfied with the business or its management, and sold his stock to the appellant. To a suit brought by appellee on the note executed for this stock, the appellant pleaded that he had paid off the appellee's share of the note of \$5,000, and therefore owed him nothing. The latter replied by saying that, in the sale of his stock to appellant, he was to and did surrender to appellant all his interest in and to the company's property, including the wool set apart as aforesaid, and was to be released from all debts of the concern, including the joint note at the bank. This the appellant denied. The case was transferred to the equity docket without objection, and, on the proof, the chancellor sustained the contention of the appellee, and rendered judgment for the full amount of the note sued on. This judgment may be approved upon either of two theories. We may regard the legal title to the wool as in the corporation. A sale of the stock in such event carried with it practically the property charged specifically with the payment of the bank debt, and a purchaser with knowledge of this fact must look to the property he bought to pay the debt, and not to his vendor. Or we may regard the proof as sufficient to sustain the specific contract of release from this debt relied on by the appellee. On this point the evidence is contradictory, and we do not feel authorized to disturb the finding below. Judgment affirmed.

BLANKENBAKER v. SNYDER.

(Court of Appeals of Kentucky. Sept. 18, 1896.)

WILLS—DEVISE TO CHILDREN—CONSTRUCTION.

A testator who had been twice married left several children by his first wife surviving him, and also children by his second wife. In making final disposition of his estate, the will proceeds, "I desire to give to my first children all my negroes," and, after making specific the devise to them of other property, "I desire that my present wife and her children shall have my

homestead, containing 400 acres, to remain undivided for her and their benefit during widowhood." After giving to his wife certain personalty, he further directs the balance sold, and the proceeds equally divided among all of his children, "without distinction," and that "all my notes and accounts shall be collected, and the proceeds equally divided between my children, without distinction." The last wife, at the time of her marriage to the testator, was a widow, and had one child, who survived the testator. *Held*, that such child was not entitled to share with testator's children by his last wife in the devise of the estate made to them.

Appeal from circuit court, Oldham county.
"Not to be officially reported."

Suit by Rosa Blankenbaker against Theodore Snyder for the construction of a will. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Woolfolk & Klein and Joe Clore, for appellant. Abbott & Rutledge, for appellee.

PRYOR, C. J. This case is here for the construction of the will of John Snyder. He had been twice married, leaving several children by his first wife surviving him, and also four children by his last wife. His last wife was a widow, and had one child by her first husband, who was also living at testator's death. Her name was Elizabeth Wilhoite. She married, and died after the testator, leaving a daughter, Rosa, who married Blankenbaker. The question involved in the case is: Was the mother of Rosa (Elizabeth Wilhoite) entitled to share with testator's children by his last wife in the division of the estate made to them? The devise or clause under which the claim is made is as follows: "I desire that my present wife and her children shall have my homestead, containing 400 acres, to remain undivided for her and their benefit during widowhood." If this was the only provision of the will there might be some difficulty in giving the construction to the instrument placed upon it by the court below. In making this final disposition of his estate, the testator seems to have designated, first, his children by his first wife, and proceeds, "I desire to give to my first children all my negroes," and then proceeds to make specific the devise to them of other property, and says, "I desire that my present wife and her children shall have my homestead, containing 400 acres." After giving to his wife certain personalty, he further directs the balance sold, and the proceeds equally divided among all of his children, without distinction. Again, he says, "I desire that all my notes and accounts shall be collected, and the proceeds equally divided between my children, without distinction." These two last devises followed those by which the testator attempted to, and did, in express terms, devise to his children by his first wife the bulk of the estate intended for them, and the amount of the estate intended for his children by his last wife; but in the devise to his children by his last wife he uses the words "to my present wife and her children" to distinguish

them from the children by his first wife, and never intended to make one not of his blood share equally in his estate with his own children. After making this classification, showing what the children by his first and last wives were to have, he then proceeds to direct, in two separate clauses of his will, certain personalty sold and notes collected, and the proceeds equally divided between his children, without distinction, showing plainly his purpose to distinguish the devises first made between the children by his first and second wives, so as to leave no doubt in regard to what they were to get, and then to divide the residue equally, without distinction. In other words, the language, "to my wife and her children," was used to distinguish the children by his last wife from those by his first wife. The appellant's mother, therefore, took nothing under the devise. Judgment affirmed.

LOUISVILLE & N. R. CO. v. WADE.

(Court of Appeals of Kentucky. Sept. 18, 1896.)

RAILROAD COMPANIES — INJURY TO PERSON ON SWITCH TRACK — PEREMPTORY INSTRUCTION.

While walking between the rails of a switch track, plaintiff was struck by a timber projecting from a car of defendant's freight train, which was then passing over the main track. In an action for the injury, there was no evidence that defendant had licensed plaintiff or the public generally to use the track as a passway, and none that defendant knew of the dangerous condition of the timber, or that plaintiff was in danger. *Held*, that defendant was entitled to a peremptory instruction that plaintiff could not recover.

Appeal from circuit court, Warren county.
"Not to be officially reported."

Action by Norman Wade against the Louisville & Nashville Railroad Company for personal injuries. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. A. Mitchell, H. W. Bruce, and Wm. Lindsay, for appellant. Edward W. Hines and B. F. Procter, for appellee.

GUFFY, J. This appeal is prosecuted by the appellant from a judgment of the Warren circuit court rendered in the suit of appellee against appellant. It appears that appellee, who was a boy about 14 years old, was between the rails of a switch in Woodburn, Ky.; and, while so standing or walking, one of appellant's trains of freight cars passed over appellant's main track, and a piece of timber that was on one of the freight cars struck appellee on the head, and knocked him down, injuring him to some extent. Gross negligence was charged in the petition. The defense was that appellee was a trespasser on appellant's track, and that appellant was not aware of the extension of the timber over or beyond the car, nor of appellee's being in danger. Contributory negligence was also pleaded. A trial resulted in a verdict and judgment in appellee's favor

for \$150. Appellant's motion for new trial having been overruled, it prosecutes this appeal.

It is the contention of appellant that appellee was a trespasser on its track, and that it had no knowledge of the timber being in a condition to injure any one; hence, that the peremptory instruction asked for by appellant should have been given. Appellee contends that the switch was used as a road or passway by consent of appellant; therefore appellee was not a trespasser. Other questions are discussed in the briefs, but we deem it unnecessary to notice them. It is not proven that appellant had licensed appellee or the public generally to use the railroad track in question as a road or passway, nor will the facts proven authorize a presumption of license or dedication. There was no proof introduced to show appellant's agents or servants knew of the dangerous condition of the timber, nor that appellee was in any danger. It results, therefore, that the court erred in refusing the peremptory instruction asked. *Railway Co. v. Gastineau's Adm'r*, 83 Ky. 121; *Brown's Adm'r v. Railroad Co.* (Ky.) 30 S. W. 639; *Hoskins v. Railroad Co.* (Ky.) 30 S. W. 644; *McDermott v. Railroad Co.* (Ky.) 20 S. W. 380. The judgment of the court below is therefore reversed, and cause remanded, with directions to set aside the verdict and judgment, and award appellant a new trial, and for proceedings consistent with this opinion.

WEBSTER v. TATTERSHALL.

(Court of Appeals of Kentucky. Sept. 18, 1896.)

MECHANIC'S LIEN—PROPERTY OF MARRIED WOMAN—WRITTEN CONTRACT—ESTOPPEL.

Under St. § 2479 (referring to the mechanic's lien law), which provides that "the provisions of the preceding sections shall apply to and be enforced against a married woman and property owned by her, if the service or labor was performed, or the materials furnished under a written contract signed by her," she cannot be charged, without a written contract, by the fact that she acquiesced in the erection of a building on her property, and gave directions about its construction.

Appeal from circuit court, Kenton county. "Not to be officially reported."

Suit by Hiram Tattershall against Sarah J. Webster and another to enforce a mechanic's lien. From a judgment in favor of plaintiff, defendant Sarah J. Webster appeals. Reversed.

J. L. Elliston and Raymond C. Gray, for appellant. Walker C. Hall and A. C. Ellis, for appellee.

PRYOR, C. J. The appellee erected upon the lot of the appellant a frame building, under a written contract with her husband, to which the wife (appellant) was not a party. While the house was undergoing completion, a part of the contract price being due, the appellee attempted to assert a mechanic's

lien on the property, and by the judgment of the chancellor the property was ordered sold.

There is but one way to create a lien of that sort on the realty of the wife, and that is by a writing, signed by her, evidencing the contract. The statute authorizing or creating such liens provides, in express terms, as follows: "The provisions of the preceding sections shall apply to and be enforced against a married woman and property owned by her, if the service or labor was performed, or the materials furnished under a written contract signed by her." St. Ky. § 2479. No equitable lien exists against the property of a married woman, and it can only be created in the manner pointed out by the statute. The mechanic undertaking the work must examine the title, and particularly in a case where it is a matter of record in the county where the property improved is situated. The chancellor below adjudged the property sold under the doctrine of estoppel, the proof conducing to show on the part of the appellee that the wife represented the title as in her husband, and not in herself. The testimony on this point is meager, and rather tends to show that it was the husband's representation the appellee was relying upon. It is true, the wife gave directions about the construction of the building, and tried to raise money to pay the appellee. Still, this did not make her property bound for the debt, in the face of a statute designating in express terms the manner in which the estate of the feme could be held bound. When looking to the testimony of the wife, and those introduced in her behalf, it appears that appellee knew of the title, and that she was opposed to making the expenditure; and, if the wife's estate can be made liable under the facts of this case, it is a virtual repeal of the statute, the wife's acquiescence merely making her liable for the debt.

While the doctrine of estoppel might be held to apply, as to a married woman, where fraud is practiced by her, or the party misled into making a contract for her benefit upon a representation she knew to be false, the facts of this case do not come within this rule. Phil. Mech. Liens, § 106. "When a statute designates the particular mode in which the lien may be created, the direction defines and limits the rights of mechanics against the property of married women. * * * as where the law requires the consent of the owner for the erection of the building to be in writing. The land of a married woman is not liable under a contract made by her husband, even if she, during the erection of the building thereon, acquiesces in its erection, and gives directions in relation thereto." The chancellor is powerless to afford the relief, whatever may be the hardship of the particular case. It is the statute that gives the lien, and to follow it obviates the necessity of resorting to the facts of each case, and the pecuniary condi-

tion of the parties, so as to create an equity that would compensate the mechanic for his labor. To what extent the chancellor might authorize the removal of the building, when erected upon a mistake of fact, is not a question before us. The judgment is reversed, with directions to dismiss the petition, as to the wife.

DOSS et al. v. KINCHELOE'S ADM'R.

(Court of Appeals of Kentucky. Sept. 19, 1896.)

SALE BY ADMINISTRATOR—ADVERSE CLAIM TO DECEDENT'S LANDS—EVIDENCE—ESTOPPEL.

That one lived in the vicinity for 10 years after suit was brought to subject certain lands to the payment of a decedent's debts, and knew of a mortgage thereon, but never appeared, or in any way claimed the land, though it was in the possession of others, who were using it as their own, is a circumstance tending to show that whatever claim he had against the land was satisfied in the decedent's lifetime.

Appeal from circuit court, Muhlenberg county.

"Not to be officially reported."

Suit by L. W. Kincheloe's administrator against George W. Doss and others to settle his intestate's estate. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Jonson & Wickliffe, for appellants. Edward W. Hines, for appellee.

HAZELRIGG, J. In 1876 Kincheloe's administrator brought this suit to settle the estate of his intestate, and sought to sell certain real estate for the purpose of paying debts. He described the real property owned by the decedent, and alleged that James P. McIntire, who was made a defendant, was setting up some claim to certain portions of it, and asked that he be compelled to answer and set up his claim, if any he had. Process issued against him, and, while there is no return showing service on him, a judgment subsequently rendered recites that the parties were all duly summoned. Another defendant to this suit was the present appellee, E. L. Hines, who was a creditor of the estate, and who held a mortgage, assigned to him by one Cox, on the land which McIntire was alleged to be claiming. Hines appeared, and after proper reference of the case to the commissioner, and adjustment of the amount of the various debts, this mortgaged land was finally sold, by order of the chancellor, in 1890, and Hines became the purchaser. Pending the motion to confirm the sale, the appellant Doss appeared in the case, and, by his pleadings, alleged that he was the owner of the land by purchase from McIntire in 1884; that the latter formerly held a mortgage on it, suit to foreclose which had been brought in 1868, and judgment of sale had been rendered shortly thereafter; that at the sale McIntire had become the purchaser, but had obtained no deed therefor until after Kincheloe's death,

in 1874. Hines answered that this deed had been obtained without notice to the heirs of Kincheloe, and that the McIntire debt had been fully paid by Kincheloe in his lifetime, and, moreover, that in 1874, before he loaned the money to Kincheloe and obtained the mortgage to secure it, hearing of McIntire's claim, he sought him, for the purpose of learning the extent of his interest, and was informed by McIntire that he no longer had any claim against the land. Upon these issues there was no proof taken, save on behalf of Hines; and it abundantly sustains his averments, both as to payment, and the facts showing an estoppel. Other circumstances confirm this positive proof. While McIntire lived in the vicinity for some 10 years after suit was brought to subject the land to pay debts, and knew of the Hines mortgage thereon, he never appeared, or in any way claimed the land, although it was in possession of others, who were using it as their own. We think the chancellor's conclusions were correct, and the judgment is affirmed.

KELLEY v. YANDELL.

(Court of Appeals of Kentucky. Sept. 22, 1896.)

PLEADING—SUFFICIENCY OF PETITION—ACTION TO DECLARE MORTGAGE PREFERENTIAL.

1. A petition seeking to have a mortgage declared preferential, and to operate as an assignment by the mortgagor for the benefit of creditors, which alleges that such mortgage purports to have been executed to secure a loan made by the mortgagee at the time, but that plaintiff has no knowledge or information as to whether or not such loan was in fact made, but denies that it was, is insufficient to state a cause of action.

2. The provision of St. § 1910, that an illegal preference by a debtor shall not vitiate any mortgage made in good faith to secure a liability created simultaneously therewith, if recorded within 30 days after execution, applies only to mortgages made on property which has been preferentially conveyed; and a failure to file a mortgage for record within 30 days does not affect its validity, when attacked as being preferential.

Appeal from circuit court, Washington county.

"Not to be officially reported."

Action by J. W. Kelley against D. W. Yandell. Judgment for defendant, and plaintiff appeals. Affirmed.

W. C. McChord, for appellant. Clements & Thurnan, for appellee.

DU RELLE, J. This case comes up on demurrer to appellant's petition, seeking to have a mortgage by Grundy and wife to appellee declared preferential, and adjudged to operate as an assignment of all Grundy's property for the benefit of his creditors. The only question necessary to the decision of this case is whether the petition is sufficient. Appellant was a judgment creditor of Grundy, and had an execution levy upon the lots of land covered by the mortgage which is sought to be declared preferential. The pe-

tion contains no direct averment or charge that the mortgage was executed to secure a pre-existing debt, or that it was fraudulent. The averment upon that subject is as follows: "Plaintiff says, by the terms of said mortgage it purports to be executed to defendant Yandell to * * * him the sum of fifteen hundred dollars, which, said Yandell, simultaneous with the execution of said mortgage, loaned the said defendants Thomas S. and Maggie B. Grundy. As to whether or not defendant Yandell at that time, or at any other time, loaned said defendants, or either of them, the sum of fifteen hundred dollars, or any other sum, plaintiff has no knowledge, or information sufficient to form a belief. Plaintiff denies that defendant did loan said money on that or any other time." This would be a sufficient denial of an averment by the other party (Civ. Code, § 113), but it is not, in our judgment, a sufficient charge that the loan to Grundy was not made simultaneously with the execution of the mortgage. In order to bring the case within the statute as to preferential conveyances, all the necessary averments should be definitely and distinctly made; and this is not done by a denial of knowledge, or information sufficient to form a belief, in a petition seeking affirmative relief. The fact that the mortgage in question was not recorded for some considerable time after its execution cannot affect the decision of this case, for this court distinctly held in *Meier v. Flinsbach*, 95 Ky. 146, 24 S. W. 235, that the proviso of the statute as to recording the mortgage within 30 days from its execution (St. Ky. § 1910) applies only in cases where there has been an antecedent preferential conveyance. Judgment affirmed.

STONE, Auditor, v. PFLANZ, Sheriff.

(Court of Appeals of Kentucky. Sept. 22, 1896.)

JAILERS — COUNTIES WITH 75,000 POPULATION — FEES—MONTHLY STATEMENT TO AUDITOR—SUPPLIES FOR COUNTY OFFICERS.

1. Under St. § 356, a county jailer is allowed two dollars for each day's attendance on the circuit court, and, for furnishing fuel, light, and water to the circuit court, not to exceed two dollars a day. By section 1730, he is allowed like fees in connection with the county and quarterly courts, in addition to his regular fees for the care of prisoners. In counties having a population of 75,000, section 1773 requires that on the first day of each month the jailer shall make an itemized statement, showing, among other things, the amount received the preceding month by him as fees in his official capacity, and whether due or paid to him, and at the same time pay the amount received to the state auditor. *Held*, that he was bound to include in such statement the fees due or paid to him under sections 356 and 1730.

2. St. § 1774, provides that, on receipt of such statement, the auditor shall draw his warrant on the treasurer for an amount not exceeding 75 per cent. of the amount of the fees and compensation due to or paid to the jailer for services rendered the preceding month. *Held*, that the commonwealth is entitled to retain 25 per cent.

of the items reported by the jailer under sections 356 and 1730.

3. The jailer is not authorized by virtue of St. §§ 356, 1730, to furnish fuel, light, and water to any county or other officer.

Appeal from Jefferson law and equity court.

"To be officially reported."

Agreed case between Sam H. Stone, auditor of public accounts, and J. R. Pfanz, sheriff. From a judgment in favor of the sheriff, the auditor appeals. Reversed.

W. S. Taylor, for appellant. Carroll & Hagan, for appellee.

LEWIS, J. This appeal is by S. H. Stone, auditor of public accounts, from a judgment of the Jefferson circuit court rendered in an agreed case; the controversy being in regard to certain rights and duties of the jailer of that county. Section 1772, St. Ky., relating to counties having a population of 75,000 or over (Jefferson being such), is as follows: "The jailer shall receive an annual salary of five thousand dollars; and the number of his deputies, guards and turnkeys, and the salaries allowed to each, shall be fixed by the judge of the county court, the mayor of the city where the jail is located, and the judge of the criminal division of the circuit court; but the annual salary of the chief deputy shall not exceed eighteen hundred dollars, nor shall the annual salary of each of the other deputies, guards or turnkeys exceed twelve hundred dollars," etc. Section 1773 provides: "The jailer shall on the first day of each month make out an itemized statement, subscribed and sworn to by him, showing the expenses of his office, exclusive of salaries, and the amount of such expenses, as well as the amount received the preceding month by such jailer as fees, or due to him for all services rendered by him in his official capacity, and whether due or paid to him by the state or city or county or United States government, and shall at the same time pay to the auditor the amount so received," etc. Section 1774 provides: "Upon the receipt of such statement the auditor shall draw his warrant upon the treasurer for an amount not exceeding seventy-five per cent. of the amount of the fees or compensation due to or paid to the jailer for services rendered the preceding month. If the amount so paid is not sufficient to pay the salaries and expenses of the office for the month, the deficit may be made up out of the amount paid in any succeeding month; but in no event shall the amount paid exceed seventy-five per cent. of the amount paid into the treasury by the jailer, or credited to him by the auditor," etc. In addition to proper and fixed fees for imprisoning, keeping, dieting, and releasing prisoners, each jailer is, by section 1730, allowed for attending county and quarterly courts, to be paid out of the county levy, per day, not exceeding two dollars; for furnishing fuel and light to county and

quarterly courts, a reasonable compensation not exceeding two dollars per day, to be paid out of the county levy. He is also, by section 356, allowed, for each day's attendance upon the circuit court, two dollars; and, for furnishing fuel, light, and water to the circuit court, not exceeding two dollars per day. And the principal question in this case submitted to and determined by the court below is whether the amount received by the jailer of Jefferson county under sections 1730 and 356 should be included in each monthly report he is required by section 1773 to make, and whether the commonwealth of Kentucky is entitled, in virtue of section 1774, to retain 25 per cent. thereof.

Section 1773, in plain and unqualified terms, requires the jailer of a county having a population of 75,000 or over to make out on the first day of each month an itemized statement showing the amount received by him the preceding month as fees or compensation, or due to him for all services rendered by him in his official capacity, whether due or paid by the state, city, county, or United States government, and at the same time pay into the treasury the amount so received. And, in pursuance of the manifest policy of law, the auditor, or, by his direction, the jailer for him, is required by section 1775 to speedily collect the amount found to be due by each monthly statement from the county, city, or United States government, as the case may be, and give to the jailer credit by the amount so collected and paid into the treasury, as well as by the amount due from the state, which latter amount shall be considered as paid to the auditor by the jailer.

As the services required by sections 356 and 1730 are, in the meaning of section 1773, unquestionably official services, and compensation therefor is fixed and provided for by statute, it would, in our opinion, be very difficult to make plainer the intention of the legislature that the jailer shall account for, report, and pay amount thereof into the treasury than is done by the language of section 1773. Any other construction of that section would be contrary to section 106 of the constitution, which requires jailers and other officers in counties having a population of 75,000 or more to be paid out of the state treasury by salary to be fixed by law, but not to exceed 75 per centum of the fees collected by them respectively, and paid into the treasury. Besides, to permit the jailer in such case as this to appropriate wholly the fees and compensation received for services rendered under sections 356 and 1730 would enable him to evade section 246 of the constitution, which provides that no public officer, except the governor, shall receive more than \$5,000 per annum as compensation for official services, independent of the compensation of legally authorized deputies and assistants. We do not see how the statute, as we construe it, does injustice to such

county, inasmuch as it is not required to bear any greater or other burden than counties having less population than 75,000. If such be the proper construction of section 1773, it seems to us to necessarily follow that the commonwealth is entitled, under section 1774, to retain 25 per cent. of the fees and compensation so paid into the treasury by the jailer.

Another question submitted and determined is whether the jailer is authorized by sections 356 and 1730 to furnish fuel, light, water, etc., to the various officers of Jefferson county who are now appellees. In our opinion, neither of those sections, nor any other statute, authorizes, in terms or by any reasonable implication, the jailer to render such service to any county or other officer. The judgment of the lower court is therefore reversed, and case remanded, for proceedings consistent with this opinion.

MEMORANDUM DECISIONS.

ORR & LINDSLEY SHOE CO. v.
THOMPSON.

(Court of Civil Appeals of Texas. March 12, 1896.)

CORPORATIONS—INSOLVENCY—PREFERENCES—DISTRIBUTION OF ASSETS.

Appeal from district court, Rusk county; W. J. Graham, Judge.

Action by the Orr & Lindsley Shoe Company against the Farmers' Alliance Co-operative Association and R. H. Thompson, garnishee. From the judgment, plaintiff appealed. Reversed.

J. H. Turner and W. C. Buford, for appellant. John R. Arnold, for appellee.

GARRETT, C. J. On the 8th day of January, 1891, the Farmers' Alliance Co-operative Association of Rusk county, Tex., being insolvent, by its manager, W. H. H. Hays, executed a deed of trust by which it undertook to convey to the appellee, R. H. Thompson, a stock of goods for the benefit of its creditors with preferences. The Orr & Lindsley Shoe Company instituted a suit, No. 4,750 in the district court of Rusk county, against the said association, for debt, to the January term, 1891. Hays, the manager of said corporation, accepted service during term time, and judgment was rendered in favor of appellant against the association on January 17, 1891, for the sum of \$2,773.10. Appellant sued out an execution on said judgment January 27, 1891, and had it levied on the goods in the hands of appellee, who immediately made claim thereto, and filed his oath and bond for the purpose. Afterwards, at the same term of court, the judgment was set aside for want of service upon the defendant. On February 7, 1891, the appellant's attorney, W. C. Buford, made an affidavit and

filed a bond for garnishment in said cause No. 4,750 against the appellee and Hays, and a writ of garnishment was issued on the same day, and served on them on February 9, 1891. Hays was discharged upon his answer. The appellee answered on July 6, 1891, and excepted to the writ that it had been issued without any affidavit, application, or legal bond; and, further, that he was not indebted, etc., except that, on January 8, 1891, the Rusk County Farmers' Alliance Co-operative Association had by a conveyance in writing delivered to him, in trust to pay certain debts of the association out of the proceeds thereof, a stock of goods, wares, and merchandise, a list of which he attached to the answer; that said stock of goods was taken out of his possession on January 27, 1891, by the sheriff of Rusk county, acting under process issued out of the district court of said county, but had afterwards been redelivered to him and sold by him for the sum of \$3,000, and the proceeds applied to the discharge of the debts of the association as specified in the conveyance to him. The goods were in his possession when he was served with the writ of garnishment. On July 5, 1891, by consent of parties, the claim case and the proceeding in garnishment were by an order of court consolidated. Appellant filed an amended tender of issues in the consolidated case, that the association, at the time the mortgage was executed by it, was wholly insolvent, and unable to pay its debts, and, knowing its inability to do so, had conveyed all of its available property to said Thompson, the same now claimed by him, in order to prefer certain of its creditors, and that said mortgage was void; that said Thompson had no claim against the association, and represented none of the creditors thereof; that on February 7, 1891, appellant had sued out a writ of garnishment against the appellee, which was served on him on February 9, 1891, while he was still in possession of said goods; and that it had a valid judgment, etc. Appellee replied that the execution was void; that he was in possession of the goods, claiming same by a transfer from the owner thereof; that the goods were worth not over \$3,000; that appellant would not be entitled to more than a pro rata distribution of the proceeds. He set out costs, expenses, and attorney's fee, and asked an allowance therefor. He also entered a general denial. The case was tried without a jury. The court held that the deed of trust was void, but that the appellant was entitled to recover of the garnishee only such proportion of the fund in his hands as its debt bore to the entire indebtedness, and the fund was found to be \$2,152.25 after deducting expenses, attorney's fee, etc., making the sum for which judgment was rendered \$604.81. The court also held that the execution by virtue of which the goods had been levied on was void, and that the proceedings in the claim case were without foundation, and adjudged the costs of that proceeding against the appellant.

It appeared from the findings of the court that the association, which conveyed its stock

of goods, wares, and merchandise to the appellee, was formed by seven citizens of Rusk county, who subscribed and filed with the secretary of state on October 22, 1887, a charter to incorporate themselves as the Farmers' Alliance Co-operative Association. The charter was acknowledged by six of the subscribers. The association was formed for the purpose of purchasing and selling agricultural and farm products, goods, wares, and merchandise in Rusk county, Tex., and commenced and carried on business until January 8, 1891, when it became insolvent and made the mortgage to appellee. The mortgage was signed by "W. H. H. Hays, Business Manager and Agent of the Rusk County Farmers' Alliance Co-operative Association," of which he was manager, as shown by the signature. Appellee is estopped to deny the validity of the incorporation of the association. He accepted the conveyance from it, and claimed and was in possession of the goods under the conveyance when the execution was levied and when the writ of garnishment was served upon him. It is clear, also, that the name recited in the mortgage is only a misnomer. Since the mortgage would be void, because an insolvent corporation cannot prefer its creditors, it is immaterial whether Hays had authority to execute it or not. It would be no defense in either event. As an attempt by an insolvent corporation to prefer its creditors, the mortgage was void, and the goods in the hands of the appellee were subject to process in favor of diligent creditors, and to be applied to their debts. They were not held by the garnishee subject to pro rata distribution among all the creditors, and the court erred in so holding. *Lyons-Thomas Hardware Co. v. Perry Stove Manuf'g Co.*, 86 Tex. 149, 24 S. W. 16; *Dry Goods Co. v. Wettermark* (Tex. Civ. App.) 30 S. W. 505. As the judgment upon which the execution issued was afterwards set aside by the court, the right of the appellant to recover in the claim case, and to have judgment against the sureties on the appellee's bond as claimant, fell with it, and the costs of the proceedings in the claim case were also properly adjudged against the appellant. It will not be necessary to consider other points made by appellee against the validity of the execution, and the appellant's right to have judgment by reason of the levy thereof.

Appellee has questioned the validity of the garnishment proceedings by exceptions made in the court below and cross assignments of error in this court. The writ of garnishment appears to have been issued upon an affidavit made by W. C. Buford as attorney for the appellant. It gives the style and number of the suit for debt by the appellant against the association, and contains all the requisites of an affidavit for garnishment in a pending suit. *Rev. St. 1879, art. 183, § 2; Id. art. 185.* It was not necessary to bring up the petition in the transcript, as the affidavit is complete without it. No formal and separate application for a writ of garnishment is necessary. If the affidavit is complete, and contains the

requisites for an application under article 185 above, it is not necessary to ask in so many words that the writ issue. It does not appear affirmatively from the record that the judgment rendered without service on January 17th had been set aside by the court before the affidavit for garnishment was filed, but it appears from the affidavit and bond that the proceeding was under the second subdivision of article 183 for garnishment pending suit. The failure to show that the judgment had been set aside does not affect the validity of the garnishment proceeding. The statement in the affidavit, that "they" have reason to believe "that Hays and Thompson had property and effects in their possession belonging to the defendant," is in strict compliance with the statute, which requires that the affidavit shall state that plaintiff shall so believe, and the failure of the attorney to state his personal belief in this respect did not vitiate the writ. The use of the word "they," while perhaps not strictly correct in a grammatical sense, leaves no doubt that the plaintiff in the suit is referred to. The statement that the "garnishment is not sued out to injure either the defendant or the garnishees" is sufficient to negative the intent to injure either of the two garnishees named in the affidavit. Appellant's bond for garnishment recites "that we, the Orr & Lindsley Shoe Company," etc., "are held and firmly bound," etc., "conditioned that if the said Orr & Lindsley Sho Company, plaintiff, shall prosecute their suit to effect," etc. It is objected that the omission of the letter "e" in "Shoe," in the name of plaintiff in the condition of the bond, renders the bond void. The objection is not well taken. Without further reference to objections against the validity of the garnishment proceedings, we are of the opinion that they were in all respects valid and required the appellee to answer.

After the objections to the writ, the garnishee showed by his answer that at the time he was served with the writ he was in possession of goods, wares, and merchandise belonging to the defendant of the reasonable value of \$3,000, which made a contest thereof unnecessary, even if the amended tender of issues in the consolidated case should not be considered a contest. He, however, became a litigant, and contested every inch of ground in the way of appellant's recovery. He sold the goods, and paid the proceeds, less sums retained by him for expenses, to other persons, who had no legal right thereto. He thus clearly made himself responsible for the costs. *Carlisle v. Sommer*, 61 Tex. 124. It was not necessary for the appellant to put its judgment in evidence to entitle it to recover. The court could take judicial notice that it had rendered judgment in the suit for debt, and it will be presumed that judgment had been rendered thereon before the rendition of the judgment in this proceeding. *Farrar v. Bates*, 55 Tex. 193. The judgment of the

court below recites that the amount of the plaintiff's debt was \$2,773.10 and that there was remaining in the hands of the garnishee, out of the amount for which he sold the property, after deducting allowances made for his services, attorney's fees, etc., the sum of \$2,152.25. The indebtedness being greater than the amount subject to garnishment, the appellant should have recovered judgment for the full amount so found, with interest thereon at the rate of 6 per cent. from the date of the judgment.

By its second assignment of error the appellant questions the amount allowed the garnishee, as follows: "The court erred in allowing said Thompson \$300 for his services, and \$350 for attorney's fees, and \$65 for insurance, because the same is out of proportion to the services performed and unreasonable." By the proposition under this assignment, the right of the garnishee to have any allowance is questioned. This contention is not supported by the assignment, but a complete reply to the matter is that it was agreed to by the plaintiff on the trial of the cause that the court might fix a reasonable fee for the attorney of the garnishee, and reasonable compensation to the garnishee himself for services as trustee, to be allowed out of the proceeds of the sale of the goods. There is no statement of facts or any fact, to show that the allowances are unreasonable. The amount allowed for insurance would seem to be a proper charge against the goods, incurred in the care thereof.

The judgment of the court below will be reversed, and judgment will be here rendered in favor of the appellant against the garnishee, R. H. Thompson, for the sum of \$2,152.25, with interest from the date of the judgment of the court below, and all costs of the garnishment proceedings.

On Motion for Rehearing.

(June 4, 1896.)

In our decision of this case we held that, the deed of trust executed by the Farmers' Alliance Co-operative Association of Rusk County to the appellee being void as an attempt to prefer creditors, the goods in appellee's hands were subject to garnishment by the appellant. On motion for rehearing we certified the question to the supreme court, as well as the further question whether, in the event a diligent creditor could not subject the assets of an insolvent corporation to his own claim to the exclusion of the other creditors, a pro rata distribution of such assets could be effected by garnishment in a proceeding to which the other creditors were not parties. To both questions negative answers were given. See opinion of this court March 12, 1896, and of the supreme court May 11, 1896 (35 S. W. 473).

The opinion of the supreme court disposes of the case. The motion for rehearing is granted, and the judgment of the court below

holding the garnishee liable, is reversed, and judgment is here rendered discharging the garnishee at the cost of appellant.

Reversed and rendered.

BLOCKLOCK v. BOARD OF EQUALIZATION OF GENTRY COUNTY. (Supreme Court of Missouri, Division No. 2. June 30, 1896.) Appeal from circuit court, Gentry county; C. A. Anthony, Judge. Certiorari by E. C. Blocklock to the board of equalization of Gentry county. Proceeding dismissed. Petitioner appeals. Affirmed. C. H. S. Goodman and J. W. Sullinger, for appellant. W. F. Dolbey and McCullough & Peery, for respondent.

BURGESS, J. This case is the counterpart of *Ward v. Board* (decided at the present term) 36 S. W. 648; and, for the same reasons assigned in that case, the judgment is affirmed. **GANTT, P. J., and SHERWOOD, J.,** concur.

BROWN v. SCHMIT et al. (Court of Appeals of Kentucky. June 13, 1896.) Appeal from circuit court, Daviess county. "Not to be officially reported." Action by August Schmit and others against James A. Brown. From a judgment for plaintiffs, defendant appeals. Affirmed. Birkhead & Clements and Chapeze Wathen, for appellant. J. G. Taylor and Wilfred Carrico, for appellees.

GUFFY, J. It appears that the appellees had, some time in 1883, recovered judgments against G. S. McClintock, and in 1893 caused executions to be levied upon 27 acres of land in Daviess county, as the property of McClintock, upon which appellant, Brown, held a mortgage; and after the levy, and before the sale, appellees instituted separate actions, asking a sale of the land to pay their debts, and alleging, in substance, that the mortgage was fraudulent, or, if the mortgage debt ever existed, that it had been paid. The three suits were consolidated. Appellant and McClintock answered, and insisted on the validity of the mortgage. Before the trial, appellees, by amended petition, pleaded, in substance, that appellant, Brown, never accepted the mortgage until after the levy of appellees' execution upon the land, in the mortgage named. Appellant Brown and McClintock were the only witnesses examined. The chancellor was of opinion, and so adjudged, that there had been no acceptance of the mortgage by appellant until after the levy aforesaid, and that, as matter of law, the mortgage lien took effect only from the time of acceptance, and adjudged that appellees' liens were superior to that of appellant, and adjudged a sale of the land accordingly, and, to reverse that judgment, John A. Brown prosecutes this appeal. We deem it unnecessary to recite the facts and circumstances proven in the case. We are of opinion that they fully sustain and authorize the judgment complained of. Judgment affirmed.

HENDERSON BRIDGE CO. v. CITY OF HENDERSON. (Court of Appeals of Kentucky. June 24, 1896.) Appeal from circuit court, Henderson county. "Not to be officially reported." Action between the city of Henderson and the Henderson Bridge Company. There was a judgment for the former, and the latter appeals. Affirmed. Yeaman & Lockett, H. W. Bruce, and Wm. Lindsay, for appellant. Clay & Clay, and Montgomery Merritt, for appellee.

LEWIS, J. This appeal involves the right of the city of Henderson to tax the Henderson Bridge Company and its property for municipal and other purposes for the years 1890, 1891,

1892, and 1893, and the same questions of law are involved as in the other case of the same style this day decided (36 S. W. 561); and, for the same reasons therein given, this judgment is also affirmed.

HUTCHESON v. WILSON. (Court of Appeals of Kentucky. Sept. 23, 1896.) Appeal from circuit court, Logan county. "Not to be officially reported." Action by R. G. Wilson against S. Z. Hutcheson on notes. The cause was transferred to equity, and, from a judgment for plaintiff, defendant appeals. Affirmed. Craddock & Sandidge, for appellant. Wilbur F. Browder, for appellee.

PAYNTER, J. This action was brought by Wilson against Hutcheson on two notes, one of which was for \$150.25, executed by Hutcheson to Wilson, and the other was for \$533.10, executed by Wilson and Hutcheson to G. W. Davidson. Wilson paid Davidson, and seeks to recover one-half of the amount of the note and interest from his co-obligor, Hutcheson. Hutcheson filed an answer, in which he alleged that he and Wilson, etc., were partners in certain enterprises for certain years; that the notes were executed growing out of such partnership transactions; that there had been only partial settlements of the partnership matters; that he was entitled to compensation for his services, inasmuch as they were more valuable to the partnership business than those rendered by his partners; that his partners had drawn out certain sums not accounted for in settlements; and he claimed that he was entitled to be allowed a sum greater in amount than the claims asserted by Wilson against him. Wilson pleaded there had been a settlement of the partnership affairs, and that the amount due him was as claimed in the petition. The cause was transferred to equity, and there tried. The court rendered judgment for the plaintiff on his claims. The circumstances and facts developed by the record fully sustain the conclusions of the court. Therefore the judgment is affirmed.

McTIGUE v. COMMONWEALTH. (Court of Appeals of Kentucky. Sept. 24, 1896.) Appeal from circuit court, Logan county. "Not to be officially reported." Thomas McTigue was convicted before a justice of the peace of a violation of the prohibitory law of Logan county, and appeals. Reversed. E. W. Hines, for appellant. W. S. Taylor, for the Commonwealth.

GUFFY, J. This appeal involves the same question which was decided by this court, March 28, 1896, in the case of this same appellant against the commonwealth (35 S. W. 121). For the reasons given in that opinion, the judgment of the court below in this case is reversed, and cause remanded, with directions to sustain appellant's motion to dismiss, and for proceedings consistent with this opinion.

TREASY v. MOORE et al. (Court of Appeals of Kentucky. June 23, 1896.) Appeal from circuit court, Jefferson county. "Not to be officially reported." Action by Jane M. Treasy against the Fidelity Trust & Safety-Vault Company and others. From a judgment for plaintiff, defendant Martin Treasy appeals. Affirmed. E. E. McKay, for appellant. J. M. Chatterton, for appellees.

GUFFY, J. In the suit of Jane M. Treasy against the Fidelity Trust & Safety-Vault Company, etc., in which the appellant, Martin Treasy, was defendant, pending in the Jefferson circuit court, the plaintiff was adjudged to be the owner of and entitled to one-fourth interest absolutely in a lot of ground, and the improvements thereon, situated on the south side of

Market street, fronting on Market street 17½ feet, and extending back southwardly, same width, 200 feet. Said house is numbered 708 West Market street, and is known and described in the commissioner's report as the "Phillips House"; said property having been held as firm property by the late firm of James Treasy & Bro. The above judgment was rendered June 9, 1891. On the 9th of May, 1892, an amended judgment was entered, which reads as follows: "Now come Michael Moore, a brother of, and Catherine Igoe, a sister of, and being the only heirs at law of the plaintiff herein, Jane M. Treasy, who departed this life, intestate, on the day of January, 1892, by counsel, and also come defendants, the Fidelity Trust & Safety-Vault Company, the executor of James Treasy, deceased, and Martin Treasy, all by counsel, and by agreement the judgment entered herein on the 9th day of June, 1891, is now and hereby amended and corrected as follows, so as to correctly describe by metes and bounds the lot and improvements fronting on the south side of Market street, between Seventh and Eighth streets, in Louisville, Ky., and in which the plaintiff decedent, Jane M. Treasy, was adjudged a one-fourth interest absolutely, and which is erroneously called the 'Phillips House,' and erroneously numbered 708; and it is now and herein adjudged that the description intended to have been embraced by said judgment, and which was adjudged to be held by James Treasy & Bro. as partnership property, and in which the said decedent, Jane M. Treasy, was adjudged to be the owner of a one-fourth interest, and Martin Treasy the owner of the other three-fourths, was and is as follows: A lot of land and improvements thereon, lying in the city of Louisville, Jefferson county, Kentucky, on the south side of Market street, and being (17½) seventeen and one-half feet on said street, and running back two hundred (200) feet to an alley, and being the extreme eastern 17½ feet of two fifty-two and one-half feet formerly owned by William Talbot, and being recorded in Deed Book 259, page 310. And, by agreement of all parties in interest herein, this amended judgment may be entered, so as to correctly and accurately describe said property. And so much of said former judgment as adjudged Jane Treasy or Martin Treasy any interest in the house known as the 'Phillips House,' and numbered 708, is hereby set aside and held for naught. Sterling B. Toney, Judge. Humphrey and Davie, Attorneys for Martin Treasy. Marshall & Lochre, Attys. Fidelity Trust & Safety Vault Company. J. M. Chatterson, Atty. Michael Moore. Saml S. Blitz, Attorney for Catherine Igoe." At the June term, 1894, the appellant moved to set aside the order and judgment of May, 1892, upon the ground that it was made after the death of the plaintiff, and without any revivor in the name of her heirs or representatives, and because he (appellant) did not consent to the same. The court, upon final hearing, overruled appellant's motion, and dismissed the same, and from that judgment appellant prosecutes this appeal. All the heirs and legatees of Jane M. Treasy were made parties to appellant's motion to set aside the order of May, 1892; hence it is now immaterial whether they were all before the court consenting to the order of May, 1892, or not. It is evident that the lot of ground described in the judgment of May, 1892, is the same intended to be described in the judgment of June, 1891, and is in fact the same ground; but the order of June, 1891, erroneously stated that the house known as the "Phillips House" (No. 708) was on the lot, when in fact that house was not on the ground adjudged to plaintiff. It was therefore proper to make the correction, and we think the court had jurisdiction to do so. Appellant's attorney in the suit had the right to consent to the correction under the facts shown in this cause, even if it be true that appellant did not personally consent to the correction. Judgment affirmed.

WHITMER v. WHITMER. (Court of Appeals of Kentucky. June 5, 1896.) Appeal from circuit court, Muhlenburg county. "Not to be officially reported." Action by Susan F. Whitmer against Elisha Whitmer. Judgment for defendant. Plaintiff appeals. Reversed. E. W. Hines and Charles Eaves, for appellant. W. H. Yost, Jr., for appellee.

PRYOR, C. J. An inspection of the record satisfies the court that no injustice is done the appellee by continuing the allowance for the support of his wife and children. He abandoned his wife without cause, leaving her no means of support, and made charges of such a serious character as to the paternity of his children, unsupported by proof, as forced the chancellor to place them under the control of the mother. He has money in bank, with a farm, the rental value of which is \$275 per year; and, if the wife had no children, under the circumstances of this case the allowance is not too much for her own support. The judgment discontinuing the allowance is reversed, with directions to overrule appellee's motion to either discontinue or reduce it.

SWENSON v. SMITH COUNTY et al. KOUNTZE et al. v. SAME. BAGLEY v. SAME. (Supreme Court of Texas. May 25, 1896.) Error to court of civil appeals. First supreme judicial district. Actions by S. M. Swenson, Kountze Bros., and George F. Bagley against Smith county and others, to recover on a certain railroad bond. Judgment for defendants, and plaintiffs appeal. Reversed in the court of civil appeals, and defendants appeal. Reversed.

GAINES, C. J. These are companion cases with that of Morrill v. Smith Co. (this day decided) 36 S. W. 56. All involve the same questions, and have been presented upon briefs which are substantially the same. For the reasons given in the opinion in the case last named, the judgment in each of the above-styled cases is reversed, and the cause remanded.

GULF, C. & S. F. RY. CO. v. LEE. (Court of Civil Appeals of Texas. May 21, 1896.) Appeal from Washington county court; G. P. Curry, Judge. Action by William Lee against the Gulf, Colorado & Santa Fé Railway Company to recover for damages to household goods. From a judgment for plaintiff, defendant appeals. Reversed. Searcy, Garrett & Harman, J. W. Terry, and Chas. K. Lee, for appellant.

PER CURIAM. Appellee sued appellant to recover for damage done to his household goods, which he shipped from Brenham to Millheim, by rough and careless handling. He recovered a judgment in the county court (to which the case was carried on appeal from justice's court) for \$91. The case has been briefed here by appellant alone, and from an examination of the facts it is evident that, if appellee sustained damage to the amount of the judgment, he failed to make it appear. His evidence as to many of the articles is so indefinite that no conclusion as to the extent to which they were damaged can be reached. It is perhaps true that as to some items his proof is sufficient; as to most of them it is not. In some instances where appellant claims the damage is not shown, the proof would perhaps warrant the inference that the value of the article was entirely destroyed; but, under the most liberal view of the evidence, damage is not shown in amount sufficient to sustain the verdict of the jury. Reversed and remanded.

KAHN et al. v. STATE. (Court of Civil Appeals of Texas. May 2, 1896.) Appeal from district court, Harrison county; M. J. Graham, Judge. Action by the state of Texas

against Alexander Kahn and others to recover a statutory penalty on Kahn's bond as a retail dealer in malt liquors. From a judgment in favor of plaintiff, defendant appeals. Reversed. L. P. Wilson, for appellant. John B. Carter and M. P. McGee, for the State.

FINLEY, J. This is a suit instituted by the district and county attorneys, in the name of the state of Texas, against Alexander Kahn and the sureties upon his bond as a retail dealer in malt liquors for the recovery of the penalty of \$500 on account of the breach of the conditions of said bond in failing to keep an open house, as required by the bond. The case was tried by the court below, and resulted in a verdict and judgment for the plaintiff, from which this appeal is taken. The case is a companion case to that of *Merzbacher v. State* (decided by this court April 18, 1896) 36 S. W. 308. Chief Justice LIGHTFOOT delivering the opinion of the court. Every material question presented in the record before us was discussed and passed upon in the *Merzbacher Case*, and the decision in that case is of controlling effect in this case. For the reasons announced in the opinion referred to, the judgment of the court below in this case is reversed, and the cause remanded. Reversed and remanded.

MEYER BROS. DRUG CO. v. HARRISS et al. (Court of Civil Appeals of Texas. March 21, 1896.) Appeal from district court, Hill county; J. M. Hall, Judge. Action by Meyer Bros. Drug Company against J. T. Harriss and others. Judgment for defendants, and plaintiff appeals. Affirmed. McKinnon & Carlton and Smith & Wear, for appellant. Thos. Ivy, for appellees.

FINLEY, J. On March 22, 1894, the appellant filed its amended original petition in the district court of Hill county, Tex., against J. T. Harriss, Minnie Terrell, Alec Cabbell, and W. W. Phillips, to recover the real estate described in the petition. In addition to the ordinary allegations in trespass to try title, appellant claimed that, although a deed was made from S. C. Upshaw (common source of title) to Minnie Terrell, said Minnie took said title for the use and benefit of her co-defendant, J. T. Harriss, and for the purpose of enabling the said Harriss to defraud his creditors; that judgment had been recovered in favor of appellant against said Harriss, and execution issued upon said judgment, and levied on said lot; said judgment was of date August 17, 1892, and for the sum of \$507.83, besides interest, etc.; that alias execution issued June 14, 1893, and on same day was levied upon the land in controversy as the property of J. T. Harriss, and on August 1, 1893, said property was sold at public sale by the sheriff of Hill county, and appellant bid and paid the sum of \$25 therefor, without notice of any claim on the part of Cabbell and Phillips in and to said property. By appellant's first amended original petition, filed March 22, 1894, appellees W. W. Phillips and A. C. Cabbell were for the first time made parties defendants to the suit, which had been pending against the other defendants, Harriss and Terrell, since the original petition was filed, to wit, September 22, 1893, and, in addition to other matters of defense in evidence, defendants Phillips and Cabbell respectively relied on the theory of their being innocent purchasers; Phillips immediately under Minnie Terrell, by deed dated June 4, 1893, etc., before the levy of appellant's alias execution on the land in suit; and that defendant Cabbell purchased immediately from Phillips by deed dated June 6, 1893, which was before the levy of appellant's alias execution, which was levied June 14, 1893; and thus holding under chain of title from S. C. Upshaw, the common source, without any notice of any fraud on the part of J. T. Harriss or Minnie Terrell.

Appellee Minnie Terrell also depended upon the defense of bona fide purchaser of the legal title from S. C. Upshaw, that appellee J. T. Harriss never had any legal or equitable interest in the land, and that she had no notice of any intention on the part of Harriss to defraud his creditors, etc. The trial below resulted in a verdict and judgment for the defendants, from which plaintiff appealed.

Conclusions of fact: (1) S. C. Upshaw was the admitted common source of title. (2) S. C. Upshaw conveyed the land to Minnie Terrell, by deed, on February 23, 1893, recorded June 13, 1893. (3) Minnie Terrell conveyed the land to W. W. Phillips May 4, 1893, deed recorded October 30, 1893. (4) W. W. Phillips conveyed the land to A. C. Cabbell June 6, 1893, deed recorded October 30, 1893. (5) It was shown that Meyer Bros. Drug Company was judgment creditor of J. T. Harriss; the judgment rendered August 17, 1892. (6) On June 14, 1893, a valid execution was issued on said judgment, and levied upon the land as the property of J. T. Harriss. (7) The land was sold under said levy, and plaintiff purchased it for \$25, without notice of the conveyances of Minnie Terrell to W. W. Phillips and W. W. Phillips to A. C. Cabbell. (8) Each of the voluntary conveyances above mentioned were based upon valuable considerations, and were in good faith. (9) The evidence failed to establish the contention of the plaintiff that the legal title to the land was placed in the name of Minnie Terrell for the benefit of J. T. Harriss, to enable him to defraud his creditors. On the contrary, the evidence showed that Minnie Terrell was a bona fide purchaser of the land, and that J. T. Harriss had no interest whatever in the land. (10) W. W. Phillips purchased the land for value, without any notice whatever that J. T. Harriss had any interest therein, or connection therewith; and A. C. Cabbell purchased for value, without notice of such facts.

Conclusions of law: The plaintiff having failed to show that J. T. Harriss had any interest in the land which could be seized under execution, its purchase under the execution sale passed no title, and plaintiff was not entitled to recover; and, further, Phillips and Cabbell were innocent purchasers for value, without notice, and the superior title passed by their purchases. There are no reversible errors presented. Judgment affirmed.

TEXAS & P. RY. CO. v. GILLELAND.¹ (Court of Civil Appeals of Texas. April 25, 1896.) Appeal from district court, Harrison county. Action by Eliza Gilleland against the Texas & Pacific Railway Company to recover for personal injuries. There was a judgment for plaintiff, and defendant appeals. Affirmed.

FINLEY, J. This is a suit by Elizabeth Gilleland to recover damages for personal injuries sustained by her while crossing the railway track at a public crossing in the city of Marshall in a carriage, produced by a collision with a switch engine of the Texas & Pacific Railway Company. The evidence clearly establishes that the engine ran against and upon the carriage while crossing the railway at a public crossing, and that the operatives of the engine were guilty of negligence in so doing, and that plaintiff was thereby injured and damaged to the full extent awarded by the jury. This case is a companion case to that of *Railway Co. v. Curlin* (decided by this court April 13, 1896) 36 S. W. 1003, and all of the questions presented in this case were raised and passed upon in the other case referred to. This case is submitted upon the briefs filed in the *Curlin Case*. The questions in the two cases being identical, the decision of the *Curlin Case* is therefore decisive of this. Our views are fully expressed in the opinion rendered in the *Curlin Case*, to which reference is here made. The judgment of the court below is affirmed.

VINEYARD et al. v. BRUNDRETT. (Court of Civil Appeals of Texas. March 12, 1896.) Appeal from district court, Aransas county; S. F. Grimes, Judge. Action by S. C. Vineyard and another, as guardians, against John M. Brundrett. Judgment for defendant, and plaintiffs appeal. Affirmed. R. H. Ward, for appellants. Glass, Callender & Carsner, for appellee.

PLEASANTS, J. The issues involved in this appeal are precisely the same as those in the case of *Same Appellants v. O'Connor*, 35 S. W. 1084, and by agreement of parties the decision rendered by this court in the former case should be rendered in this. The judgment of the lower court is therefore affirmed, and our opinion herein is the same as that delivered in said cause.

On Motion for Rehearing. (June 25, 1896.) This is a companion case of *Vineyard v. O'Connor*, 35 S. W. 1084, and by agreement between parties the decision in one of the two cases should control and determine the decision in the other; and, the judgment of this court affirming the judgment of the court below in case of *Vineyard v. O'Connor* having been reversed, and the cause remanded to the district court, the motion for a rehearing is granted, and the judgment of the district court is reversed, and the cause remanded to that court for a new trial in accordance with the law as announced by our supreme court in the opinion reversing the decision of this court in said cause. *Vineyard v. O'Connor*, 36 S. W. 424.

BOYD v. STATE. (Court of Criminal Appeals of Texas. June 10, 1896.) Appeal from district court, Tarrant county; S. P. Greene, Judge. William Boyd was convicted of bigamy, and appeals. Affirmed. Mann Trice, for the State.

DAVIDSON, J. Appellant was convicted of the crime of bigamy. The record contains neither a statement of facts, bill of exceptions, nor assignment of errors; and the only ground urged in the court below for a new trial was the alleged insufficiency of the evidence to support the conviction. This question cannot be reviewed by this court in the absence of a statement of facts. The indictment is in good form, and the charge of the court conforms to a state of facts provable under the allegations of the indictment. There being no error in the record, the judgment is affirmed.

BRISCOE v. STATE. (Court of Criminal Appeals of Texas. June 10, 1896.) Appeal from district court, Harris county; E. D. Cavin, Judge. Abe Briscoe was convicted of murder in the second degree, and appeals. Affirmed. Wm. A. Carter, for appellant. Mann Trice, for the State.

DAVIDSON, J. This is a companion case to *Briscoe v. State* (just decided) 36 S. W. 281. In that case the indictment charged the appellant with the homicide of William Payne. In this case he is charged with the murder of Francis Payne, and convicted, and given 10 years in the penitentiary. The questions in this case are identical with those in the former case. For the reasons there indicated, the judgment in this case is affirmed.

CAFFEY v. STATE. (Court of Criminal Appeals of Texas. June 10, 1896.) Appeal from district court, Comanche county; T. H. Conner, Judge. A. J. Caffey was convicted of forgery, and appeals. Reversed. Lindsey & Goodson, for appellant. Mann Trice, for the State.

HURT, P. J. Appellant in this case was convicted of forgery, and his punishment assessed at two years' confinement in the state penitentiary, and he prosecutes this appeal. The indictment in this case is similar to the one against the same defendant previously decided at this term, and the questions presented are the same. Appellant, among other things, moved to quash the indictment on the ground that it did not allege an offense against the laws of the state of Texas, because the check or voucher in question was not a completed instrument, in that it was not accompanied by an affidavit of the teacher. The court overruled the motion to quash, and appellant reserved his bill of exceptions. The court should have granted the motion. See the case of *Caffey v. State* (previously decided) 36 S. W. 82, and authorities there cited. For the error of the court in refusing to quash the indictment, the judgment is reversed, and the cause dismissed. **HENDERSON, J.,** concurs. **DAVIDSON, J.** For the same reason given in *Caffey v. State*, 36 S. W. 82, I dissent in this case.

Ex parte SHEPHERD. (Court of Criminal Appeals of Texas. May 28, 1896.) Appeal from district court, Travis county; R. E. Brooks, Judge. Habeas corpus proceedings by Sterling Shepherd for bail. Bail denied, and relator appeals. Reversed. Mann Trice, for the State.

HURT, P. J. Appellant, having been arrested on a charge of rape, resorted to habeas corpus proceedings for the purpose of obtaining bail. On the trial of the writ, bail was refused, and this appeal prosecuted. We have examined the record, and believe this ruling of the court was erroneous. Without entering into a discussion of the evidence, we think, under the statement of facts, the relator is entitled to bail. It is therefore fixed at \$500, upon the giving of which in the terms and under the forms of law he will be released from custody, and it is accordingly so ordered.

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Of bills and notes, see "Bills and Notes."

BONDS.

See, also, "Principal and Surety."

In attachment, see "Attachment."

In forcible entry and detainer, see "Forcible Entry and Detainer."

In replevin, see "Replevin."

Of city, see "Municipal Corporations."

Of corporations, see "Corporations."

Bonds covering the term of office of a county trustee instead of one year thereof, as required by statute, *held* to be valid common law bonds.—*Maddox v. Shacklett* (Tenn. Ch. App.) 731.

Sufficiency of the petition in an action on a bond conditioned for the payment of all damages that might be sustained by plaintiff by reason of his suspension from office.—*Hagans v. McClain* (Tex. Civ. App.) 818.

That no order appears showing the execution of an official bond as sheriff does not affect the validity of his bond for collector of taxes, the

execution of which is shown by an order of the court.—*Commonwealth v. Howard* (Ky.) 556.

Pleading and evidence in an action on a bond reviewed, and *held* insufficient to sustain judgment against the sureties.—*Collins v. Chastain* (Tex. Civ. App.) 503.

On breach of a bond, the obligee may join in one suit the sureties thereon, and the sureties on a subsequent bond given as additional security for the performance of the same contract.—*Deutschman v. Battaile* (Tex. App.) 439.

BOUNDARIES.

By agreement, landowners may establish a boundary, without reference to the line of the government survey.—*Cox v. Daugherty* (Ark.) 184.

Briefs.

See "Appeal and Error."

BROKERS.

Evidence examined, and *held*, that plaintiffs were not entitled to commission for a sale of real estate.—*Meston v. Davies* (Tex. Civ. App.) 805.

Contract for the sale of land providing that the agent should be paid a commission on the "amount received" construed, and *held* that, after payment, no commission was payable until collected.—*Gresham v. Galveston County* (Tex. Civ. App.) 796.

A vendor of land *held* liable for commissions though the vendee had agreed to assume the liability therefor.—*Burnett v. Casteel* (Tex. Civ. App.) 782.

Evidence examined, and *held* insufficient to show a right to commission on sale of land.—*Smith v. Patrick* (Tex. Civ. App.) 762.

BUILDING AND LOAN ASSOCIATIONS.

A by-law of a building association imposing a fine of 10 cents per month on each share of stock, for every month when dues are not paid, is reasonable.—*Roberts v. American Building & Loan Ass'n* (Ark.) 1085.

Fines imposed by building associations on their members for defaults in making payments, if reasonable in amount, will be enforced in equity, independently of statutory provisions.—*Roberts v. American Building & Loan Ass'n* (Ark.) 1085.

The equitable rule stated for computing the amount due on a building association loan, on a foreclosure against a borrowing member in default, and a cancellation of his stock.—*Roberts v. American Building & Loan Ass'n* (Ark.) 1085.

Suit against association by the supervisor authorized by Act March 22, 1895, may be conducted by counsel other than the attorney general.—*State ex rel. Walker v. Flitcraft* (Mo.) 675.

Under Act March 22, 1895, the state treasurer, as ex officio supervisor of building and loan associations, can dismiss a suit against such an association without the knowledge or consent of the attorney general.—*State ex rel. Walker v. Flitcraft* (Mo.) 675.

A borrowing member is not entitled, on the insolvency of the association, to have the amount of dues paid in applied in payment of his debt.—*Price v. Kendall* (Tex. Civ. App.) 810.

In an action by the association's receiver to recover a debt due from a member to the asso-

ciation, it was *held* that defendant was not entitled to apply the amount of dues paid in and interest thereon, in part payment, the balance of the debt not being tendered.—*Price v. Kendall* (Tex. Civ. App.) 810.

Stockholder is not entitled to apply stock payments on a loan.—*Pioneer Savings & Loan Co. v. Cannon* (Tenn. Sup.) 386.

Contract of foreign loan company *held* not affected by subsequent legislation relating to filing of such company's charter.—*Pioneer Savings & Loan Co. v. Cannon* (Tenn. Sup.) 386.

A note executed to a loan association providing for 5 per cent. interest and 5 per cent. premium *held* not usurious.—*Pioneer Savings & Loan Co. v. Cannon* (Tenn. Sup.) 386.

Building Contracts.

See "Contracts."

Burden of Proof.

See "Evidence."

BURGLARY.

Evidence examined, and *held* insufficient to support a conviction.—*Starchman v. State* (Ark.) 940.

Where a safe had been blown open with dynamite, evidence that, under a search warrant, drills and dynamite had been found in defendant's house, was admissible.—*Starchman v. State* (Ark.) 940.

An instruction as to the effect of possession of the stolen property *held* a charge on the evidence.—*Scott v. State* (Tex. Cr. App.) 276.

By-Laws.

Of building association, see "Building and Loan Associations."

CANCELLATION OF INSTRUMENTS.

Insurance policies, see "Insurance."

A deed by a woman of 80 to her daughter of all her property, to the exclusion of another daughter, set aside for undue influence.—*Martin v. Baker* (Mo.) 369.

Evidence examined, and *held* to entitle plaintiff to a rescission of a contract for the purchase of stock for fraud on tender of the stock.—*Robinson v. Dickey* (Tex. Civ. App.) 499.

A conveyance, fully executed and legal in itself, will not be set aside by a court of equity, at the suit of the grantor, because it was executed to assist the grantee in perpetrating a fraud.—*Walton v. Blackman* (Tenn. Ch. App.) 195.

To authorize a court to set aside a deed duly executed, on the ground of fraud, the proof must be clear and convincing.—*Walton v. Blackman* (Tenn. Ch. App.) 195.

One who had ample opportunity to examine the goods in exchange for which he conveyed land cannot have the deed rescinded because he overvalued the goods.—*Adams v. Pardue* (Tex. Civ. App.) 1015.

CARRIERS.

See, also, "Railroads."

Of goods.

The burden is on the last of connecting carriers to show that injuries to goods did not oc-

cur on its line.—*Louisville & N. R. Co. v. Tennessee Brewing Co.* (Tenn. Sup.) 392.

The last carrier is not liable for injuries to goods occurring before they reached it by reason of a defective car furnished by a preceding carrier.—*Louisville & N. R. Co. v. Tennessee Brewing Co.* (Tenn. Sup.) 392.

Act March 4, 1891, invalidating contracts which limit to less than two years the period in which suit may be brought thereon, applies to an interstate shipment.—*Galveston, H. & S. A. Ry. Co. v. Herring* (Tex. Civ. App.) 129.

The shipper of goods, after delivery and receipt of bill of lading, can make the delivery conditional on the payment of a draft.—*Louisville & N. R. Co. v. Hartwell* (Ky.) 183.

Where a consignor, after delivery to the carrier, forbids the delivery to the consignee, there is no presumption that the consignee is the owner of the goods.—*Louisville & N. R. Co. v. Hartwell* (Ky.) 183.

— Live-stock shipments.

Measure of damages for failure to deliver live stock at market on the day intended.—*Louisville & N. R. Co. v. Robinson* (Ky.) 6.

The measure of damages for delay in shipping cattle and failure to feed them in transit is the difference between the price actually brought and that which would have been secured if they had been delivered on time and properly fed.—*Missouri, K. & T. Ry. Co. of Texas v. Cobb* (Tex. Civ. App.) 500.

A contract for shipment of live stock which requires written notice of injury or claim for damages to be given by the shipper before the stock is unloaded, in order to charge the carrier with liability, is in violation of the constitutional provision prohibiting the limiting of liability, and void.—*Ohio & M. Ry. Co. v. Tabor* (Ky.) 18.

A provision of law prohibiting a carrier from limiting its common-law liability does not affect interstate commerce, and applies to contracts for shipments terminating in another state.—*Ohio & M. Ry. Co. v. Tabor* (Ky.) 18.

Carrier is responsible for damages resulting to a shipment of horses from a negligent delay, though the inherent propensities of the horses may have contributed to the result.—*Galveston, H. & S. A. Ry. Co. v. Herring* (Tex. Civ. App.) 129.

When carrier responsible for damages resulting to a shipment of live stock, though the cars were on a connecting line when the injury occurred.—*Galveston, H. & S. A. Ry. Co. v. Herring* (Tex. Civ. App.) 129.

Railway company is not liable for death of stock from disease contracted from stock escaping from its cars, unless negligence is shown.—*Selwege v. St. Louis & S. F. Ry. Co.* (Mo.) 652.

Of passengers.

One procuring a first-class limited ticket *held* entitled to maintain an action for forcible ejection on taking the cars the following day.—*Louisville & N. R. Co. v. Gaines* (Ky.) 174.

A carrier of passengers is not liable for an injury to a passenger occasioned by a fellow passenger accidentally, and which the carrier had no reason to anticipate.—*Galveston, H. & S. A. Ry. Co. v. Long* (Tex. Civ. App.) 485.

For negligence in failing to stop a train at a station, whereby a passenger was carried beyond her destination, a railroad company is liable in compensatory damages only.—*Louisville & N. R. Co. v. Jackson* (Ky.) 173.

Evidence that a passenger on defendant's train was injured while passing from one car to another considered, and *held* insufficient to sustain a recovery by plaintiff.—*Choate v. San Antonio & A. P. Ry. Co.* (Tex. Sup.) 247.

A passenger alighting from a moving train held guilty of contributory negligence.—*Williams v. St. Louis S. W. Ry. Co.* (Tex. Civ. App.) 329.

In an action for injuries to a passenger, where her evidence raised the question of contributory negligence, held, that a charge that, if she was injured by failure to use reasonable care, she could not recover, should have been given.—*Gulf, C. & S. F. Ry. Co. v. Flatt* (Tex. Civ. App.) 1029.

The declarations of a brakeman when ejecting a passenger from a train are not competent to prove that he acted under orders from the conductor.—*Lyons v. Texas & P. Ry. Co.* (Tex. Civ. App.) 1007.

Where an open street car was of the usual construction, held error to charge that the space between the fender over the wheels and the side of the car rendered defendant liable, if plaintiff was injured thereby.—*Thompson v. Metropolitan St. Ry. Co.* (Mo.) 625.

Measure of damages for compelling a passenger to pay more than the regular fare between two stations determined.—*Courts v. Louisville & N. R. Co.* (Ky.) 548.

CEMETERIES.

The owner of a cemetery lot may maintain a bill in equity against the association for failure to keep the walks, etc., in proper repair.—*Houston Cemetery Co. v. Drew* (Tex. Civ. App.) 802.

Certificate.

Of acknowledgment, see "Acknowledgment."

CERTIORARI.

Under Const. art. 6, § 3, certiorari will issue to review the action of a lower court issuing a writ of habeas corpus to prisoners held under sentence of death.—*State ex rel. Walker v. Dobson* (Mo.) 238.

That petitioner on certiorari to the board of equalization reads in evidence from a so-called bill of exceptions signed by the board does not make it a part of the record.—*Ward v. Board of Equalization of Gentry County* (Mo.) 648.

On certiorari there can be reviewed only such matters as appear from the face of the record, and go to the jurisdiction of the tribunal to which the writ is sued out.—*Ward v. Board of Equalization of Gentry County* (Mo.) 648.

Chancery.

See "Equity."

Change of Venue.

See "Criminal Law"; "Venue."

CHARITIES.

A gift in trust for a certain unincorporated church held invalid for indefiniteness.—*Jones v. Green* (Tenn. Ch. App.) 729.

CHATTEL MORTGAGES.

Reformation for mistake, see "Reformation of Instruments."

A lien of a mortgage held superior to that of a creditor of the mortgagor garnishing money due from a purchaser of the mortgaged chattels.—*New Albany Woolen Mills v. Lewis* (Ky.) 12.

A chattel mortgage, though not filed "forthwith," is valid as against one becoming a cred-

itor of the mortgagor after such delayed filing.—*Maverick v. Bohemian Club* (Tex. Civ. App.) 147.

A verbal agreement between mortgagor and mortgagee to substitute other property for that covered by the mortgage is valid between the parties.—*Leeds v. Reed* (Tex. Civ. App.) 347.

Citation.

See "Process"

City.

See "Municipal Corporations."

Civil Damage Laws.

See "Intoxicating Liquors."

CLERKS OF COURTS.

A deputy clerk of court is not disqualified to take the affidavit and approve a bond for attachment merely because the clerk was a director and vice president of the bank that sued out the attachment.—*Laning v. Iron City Nat. Bank* (Tex. Civ. App.) 481.

Cloud on Title.

See "Quieting Title."

Collateral Attack.

On judgment, see "Judgment."

Collateral Security.

See "Pledges."

Collusion.

Effect on jurisdiction, see "Courts."

Color of Title.

See "Adverse Possession."

COMMERCE.

Rev. St. 1886, §§ 953, 954, prohibiting transportation through the state of Mexican, Cherokee, or Indian cattle, is an interference with interstate commerce.—*Selvege v. St. Louis & S. F. Ry. Co.* (Mo.) 652.

Commercial Paper.

See "Bills and Notes."

Commission.

Of broker, see "Brokers."

Commissioner.

Jury commissioners, see "Jury."

Common Carrier.

See "Carriers."

Common Law.

Bonds, see "Bonds."

Community Property.

See "Husband and Wife."

Comparative Negligence.

See "Negligence."

Compensation.

For land taken for public use, see "Eminent Domain."
Of broker, see "Brokers."
Of county recorder, see "Counties."
Of receiver, see "Receivers."

Competency.

Of evidence, see "Evidence."
Of juror, see "Jury."
Of witness, see "Witnesses."

Complaint.

See "Pleading."

COMPROMISE AND SETTLEMENT.

As consideration for note, see "Bills and Notes."
Authority of guardian to compromise claim in favor of wards, see "Guardian and Ward."

Where a settlement covering all legitimate demands is made, it is a bar to any further action thereon.—State v. Tomlin (Tenn. Ch. App.) 952.

Ignorance of law not induced by fraud will not relieve one from a settlement.—Ximenes v. Wilson County (Tex. Civ. App.) 127.

Condition.

In policies, see "Insurance."

Conditional Sales.

See "Sales."

Confession.

As evidence, see "Criminal Law."

Confirmation.

Of judicial sales, see "Judicial Sales."

Conflict of Laws.

What law governs assignment, see "Assignments for Benefit of Creditors."
—negotiable instruments, see "Bills and Notes."
—pleadings, see "Pleading."

Connecting Lines.

See "Carriers."

Consideration.

For contract, see "Contracts."

Consolidation.

Of railroads, see "Railroads."

CONSPIRACY.

Under Act March 30, 1889, relating to conspiracies against trade, proof merely that defendant was an agent, without proof that he had knowledge of the conspiracy, is insufficient.—Hathaway v. State (Tex. Cr. App.) 465.

Where the indictment, under an act relating to conspiracies against trade, does not charge defendant as principal, or that he acted for the trust, proof of such facts will not support

a conviction.—Hathaway v. State (Tex. Cr. App.) 465.

Constable.

See "Sheriffs and Constables."

CONSTITUTIONAL LAW.

Regulation of commerce, see "Commerce."
Special laws, see "Statutes."

Rev. Ord. St. Louis, c. 25, art. 6, § 1033, cl. 8, is unconstitutional, in that it invades the right of personal liberty.—Ex parte Smith (Mo.) 628.

Act 1895, c. 137, §§ 2, 3, held unconstitutional as not due process of law.—Johnson v. Hudson (Tenn. Sup.) 380.

Under the constitution of 1849 and the later constitution, the legislature had power to pass Gen. St. § 2781, providing for the removal of city officers by the board of aldermen "sitting as a court."—Gibbs v. Board of Aldermen of City of Louisville (Ky.) 524.

Rev. St. 1889, § 3931, relating to dealing in options, is constitutional.—State v. Gritzner (Mo.) 39.

Act April 1, 1891 (Laws 1891, p. 172), is not in violation of Const. art. 2, § 28.—State ex rel. Kansas City & S. Ry. Co. v. Slover (Mo.) 50.

Rev. Pen. Code 1895, arts. 973, 974, making it a misdemeanor to build a fence three miles long without a gate, held unconstitutional.—Dilworth v. State (Tex. Cr. App.) 274.

Act 1895, c. 182, making it a misdemeanor in certain counties to allow live stock to run at large, is unconstitutional.—Sutton v. State (Tenn. Sup.) 697.

Under the provision of the bill of rights that in all criminal prosecutions the accused shall be confronted with the witnesses, the reading of the testimony of witnesses against an accused given on a former trial or a preliminary hearing cannot be legally authorized.—Cline v. State (Tex. Cr. App.) 1090.

A court cannot be given concurrent jurisdiction over offenses against the state without allowing appeals from its judgments as allowed by the constitution.—Leach v. State (Tex. Cr. App.) 471.

Acts 1895, c. 127, providing for the protection of fish, held constitutional.—Peters v. State (Tenn. Sup.) 390.

New Rev. Civ. St. 1895, art. 5049, is unconstitutional, so far as it applies to an agent soliciting orders for a foreign corporation.—Ex parte Holman (Tex. Cr. App.) 441.

Construction.

Of contract, see "Contracts."
Of wills, see "Wills."

CONTEMPT.

A refusal to obey an order granted without jurisdiction does not render the person so refusing liable for contempt.—St. Louis, K. & S. R. Co. v. Wear (Mo.) 357.

A writ directing a receiver to take possession of certain property, and to arrest for contempt persons refusing to surrender it not parties to the action, held erroneous.—St. Louis, K. & S. R. Co. v. Wear (Mo.) 357.

Contest.

Of will, see "Wills."

CONTINUANCE.

In criminal cases, see "Criminal Law."

A showing of diligence in obtaining absent witnesses *held* necessary to justify a continuance.—Clark v. State (Tex. Cr. App.) 273.

CONTRACTS.

See, also, "Assignments for Benefit of Creditors"; "Bailment"; "Bills and Notes"; "Bonds"; "Carriers"; "Chattel Mortgages"; "Deeds"; "Frauds, Statute of"; "Fraudulent Conveyances"; "Insurance"; "Landlord and Tenant"; "Master and Servant"; "Mortgages"; "Partnership"; "Pledges"; "Principal and Agent"; "Principal and Surety"; "Sales"; "Specific Performance"; "Usury"; "Vendor and Purchaser."

By city, see "Municipal Corporations."
Consideration of deeds, see "Deeds."
Construction of pledge, see "Pledges."
Establishment of boundaries, see "Boundaries."
For attorneys' services, see "Attorney and Client."

Measure of damages for breach, see "Damages."

Of hiring, see "Master and Servant."

Stipulation in contract for sale of beer that buyer would not sell goods not manufactured by seller *held* not void, as against public policy.—Fuqua v. Pabst Brewing Co. (Tex. Civ. App.) 479.

The statute defining and prohibiting trusts and conspiracies in restraint of trade has no application to contracts between principal and agent.—Welch v. Phelps & Bigelow Windmill Co. (Tex. Sup.) 71.

An error in computation under a contract, made from an agreed basis, may be corrected, though the contract provides that the computation made shall be final.—McEwen v. City of Nashville (Tenn. Ch. App.) 968.

A contract having provided that certain material to be furnished by plaintiff should be free from dust, plaintiff is entitled to recover for sifting the same, where the referee found that he did so under orders from defendant, in order that defendant might make certain experiments.—Steffen v. City of St. Louis (Mo.) 31.

The admission of evidence relating to another contract than that in suit *held* reversible error.—Davis v. Brown (Ky.) 534.

Consideration.

A contract *held* void as based on an illegal consideration.—Reed v. Brewer (Tex. Civ. App.) 99.

Defendant's promise to continue his agency for sale of plaintiff's goods until he should find a purchaser *held* a sufficient consideration for plaintiff's agreement to appoint such purchaser as his agent.—Deutschman v. Battaile (Tex. Civ. App.) 489.

Where an action was brought on notes based on an illegal consideration, an agreement by defendant to pay the same in consideration of dismissal of an action thereon does not render the contracts legal.—Reed v. Brewer (Tex. Civ. App.) 99.

Interpretation.

An abutting owner agreeing with a street contractor to pay his pro rata share of the cost of the improvement is personally liable on the contract.—Burton v. Laing (Tex. Civ. App.) 298.

Where a city has contracted to pay any damage which may accrue by reason of the placing of its standpipe on private property, it is liable for damages resulting from an overflow, re-

gardless of the question of its negligence.—Harter v. City of Marshall (Tex. Civ. App.) 294.

Contract to contribute \$5,000 to certain business *held* not a loan, so as to entitle plaintiff to recover it on severing his connection with the business.—Mack v. Wurmsr (Mo.) 221.

Contract for erection of buildings on adjoining lots *held* to be a several contract between the contractor and the two property holders.—City of Independence v. Ott (Mo.) 624.

A contract between two owners of lands and a building contractor *held* a several, and not a joint, contract.—City of Independence v. Ott (Mo.) 624.

A contract between an old corporation and the promoters of a new one construed, and *held* that the franchise and the property transferred to the promoters were not to be used to pay for stock of the new corporation.—Keating v. McCutcheon (Tex. Civ. App.) 597.

The fact that parties to a written instrument call it a "lease" is not conclusive.—St. Joseph & St. L. R. Co. v. St. Louis I. M. & S. Ry. Co. (Mo.) 602.

Contract in settlement of a loan from a building association construed, and *held* a release of the borrower's stock in such association.—Building & Loan Ass'n of Dakota v. Hamm (Tex. Civ. App.) 313.

Contribution.

Between devisees, see "Wills."

Contributory Negligence.

See "Negligence."

Conversion.

Wrongful conversion, see "Trove and Conversion."

Conveyances.

See "Chattel Mortgages"; "Deeds"; "Fraudulent Conveyances"; "Mortgages"; "Sales"; "Vendor and Purchaser."

CORPORATIONS.

See, also, "Banks and Banking"; "Building and Loan Associations"; "Carriers"; "Insurance"; "Municipal Corporations"; "Railroads"; "Telegraphs and Telephones."

Attachment against, see "Attachment."

Evidence examined, and *held* that the holder of certain corporate bonds acquired them without consideration.—Farmers' & Merchants' Nat. Bank v. Waco Electric Railway & Light Co. (Tex. Civ. App.) 131; Metropolitan Trust Co. v. Farmers' & Merchants' Nat. Bank, *Id.*

Foreign corporations other than those engaged in interstate commerce can be prohibited from transacting business without obtaining a permit.—Huffman v. Western Mortgage & Investment Co. (Tex. Civ. App.) 306.

In an action by a foreign corporation, the petition must allege compliance with statutory provisions.—Huffman v. Western Mortgage & Investment Co. (Tex. Civ. App.) 306.

A corporation cannot apply dividends due an individual stockholder to a debt due from a firm of which he is a member.—American Nat. Bank v. Nashville Warehouse & Elevator Co. (Tenn. Ch. App.) 960.

A corporation *held* not entitled to set off the dividends of a stockholder in payment of a debt due him to the corporation, where it had actual notice of the transfer of the stock.—American

Nat. Bank v. Nashville Warehouse & Elevator Co. (Tenn. Ch. App.) 960.

An agreement by stockholders to contribute pro rata to defray the corporate debts may be enforced by the corporation.—*Lillard v. Decatur Cotton Seed Oil Co.* (Tex. Civ. App.) 792.

A note given a foreign insurance company by its agents for uncollected premiums after passage of Act 1891, c. 122, § 3, was void, though the contract with the agents, made before the act, required them to be responsible for all premiums.—*New Hampshire Ins. Co. v. Kennedy* (Tenn. Sup.) 709.

The objection that the transfer of stock was not made to plaintiff on the books, *held* cured by the intervention of the person whose name appears on the books.—*Houston Cemetery Co. v. Drew* (Tex. Civ. App.) 802.

A petition by stockholders for the appointment of a receiver for the corporation *held* to excuse complainants from seeking redress through the corporation itself.—*Houston Cemetery Co. v. Drew* (Tex. Civ. App.) 802.

Where a bank advances money to a corporation for which a receiver is appointed, to pay its operating expenses, its claims rank with those of general creditors only.—*Farmers' & Merchants' Nat. Bank v. Waco Electric Railway & Light Co.* (Tex. Civ. App.) 131; *Metropolitan Trust Co. v. Farmers' & Merchants' Nat. Bank, Id.*

Preference between claims on earnings from operating an insolvent corporation by a receiver determined.—*Farmers' & Merchants' Nat. Bank v. Waco Electric Railway & Light Co.* (Tex. Civ. App.) 131; *Metropolitan Trust Co. v. Farmers' & Merchants' Nat. Bank, Id.*

An attaching creditor of an insolvent corporation in the hands of a receiver has no lien depriving the court of power to apportion the earnings of the property to the operating expenses.—*Farmers' & Merchants' Nat. Bank v. Waco Electric Railway & Light Co.* (Tex. Civ. App.) 131; *Metropolitan Trust Co. v. Farmers' & Merchants' Nat. Bank, Id.*

Corroboration.

Of accomplice's testimony, see "Criminal Law."

COSTS.

In divorce case, see "Divorce."

Where a transcript includes superfluous matter, the costs therefor should be taxed against the appellant.—*Stephenson v. Chappell* (Tex. Civ. App.) 482.

Where a part of the substantial issues in equity are found for plaintiff, the court can divide the costs.—*Bender v. Zimmerman* (Mo.) 210.

The taxation of costs will not be revised in the absence of a motion to retax.—*Pennsylvania Fire Ins. Co. v. Wagley* (Tex. Civ. App.) 997.

Though a mistake in a decree will be corrected on appeal, the costs of appeal will not be allowed appellant where the error was not called to the attention of the court below.—*Tinsley v. Houston Land & Trust Co.* (Tex. Civ. App.) 815.

Costs *held* properly charged to defendants, though they obtained an affirmative judgment.—*McFalls v. Brown* (Tex. Civ. App.) 1110.

Counsel.

See "Attorney and Client."

Counterclaim.

See "Set-Off and Counterclaim."

COUNTIES.

See, also, "Highways"; "Municipal Corporations."

Warrants for past indebtedness, though valid, cannot be paid from the revenue provided for current expenses, until all warrants drawn for expenses of the year for which the tax was levied have been paid.—*State ex rel. Kirtley v. Schell* (Mo.) 206.

County warrants issued for legitimate expenses of the county, and within the levy, are not invalid because the county fails to collect sufficient from the levy to pay all warrants issued.—*State ex rel. Kirtley v. Schell* (Mo.) 206.

A county recorder, under Rev. St. 1889, § 7450, *held* entitled as a matter of right to an amount sufficient to pay necessary assistants.—*State, to Use of Vernon County, v. King* (Mo.) 681.

Evidence in an action against a recorder to recover excess over his salary examined, and *held* not to show anything due the county.—*State, to Use of Vernon County, v. King* (Mo.) 681.

Failure of county recorder to keep an account of his fees as required by Rev. St. 1889, § 7450, casts on him the burden of showing such amount.—*State, to Use of Vernon County, v. King* (Mo.) 681.

An appropriation of money for an exhibit of the county resources at the Tennessee Centennial Exposition under Acts 1895, c. 25, is an appropriation for a county purpose within the constitution.—*Shelby County v. Tennessee Centennial Exposition Co.* (Tenn. Sup.) 694.

The validity of Act 1895, c. 25, authorizing appropriation by counties for the Tennessee Centennial Exposition, is not affected by the fact that the exposition is not to be had within the territorial limits of any particular county, nor by the extension of the time of the exposition to 1897.—*Shelby County v. Tennessee Centennial Exposition Co.* (Tenn. Sup.) 694.

Court of Civil Appeals.

See "Courts."

COURTS.

See, also, "Judges."

Improper remarks by court, see "Criminal Law."

Under Const. art. 5, § 1, the legislature cannot give a municipal court concurrent jurisdiction with state courts over violations of state laws.—*Leach v. State* (Tex. Cr. App.) 471.

When local court has jurisdiction of a wrong committed in a foreign state.—*Mexican Cent. Ry. Co. v. Mitten* (Tex. Civ. App.) 282.

Where, after the dismissal of a suit to wind up a corporation, another court has acquired jurisdiction of the same subject-matter, and a receiver appointed by it is rightfully in possession of the property of the corporation, the suit will not be reinstated in the first court.—*State ex rel. Walker v. Flitcraft* (Mo.) 675.

Courts will not take jurisdiction of a collusive suit.—*State ex rel. Hahn v. City of Westport* (Mo.) 663.

A court which examines and orders filed a bill for a receiver of a railroad company acquires exclusive jurisdiction over the property of the corporation from that time, where it is followed by the appointment of the receiver as prayed.—*Riesner v. Gulf, C. & S. F. Ry. Co.* (Tex. Sup.) 53.

The court of criminal appeals has no jurisdiction of an appeal from the judgment on a mo-

tion by a district attorney against a sheriff and the sureties on his bond to pay certain moneys collected by the sheriff.—*Russell v. State* (Tex. Cr. App.) 1070.

The court of criminal appeals, except in extraordinary cases, will not grant original writs of *habeas corpus*.—*Ex parte Lambert* (Tex. Cr. App.) 81.

The county court while in session need not, from day to day, make orders of adjournment.—*Commonwealth v. Howard* (Ky.) 557.

Under Gen. St. c. 28, art. 17, §§ 6, 7, the entire time the county court is in session may be treated as one day, and a single adjournment order made at the end of that time.—*Commonwealth v. Howard* (Ky.) 556.

The decision of the federal supreme court as to the violation of the federal constitution by a state statute is binding on the state courts.—*State v. Hernando Ins. Co.* (Tenn. Sup.) 721; *Same v. Bluff City Ins. Co., Id.*

The decision of the federal supreme court determining that the decisions of a state court holding a state statute a violation of the federal constitution have not become a rule of property, is binding on the state courts.—*State v. Hernando Ins. Co.* (Tenn. Sup.) 721; *Same v. Bluff City Ins. Co., Id.*

Supreme court.

A decision of the court of civil appeals on a question of fact is not reviewable by the supreme court.—*Warren v. City of Denison* (Tex. Sup.) 404.

The supreme court has no jurisdiction of an appeal from the court of civil appeals, on the ground of conflict with prior decisions, unless the conflict is well defined.—*Bassett v. Sherrod* (Tex. Sup.) 400.

Under Const. 1875, art. 6, § 12, as amended, the supreme court has jurisdiction by direct appeal of an action to which a city is a party.—*Steffen v. City of St. Louis* (Mo.) 31.

Under Rev. St. 1895, art. 941, on reversal by the court of civil appeals of an action for injuries on the ground that plaintiff was guilty of contributory negligence as a matter of law, the case may be taken to the supreme court.—*Lee v. International & G. N. R. Co.* (Tex. Sup.) 63.

A judgment of the court of civil appeals *held* not to practically settle the case so as to give the supreme court jurisdiction on error.—*Powell v. Texas & N. O. R. Co.* (Tex. Sup.) 72.

The supreme court will not entertain jurisdiction of a writ of error because of a conflict between the case and a prior decision of the court of appeals, where such latter case has been overruled.—*Sullivan v. Hartford Fire Ins. Co.* (Tex. Sup.) 73.

The supreme court *held* to have authority, where the surety on an appeal bond becomes insolvent, to require appellant to furnish a new bond, under pain of vacating the supersedeas.—*American Brewing Co. v. Talbot* (Mo.) 657.

COVENANT, ACTION OF.

To entitle a plaintiff to substantial damages for breach of a covenant for seisin, he must prove that the grantor was not seised of an indefeasible estate.—*Evans v. Fulton* (Mo.) 230.

The measure of damages for breach of a covenant for seisin, by which the grantee loses his purchase, where the consideration was paid in property, is the market value of such property, with interest.—*Evans v. Fulton* (Mo.) 230.

Covenant to keep in repair is not a covenant to rebuild.—*Leonard v. Read* (Tenn. Ch. App.) 581.

Covenants.

See "Deeds"; "Vendor and Purchaser." To repair, see "Landlord and Tenant."

Coverture.

See "Husband and Wife."

Credibility.

Of witness, see "Witnesses."

CRIMINAL LAW.

See, also, "Bail"; "Indictment and Information"; "Jury"; "Witnesses."

Obstruction of highway, see "Highways." Particular crimes, see "Assault and Battery"; "Burglary"; "Conspiracy"; "False Personation"; "False Pretenses"; "Forgery"; "Gaming"; "Homicide"; "Incest"; "Larceny"; "Perjury"; "Rape"; "Seduction."

Where appellant, convicted of a crime, dies pending appeal, the appeal abates.—*Hardin v. State* (Tex. Cr. App.) 82.

A motion to quash which does not state the grounds is properly overruled.—*Edgar v. State* (Tenn. Sup.) 379.

Arraignment and pleas.

Objection that one was not allowed to be present while the grand jury, that found an indictment against him, was being impaneled, is waived by a plea of not guilty.—*Hamilton v. State* (Ark.) 1054.

A conviction under the "small offense" act is not a bar to a subsequent indictment for the same offense where the judgment of conviction was void for failure to assess the proper fine.—*State v. Layne* (Tenn. Sup.) 390; *Same v. Spriggs, Id.*

A regular and proper conviction under the act relating to "small offenses" may be pleaded in bar to an indictment for the same offense.—*State v. Layne* (Tenn. Sup.) 390; *Same v. Spriggs, Id.*

A verdict, defective because it failed to state the degree of homicide of which defendant was found guilty, and a judgment rendered thereon, which was reversed on appeal, do not constitute a former jeopardy.—*Carpenter v. State* (Ark.) 900.

Conduct of trial.

Under Cr. Code, § 185, trial of an indictment for felony may be fixed for the term of the court at which it was found.—*Holly v. Commonwealth* (Ky.) 532.

Where an absent witness came in before argument, but defendant did not request that he be examined, he cannot complain that he was deprived of his testimony, though the court had announced that he would hear no more testimony.—*Mitchell v. State* (Tex. Cr. App.) 456.

It is within the discretion of the court to permit authorities to be read to the jury.—*Phipps v. State* (Tex. Cr. App.) 753.

Code Cr. Proc. 1879, § 774, does not authorize the reading by the state in a criminal prosecution of a copy of testimony given by a witness on the preliminary hearing, though the witness has since died.—*Cline v. State* (Tex. Cr. App.) 1099.

Right of counsel for defendant, on defense of insanity, to open and close, determined.—*Shirley v. State* (Tex. Cr. App.) 267.

A conviction will not be reversed because of remarks of the district attorney, it not appearing that defendant was prejudiced, and the jury being instructed to disregard them.—*Schroeder v. State* (Tex. Cr. App.) 94.

An order limiting defendant's counsel to five minutes more in which to close *held* not prejudicial.—*Scott v. State* (Tex. Cr. App.) 276.

Certain remarks of the district attorney as to the enforcement of the rule relative to the exclusion of witnesses, while not proper, were not prejudicial.—*Trotter v. State* (Tex. Cr. App.) 278.

Remarks of counsel will not be reviewed where no request was made for an instruction directing the jury to disregard the same.—*Trotter v. State* (Tex. Cr. App.) 278.

Remarks to the jury by the prosecuting attorney to the effect that defendant had committed other crimes may be prejudicial.—*Bennett v. State* (Ark.) 947.

A new trial is properly refused because of remarks of the prosecuting attorney, where no exception was reserved thereto.—*Epson v. State* (Tex. Cr. App.) 584.

Remarks of prosecuting attorney, intimating a motive for the crime, *held* not ground for a reversal, where the evidence justified a verdict of guilty.—*Massie v. Commonwealth* (Ky.) 550.

Remark of the court, in overruling an objection to testimony as to character, that there is no higher evidence of good character than that it has never been discussed, is erroneous.—*McCullar v. State* (Tex. Cr. App.) 585.

An objection to a hypothetical question as not containing the full testimony will not be considered, defendant's remedy having been to propose a question.—*Shirley v. State* (Tex. Cr. App.) 267.

Venue.

The venue need not be proved beyond a reasonable doubt.—*Wilson v. State* (Ark.) 842.

It is not necessary to summon a special venire before change of venue can be had.—*Sims v. State* (Tex. Cr. App.) 256.

Objections to change of venue by state *held* properly overruled.—*Sims v. State* (Tex. Cr. App.) 256.

Where the prisoner has been arraigned, and has pleaded to the indictment before the venue is changed, a second arraignment and plea in the second county are unnecessary.—*Sims v. State* (Tex. Cr. App.) 256.

Where the prisoner was arraigned, and his plea entered, and the indictment read to the jury, before venue was changed, and, by mistake, the indictment was not read to the jury in the second county until after defendant's evidence was in, *held* not error to fail to require a reiteration of the testimony after the reading of the indictment.—*Sims v. State* (Tex. Cr. App.) 256.

Continuance.

Application for continuance examined, and *held* to show lack of diligence.—*Mitchell v. State* (Tex. Cr. App.) 456.

Affidavit for continuance *held* insufficient to show diligence on the part of defendant in securing attendance of the witness.—*Snodgrass v. State* (Tex. Cr. App.) 477.

A continuance for an absent witness *held* properly denied, where it appeared that his testimony would probably be untrue.—*Snodgrass v. State* (Tex. Cr. App.) 477.

Where, on an application for continuance, defendant states that he would prove that, at the time of the alleged crime, he was at T., he cannot show on the trial that at such time he was at P.—*Hudson v. State* (Tex. Cr. App.) 452.

Application for continuance for absent witness *held* not to show diligence.—*Hudson v. State* (Tex. Cr. App.) 452.

A continuance for absent witnesses *held* properly denied, on the ground that they prob-

ably would not testify as alleged.—*Hudson v. State* (Tex. Cr. App.) 452.

A continuance for the arrival of a witness, no showing being made as to the materiality of his testimony, is not error.—*Williamson v. State* (Tex. Cr. App.) 444.

A motion for further time to answer contradictory affidavits, on motion for new trial, *held* properly denied where not made until after a discussion of the motion.—*Lawrence v. State* (Tex. Cr. App.) 90.

An affidavit for continuance because of absent witnesses *held* insufficient, as it did not state the specific facts which the witness could prove.—*Shirley v. State* (Tex. Cr. App.) 267.

A continuance because of absent witnesses *held* improperly refused.—*Edmonson v. State* (Tex. Cr. App.) 270.

A denial of continuance for absence of witness is not error where it was not shown that he was within the jurisdiction of the court.—*Hamilton v. State* (Ark.) 1054.

It is not an abuse of discretion to deny continuance for further time to prepare for trial, where defendant has been in jail for several weeks.—*Hamilton v. State* (Ark.) 1054.

A continuance for absence of witness whose evidence is immaterial is properly denied.—*Hamilton v. State* (Ark.) 1054.

It was not error to deny a continuance on the ground of absent witnesses, where the facts as to which they would testify were testified to by other witnesses.—*Carpenter v. State* (Ark.) 900.

Evidence.

Evidence that defendant held a position of trust at a fair salary is incompetent to prove reputation.—*Howard v. State* (Tex. Cr. App.) 475.

Confessions to sheriff are inadmissible, over defendant's objection that he had not been cautioned at the time.—*Rodriguez v. State* (Tex. Cr. App.) 439.

In the absence of a witness, his testimony on preliminary examination cannot be used against accused at the final trial, when objected to.—*Cox v. State* (Tex. Cr. App.) 435.

Statement made by a witness on the trial of one accused of homicide may afterwards be introduced as original evidence on the trial of the witness for the same offense.—*Harris v. State* (Tex. Cr. App.) 88.

Testimony that witness heard others say that defendant had threatened the life of another, was hearsay.—*Woods v. State* (Tex. Cr. App.) 96.

Evidence of the demeanor of a person not under restraint when charged with a crime is admissible on his trial.—*State v. Hill* (Mo.) 223.

Evidence as to statements made by defendant *held* not error.—*Shirley v. State* (Tex. Cr. App.) 267.

Testimony that the state's witness had told the same story the morning after the homicide *held* inadmissible as original evidence.—*Riojas v. State* (Tex. Cr. App.) 268.

The state is not obliged to place on the stand one who was an eyewitness of the homicide.—*Trotter v. State* (Tex. Cr. App.) 278.

On a trial for forgery of a deed, evidence that the person for whose benefit the deed was forged asked another to obtain for him two blank deeds, being the act of co-conspirator in furtherance of the common design, was admissible.—*Bennett v. State* (Ark.) 947.

But such person's declaration in defendant's absence that defendant promised to make him a deed which would clear him, not being in fur-

therance of the common design, was not admissible.—*Bennett v. State* (Ark.) 947.

Testimony of the officer, when he arrested defendant from the description given him, is inadmissible to identify defendant.—*Mallory v. State* (Tex. Cr. App.) 751.

An objection to evidence that defendant had uttered other forged checks "because" they were not part of the *res gestæ* does not state as a fact that the evidence was not *res gestæ*.—*Mallory v. State* (Tex. Cr. App.) 750.

On an issue as to whether certain words could have been heard by a witness testifying thereto, evidence of an experiment to determine the question is admissible.—*Wilson v. State* (Tex. Cr. App.) 587.

Testimony of alleged conspirators *held* properly excluded, as it was not shown to refer to the conspiracy.—*Holly v. Commonwealth* (Ky.) 532.

Sufficiency of instruction as to the necessity of corroboration of an accomplice's testimony determined.—*Guyer v. State* (Tex. Cr. App.) 450.

A confession of defendant's accomplice, in his presence, not denied by defendant, *held* admissible.—*Green v. State* (Tenn. Sup.) 700.

In a prosecution for false swearing as to the age of a girl, to secure a marriage license, *held*, that the girl was defendant's accomplice, so as to require her testimony to be corroborated.—*Smith v. State* (Tex. Cr. App.) 586.

Instructions.

Charge *held* erroneous as on the weight of the evidence.—*Ball v. State* (Tex. Cr. App.) 448.

Evidence having been admitted as to the general character of defendant, it was not necessary to charge that such evidence was competent only to discredit his testimony.—*Holly v. Commonwealth* (Ky.) 532.

Instructions *held* sufficient in the absence of exceptions to the charge or request for further instructions.—*Marshall v. State* (Tex. Cr. App.) 86.

When instruction that jury must find beyond a reasonable doubt that defendant was a principal is sufficient without instructing them to acquit if she were an accomplice or an accessory.—*Harris v. State* (Tex. Cr. App.) 88.

An instruction *held* not a charge on the weight of evidence, and not assuming as a fact the matter in dispute.—*Files v. State* (Tex. Cr. App.) 93.

An instruction directing the jury to consider, in weighing defendant's evidence, other charges admitted in impeachment, *held* erroneous.—*Scott v. State* (Tex. Cr. App.) 276.

An instruction directing the jury to disregard certain evidence in passing on "the guilt or innocence" of defendant *held* error.—*Scott v. State* (Tex. Cr. App.) 276.

It is not error to charge the jury in considering defendant's testimony to take into consideration his interest in the result.—*Hamilton v. State* (Ark.) 1054.

Where the usual instruction as to reasonable doubt is given, it is not reversible error to charge that the evidence must exclude every other reasonable hypothesis than guilt.—*Lewis v. State* (Ark.) 689.

The fact that the court instructed on the subject of accomplices by mistake *held* not ground for reversal, where it subsequently charged to jury to disregard the prior instruction.—*Green v. State* (Tenn. Sup.) 700.

A request to charge as to the effect the jury might give to the bad character of deceased was properly refused.—*Carpenter v. State* (Ark.) 900.

An instruction on reasonable doubt was not erroneous.—*Carpenter v. State* (Ark.) 900.

Where the state introduces evidence of accomplices, a charge that a conviction cannot be had on their uncorroborated testimony should be given.—*Martin v. State* (Tex. Cr. App.) 587.

An instruction giving too much prominence to a certain portion of the evidence is erroneous.—*Wilson v. State* (Tex. Cr. App.) 587.

An instruction that if the jury believe from a "preponderance" of the evidence that defendant took certain cattle under the belief that he was the owner they should acquit, is erroneous.—*Lovejoy v. State* (Ark.) 575.

Custody and conduct of jury.

Allowing one juror to separate a short distance from the other jurors *held* not prejudicial.—*Holly v. Commonwealth* (Ky.) 532.

After retirement of a jury they cannot hear testimony other than that which has already been placed before them.—*Lorance v. State* (Tex. Cr. App.) 93.

Judgment and sentence.

A sentence of defendant the day after the verdict was not prejudicial, where he was allowed time to move for a new trial.—*Holly v. Commonwealth* (Ky.) 532.

Under Code Cr. Proc. 1895, § 840, where subsequent sentences were cumulated in the sentences only, and not in the judgments proper, the sentences were not void.—*Ex parte Crawford* (Tex. Cr. App.) 92.

Sentence on conviction of a less grade than a capital felony is a pre-requisite to appeal.—*Crow v. State* (Tex. Cr. App.) 93.

New trial.

Affidavit of juror *held* insufficient for the impeachment of the verdict.—*Snodgrass v. State* (Tex. Cr. App.) 477.

Statements of one juror to the jury that defendant had killed a certain man *held* misconduct, justifying a new trial.—*Mitchell v. State* (Tex. Cr. App.) 456.

A new trial will not be granted because a juror falsely stated that he was a householder and a freeholder.—*Williamson v. State* (Tex. Cr. App.) 444.

A new trial for absence of a witness as to a certain point *held* properly denied, on affidavits by such witness denying that he would testify as alleged.—*Williamson v. State* (Tex. Cr. App.) 444.

When it is cumulative, newly-discovered testimony is not ground for a new trial.—*Turner v. State* (Tex. Cr. App.) 87.

A new trial for newly-discovered evidence *held* improperly denied, where affidavits filed by the state show that the evidence is probably untrue.—*Lawrence v. State* (Tex. Cr. App.) 90.

Where it appears that the alleged newly-discovered evidence was known to the defendant before the trial, a new trial was properly denied.—*Anderson v. State* (Tex. Cr. App.) 97.

Permitting jurors to separate is not ground for a new trial.—*Hamilton v. State* (Ark.) 1054.

The fact that an admission by the state of the truth of the facts an absent witness would testify to fails to admit an uncontroverted fact is not ground for reversal.—*Phipps v. State* (Tex. Cr. App.) 753.

A statement by a juror to his fellow jurors during the progress of a trial that he was a member of a grand jury which indicted the defendant for another crime will vitiate their verdict of conviction.—*Ryan v. State* (Tenn. Sup.) 930.

Appeal and error.

Exceptions on refusal to sustain objections to questions will not be considered, where the answers, if made, are not shown.—*Snodgrass v. State* (Tex. Cr. App.) 477.

The asking of an improper question, which was not permitted to be answered, *held* not prejudicial error.—*Howard v. State* (Tex. Cr. App.) 475.

The admission of evidence to which no objection was made cannot be reviewed.—*Howard v. State* (Tex. Cr. App.) 475.

A charge that temporary insanity, induced by drink, would only mitigate the punishment, *held* not cause for reversal, where the proof did not show that defendant was insane when he committed the act.—*Howard v. State* (Tex. Cr. App.) 475.

The same strictness is required of the court, in stating the grounds on which evidence apparently erroneous was admitted, as is required of defendant in stating objections to admission of evidence.—*Ball v. State* (Tex. Cr. App.) 448.

On a trial for assault with intent to murder, where the verdict imposed the minimum sentence, possible error in denying a continuance for absence of witness whose testimony would have gone to mitigate the punishment was without prejudice.—*Ray v. State* (Tex. Cr. App.) 446.

Error in admitting evidence cannot be considered, where no exception was reserved.—*Cummings v. State* (Tex. Cr. App.) 442.

An appeal from an order in habeas corpus remanding defendant to await the action of the grand jury will be dismissed, where the grand jury has met and returned no indictment.—*Ex parte Davis* (Tex. Cr. App.) 441.

Where the record contains no motion or ground for new trial, the court can only look to the indictment and the testimony.—*Withers v. Commonwealth* (Ky.) 14.

A statement of facts not taken to the judge until 15 days after the adjournment of the court cannot be considered.—*Bryant v. State* (Tex. Cr. App.) 79.

Refusal of a continuance for absent witnesses cannot be reviewed unless the motion is in the record.—*Purdy v. State* (Tex. Cr. App.) 82.

Bills of exceptions must set out the circumstances attending the matters complained of, to enable the appellate court to review them.—*Harris v. State* (Tex. Cr. App.) 88.

A bill will be dismissed where the record contains neither the sentence nor notice of appeal.—*Simmons v. State* (Tex. Cr. App.) 95.

Where the bill of exceptions was not signed or filed until after term, the defect was not cured by a certificate from the judge that he had misplaced it.—*Riojas v. State* (Tex. Cr. App.) 268.

Admission of a statement by defendant before the examining magistrate will not be held reversible error on grounds recited in the bill of exceptions, where the bill as modified by the judge shows that such grounds did not exist.—*Briscoe v. State* (Tex. Cr. App.) 281.

Where the judge recuses himself when defendant's case is called, and a special judge is appointed, recalling the case *held* no error.—*Clark v. State* (Tex. Cr. App.) 273.

Where there was no objection to witness illustrating to the jury the position of certain footprints, the matter cannot be reviewed.—*Hamilton v. State* (Ark.) 1054.

The admission of a confession of an accomplice *held* harmless where the jury were instructed to disregard it.—*Green v. State* (Tenn. Sup.) 700.

An objection, raised for the first time on appeal, that the court granted a change of venue in the absence of accused, overruled.—*Green v. State* (Tenn. Sup.) 700.

Where the purpose for which evidence is offered is not obvious to enable the review of an order excluding it, the purpose must be stated in the bill of exceptions.—*Mallory v. State* (Tex. Cr. App.) 750.

The exclusion of evidence cannot be reviewed unless the bill of exceptions is approved by the trial judge.—*McCullar v. State* (Tex. Cr. App.) 585.

Cross Appeal.

See "Appeal and Error."

Cross Bill.

See "Equity."

Cross-Examination.

Of witness, see "Witnesses."

Crossing Accident.

See "Railroads."

Curators.

See "Executors and Administrators."

CUSTOMS AND USAGES.

Where goods are shipped by a bill of lading running to the order of the shipper, evidence of custom that title should pass to the purchaser *held* inadmissible.—*Charles v. Carter* (Tenn. Sup.) 396.

DAMAGES.

Civil damage laws, see "Intoxicating Liquors." For breach of covenant, see "Covenant, Action of."

For death through negligence, see "Death."

For injury to passenger, see "Carriers."

For libel or slander, see "Libel and Slander."

For taking of land for public use, see "Eminent Domain."

Measure of damages for wrongful attachment, see "Attachment."

Action on claimant's bond for trial of right to personal property as for liquidated damages.—*Fleming v. Stansell* (Tex. Civ. App.) 504.

Measure of damages to property resulting from a nuisance, where the damages are not permanent.—*City of San Antonio v. Mackey* (Tex. Civ. App.) 760.

In a personal injury case the court will not order a personal examination of the person injured, by physicians appointed by the court.—*Gulf, C. & S. F. Ry. Co. v. Pendery* (Tex. Civ. App.) 793.

Measure of damages on an indemnity given by a subcontractor to the contractor, where the contractor has compromised the claim against him, determined.—*Laing v. Hanson* (Tex. Civ. App.) 116.

The measure of damages for wrongful delivery to the carrier from the consignee, without requiring payment of a draft, cannot exceed the value of the goods.—*Louisville & N. R. Co. v. Hartwell* (Ky.) 183.

Complaint construed, and *held*, that plaintiff could show that he was compelled to take morphine, and to be under its influence, continually since the injury sued for.—*Missouri, K. & T. Ry. Co. v. Hanson* (Tex. Civ. App.) 289.

Plaintiff in a personal injury suit having pleaded that the injuries were permanent, *held*

entitled to show his reasonable expectancy of life.—*Texas & P. Ry. Co. v. Bigham* (Tex. Civ. App.) 1111.

In an action for injury to cattle, plaintiff may prove the extent of the damage, though he does not allege the market value of the cattle, or the measure of damages.—*Texas & P. Ry. Co. v. Bigham* (Tex. Civ. App.) 1111.

A petition for personal injuries *held* to justify the admission of evidence as to the extent of plaintiff's diminished capacity to perform labor, and as to the lessened value of his services.—*Texas & P. Ry. Co. v. Bigham* (Tex. Civ. App.) 1111.

Verdict for \$5,000 *held* not excessive for personal injuries.—*Mexican Cent. Ry. Co. v. Mitten* (Tex. Civ. App.) 282.

Order setting aside, as excessive, a verdict in favor of a servant for \$6,750, for loss of two fingers on his right hand, *held* proper.—*Louisville Water Co. v. Upton* (Ky.) 520.

When charge allowing a recovery for future suffering as an item of damages not erroneous.—*Mexican Cent. Ry. Co. v. Mitten* (Tex. Civ. App.) 282.

DEATH.

Of bailee, see "Bailment."

Of party, see "Abatement and Revival."

Petition in an action to recover the statutory forfeiture for a death occasioned by negligence of a street-car driver construed.—(*Meyer v. Southern Ry. Co.* (Mo.) 367.

Evidence that deceased proposed to work for witness for a certain sum is admissible to rebut plaintiff's evidence that deceased's earnings amounted to more than said sum.—*Galveston, H. & S. A. Ry. Co. v. Harris* (Tex. Civ. App.) 776.

Evidence that deceased squandered his earnings is admissible to contradict the testimony of plaintiff that deceased expended his wages in support of herself and his children.—*Galveston, H. & S. A. Ry. Co. v. Harris* (Tex. Civ. App.) 776.

A petition, in an action under Const. § 241, for the death of plaintiff's intestate, alleging that it was caused by the willful, gross, and reckless negligence of defendant, *held* sufficient.—*East Tennessee Tel. Co. v. Simms' Adm'r* (Ky.) 171.

In an action under Const. § 241, before the legislature provided as to whom any recovery should go, the petition need not allege that deceased left a wife and children.—*East Tennessee Tel. Co. v. Simms' Adm'r* (Ky.) 171.

In an action under Const. § 241, compensatory damages are recoverable.—*East Tennessee Tel. Co. v. Simms' Adm'r* (Ky.) 171.

Death by Wrongful Act.

See "Death."

Decedents.

Transactions with, see "Witnesses."

Declarations.

As evidence, see "Evidence."

Decree.

See "Equity"; "Judgment."

DEDICATION.

Where a city sells lots running to a common which remains unimproved for years, no

presumption is raised of a dedication of a right of way over such common.—*Hewitt v. City of Pulaski* (Tenn. Ch. App.) 878.

DEEDS:

See, also, "Fraudulent Conveyances"; "Vendor and Purchaser."

Acknowledgment, see "Acknowledgment."

As evidence, see "Evidence."

Cancellation, see "Cancellation of Instruments."

Estoppel by, see "Estoppel."

Of homestead, see "Homestead."

Reformation in equity, see "Reformation of Instruments."

Contract set out as a reservation in a deed *held* to be in legal effect simply a lease without further payment of rent.—*Leonard v. Read* (Tenn. Ch. App.) 581.

A deed *held* not void for failure to designate a grantee.—*Vineyard v. O'Connor* (Tex. Sup.) 424.

A deed examined, and *held* not invalid for want of a sufficient description.—*Vineyard v. O'Connor* (Tex. Sup.) 424.

The presumption is that the consideration recited in a deed was paid by the grantee.—*Atwell v. Watkins* (Tex. Civ. App.) 103.

A grantor cannot alter a deed after it has been delivered and recorded.—*Hancock v. Dodd* (Tenn. Ch. App.) 742.

Default.

Judgment by, see "Judgment."

Defective Appliances.

See "Master and Servant."

Delay.

In delivering message, see "Telegraphs and Telephones."

Delivery.

Of bills and notes, see "Bills and Notes."

Demand.

For payment of bills and notes, see "Bills and Notes."

Demurrer.

See "Pleading."

Deposit.

See "Banks and Banking."

DEPOSITIONS.

The deposition of one defendant without notice to another defendant is inadmissible against the latter.—*Zerkel v. Wooldridge* (Tex. Civ. App.) 499.

Objections by infant defendants to depositions, on the ground that the cause was not at issue, *held* not tenable.—*Harton v. Lyons* (Tenn. Sup.) 851.

Under Rev. St. 1879, art. 2233, *held* proper to refuse to suppress a cross interrogatory.—*New York, T. & M. Ry. Co. v. Green* (Tex. Civ. App.) 812.

It is not error to refuse to suppress a deposition because a witness refused to answer important cross interrogatories.—*New York, T. & M. Ry. Co. v. Green* (Tex. Civ. App.) 812.

DESCENT AND DISTRIBUTION.

See, also, "Dower"; "Executors and Administrators"; "Wills."

Widow *held* entitled to homestead in the real estate of her deceased husband without dissenting from his will.—*Wooten v. House* (Tenn. Ch. App.) 932.

Description.

In deed, see "Deeds."

Devise.

See "Wills."

Directing Verdict.

See "Trial."

DISMISSAL AND NONSUIT.

Refusal to permit the reinstatement of a case after a voluntary nonsuit *held* error.—*Lyons v. Texas & P. Ry. Co.* (Tex. Civ. App.) 1007.

Disqualification.

Of judge, see "Judges."

DIVORCE.

Divorce procured by husband does not affect his common-law right to rents and profits of the wife's general estate during coverture.—*Brasfield v. Brasfield* (Tenn. Sup.) 384.

Under Mill. & V. Code, § 3334, costs in action for divorce where wife's bill is dismissed and judgment is rendered on defendant's cross bill, *held* properly taxed against the wife.—*Brasfield v. Brasfield* (Tenn. Sup.) 384.

Where the papers in a suit have been lost, in the absence of anything showing that the service by publication was insufficient, it will be presumed that the court acquired jurisdiction.—*Finch v. Frymire* (Tenn. Ch. App.) 883.

Documents.

As evidence, see "Evidence."

DOWER.

Under Rev. St. 1889, § 4513, a petition for the admeasurement of dower must allege that the husband was seised, as to the land, of an estate of inheritance.—*Garrison v. Young* (Mo.) 662.

A widow in possession prior to the assignment of dower cannot attack a decree against her husband for the possession of the land because rendered after the death of the husband without revival.—*Smith v. Whitsett* (Tenn. Ch. App.) 1048.

Draft.

See "Banks and Banking."

Drunkards.

Sale of liquor to, see "Intoxicating Liquors."

Due Process of Law.

See "Constitutional Law."

Duress.

Payment of taxes under, see "Taxation."
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EASEMENTS.

A right of way over land of another is an interest in lands, which can only be created by grant.—*Long v. Mayberry* (Tenn. Sup.) 1040.

The use of a way over land of another in common with the owner does not constitute an adverse possession of the land.—*Long v. Mayberry* (Tenn. Sup.) 1040.

Ejection.

Of passenger, see "Carriers."

EJECTMENT.

See, also, "Adverse Possession"; "Quieting Title"; "Trespass to Try Title."

Ejectment will not lie when defendant's title is based on sheriff's deed given on the sale of lands for delinquent taxes under the revenue act of 1877.—*Vastine v. Laclede Land & Improvement Co.* (Mo.) 374.

ELECTIONS.

See, also, "Officers."

Judicial notice of time of presidential election, see "Evidence."

Under the election law, a general registration must be made in every presidential year prior to the fall election, though a previous registration was made for the general city election in the spring of the same year.—*Jackson County v. Arnold* (Mo.) 662.

EMINENT DOMAIN.

Measure of damages on the appropriation of a portion of one block used in common with two other blocks in connection with an elevator, as one property, determined.—*Union Elevator Co. v. Kansas City Suburban Belt Ry. Co.* (Mo.) 1071.

The right of an elevator company to cross a public levee with a railroad track not being exclusive, the crossing of such track by a railroad is not, as to the elevator company, a taking of private property.—*Union Elevator Co. v. Kansas City Suburban Belt Ry. Co.* (Mo.) 1071.

Where a city council grants a right of way over certain streets, the fee of which is in the owners of the majority of the front feet consenting thereto, there is no taking, within the constitution requiring compensation.—*Gray v. Dallas Terminal Railway & Union Depot Co.* (Tex. Civ. App.) 352.

EQUITY.

See, also, "Cancellation of Instruments"; "Divorce"; "Fraudulent Conveyances"; "Injunction"; "Mandamus"; "Mortgages"; "Partition"; "Quieting Title"; "Receivers"; "Reformation of Instruments"; "Specific Performance"; "Trusts."

Equitable set-off, see "Set-Off and Counterclaim."

A court of equity has jurisdiction to protect a person who is mentally incapacitated, by disease, age, or infirmity, against the undue influence or fraud of others.—*Edwards v. Edwards* (Tex. Civ. App.) 1060.

Complainant's laches *held* to have barred his right to have a deed rescinded.—*Bostick v. Haynie* (Tenn. Ch. App.) 856.

The right of reversioners to contribute their share of the price paid by the life tenant for the land at foreclosure sale *held* barred by

laches as against a bona fide purchaser.—Cockrill v. Hutchinson (Mo.) 375.

A bill filed for complainant and all others similarly situated does not make the latter parties.—Houston Cemetery Co. v. Drew (Tex. Civ. App.) 802.

One claiming a superior lien on attached property cannot in a cross bill traverse the attachment affidavit.—Farmers' & Merchants' Nat. Bank v. Waco Electric Railway & Light Co. (Tex. Civ. App.) 131; Metropolitan Trust Co. v. Farmers' & Merchants' Nat. Bank, Id.

In consolidated actions against a corporation, in which a receiver was appointed, and a trustee sought to foreclose a mortgage, a cross bill by one alleging that part of the property in the hands of the receiver was not that of the corporation, but of a third party, and praying for its release and for foreclosure of liens against it, is not demurrable.—Farmers' & Merchants' Nat. Bank v. Waco Electric Railway & Light Co. (Tex. Civ. App.) 131; Metropolitan Trust Co. v. Farmers' & Merchants' Nat. Bank, Id.

Error, Writ of.

See "Appeal and Error"; "Certiorari"; "Exceptions, Bill of"; "New Trial."

ESTATES.

See, also, "Deeds"; "Dower"; "Homestead"; "Life Estates"; "Remainders"; "Wills."

Tenant of an estate during life or widowhood cannot encroach upon the corpus, but may use the income therefrom as she pleases.—Wooten v. House (Tenn. Ch. App.) 932.

A tenant during widowhood may be allowed disbursements made from the corpus of the estate for her daughter, one of the remainder-men.—Wooten v. House (Tenn. Ch. App.) 932.

Where a part of an estate for widowhood consists of notes made to the husband, the widow, on termination of the estate by a second marriage, is not chargeable with interest on the notes which had not been collected by her.—Wooten v. House (Tenn. Ch. App.) 932.

When tenant of limited estate may use the corpus of it for the maintenance and education of her children.—Wooten v. House (Tenn. Ch. App.) 932.

When tenant for widowhood chargeable with all sums received by her, whether principal or interest.—Wooten v. House (Tenn. Ch. App.) 932.

ESTOPPEL.

To allege error, see "Appeal and Error."

To claim homestead, see "Homestead."

To set up breach of condition in policy, see "Insurance."

By deed.

A grantor in a warranty deed may acquire title at a sale for taxes accruing after the conveyance.—Foster v. Johnson (Tex. Sup.) 67.

Where a deed conveys an expectant interest with warranty, a subsequently acquired title inures immediately to the grantee.—Hale v. Hollon (Tex. Civ. App.) 288.

Recitals in a mortgage executed by a wife that the estate was her separate estate held not to estop her heirs from asserting the contrary.—Cockrill v. Hutchinson (Mo.) 375.

Illegal acts of land commissioners in granting certificates will not estop the state from recovering the land located thereunder.—Galveston, H. & S. A. Ry. Co. v. State (Tex. Civ. App.) 111.

In pais.

The maker of a note held not estopped to allege that the note had been fraudulently altered after he executed it.—Stephens v. Anderson (Tex. Civ. App.) 1000.

Heirs of an owner of property held to be estopped by the conduct of their decedent to claim title thereto as against an innocent purchaser from his widow.—Harding v. Montague (Tenn. Ch. App.) 958.

An heir is not entitled to claim the distributive share of himself and other heirs from whom he procured assignments, in the proceeds of notes executed by himself upon which suit was brought by one as administratrix, but to whom the notes had been given by the intestate as a gift.—Gibson v. Willis (Tenn. Ch. App.) 154.

A holder of bonds of an insolvent corporation is not estopped to deny want of consideration of other bonds not in the hands of innocent holders.—Farmers' & Merchants' Nat. Bank v. Waco Electric Railway & Light Co. (Tex. Civ. App.) 131; Metropolitan Trust Co. v. Farmers' & Merchants' Nat. Bank, Id.

When city estopped from denying validity of a contract contingent on its contract with other parties.—Leake v. City of Cleburne (Tex. Civ. App.) 97.

An offer to open an alley way, as a compromise to end litigation, does not bind the maker in a subsequent action to compel him to open such alley way.—Hewitt v. City of Pulaski (Tenn. Ch. App.) 878.

Where, on final accounting, a guardian files receipts for funds on hand from himself as trustee, and afterwards the cestui que trust receipts for moneys received from him as trustee, she is estopped, as against the sureties on his guardian's bond, from claiming that he never transferred the funds to himself as trustee.—State ex rel. Hospes v. Branch (Mo.) 226.

Estoppel must be pleaded to be proved.—Cockrill v. Hutchinson (Mo.) 375.

That one lived in the vicinity for 10 years after suit to subject certain lands to a decedent's debts, but never appeared or in any way claimed the land, though it was in possession of others, is a circumstance tending to show that whatever claim he had against the land was satisfied in the decedent's lifetime.—Doss v. Kincheloe's Adm'r (Ky.) 1127.

EVIDENCE.

See, also, "Depositions"; "Witnesses."

Burden of proving contributory negligence, see "Negligence."

—negligence, see "Negligence."

Harmless error in rulings on, see "Appeal and Error."

In action for wrongful death, see "Death."

In criminal cases, see "Burglary"; "Conspiracy"; "Criminal Law"; "False Personation";

"Forgery"; "Homicide"; "Larceny."

Newly-discovered, as ground for new trial, see "Criminal Law"; "Homicide."

Of adverse possession, see "Adverse Possession."

Of custom, see "Customs and Usages."

Of fraud, see "Fraud."

Of partnership, see "Partnership."

Of relationship of master and servant, see "Master and Servant."

Pleading and proof, see "Pleading."

Weight and sufficiency, see, also, "Appeal and Error."

The court takes judicial notice of the time when a presidential election is to be held.—Jackson County v. Arnold (Mo.) 662.

Proof that a letter containing a notice was properly addressed with postage prepaid, and deposited in the post office, held sufficient proof

of notice to the addressee.—*Gaar, Scott & Co. v. Stark* (Tenn. Ch. App.) 149.

Certain evidence *held* admissible to establish the identity of a person to whom a land certificate was issued.—*Brown v. Brown* (Tex. Civ. App.) 918.

On an issue as to which of two deceased persons of the same name was issued a military land certificate, evidence that one of said persons told witness that he was in the war of 1836 was admissible, though the certificate was for services rendered from 1837 to 1838.—*Brown v. Brown* (Tex. Civ. App.) 918.

The burden is on defendant to sustain a plea in abatement on the ground of privilege to be sued in the county of his residence.—*Hopson v. Caswell* (Tex. Civ. App.) 312.

Where a deed recites payment of the consideration by another than the grantee, the burden is on the grantee to show that he acquired the equitable title.—*Atwell v. Watkins* (Tex. Civ. App.) 103.

Hearsay evidence is inadmissible to prove age.—*State v. Marshall* (Mo.) 619.

The declarations of a deceased father to his daughter, that alleged community property was bought with his separate money, *held* inadmissible, as hearsay.—*Stephenson v. Chappell* (Tex. Civ. App.) 482.

In an action against a telephone company for negligence, *held* error to admit a letter written by defendant's secretary after the injury, to the effect that a dead wire caused it.—*East Tennessee Tel. Co. v. Simms' Adm'r* (Ky.) 171.

Best and secondary.

Certified copy of county record of land patent is admissible where the original patent cannot be produced and the general land office records are defective.—*Baldwin v. Roberts* (Tex. Civ. App.) 789.

The record of a chattel mortgage of another state cannot be proved by the testimony of the register of deeds in whose office it was filed.—*Jones v. Melindy* (Ark.) 22.

The court may permit the testimony of a witness given on a former trial to be read from the bill of exceptions made part of the record of the case, where it appears that the witness is absent from the state.—*Louisville Water Co. v. Upton* (Ky.) 520.

Opinion evidence.

On question of damages on the construction of a railroad, witnesses should only state the facts, and leave to the jury the question of the amount of damages.—*Union Elevator Co. v. Kansas City Suburban Belt Ry. Co.* (Mo.) 1071.

Testimony that a brakeman knew as a fact that children were attempting to cross the track *held* not objectionable as being opinion evidence.—*Gulf, C. & S. F. R. Co. v. West* (Tex. Civ. App.) 101.

An answer to the question, "In the conversation you had with defendant, did he not cross himself?" was inadmissible as being the opinion of the witness.—*Joyce v. State* (Ark.) 908.

The captain of a steamboat *held* competent to testify that a boat can strike an obstruction without the knowledge of those on board.—*Louisville Ins. Co. v. Monarch* (Ky.) 563.

A mechanical engineer *held* competent to testify as to the rate of speed at which certain grindstones could be safely run.—*Helfenstein v. Medart* (Mo.) 863.

When nonexpert testimony is not admissible.—*American Acc. Co. v. Fiddler's Adm'r* (Ky.) 528.

Expert testimony.

Residents of a city, testifying that they are acquainted with property therein, and its value, can testify as experts in an action for damages

by reason of such construction.—*Union Elevator Co. v. Kansas City Suburban Belt Ry. Co.* (Mo.) 1071.

To render expert testimony admissible, the conditions existing must be incorporated in the question.—*Culbertson v. Metropolitan St. Ry. Co.* (Mo.) 834.

The determination as to whether a witness is an expert is largely within the discretion of the court.—*Helfenstein v. Medart* (Mo.) 863.

Documents.

A sketch taken from a county map on file in the office of the public land commissioner *held* admissible in an action to recover certain public land.—*Rogers v. Mexia* (Tex. Civ. App.) 825.

An atlas on file in the office of the land commissioner containing a sketch delineating the land in controversy, *held* admissible on the issue of notice to defendants of a prior grant, in an action to recover certain public land.—*Rogers v. Mexia* (Tex. Civ. App.) 825.

An abstract of plaintiff's title as shown by the archives in the office of the public land commissioner *held* admissible in evidence in an action to determine title to certain public land.—*Rogers v. Mexia* (Tex. Civ. App.) 825.

When one claims under a trust deed, the deed, the trustee's deed, and a judgment ousting the grantor in the trust deed, *held* admissible to show title.—*Atwell v. Watkins* (Tex. Civ. App.) 103.

Pleading verified as required by law, and superseded by an amendment, is admissible in evidence against the party filing it.—*Barrett v. Featherstone* (Tex. Sup.) 245.

The averments of the original petition after amendment has been filed are not evidence against plaintiff.—*Southern Pac. Co. v. Wellington* (Tex. Civ. App.) 1114.

Parol evidence.

An agreement in a sale of land that the grantor should continue to collect the rents may be shown by parol evidence or by correspondence between the parties.—*Hereford Cattle Co. v. Powell* (Tex. Civ. App.) 1033.

Testimony as to land patent *held* not objectionable as varying records of general land office.—*Baldwin v. Roberts* (Tex. Civ. App.) 789.

Where an agreement to have insurance covering buildings conveyed transferred to the grantee is omitted from the deed by mistake, parol evidence is admissible to show such agreement.—*Lewis v. Turnley* (Tenn. Sup.) 872.

Where deed failed to state nature of the interest conveyed, parol evidence *held* admissible to show that the warranty of title, as well as the conveyance, covered merely a part interest.—*House v. Johnson* (Tex. Civ. App.) 918.

Where a written instrument is clear, parol evidence is inadmissible to show a different meaning, in the absence of any allegation of fraud or mistake.—*Building & Loan Ass'n of Dakota v. Hamm* (Tex. Civ. App.) 313.

Parol evidence *held* admissible to show consideration of deed.—*Missouri, K. & T. Ry. Co. of Texas v. Doss* (Tex. Civ. App.) 497.

Parol evidence is admissible to show that a second bond was not given in lieu of the first bond.—*Deutschman v. Battaile* (Tex. Civ. App.) 489.

Parol evidence is inadmissible to show that, by a contract providing that plaintiff "agrees to allow him a running credit on such sales to at least the amount of \$1,000," plaintiff agreed not to furnish credit to a greater amount than \$1,000.—*Fuqua v. Pabst Brewing Co.* (Tex. Civ. App.) 479.

Evidence that delivery of a check, after default, was under an agreement that the party

delivering it should not be liable on a previous indorsement, *held* admissible.—*Rogers v. Bedell* (Tenn. Sup.) 1096.

Examination.

Of witness, see "Witnesses."

EXCEPTIONS, BILL OF.

See, also, "Appeal and Error"; "Criminal Law."

A rule of court *held* to abridge the time given by statute to a litigant within which to settle and file a bill of exceptions.—*State ex rel. Hoffman v. Withrow* (Mo.) 896, 1038.

Excessive Damages.

See "Damages."

Exchange of Property.

Cancellation of deed given as consideration for exchange, see "Cancellation of Instruments."

Excusable Homicide.

See "Homicide."

EXECUTION.

Where a purchaser, on setting aside the sale, demands reimbursement, he must account for the rents and profits.—*House v. Robertson* (Tex. Sup.) 251.

Gross inadequacy of price will warrant setting aside a sale where the execution was irregularly issued.—*House v. Robertson* (Tex. Sup.) 251.

A sale for a grossly inadequate price will be set aside where there are any irregularities in such sale.—*Donham v. Hoover* (Mo.) 627.

Where the enforcement of an execution is sought to be restrained on the ground that the property levied on was a homestead, the writ need not be returnable to the court where the judgment was rendered, under *Sayles' Civ. St. art. 2880*.—*Leachman v. Capps* (Tex. Sup.) 250.

EXECUTORS AND ADMINISTRATORS.

See, also, "Descent and Distribution"; "Wills."

Under the probate law of 1848 giving the probate court jurisdiction to decree the specific performance of a contract by the decedent to convey land, the court had no jurisdiction to decree specific performance in an ex parte proceeding on petition of the administrator.—*Buchanan v. Park* (Tex. Civ. App.) 807.

Order on petition of an administrator to sell certain lands *held* not void for want of a sufficient description.—*Buchanan v. Park* (Tex. Civ. App.) 807.

An administrator appointed in Texas *held* not entitled, on payment of the proceeds to the executor in another state, to the statutory commission of 5 per cent.—*Spofford v. Minor* (Tex. Civ. App.) 771.

Taxes assessed during the lifetime of a testator are payable out of his estate.—*Wooten v. House* (Tenn. Ch. App.) 932.

Where a third person paid the funeral expenses of a testator, the executrix can show that she repaid him with money of the estate.—*Wooten v. House* (Tenn. Ch. App.) 932.

When tenant for widowhood within the rule that, on accounting, a guardian will be allowed such necessary expenditures, if clearly made

out, as a court of chancery would have ordered if applied to in the first instance.—*Wooten v. House* (Tenn. Ch. App.) 932.

Allegations of a petition *held* insufficient to show that plaintiff sued in the capacity of administrator.—*Wilson v. Hall* (Tex. Civ. App.) 327.

The administrator of a bailee has no right to the possession of the property bailed.—*Morris v. Lowe* (Tenn. Sup.) 1098.

A widow taking possession of property bailed to her husband, and claiming it as her own, is not his administratrix de son tort.—*Morris v. Lowe* (Tenn. Sup.) 1098.

A limited administrator may be appointed for the special purpose of representing an estate in certain litigation, and his appearance therein binds the estate.—*McKamy v. McNabb* (Tenn. Sup.) 1091.

On appeal from the approval of an administrator's final account, striking out objections and demurrers thereto without a hearing *held* erroneous.—*Rahm v. Bergstrom* (Tex. Civ. App.) 494.

EXEMPTIONS.

See, also, "Homestead."

From taxation, see "Taxation."

An exemption is a personal privilege, and can only be taken advantage of by the debtor himself.—*Howland v. Chicago, R. I. & P. Ry. Co.* (Mo.) 29.

An instruction that the forage exempt under Rev. St. 1896, art. 2395, subd. 15, must be "necessary" for home consumption, is erroneous.—*Stephens v. Hobbs* (Tex. Civ. App.) 287.

Expert Testimony.

See "Evidence."

Extinguishment.

Of lien, see "Mechanics' Liens."

Factorizing Process.

See "Garnishment."

FALSE PERSONATION.

Indictment under Mill. & V. Code, § 5621, *held* sufficient, though it did not state how such false personation would affect the interest of the party personated.—*Edgar v. State* (Tenn. Sup.) 379.

Evidence examined, and *held* sufficient to sustain conviction.—*Edgar v. State* (Tenn. Sup.) 379.

FALSE PRETENSES.

See, also, "Fraudulent Conveyances."

An indictment charging that defendant, by falsely representing that he owned a stud, induced prosecutor to part with \$75, *held* insufficient for failure to charge a sale and delivery of the stud.—*Cummings v. State* (Tex. Cr. App.) 266.

An indictment charging defendant with obtaining money on shipment of boxes falsely represented to contain tobacco suitable for cigars, *held* sufficient.—*Hafner v. Commonwealth* (Ky.) 549.

Federal Courts.

See "Courts."

Federal Question.

As ground for removal of cause, see "Removal of Causes."

Fees.

Of county officers, see "Counties."
Of jailer, see "Prisons."

Fellow Servant.

See "Master and Servant."

Feme Covert.

See "Husband and Wife."

Filing.

Mortgage, see "Chattel Mortgages."
Transcript of record on appeal, see "Appeal and Error."

Fire Escapes.

Duty of landlord to furnish, see "Landlord and Tenant."
Regulation by city ordinance, see "Municipal Corporations."

Fire Insurance.

See "Insurance."

Firm.

See "Partnership."

Fisheries.

Laws for protection of fish, see "Constitutional Law."

FIXTURES.

Machinery, the purchase price of which was secured by chattel mortgage, *held* not subject to a prior vendor's lien.—*Willis v. Munger Improved Cotton Machine Manuf'g Co.* (Tex. Civ. App.) 1010.

Right to remove machinery which was placed in a gin mill, and which was necessary for the operation thereof.—*Willis v. Munger Improved Cotton Machine Manuf'g Co.* (Tex. Civ. App.) 1010.

FORCIBLE ENTRY AND DETAINER.

A condition in a bond given by defendant in forcible detainer under Act Feb. 5, 1901, *held* to substantially comply with such statute.—*Richardson v. Harrell* (Ark.) 573.

Foreclosure.

Of mortgage, see "Mortgages."

Foreign Assignment.

See "Assignments for Benefit of Creditors."

Foreign Corporations.

See "Corporations."

Foreign Judgment.

See "Judgment."

Foreign Receiver.

See "Receivers."

FORGERY.

Forgery may be committed by making an instrument purporting to be the warranty deed of a person deceased, conveying the land to one who was on trial for taking wood from the land of another, and made for the purpose of being used on such trial.—*Bennett v. State* (Ark.) 947.

An indictment charging the forgery of a deed and acknowledgment thereof charges but one offense.—*Bennett v. State* (Ark.) 947.

An indictment charging that defendant did "unlawfully," etc., "forge a certain deed," etc., necessarily imports that it was done without authority.—*Bennett v. State* (Ark.) 947.

It is not necessary to set out the particular acts in which the forgery consisted.—*Bennett v. State* (Ark.) 947.

"Watkins" and "Wadkins" are idem sonans, so that there was no variance between an indictment for forging a deed to one, and the deed itself, purporting to convey the premises to the other.—*Bennett v. State* (Ark.) 947.

Defendant may put in evidence for comparison a letter written by him before the accusation was made, the letter being authenticated by his evidence.—*Mallory v. State* (Tex. Cr. App.) 751.

When indictment for forging a check payable to a teacher is insufficient, under *Sayles' Civ. St. art. 3776*.—*Caffey v. State* (Tex. Cr. App.) 82.

Under an indictment setting out the forged instrument and the intent to defraud, proof is admissible that the signature was that of a firm.—*Howard v. State* (Tex. Cr. App.) 475.

An indictment *held* sufficient, though it did not charge the intent to defraud a third person.—*Howard v. State* (Tex. Cr. App.) 475.

Held, that there was a fatal variance between an indictment for forgery of a deed, and the deed itself.—*Bennett v. State* (Ark.) 947.

On a trial for forgery of a deed, if the jury find that the deed was made to be used as good, and that there was a possibility of another's being injured thereby, a presumption of fraud would necessarily arise.—*Bennett v. State* (Ark.) 947.

Evidence that defendant was drunk about the time he passed a forged check *held* not to justify a charge on temporary insanity, there being no evidence of his condition when he signed the check.—*Howard v. State* (Tex. Cr. App.) 475.

Former Jeopardy.

See "Criminal Law."

FRAUD.

As ground for cancellation of instrument, see "Cancellation of Instruments."
Equity jurisdiction, see "Equity."

In an action based on fraud, testimony that defendants had been guilty of fraud in other transactions is inadmissible.—*Levy v. Lee* (Tex. Civ. App.) 300.

Instruction on an issue of false representation examined, and *held* sufficient.—*Barrett v. Featherstone* (Tex. Sup.) 245.

Measure of damages for false representations as to the quality of land purchased is the difference between the price and the actual value of the land, if as represented.—*Pruitt v. Jones* (Tex. Civ. App.) 502.

FRAUDS, STATUTE OF.

Taking possession and making improvements under an oral contract for the use of lands takes

it out of the statute of frauds.—Anderson v. Anderson (Tex. Civ. App.) 816.

A parol agreement to give regular work as long as an employé does faithful service is not within the statute.—Louisville & N. R. Co. v. Offutt (Ky.) 181.

In an action on a note, plaintiff, by failing to plead the statute of frauds in reply to defendant's answer, is estopped to assert it.—Hurt v. Ford (Mo.) 671.

Letters which show a valid and concluded agreement to extend a note for two years sufficiently comply with the statute of frauds.—Kearby v. Hopkins (Tex. Civ. App.) 503.

Agreement to extend time of payment for two years *held* within the statute.—Kearby v. Hopkins (Tex. Civ. App.) 503.

FRAUDULENT CONVEYANCES.

See, also, "Assignments for Benefit of Creditors."

A statement by a grantor in the presence of his grantee in reference to the fraudulent character of the deed, and the declaration of the grantee cautioning the grantor not to speak of it, were admissible to establish fraud in the execution of the deed.—Harton v. Lyons (Tenn. Sup.) 851.

Right of a purchaser from a husband to attack a prior deed to the same land executed by the husband to his wife to delay creditors.—Harton v. Lyons (Tenn. Sup.) 851.

Statements of a grantor, while in possession of the land after the execution of a deed, as to the fraudulent character of the deed, are competent as part of the *res gestæ* of the possession, and as explanatory thereof.—Harton v. Lyons (Tenn. Sup.) 851.

The heirs of a fraudulent grantee who has never been in possession cannot recover the land from one in possession who purchased it for value, without fraud on his part, from the fraudulent grantor who was in possession exercising ownership at the time of the purchase from him.—Harton v. Lyons (Tenn. Sup.) 851.

The statement of a grantee, while he held title of the land, as to the fraudulent character of the conveyance to him, was competent, as showing the intention of the maker and holder.—Harton v. Lyons (Tenn. Sup.) 851.

Whether insolvent debtor sold property to defraud his creditors, and whether vendee had notice of such intent, are questions of fact.—Armstrong Co. v. Elbert (Tex. Civ. App.) 139.

Evidence examined, and *held* insufficient to show that a trust deed was fraudulent as to creditors.—Ettlinger v. Kahn (Mo.) 37.

Evidence *held* insufficient to show a bona fide transfer of lands.—Brandenburgh v. Louisville Tin & Stove Co. (Ky.) 7.

Assignee of a mortgage, who was not a creditor and had no interest in the lands, cannot question the bona fides of a conveyance executed by the mortgagor before the assignment.—Kearby v. Hopkins (Tex. Civ. App.) 503.

Under Rev. St. 1895, art. 2545, a gift is void, though the grantor has sufficient property to pay his debts, where it is concealed.—Walker v. Loring (Tex. Sup.) 246.

In determining whether a voluntary grantor had sufficient property to pay his debts, an equity of redemption may be considered.—Walker v. Loring (Tex. Sup.) 246.

Futures.

Dealing in, see "Gaming."

Gambling.

See "Gaming."

GAME.

A body of water covering 1,040 acres, 1,000 of which is owned by defendant and 40 by another person, *held* not a private pond, within Acts 1895, c. 127.—Peters v. State (Tenn. Sup.) 399.

GAMING.

Notes given for profits of speculations on margins *held* to be based on gambling consideration, and that no recovery could be had thereon.—Mechanics' Sav. Bank & Trust Co. v. Duncan (Tenn. Ch. App.) 887.

Evidence examined, and *held* insufficient to show a dealing in options, within Rev. St. 1889, § 3931.—State v. Gritzner (Mo.) 39.

Sufficiency of the indictment under Pen. Code 1895, art. 377, for illegally dealing in futures.—Goldstein v. State (Tex. Cr. App.) 278.

An indictment under Rev. Pen. Code 1895, art. 377, for dealing in futures, *held* insufficient.—Cothran v. State (Tex. Cr. App.) 273.

GARNISHMENT.

See, also, "Attachment"; "Execution"; "Exemptions."

Under Code, §§ 3803, 3810, a garnishee is not liable where the debtor, his employé, was overdrawn in his accounts, and there was no balance in the employé's favor on the return day of the writ.—Capital City Bank v. Anderson Transfer Co. (Tenn. Ch. App.) 964.

Where defendant answers that the debt has been garnished in another state, the proper practice, before the debt has been condemned, is to render judgment against defendant, and award a stay until the entry of judgment in the garnishment action.—Howland v. Chicago, R. I. & P. Ry. Co. (Mo.) 29.

Process of garnishment runs against property which garnishee has obtained from the debtor by virtue of a sale in fraud of creditors, and plaintiff may attack the validity of the sale.—Armstrong Co. v. Elbert (Tex. Civ. App.) 139.

GIFTS.

For charitable purposes, see "Charities."

When one paying the consideration for land has the land deeded to his brother, no presumption of a gift arises.—Atwell v. Watkins (Tex. Civ. App.) 103.

GRAND JURY.

Under Sand. & H. Dig. § 2058, the presence in the grand-jury room of one who acted for the prosecuting attorney, but who was not shown to have said anything to influence the finding of the grand jury, was not ground to quash the indictment.—Bennett v. State (Ark.) 947.

Objections to irregularities in the formation of the grand jury are waived by pleading to the indictment.—Carpenter v. State (Ark.) 900.

The words "February term," indorsed on the list of grand jurors selected to serve at the January term, were not prejudicial to defendant, on a trial for murder.—Carpenter v. State (Ark.) 900.

Grant.

See "Public Lands."

As basis of easement, see "Easements."

GUARDIAN AND WARD.

Sureties on a guardian's bond *held* not relieved by a receipt given by him as trustee to himself as guardian on his final accounting.—*State ex rel. Hoopes v. Branch* (Mo.) 228.

Unless limited by statute a guardian has authority to compromise claims on behalf of his ward.—*Manion v. Ohio Val. Ry. Co.* (Ky.) 530.

The statute requiring leave of court for a guardian to compound claims or demands owing to his ward does not include an unliquidated claim for damages for a tort, and a settlement of such claim by a guardian is binding on the ward.—*Manion v. Ohio Val. Ry. Co.* (Ky.) 530.

A guardian cannot, without an order of court, release to the survivor of a community estate his wards' interest therein.—*Stephenson v. Chappell* (Tex. Civ. App.) 482.

HABEAS CORPUS.

Certiorari to review proceedings, see "Certiorari."

In habeas corpus the court will inquire into the constitutionality of a statute or ordinance on which judgment of imprisonment is founded.—*Ex parte Smith* (Mo.) 628.

Habeas corpus will not issue where the petition fails to state the fact concerning the imprisonment, and shows that petitioners are held under a judgment of conviction of murder by a legally constituted court, and under sentence of death.—*State ex rel. Walker v. Dobson* (Mo.) 238.

Harmless Error.

See "Appeal and Error."

In instructions, see "Trial."

Headright Certificate.

Power to locate, see "Powers."

Hearsay Evidence.

See "Criminal Law"; "Evidence."

HIGHWAYS.

Evidence *held* to show a prescriptive right in city to use land as a street.—*Waring v. City of Little Rock* (Ark.) 24.

Evidence *held* insufficient to support a conviction for willfully obstructing a public road.—*Myers v. State* (Tex. Cr. App.) 255.

Hiring.

See "Master and Servant."

HOMESTEAD.

A wife *held* entitled to recover the homestead conveyed by her and her husband, without refunding the purchase money, where she did not acknowledge the deed privily.—*McFalls v. Brown* (Tex. Civ. App.) 1110.

Assignee of contract with a building association, creating a lien on homestead, and of the homestead property, cannot set up homestead rights of the prior owners as a defense to an action on the contract.—*Paddock v. Texas Building & Loan Ass'n* (Tex. Civ. App.) 1008.

The head of a family may have a homestead in land lying apart from the tract on which he resides, where, with such residence lot, the value is \$1,000.—*First Nat. Bank v. Meachem* (Tenn. Ch. App.) 724.

Evidence of occupancy of a tract worth at least \$1,000 *held* notice that the occupant has adopted it as a homestead.—*First Nat. Bank v. Meachem* (Tenn. Ch. App.) 724.

A conveyance by the husband alone *held* void, not only as to the wife, but, so far as it affects the homestead, as to the husband also.—*First Nat. Bank v. Meachem* (Tenn. Ch. App.) 724.

Facts *held* not to take case out of general rule that tenant in common is not entitled to homestead.—*Simmons v. Leonard* (Tenn. Ch. App.) 846; *Robnett v. Same*, *Id.*

Homestead rights of wife *held* not affected by contract of suretyship by husband.—*Gober v. Smith* (Tex. Civ. App.) 910.

A husband and wife procuring a loan on oath that the land was not their homestead *held* not estopped thereby to claim such homestead.—*Watkins v. Markham* (Tex. Civ. App.) 145.

A widow who keeps and supports an orphan grandson 13 years old is the head of a family, and entitled to a homestead.—*Smith v. Wright* (Tex. Civ. App.) 324.

Evidence examined, and *held* insufficient to show that certain property was a homestead.—*Howell v. Stephenson* (Tex. Civ. App.) 302.

An executory sale by a widow of land in which she has a homestead right, and which she repurchased on nonpayment of the purchase money, and reacquired, will not be held to have extinguished her homestead right.—*Smith v. Wright* (Tex. Civ. App.) 324.

HOMICIDE.

Certain newly-discovered evidence *held* not cumulative, and ground for new trial.—*Riojas v. State* (Tex. Cr. App.) 268.

Murder.

Where the homicide was not committed in the commission of a felony, and no evil disposition is shown, there must have been an intent to kill, to constitute murder.—*Fitch v. State* (Tex. Cr. App.) 584.

Where no cruel disposition is shown, the intent to kill cannot be inferred from a killing with a stick four feet long and two inches in diameter.—*Fitch v. State* (Tex. Cr. App.) 584.

Where a conspiracy existed to commit an unlawful act, and in execution of it one defendant killed deceased, the other defendant would be guilty of murder.—*Mitchell v. State* (Tex. Cr. App.) 456.

Sufficiency of definition of murder in the second degree determined.—*Hamilton v. State* (Ark.) 1054.

It is not necessary that any length of time intervene between the intent to kill and the act of killing.—*Lawrence v. State* (Tex. Cr. App.) 90.

Manslaughter.

Where the testimony tended to show that the shooting was accidental, an instruction as to negligent homicide should be given.—*Mitchell v. State* (Tex. Cr. App.) 456.

A charge on manslaughter *held* sufficient, without stating the particular facts on which it was predicated.—*Lawrence v. State* (Tex. Cr. App.) 90.

Excusable and justifiable homicide.

A homicide is not justified where defendant provoked the difficulty and was forced to kill in self-defense.—*Hawkins v. State* (Tex. Cr. App.) 443.

Where defendant armed himself to prevent deceased from building a fence on his land, he was not deprived of the right of self-defense on the ground that he provoked the difficulty.—*Wilson v. State* (Tex. Cr. App.) 587.

Error cannot be predicated on an insufficient definition of self-defense where there was no evidence on which to base the instruction.—*Hamilton v. State* (Ark.) 1054.

Evidence examined, and *held* not to show that defendant acted in self-defense.—*Hamilton v. State* (Ark.) 1054.

Admissibility of evidence as to apprehensions of danger by a witness to the affray determined.—*Phipps v. State* (Tex. Cr. App.) 753.

An instruction on the guilt of defendant if he shot deceased without intending to save his own life or to protect his person, nor in defense of his habitation, *held* proper.—*Carpenter v. State* (Ark.) 900.

A request to charge on the right of defendant to assist his brother in resisting a mere trespass upon land to the extent of taking life was properly refused.—*Carpenter v. State* (Ark.) 900.

Where defendant was the aggressor, the fact that deceased started to draw his pistol, whereupon defendant shot him, does not make a case of self-defense.—*Lawrence v. State* (Tex. Cr. App.) 90.

Instructions as to defendant's right of self-defense *held* erroneous.—*McClurg v. Commonwealth* (Ky.) 14.

An instruction as to the effect of "considerable provocation" *held* erroneous as failing to instruct as to what constitutes legal provocation.—*McClurg v. Commonwealth* (Ky.) 14.

On trial for homicide in defending property, a charge exonerating defendant under certain circumstances if he was "rightfully in possession" *held* erroneous.—*Sims v. State* (Tex. Cr. App.) 256.

On trial for homicide committed in defending property, *held* that, if defendant shot deceased while deceased was in the act of unlawfully tearing down the property, the homicide was justifiable.—*Sims v. State* (Tex. Cr. App.) 256.

Assault with intent to kill.

Degree of provocation because of insult to female relative, necessary to reduce an assault with intent to kill to aggravated assault, determined.—*Garrett v. State* (Tex. Cr. App.) 454.

When charge on aggravated assault is unnecessary.—*Ray v. State* (Tex. Cr. App.) 446.

Where the evidence shows an assault with intent to kill, or justification, a charge as to aggravated assault was properly refused.—*Phillips v. State* (Tex. Cr. App.) 86.

Evidence *held* to sustain a conviction of assault with intent to murder.—*Thompson v. State* (Tex. Cr. App.) 265.

Indictment.

An indictment alleging that defendant "did unlawfully, willfully, feloniously, and of his malice aforethought, kill and murder," need not use the word "malicious."—*Hamilton v. State* (Ark.) 1054.

When indictment alleging that "the defendant did then and there with malice aforethought kill [deceased] by some means to grand jury unknown" is sufficient.—*Harris v. State* (Tex. Cr. App.) 88.

Evidence.

Certain testimony as to the killing *held* admissible.—*Williamson v. State* (Tex. Cr. App.) 444.

Certain evidence *held* properly excluded, as not showing a conspiracy so far as deceased was concerned.—*Holly v. Commonwealth* (Ky.) 532.

Statements made three hours after an assault with intent to murder are not a part of the *res gestae*.—*Ray v. State* (Tex. Cr. App.) 446.

A witness' statement that, immediately after the homicide, a certain person, who was with defendant at the time of the commission of the crime, was "watching witness," was not the expression of the witness' opinion, and, if not admissible as part of the *res gestae*, was of such a character that its withdrawal from the jury cured the error in admitting it.—*Trotter v. State* (Tex. Cr. App.) 278.

Exclusion of evidence of an officer as to his reason for following deceased to the place where he was killed *held* proper.—*Phipps v. State* (Tex. Cr. App.) 753.

When proof need not be offered that means of death was, as alleged in the indictment, unknown to the grand jury.—*Harris v. State* (Tex. Cr. App.) 88.

Evidence *held* to justify the admission of dying declarations.—*Sims v. State* (Tex. Cr. App.) 256.

Statements by deceased *held* admissible as dying declarations.—*Sims v. State* (Tex. Cr. App.) 256.

Trial.

Where the evidence of murder was clear, it was not error to instruct as to the crime of murder, though the killing was not by lying in wait.—*Massie v. Commonwealth* (Ky.) 550.

An instruction as to the consideration to be given by the jury to uncommunicated threats made by deceased was proper.—*Trotter v. State* (Tex. Cr. App.) 278.

One desiring an instruction as to murder in the second degree should present a correct instruction.—*Hamilton v. State* (Ark.) 1054.

Where the jury, after submission, requested that the instructions be repeated, and two instructions favorable to defendant were given them, it was not prejudicial error.—*Hamilton v. State* (Ark.) 1054.

An instruction on the guilt of defendant if deceased was killed in pursuance of a previous understanding between defendant and his brother, though defendant did not actually cause the death of deceased, *held* proper.—*Carpenter v. State* (Ark.) 900.

HUSBAND AND WIFE.

See, also, "Divorce"; "Dower"; "Homestead." Acknowledgment of deeds, see "Acknowledgment."

Assignment of wife's property for benefit of husband's creditors, see "Assignments for Benefit of Creditors."

Right to rents of wife's lands after divorce, see "Divorce."

Where deeds are made to either spouse during marriage, the property is presumed to be community property.—*Stephenson v. Chappell* (Tex. Civ. App.) 482.

When transfer of community property will be presumed to have been made to pay community debts.—*Baldwin v. Roberts* (Tex. Civ. App.) 789.

In an action to recover community personality which has been withheld, plaintiffs can recover on the basis of the value at the time of trial.—*Stephenson v. Chappell* (Tex. Civ. App.) 482.

In an action by maternal heirs to recover from heirs of the father, as survivor, their interest in community property withheld, defendants were properly refused credit for improvements during the period it was withheld.—*Stephenson v. Chappell* (Tex. Civ. App.) 482.

Common-law right of husband to rents and profits of wife's general estate during coverture is not affected by Act 1840-50, forbidding the sale of wife's estate to pay husband's debts.—*Brasfield v. Brasfield* (Tenn. Sup.) 384.

Act 1879, exempting rents and profits of a married woman's property from payment of debts of her husband, does not create a separate estate in such rents and profits.—*Brasfield v. Brasfield* (Tenn. Sup.) 384.

A joint mortgage by husband and wife of land not the separate estate of the wife, to secure an invalid note, *held* valid.—*Cockrill v. Hutchinson* (Mo.) 375.

A wife abandoned by her husband, and left without means, may sue alone for community property.—*Leeds v. Reed* (Tex. Civ. App.) 347.

In an action for personal injuries by a married woman, *held* that, though the husband was an unnecessary party, it was not reversible error to sue in the names of both.—*Texas & P. Ry. Co. v. Fuller* (Tex. Civ. App.) 319.

In an action for injuries to his wife, a husband can recover what he has actually lost, and another action lies for the wife for the pain and any expense she has been put to.—*Thompson v. Metropolitan St. Ry. Co.* (Mo.) 625.

A surviving wife may sue on a fire insurance policy on the homestead of the husband and wife.—*Pennsylvania Fire Ins. Co. v. Wagley* (Tex. Civ. App.) 997.

A cause of action for personal injuries to a wife, to recover which an action by the husband was pending at the time of his death, survives to the wife, and she may be substituted as a party.—*Corsicana Cotton Oil Co. v. Valley* (Tex. Civ. App.) 909.

Impeachment.

Of witness, see "Witnesses."

INCEST.

Where the evidence indicates that the act was committed with the consent of prosecutrix, a failure to instruct that defendant could not be convicted on her uncorroborated evidence was reversible error.—*Coburn v. State* (Tex. Cr. App.) 442.

Indemnity.

Evidence of, see "Evidence."

INDICTMENT AND INFORMATION.

Illegal liquor sales, see "Intoxicating Liquors." Motion to quash, see "Criminal Law."

Particular crimes, see "False Personation"; "False Pretenses"; "Forgery"; "Gaming"; "Homicide"; "Perjury."

Variance between indictment and proof, see "Forgery."

Where the first count of an indictment for carrying weapons states that the pistol was not, and the second count that it was, such as was used in the army, the state need not elect between them.—*State v. Bailey* (Ark.) 690.

Validity of an indictment found at a special term cannot be attacked on the ground that, had the case been tried at such term, it would have interfered with the regular term.—*Hamilton v. State* (Ark.) 1054.

St. Ky. § 1073 et seq., providing for the trial of misdemeanors by the county judge in certain cases, does not conflict with Const. § 12, declaring that no person for an indictable offense shall be proceeded against by information.—*Lowry v. Commonwealth* (Ky.) 1117.

One convicted of murder in the second degree cannot complain that the conviction was erroneous, on the ground that the evidence showed murder in the first degree.—*Briscoe v. State* (Tex. Cr. App.) 281.

Indorsement.

Of bills or notes, see "Bills and Notes."

Infants.

Degree of care required from, see "Negligence." Sale of liquor to minors, see "Intoxicating Liquors."

Information.

See "Indictment and Information."

Inheritance.

See "Descent and Distribution."

INJUNCTION.

Against execution, see "Execution."

Equity will not enjoin the building of a railroad in a street under an ordinance on the ground that it will damage abutting owners, but will leave them to their legal remedy.—*Gray v. Dallas Terminal Railway & Union Depot Co.* (Tex. Civ. App.) 352.

A suit on the bond is necessary on dissolution of the injunction, except where the enforcement of a judgment has been enjoined.—*Eastern Ry. Co. v. Brown* (Ky.) 555.

A plea in reconvention for damages is insufficient if it does not aver facts showing that the injunction caused the particular damages set out.—*Pipher v. Bissonet* (Tex. Civ. App.) 770.

In a suit by a widow to enjoin a writ of possession in favor of the heirs of her husband, it is insufficient to show only that by the husband's will the land was devised to other persons.—*Smith v. Whitsett* (Tenn. Ch. App.) 1048.

INSANE PERSONS.

An accommodation indorser of a renewal note *held* not relieved of liability because of his insanity, he having been sane when the prior note was executed.—*Memphis Nat. Bank v. Sneed* (Tenn. Sup.) 716.

Insolvency.

See "Assignments for Benefit of Creditors"; "Fraudulent Conveyances."

Of corporations, see "Corporations."

Of railroads, see "Railroads."

Instructions.

See "Criminal Law"; "Trial."

INSURANCE.

Description of property insured *held* sufficient.—*Hartford Fire Ins. Co. v. Moore* (Tex. Civ. App.) 146.

Acts of an agent *held* not to constitute a cancellation of a policy under its terms.—*Aetna Ins. Co. v. Rosenberg* (Ark.) 908.

An insurance company *held* liable for a loss accruing under its policy after its delivery, but before payment of the premium was demanded, though when demanded the premium was not paid and the policy was canceled.—*American Employers' Liability Ins. Co. v. Fordyce* (Ark.) 1051.

The recording of a mortgage is not notice of its existence to an insurance company having a policy on the property.—*United States Ins. Co. v. Moriarty* (Tex. Civ. App.) 948.

A mother-in-law *held* to have no insurable interest in the life of her son-in-law.—*Adams' Adm'r v. Reed* (Ky.) 568.

Creditor of member of a benefit association *held* to have no insurable interest in his life, within the provisions of the policy.—National Exch. Bank v. Bright (Ky.) 10.

Knowledge of insurance broker acting as soliciting agent that there were incumbrances on the property binds the company.—German Ins. Co. v. Everett (Tex. Civ. App.) 123.

An insurance company, having abandoned the property in the belief that it was not liable, cannot hold the insured for the expenses incurred in preparing for its recovery.—Louisville Ins. Co. v. Monarch (Ky.) 563.

Where a part of the property was recovered, the insurer is entitled to a reduction of the insurance due on a total loss.—Louisville Ins. Co. v. Monarch (Ky.) 563.

Conditions of policy.

When company estopped from avoiding a policy by reason of misdescription of property.—Hartford Fire Ins. Co. v. Moore (Tex. Civ. App.) 146.

Where a policy insured a dwelling house and household furniture, a false affidavit as to the furniture *held* not to avoid the entire policy.—Sullivan v. Hartford Fire Ins. Co. (Tex. Sup.) 73.

Under the iron-safe clause, neglect of the insured to preserve blotters containing record of sales of last day before stock burns does not preclude recovery.—Sun Mut. Ins. Co. v. Brown (Tex. Civ. App.) 591.

A substantial compliance only with the iron-safe clause is necessary.—Royal Ins. Co. v. Brown (Tex. Civ. App.) 591.

Failure to place blotters in a safe at night, whereby they are destroyed, is not a breach of a condition of a policy containing the iron-safe clause.—Pennsylvania Fire Ins. Co. v. Brown (Tex. Civ. App.) 590.

A waiver of certain breaches of conditions in a policy by an insurance company does not waive others of which it had no notice.—United States Ins. Co. v. Moriarty (Tex. Civ. App.) 943.

A general agent of an insurance company, with authority to make terms for insurance, countersign and deliver policies, and collect premiums, may waive a condition requiring payment of premiums in advance.—American Employers' Liability Ins. Co. v. Fordyce (Ark.) 1051.

The fact that a steamer did not carry a night crew on a day run does not show the steamer unseaworthy.—Louisville Ins. Co. v. Monarch (Ky.) 563.

Mutual benefit insurance.

An instrument executed by a member of a mutual benefit society *held* to convey no vested interest in the benefit certificate to the member's wife.—Handwerker v. Diermeyer (Tenn. Sup.) 869.

Where a member survived his wife, to whom his benefit certificate is payable, the certificate became his property.—Handwerker v. Diermeyer (Tenn. Sup.) 869.

Attempted change in the beneficiary *held* to be without effect.—National Exch. Bank v. Bright (Ky.) 10.

The issue as to whether an assessment was made is for the jury, where the benefit certificate was forfeited for nonpayment thereof.—Hannum v. Waddell (Mo.) 616.

A mutual benefit certificate is not forfeited by nonpayment of an assessment of which the member knows, where no notice has been given as provided by the by-laws.—Hannum v. Waddell (Mo.) 616.

A finding that a notice of an assessment in a mutual benefit association was never mailed

held warranted by the evidence.—Hannum v. Waddell (Mo.) 616.

Accident insurance.

A person unexpectedly shot, without provocation, *held* injured by accidental means.—American Accident Co. v. Carson (Ky.) 169.

A provision in an accident policy that it shall not cover intentional injuries inflicted by any one refers only to nonfatal injuries.—American Accident Co. v. Carson (Ky.) 169.

Under a policy providing that, if insured is injured in a more hazardous occupation, the beneficiary can recover only a reduced sum, the complaint must show that the insured was not killed in a more hazardous occupation.—American Accident Co. v. Carson (Ky.) 169.

Actions on policies.

Under a policy insuring against damages for which the insured may become legally liable, a discharge of such liability is not necessary to entitle the insured to recover.—American Employers' Liability Ins. Co. v. Fordyce (Ark.) 1051.

Complaint not alleging that plaintiff was the owner of the goods destroyed at the time of the fire is demurrable.—German Ins. Co. v. Everett (Tex. Civ. App.) 125.

Provision making an award a condition precedent to a suit on a fire policy *held* not to apply to a building totally destroyed, but only to personal property damaged or destroyed.—Doxey v. Royal Ins. Co. (Tenn. Ch. App.) 950.

Insurance policy construed, and *held*, that a provision making an award a condition precedent to a suit did not apply to a building destroyed, but only to personal property damaged or destroyed.—Doxey v. Royal Ins. Co. (Tenn. Ch. App.) 950.

The defense that an action on an insurance policy is prematurely brought is properly raised by demurrer.—Doxey v. Royal Ins. Co. (Tenn. Ch. App.) 950.

When evidence of the value as fixed by the agent and in the policy is admissible to show the value of the goods destroyed.—German Ins. Co. v. Everett (Tex. Civ. App.) 125.

Measure of damages for loss under policy providing that damages shall be estimated according to the value of the property at the time of the fire.—German Ins. Co. v. Everett (Tex. Civ. App.) 125.

Error in rendering a judgment for plaintiff in an action on a policy covering a building and personal property, where plaintiff had made a false statement in his application that he was sole owner of the personality.—Springfield Fire & Marine Ins. Co. v. Green (Tex. Civ. App.) 143.

In an action on a policy, where the answer alleged incompetency of the crew, evidence as to their competency was admissible.—Louisville Ins. Co. v. Monarch (Ky.) 563.

In an action on a policy, testimony as to statements by the company's agent regarding a clause relating to the recovery of the property *held* immaterial.—Louisville Ins. Co. v. Monarch (Ky.) 563.

In an action on a policy on a cargo, where it was alleged that the boat was sunk by the fraud of the owners, the captain can testify that the boat was not insured.—Louisville Ins. Co. v. Monarch (Ky.) 563.

In an action on a marine policy, the captain of the vessel can testify that the boat carried a sufficient crew.—Louisville Ins. Co. v. Monarch (Ky.) 563.

In an action on a marine policy, duplicates of evidence taken in an investigation by the hull inspectors *held* inadmissible.—Louisville Ins. Co. v. Monarch (Ky.) 563.

Evidence examined, and held to justify the insured in abandoning the property.—*Louisville Ins. Co. v. Monarch (Ky.)* 563.

Interpretation.

Of contracts, see "Contracts."

Interrogatories.

To deponent, see "Depositions."

Intestacy.

See "Descent and Distribution"; "Executors and Administrators."

INTOXICATING LIQUORS.

Whether a father who consents to the sale of liquor to his minor son was aggrieved thereby so as to be entitled to the statutory penalty is for the jury.—*Edgett v. Finn (Tex. Civ. App.)* 830.

Evidence that a plaintiff, suing on a liquor bond to recover for sale of liquor to his minor son, drank liquor with his son in other saloons, is admissible, as bearing on the question of whether he was aggrieved by such sale.—*Edgett v. Finn (Tex. Civ. App.)* 830.

Under Acts 1893, p. 178, §§ 5, 6, one licensed to sell liquor at a certain place cannot sell at another place unless his license is changed as provided by the statute.—*Travis v. State (Tex. Cr. App.)* 589.

Evidence held to show a sale to a minor.—*Horsky v. State (Tex. Cr. App.)* 443.

A delivery of liquors to another, to be paid for in other liquor in the future, is a sale.—*Keaton v. State (Tex. Cr. App.)* 440.

Where an indictment charges the sale and gift of liquor at a particular place, proof of sale and gift at any other place is a fatal variance.—*Bryant v. State (Ark.)* 188.

The local option law of Logan county (2 Acts 1889-90, p. 92, c. 549) is not repugnant to the new constitution, nor to the general act passed thereunder, nor have the penalties of the Logan county act been repealed.—*Lowry v. Commonwealth (Ky.)* 1117.

Complaint, in an action against a saloon keeper for damages, need not set out the prohibitory notice and return thereof.—*Riden v. Gremm (Tenn. Sup.)* 1097.

A saloon keeper selling liquors to an habitual drunkard, after notice, held liable to the wife for resulting injuries.—*Riden v. Gremm (Tenn. Sup.)* 1097.

A proprietor of a saloon, who unlocks it on Sunday, and admits persons to whom he gives beer to drink, is guilty of keeping the saloon open.—*Johnson v. City of Chattanooga (Tenn. Sup.)* 1092.

Iron-Safe Clause.

See "Insurance."

Issues.

See "Pleading"; "Trial."

Jail and Jailer.

See "Prisons."

JUDGES.

See, also, "Courts."

The fact that a judge is related to a shareholder of the defendant corporation held not to

disqualify him.—*Houston Cemetery Co. v. Drew (Tex. Civ. App.)* 802.

The fact that a judge hearing a case against a cemetery association had relations buried in the cemetery did not disqualify him.—*Houston Cemetery Co. v. Drew (Tex. Civ. App.)* 802.

A judge is not disqualified from hearing a case because his brother is attorney for plaintiff, and his fee is contingent on recovery.—*George Knapp & Co. v. Campbell (Tex. Civ. App.)* 765.

Where a special judge is selected to try a case, orders made in the case are presumed to have been made by him.—*Bullitt v. Eastern Kentucky Land Co. (Ky.)* 18.

JUDGMENT.

Decision on appeal, see "Appeal and Error."
In criminal cases, see "Criminal Law."

A judgment sustained by the verdict will not be set aside because of a mistake in reciting the verdict.—*Texas & P. Ry. Co. v. Padgett (Tex. Civ. App.)* 300.

Where judgment against a decedent is revived by scire facias against his executor without any answer, it is conclusive that the executor has assets to satisfy the debtor.—*Simons v. Page (Tenn. Sup.)* 843.

A judgment not supported by the pleadings will be reversed.—*Cook v. Arnold (Tex. Civ. App.)* 343.

Assignee of judgment, in action on a claimant's bond for trial of right to personal property, takes it subject to existing defenses which defendant could urge against plaintiff.—*Fleming v. Stansell (Tex. Civ. App.)* 504.

By default.

A judgment in an action on notes in the district court of Minnesota, rendered by the clerk on default, held valid.—*Taylor v. Smith (Tenn. Ch. App.)* 970.

Judgment by default will not be set aside because the filing on the petition does not correspond in date with the citation, but the petition will be corrected.—*Pennsylvania Fire Ins. Co. v. Wagley (Tex. Civ. App.)* 997.

Where plaintiff remits an excess in a judgment by default, the judgment may be corrected to conform therewith.—*Pennsylvania Fire Ins. Co. v. Wagley (Tex. Civ. App.)* 997.

An interlocutory judgment entered against one of two partners by default should be made final on dismissal of the action as against the other.—*Kingsland & Douglass Manufg Co. v. Mitchell (Tex. Civ. App.)* 757.

Judgment by default will not be vacated where no diligence on the part of defendant was shown.—*Castleman v. Norwood (Tex. Civ. App.)* 941.

Where, on default by one defendant, judgment was taken for such sum as the jury might find due, a general verdict for defendants was equivalent to a judgment that nothing was due.—*Hayden Saddlery Hardware Co. v. Ramsay (Tex. Civ. App.)* 595.

Foreign judgments.

The judgment of another state, rendered by a court of competent jurisdiction, is admissible in evidence under the general issue.—*Taylor v. Smith (Tenn. Ch. App.)* 970.

In an action on a foreign judgment, it is error to exclude the transcript of the judgment because it is without a caption.—*Taylor v. Smith (Tenn. Ch. App.)* 970.

Collateral attack.

A decree in an attachment proceeding based on a false affidavit of nonresidence cannot be

collaterally attacked where the defendant knew of the action, and had an opportunity to defend, but made default.—*People's Bank of Springfield v. Williams* (Tenn. Ch. App.) 983.

An order in probate, directing an administrator to convey land pursuant to an invalid title bond executed by the decedent, cannot be collaterally attacked.—*Buchanan v. Park* (Tex. Civ. App.) 807.

A foreign judgment in a garnishment action cannot be collaterally impeached by showing that the justice refused to allow an exemption to which the debtor was entitled under the laws of the foreign state.—*Howland v. Chicago, R. I. & P. Ry. Co.* (Mo.) 29.

Operation and effect.

Judgment lien against railroad *held* extinguished by agreement to accept bonds from re-organized company.—*Houston, E. & W. T. Ry. Co. v. Keller* (Tex. Civ. App.) 859.

— Res judicata.

Though an administratrix obtained a decree of foreclosure in an action on certain vendor's lien notes, she was not afterwards precluded from personally claiming the beneficial interest in the proceeds thereof by gift from her intestate.—*Gibson v. Willis* (Tenn. Ch. App.) 154.

It is not necessarily implied in an action on notes by an administratrix that the estate has the beneficial interest therein, nor is she thereby precluded from personally claiming the proceeds thereof.—*Gibson v. Willis* (Tenn. Ch. App.) 154.

A claimant of public lands under the homestead act is not bound by a judgment against a former claimant under the same law, holding the land to be private property not subject to entry.—*Coleman v. Davis* (Tex. Civ. App.) 103.

A judgment in trespass to try title *held* a bar to a subsequent claim for rents and profits.—*Rackley v. Fowlkes* (Tex. Sup.) 77.

Where no evidence is introduced in support of one count, and the judgment makes no reference thereto, it is not res judicata.—*Rackley v. Fowlkes* (Tex. Civ. App.) 75.

A judgment of the probate court allowing a claim against an estate *held* conclusive on the heirs and administrator.—*Moody v. Peyton* (Mo.) 621.

A judgment rescinding a contract whereby plaintiff accepted bank stock *held* not a determination that plaintiff was not liable for an assessment on such stock.—*Robinson v. Dickey* (Tex. Civ. App.) 499.

When judgment has not been rendered on a verdict, but the time has passed within which the court has power to set it aside, the verdict itself will constitute an adjudication of the facts in issue, which may be pleaded in bar of another action thereon.—*Hume v. Schintz* (Tex. Sup.) 429.

A cause of action does not merge in a void judgment.—*McCadden v. Slausen* (Tenn. Sup.) 378.

A finding on an application for the removal of a trustee that he had received funds as trustee from himself as guardian *held* not res judicata in an action on his bond as guardian for conversion of such fund.—*State ex rel. Hospes v. Branch* (Mo.) 226.

A foreign judgment on a note is not res judicata in an action on the note, where such judgment has been declared void.—*McCadden v. Slausen* (Tenn. Sup.) 378.

Judicial Notice.

See "Evidence."

JUDICIAL SALES.

See, also, "Attachment"; "Execution."

By executor or administrator, see "Executors and Administrators."

Where a sale of decedent's land is ordered made and confirmed by a court of competent jurisdiction, the purchaser acquires title as against parties to the judgment, though the deeds were made by a court having no jurisdiction.—*McNew v. Williams* (Ky.) 687.

Jurisdiction.

See "Courts."

JURY.

Custody and conduct in criminal cases, see "Criminal Law."

Interference with deliberations of, see "Trial." Taking case from jury, see "Trial."

Competency of a juror who had formed an opinion from conversing with the witnesses in the case determined.—*Trotter v. State* (Tex. Cr. App.) 278.

The competency of a juror who had formed an opinion from rumors and hearsay determined.—*Trotter v. State* (Tex. Cr. App.) 278.

The fact that a juror was related to both parties in the eighth degree, which was unknown to him when sworn, is not ground for the reversal of a judgment.—*Northcutt v. Juett* (Ky.) 179.

Act April 1, 1891 (Laws 1891, p. 172), applies to special juries.—*State ex rel. Kansas City & S. Ry. Co. v. Slover* (Mo.) 50.

Directing a sheriff to summon a special venire entirely from the country districts of the county entitled accused to a new trial on conviction.—*Zaunone v. State* (Tenn. Sup.) 711.

Under Act March 17, 1885, providing for the selection of special juries, they should not be drawn in the same manner as common juries.—*State ex rel. St. Louis, K. & N. W. Ry. Co. v. Withrow* (Mo.) 43.

Rule 37 of the St. Louis circuit court, providing that the jury commissioner shall draw special juries from the jury wheel, is invalid as in contravention of Act March 17, 1885.—*State ex rel. St. Louis, K. & N. W. Ry. Co. v. Withrow* (Mo.) 43.

A special jury is one selected by the proper officer by the exercise of his judgment.—*State ex rel. St. Louis, K. & N. W. Ry. Co. v. Withrow* (Mo.) 43.

Where the pleading shows that the right of action is barred, a jury trial is properly denied.—*Johnson v. Owensboro & N. Ry. Co.* (Ky.) 8.

Excusal of a juror for ill health is in the discretion of the court.—*Hamilton v. State* (Ark.) 1054.

The summoning of a jury from another county *held* not improper under Cr. Code, § 194.—*Massie v. Commonwealth* (Ky.) 550.

Where plaintiff has demanded a jury and the cause has been placed on the jury docket, it cannot be subsequently changed to nonjury cause without the consent of both parties.—*Warren v. Scudder Gale Grocery Co.* (Tenn. Sup.) 383.

Justifiable Homicide.

See "Homicide."

Justification.

Of libel, see "Libel and Slander."

LANDLORD AND TENANT.

Adverse possession by tenant, see "Adverse Possession."
 Railroad leases, see "Railroads."

After a sale of land under an executory contract that the grantor should continue to collect the rents, a subsequent conveyance in accordance with the contract *held* admissible to show grantor's authority to collect the rents.—*Hereford Cattle Co. v. Powell* (Tex. Civ. App.) 1033.

Evidence *held* to show an offer to surrender the premises by the lessee, and an acceptance thereof by the lessor.—*Williamson v. Crossett* (Ark.) 27.

Rev. St. §§ 6376, 6384, 6388, 6389, do not give the landlord a right of action at law against an undertenant for rent unless a lien is sought, or the right of attachment exists.—*St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. Ry. Co.* (Mo.) 602.

An undertenant *held* not liable for breach of his lessor's covenant to repair.—*St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. Ry. Co.* (Mo.) 602.

A covenant to keep in repair requires that the premises be kept in as good repair as when the lease was made.—*St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. Ry. Co.* (Mo.) 602.

At common law there is no implied warranty by landlord that premises are fit for occupation or suitable for the use for which they are let.—*Schmalzreid v. White* (Tenn. Sup.) 393.

At common law a landlord is not obliged to furnish fire escapes.—*Schmalzreid v. White* (Tenn. Sup.) 393.

LARCENY.

One taking an article with intent of allowing the owner the value on settlement of accounts is not guilty of larceny.—*Young v. State* (Tex. Cr. App.) 272.

Evidence *held* sufficient to identify the animal in possession of defendant as the stolen property.—*Pierce v. State* (Tex. Cr. App.) 95.

Sufficiency of evidence to sustain conviction determined.—*Files v. State* (Tex. Cr. App.) 93.

Sufficiency of the evidence to sustain a conviction for theft.—*Grant v. State* (Tex. Cr. App.) 264.

If the evidence suggests that, by reasonable diligence, the ownership of property, alleged in the indictment to belong to a person unknown, could have been ascertained, the indictment will not be supported.—*Grant v. State* (Tex. Cr. App.) 264.

Where the evidence as to the identity and ownership of the property was conflicting, *held* error to permit a witness who had found the property on defendant's premises to state that he could have identified it by a description given by the alleged owner.—*Lewis v. State* (Ark.) 689.

Laws.

See "Statutes."

Leases.

See "Landlord and Tenant."

Levy.

Of taxes, see "Taxation."

LIBEL AND SLANDER.

The law presumes malice from a publication which is libelous *per se*.—*Mattson v. Albert* (Tenn. Sup.) 1090.

Recovery cannot be had, the article being substantially true.—*Ratcliff v. Louisville Courier-Journal Co.* (Ky.) 177.

Where the statement that plaintiff had been in more rows than any other man in the county was averred in the answer to be true, evidence of quarrels *held* admissible.—*Ratcliff v. Louisville Courier-Journal Co.* (Ky.) 177.

The publication of a false accusation against a person is not privileged unless justified by the occasion.—*George Knapp & Co. v. Campbell* (Tex. Civ. App.) 765.

Proof of actual bad character of a plaintiff in an action for libel, in the direction of the charges made, is admissible in mitigation of damages.—*George Knapp & Co. v. Campbell* (Tex. Civ. App.) 765.

In an action for libel, a plea of justification, to constitute a defense, must be as broad as the charge made.—*George Knapp & Co. v. Campbell* (Tex. Civ. App.) 765.

A publication charging a person with having been indicted for a penal offense is actionable *per se*.—*George Knapp & Co. v. Campbell* (Tex. Civ. App.) 765.

Licenses.

To marry, see "Marriage."

To sell intoxicants, see "Intoxicating Liquors."

Liens.

See "Mechanics' Liens."

Of attorney for fees, see "Attorney and Client."

Of judgment, see "Judgment."

Of mortgage, see "Chattel Mortgages"; "Mortgages."

Vendor's, see "Vendor and Purchaser."

LIFE ESTATES.

Where a mother agreed to let her son occupy her land during her lifetime if he would improve it, and he does so, his widow and children after his death can occupy until the death of the mother.—*Hopewell v. Patterson* (Tex. Civ. App.) 319.

Sale for taxes during the possession of the life tenant reaches only the life estate.—*Ferguson v. Quinn* (Tenn. Sup.) 576.

Purchase of land at foreclosure sale by a life tenant *held* to inure to the benefit of the reversioners on their paying their share of the price.—*Cockrill v. Hutchinson* (Mo.) 375.

Stock dividends made after the death of testator, who bequeathed the stock for life, belong to the life tenant, and not to the remaindermen.—*Pritchett v. Nashville Trust Co.* (Tenn. Sup.) 1064.

LIMITATION OF ACTIONS.

See, also, "Adverse Possession."

Whether plaintiff had procured the citation in an action to be issued and served within a reasonable time after petition filed *held* a question for the jury.—*Gulf, C. & S. F. Ry. Co. v. Flatt* (Tex. Civ. App.) 1029.

A set-off not barred when the original complaint was filed is not barred though the statute had run when the cross bill setting it up was filed.—*Lewis v. Turnley* (Tenn. Sup.) 872.

A fraudulent concealment of a cause of action will prevent limitations running in defendant's favor.—*Herndon v. Lewis* (Tenn. Oh. App.) 953.

Right of action for services completed, but dependent on contingent contract for compensation, does not accrue till the contingency is

removed.—*Leake v. City of Cleburne* (Tex. Civ. App.) 97.

Filing a complaint, and the mere signing and sealing of the summons by the clerk, *held* not an institution of an action tolling the statute.—*Wilkins v. Worthen* (Ark.) 21.

In an action for damages by the building of an embankment, an answer alleging its use for more than 22 years is a sufficient plea of the statute.—*Johnson v. Owensboro & N. Ry. Co.* (Ky.) 8.

A party seeking to avoid the bar of the statute on account of fraud must show that he had used due diligence to detect it.—*Shelby County v. Bragg* (Mo.) 600.

Where several are charged as partners, a letter by one defendant, promising to pay the debt, is not a bar to the statute as to the other defendant, the partnership not being proven.—*Hayden Saddlery Hardware Co. v. Ramsay* (Tex. Civ. App.) 595.

A right of action for violation of a contract to cease business in a particular locality accrues on the first breach, and is barred in five years therefrom.—*Davis v. Brown* (Ky.) 534.

When a petition is filed within the time limited by statute, the action will not become barred because the plaintiff is unable to give the cost bond until after the time has expired.—*Gulf, C. & S. F. Ry. Co. v. Knott* (Tex. Civ. App.) 491.

Asking relief on different grounds after the substitution of parties defendant *held* not a continuation of the original action.—*Texas & P. Ry. Co. v. Watson* (Tex. Civ. App.) 290.

In replevin, the source of title cannot be inquired into, so as to defeat the defense of adverse possession, under Mill. & V. Code, § 3470.—*Morris v. Lowe* (Tenn. Sup.) 1098.

Commencement of an action in a court without jurisdiction does not suspend the running of the statute of limitations.—*Sweet v. Chattanooga Electric Light Co.* (Tenn. Sup.) 1090.

An action to foreclose a trust deed may be maintained, though an action to recover personal judgment on the notes thereby secured is barred by limitation.—*Irvine v. Shrum* (Tenn. Sup.) 1089.

Limitation of Liability.

Carriers' contracts, see "Carriers."

Liquor Selling.

See "Intoxicating Liquors."

LIS PENDENS.

The doctrine of lis pendens does not apply to a purchaser of negotiable bonds for value.—*Farmers' & Merchants' Nat. Bank v. Waco Electric Railway & Light Co.* (Tex. Civ. App.) 131; *Metropolitan Trust Co. v. Farmers' & Merchants' Nat. Bank*, *Id.*

Live Stock.

Shipment by carrier, see "Carriers."

Loans.

See "Building and Loan Associations."

Local Actions.

See "Venue."

Local Option.

See "Intoxicating Liquors."

Malice.

See "Homicide"; "Libel and Slander."

In wrongful attachment, see "Attachment."

MALICIOUS PROSECUTION.

Where the facts showing probable cause are in controversy, the question is for the jury.—*Lancaster v. Langston* (Ky.) 521.

What facts amount to probable cause is a question of law.—*Lancaster v. Langston* (Ky.) 521.

The question whether defendant acted on advice of counsel obtained in good faith is for the jury.—*Lancaster v. Langston* (Ky.) 521.

The fact that plaintiff was acquitted of the charge preferred against him, or that defendant abandoned the prosecution, *held* insufficient to show want of probable cause.—*Lancaster v. Langston* (Ky.) 521.

An instruction based only on portions of the evidence *held* misleading.—*Lancaster v. Langston* (Ky.) 521.

MANDAMUS.

The supreme court will not order citation on a petition for mandamus unless probable grounds for the writ appear therefrom.—*Hume v. Schintz* (Tex. Sup.) 429.

Manslaughter.

See "Homicide."

Margins.

Sales on, see "Gaming."

Marine Insurance.

See "Insurance."

MARRIAGE.

See, also, "Divorce"; "Dower"; "Homestead"; "Husband and Wife."

A marriage is valid, though performed in a county other than that in which the license issued.—*Cummings v. State* (Tex. Cr. App.) 442.

MARSHALING ASSETS AND SECURITIES.

Where one of two creditors secured by mortgage holds collateral security, he must account for such collateral before participation in the mortgage fund.—*Willis v. Holland* (Tex. Civ. App.) 329.

MASTER AND SERVANT.

See, also, "Principal and Agent."

Certain evidence *held* admissible to show the relationship of master and servant.—*Southern Pac. Co. v. Wellington* (Tex. Civ. App.) 1114.

Master *held* liable to an employé injured by the negligence of a vice principal.—*Kenney v. Lane* (Tex. Civ. App.) 1063.

An engineer is not the vice principal of a brakeman within Act March 10, 1891.—*Texas Cent. Ry. Co. v. Frazier* (Tex. Sup.) 432.

An agreement to give an employé regular work as long as he does faithful service is legal.—*Louisville & N. R. Co. v. Offutt* (Ky.) 181.

Contract of hiring *held* indefinite as to term of service, and terminable at any time by

either party.—*Louisville & N. R. Co. v. Offutt* (Ky.) 181.

Master's liability for injury to servant.
A servant seeking to recover from a master for injuries received must show the existence of such relationship.—*Southern Pac. Co. v. Wellington* (Tex. Civ. App.) 1114.

A master need only exercise ordinary care in furnishing safe appliances to his servants.—*Gulf, C. & S. F. Ry. Co. v. Warner* (Tex. Civ. App.) 118.

On the issue whether an engineer knew that his train had parted, evidence *held* to admit of a finding that he did not.—*Galveston, H. & S. A. Ry. Co. v. Sweeney* (Tex. Civ. App.) 800.

If by the negligence of a master a servant is placed in a position of apparent danger, and is injured in attempting to save himself, the master is liable, regardless of whether the servant acted prudently or not.—*Gulf, C. & S. F. Ry. Co. v. Knott* (Tex. Civ. App.) 491.

Evidence *held* to show that an injury of a railroad employé was not the result of negligence of the master.—*Gulf, C. & S. F. Ry. Co. v. Knott* (Tex. Civ. App.) 491.

A master cannot escape liability to his servant by turning him over to the service of another, the servant continuing at the original employment, and having no notice of such change.—*Missouri, K. & T. Ry. Co. of Texas v. Feich* (Tex. Civ. App.) 487.

Certain evidence as to defects in appliances *held* properly excluded.—*Gardner v. St. Louis & S. F. Ry. Co.* (Mo.) 214.

The sufficiency of rules provided by a master for the protection of his servants, is for the jury.—*Southern Pac. Co. v. Wellington* (Tex. Civ. App.) 1114.

It is for the court to determine in an action for injuries by an employé whether the business required the master to issue certain rules.—*Southern Pac. Co. v. Wellington* (Tex. Civ. App.) 1114.

Fellow servants.

Concurring negligence of a fellow servant and a master will not relieve the master of liability.—*Gulf, C. & S. F. Ry. Co. v. Warner* (Tex. Civ. App.) 118.

A rule of the company which makes the conductor of a freight train responsible for the brakemen's performance of their duties requires only that he shall exercise reasonable care and diligence to that end.—*Galveston, H. & S. A. Ry. Co. v. Sweeney* (Tex. Civ. App.) 800.

Issue as to whether injuries to an employé resulted from negligence of defendant and of plaintiff's fellow servants as concurring causes *held* properly submitted.—*Galveston, H. & S. A. Ry. Co. v. Sweeney* (Tex. Civ. App.) 800.

Where plaintiff is not chargeable with negligence, the negligence of a fellow servant is not a defense to an injury if there be concurring negligence of the master.—*Galveston, H. & S. A. Ry. Co. v. Sweeney* (Tex. Civ. App.) 800.

Risks of employment—Contributory negligence.

An employé does not assume the risk of a grindstone bursting from being run at an excessive speed.—*Helfenstein v. Medart* (Mo.) 863.

Where an employé was violating the rule of his employer when injured, it will not prevent recovery, where the act in no way contributed to the injury.—*Helfenstein v. Medart* (Mo.) 863.

Except in rare cases, unless contrary to statute, servant's violation of a rule of the master is not negligence *per se*.—*Galveston, H. & S. A. Ry. Co. v. Sweeney* (Tex. Civ. App.) 800.

Evidence examined and *held* insufficient to show plaintiff guilty of contributory negligence.

—*Southern Pac. Co. v. Wellington* (Tex. Civ. App.) 1114.

Measure of Damages.

See "Damages."

MECHANICS' LIENS.

The certificate of the supervising architect as to the cost of completing a building *held* admissible to show the cost of completion.—*Malone v. Mayfield* (Tex. Civ. App.) 148.

A subcontractor obtains no lien unless he complies with the provisions of Sayles' Civ. St. arts. 3165, 3176.—*Cameron v. Terrell* (Tex. Civ. App.) 142.

Evidence examined, and *held*, that the execution of certain notes was not a payment so as to extinguish the lien.—*Gilbert v. Moody* (Ky.) 523.

Under Gen. St. § 2479, which requires a written contract signed by her, to create a lien on the property of a married woman, she cannot be charged by the mere fact that she acquiesced in the erection of a building on her property, and gave directions about its construction.—*Webster v. Tattershall* (Ky.) 1126.

Memoranda.

Under statute of frauds, see "Frauds, Statute of."

Messages.

See "Telegraphs and Telephones."

Mexican Grants.

See "Public Lands."

Mistake.

As ground for new trial, see "New Trial."
—for reformation of instrument, see "Reformation of Instruments."

Modification.

Of judgment on appeal, see "Appeal and Error."

Money Lent.

By building association, see "Building and Loan Associations."

MORTGAGES.

See, also, "Chattel Mortgages"; "Fraudulent Conveyances."

Limitation of action to foreclose, see "Limitation of Actions."

Mortgage or assignment, see "Assignments for Benefit of Creditors."

Purchase by life tenant at foreclosure sale, see "Life Estates."

A mortgagee has no right of action against his mortgagor's vendee assuming the debt, but released after acceptance by the mortgagee.—*Huffman v. Western Mortgage & Investment Co.* (Tex. Civ. App.) 306.

Lien.

Priority of mortgages determined.—*Emery v. Vaughan* (Ky.) 9.

A failure to file a mortgage within 30 days does not affect its validity when attacked as being preferential.—*Kelley v. Yandell* (Ky.) 1127.

A subsequent mortgagee *held* not charged with notice that the conveyance under which the mortgagor claimed was merely to secure a

debt.—*Farmers' Nat. Bank v. James* (Tex. Civ. App.) 288.

Payment.

When mortgagor who has conveyed lands to a minor may extend the time of payment without the minor's consent.—*Kearby v. Hopkins* (Tex. Civ. App.) 506.

Party *held* not a subsequent incumbrancer affected by an extension of a prior mortgage.—*Kearby v. Hopkins* (Tex. Civ. App.) 506.

An extension of time of payment becomes a part of the condition of the mortgage.—*Kearby v. Hopkins* (Tex. Civ. App.) 506.

Extending time for paying a debt is sufficient consideration for a mortgage.—*Farmers' Nat. Bank v. James* (Tex. Civ. App.) 288.

Foreclosure.

On foreclosure, a sale on time and without redemption according to the terms of the instrument may be decreed.—*First Nat. Bank v. Meachem* (Tenn. Ch. App.) 724.

Evidence *held* to support a decree foreclosing a mortgage 32 years after its execution.—*Vaughn v. Tate* (Tenn. Ch. App.) 748.

A mortgage may be foreclosed without the production of the note where its absence is accounted for, and no personal judgment is sought.—*Vaughn v. Tate* (Tenn. Ch. App.) 748.

A trustee's sale *held* not invalid for the reason that the trustee knew that the grantor was not represented at the sale, and that the property would consequently be sacrificed.—*Seip v. Grinnan* (Tex. Civ. App.) 349.

The fact that land sold for less than its value at foreclosure sale *held* not conclusive evidence of fraud between the purchaser and trustee under the mortgage.—*Seip v. Grinnan* (Tex. Civ. App.) 349.

The fact that the purchaser at mortgage sale was an agent of the mortgagor *held* no evidence of fraud.—*Seip v. Grinnan* (Tex. Civ. App.) 349.

Where an order for the sale of property free from redemption on foreclosure is reversed on appeal, and no claim is made that the sale made was for an inadequate price, it is proper to permit it to stand and allow time for redemption thereafter.—*Hughes Bros. Manuf'g Co. v. Conyers* (Tenn. Sup.) 1093.

In a foreclosure suit brought by a junior lienholder who joins the holders of prior liens, and contests their validity, it is proper for the court to order the property sold, and the proceeds applied to all the liens according to priority.—*Hughes Bros. Manuf'g Co. v. Conyers* (Tenn. Sup.) 1093.

A clause in a mortgage providing for interest at more than the legal rate on sums advanced by the mortgagee in payment of taxes or insurance, does not render it usurious so as to prevent the allowance of what is justly due.—*Hughes Bros. Manuf'g Co. v. Conyers* (Tenn. Sup.) 1093.

The purchase by the owner of land subject to other interests of a debt secured by a trust deed superior to such interests does not operate as a merger of the lien of such trust deed.—*Irvine v. Shrum* (Tenn. Sup.) 1089.

A purchaser under a second mortgage may lawfully supplement his title by a purchase and enforcement of a prior incumbrance, a sale under which extinguishes intervening rights.—*Irvine v. Shrum* (Tenn. Sup.) 1089.

Motions.

For continuance, see "Criminal Law."

For rehearing, see "Appeal and Error."

To quash indictment, see "Criminal Law."

To tax costs, see "Costs."

MUNICIPAL CORPORATIONS.

See, also, "Counties"; "Highways."

Dedication of streets, see "Dedication."

By extending its limits a city acquires no right to interfere with vested rights of a railroad company in the territory annexed.—*Johnson v. Owensboro & N. Ry. Co.* (Ky.) 8.

A city is not prohibited by Const. § 168, from increasing under an ordinance the minimum penalty fixed by statute for the same offense.—*City of Owensboro v. Sparks* (Ky.) 4.

Ordinances.

City ordinance relating to fire escapes *held* repealed by subsequent general ordinance covering the same ground.—*Schmalzreid v. White* (Tenn. Sup.) 393.

Under Rev. St. 1879, art. 488, an ordinance limiting the speed of railroad trains, not having an enacting clause, was void.—*Galveston, H. & S. A. Ry. Co. v. Harris* (Tex. Civ. App.) 776.

An ordinance providing that money for licenses shall be paid to the treasurer and used for current expenses, except a proportion shall be paid to the board of education, sufficiently specifies the purpose for which the tax is levied.—*Burch v. City of Owensboro* (Ky.) 12.

An ordinance requiring property owners to fill excavations below the grade of the surrounding streets does not apply to excavations 25 feet from the street.—*Moran v. Pullman Palace-Car Co.* (Mo.) 659.

A city cannot by ordinance create a civil liability against one violating it, in favor of persons injured thereby.—*Moran v. Pullman Palace-Car Co.* (Mo.) 659.

An ordinance granting a railroad company a right of way over certain streets *held* not to give them authority to erect sheds and depots in the streets.—*Gray v. Dallas Terminal Railway & Union Depot Co.* (Tex. Civ. App.) 352.

The fact that an ordinance granting a railroad right of way in a street does not indicate all the streets over which it is to run does not render it void as to the streets clearly specified.—*Gray v. Dallas Terminal Railway & Union Depot Co.* (Tex. Civ. App.) 352.

An ordinance for construction of a sidewalk *held* to sufficiently set forth the kind and extent of improvements to be made.—*Board of Councilmen of City of Frankfort v. Murray* (Ky.) 180.

Officers and agents.

The mayor cannot remove officer appointed for a fixed term without notice and hearing, under St. § 2794.—*Todd v. Dunlap* (Ky.) 541; *Same v. Tilford*, Id.

Members of the boards of public safety and public works, appointed by a mayor and council for a definite term, cannot be removed except for cause after notice.—*Todd v. Dunlap* (Ky.) 541; *Same v. Tilford*, Id.

Gen. St. § 2847, does not prevent a city council from removing a city officer by proceedings under Gen. St. § 2781.—*Gibbs v. Board of Aldermen of City of Louisville* (Ky.) 524.

Members of the board of public works, the assistant sheriff of the police court, and the stenographer of the city court, *held* "municipal officers," within Const. § 161.—*City of Louisville v. Wilson* (Ky.) 944; *Same v. Nevin*, Id.; *Same v. Hoertz*, Id.; *Same v. Martin*, Id.; *Same v. O'Connell*, Id.

Where a statute provides that certain officers shall receive a salary of not less than a fixed sum, an ordinance fixing their salary after appointment at a greater sum is not an increase of salary during the term.—*City of Louisville v. Wilson* (Ky.) 944; *Same v. Nevin*, Id.; *Same v. Hoertz*, Id.; *Same v. Martin*, Id.; *Same v. O'Connell*, Id.

Contracts.

A franchise for a term of years can be granted to a water company only by receiving bids publicly after due advertisement as required by Const. § 164.—*Nicholasville Water Co. v. Board of Councilmen of Town of Nicholasville (Ky.)* 549.

When grant of a franchise and contract for water supply not separable.—*Nicholasville Water Co. v. Board of Councilmen of Town of Nicholasville (Ky.)* 549.

A city is bound to pay for the amount of water actually received and used under an invalid contract.—*Nicholasville Water Co. v. Board of Councilmen of Town of Nicholasville (Ky.)* 549.

Issue of bonds for the cost of a street improvement assessed against the abutting property holders *held* to be such an appropriation of the income of future years as required the assent of two-thirds of the legal voters, as provided by Const. § 157.—*City of Covington v. McCanna (Ky.)* 518.

Under Const. § 157, at an election to validate the issue of bonds two-thirds of the voters actually voting at the general election must assent to such issue.—*Belknap v. City of Louisville (Ky.)* 1118.

The question of issuing municipal bonds in excess of the yearly revenue must be submitted to the voters at the general election in November.—*Belknap v. City of Louisville (Ky.)* 1118.

Bonds issued by a county to a railroad company *held* valid.—*Morrill v. Smith County (Tex. Sup.)* 56.

Rights of the holders of county bonds in a sinking fund paid into the state treasury for their benefit, and invested in bonds for cancellation, considered.—*Morrill v. Smith County (Tex. Sup.)* 56.

The holder of bonds issued by a county to a railroad company, after its consolidation with another, is not estopped as against the county to assert the invalidity of the consolidation.—*Morrill v. Smith County (Tex. Sup.)* 56.

A taxpayer cannot sue to set aside a deed by the town trustees, on the ground that it conveyed a tract of land belonging to the county.—*Hoffman v. Trustees of Town of Shepherdsville (Ky.)* 522.

Control of streets.

The fact that several railroad companies have been granted rights of way over a street does not take away its character as a street.—*Gray v. Dallas Terminal Railway & Union Depot Co. (Tex. Civ. App.)* 352.

In an action to enjoin the construction of a railway under a grant from a city in the streets, evidence that the ordinance was obtained by false representations *held* properly excluded.—*Gray v. Dallas Terminal Railway & Union Depot Co. (Tex. Civ. App.)* 352.

Liability for torts.

A city is liable to the owner of property for damages resulting from a deposit of refuse thereon.—*City of San Antonio v. Mackey (Tex. Civ. App.)* 760.

A city is liable for damages for the deposit of refuse on private property, though not authorized by formal act of its council.—*City of San Antonio v. Mackey (Tex. Civ. App.)* 760.

A city must keep its sewers in proper repair and condition, even though they were properly constructed in the first instance.—*Lindsay v. City of Sherman (Tex. Civ. App.)* 1019.

A city is not liable for failure to enforce an ordinance requiring property owners to fill excavations.—*Moran v. Pullman Palace-Car Co. (Mo.)* 659.

Evidence examined, and *held* not to show that absence of lights on a street was negligence on v.368.w.—74

the part of the city.—*City of Denison v. Warren (Tex. Civ. App.)* 296.

Public improvements.

Where a contract with a city provided that the contractor should obey the instructions of the street commissioner, the contractor is entitled to recover for work done before the commissioner directed him to stop, though no special tax bills were issued.—*Steffen v. City of St. Louis (Mo.)* 31.

Liability of a city under a contract for improvements for work done under direction of street commissioner.—*Steffen v. City of St. Louis (Mo.)* 31.

Under a contract for work, made by a city, which provides that the work shall be done within limits to be fixed by the engineer, there can be no recovery for work outside such limits.—*McEwen v. City of Nashville (Tenn. Ch. App.)* 968.

An ordinance for a public improvement *held* not invalid because giving the abutting owners opportunity to do the work before it is let by contract.—*Board of Councilmen of City of Frankfort v. Murray (Ky.)* 180.

Assessment of benefits.

The amount assessed against an abutting lot must be fixed by the cost of the work in front of such lot.—*City of Dallas v. Emerson (Tex. Civ. App.)* 304.

Where, by contract with abutting owners, they are to pay two-thirds of the cost of an improvement, *held*, that an assessment for such share by the city was void.—*City of Dallas v. Emerson (Tex. Civ. App.)* 304.

The levy of an assessment must be made at the time the contract is entered into.—*City of Dallas v. Emerson (Tex. Civ. App.)* 304.

Taxation.

Where a city authorizes a bridge to be built by a bridge company within its limits, it can tax such bridge for ordinary city expenses.—*Henderson Bridge Co. v. City of Henderson (Ky.)* 581.

Agricultural lands brought within corporate limits by the extension thereof *held* subject to taxation, though not divided into lots and blocks.—*Briggs v. Town of Russellville (Ky.)* 558; *Town of Russellville v. Beall, Id.*

A city council *held* to have no power to levy an extra tax for the payment of a pre-existing debt.—*City of Denison v. Foster (Tex. Sup.)* 401.

Murder.

See "Homicide."

Mutual Benefit Insurance.

See "Insurance."

NAVIGABLE WATERS.

A riparian owner cannot claim as accretion land beyond a well-defined slough, 60 yards wide, through which water runs sufficient for navigation.—*Crandall v. Smith (Mo.)* 612.

Right of owner of land bounded by the Missouri to an alleged accretion formed between such land and an island in the Missouri river, either by the receding of a channel between such land and the island or by gradual accretion, considered.—*Hahn v. Dawson (Mo.)* 233.

NEGLIGENCE.

See, also, "Death."

Contributory negligence of person injured at crossing, see "Railroads."

— of servant, see "Master and Servant."

Master's liability for injury to servant, see "Master and Servant."
 Of railroad company, see "Railroads."
 Of street-car company, see "Street Railroads."
 Of telegraph company, see "Telegraphs and Telephones."

An instruction invoking the doctrine of comparative negligence *held* properly refused.—*Texas & P. Ry. Co. v. Curlin* (Tex. Civ. App.) 1008.

A charge which involves the repudiated doctrine of comparative negligence is erroneous.—*Missouri, K. & T. Ry. Co. of Texas v. Rodgers* (Tex. Sup.) 243.

Where plaintiff has alleged defendant's negligence, and defendant has pleaded the general denial, facts which would establish absence of negligence may be proved without having been specially pleaded.—*St. Louis S. W. Ry. Co. v. Fenlaw* (Tex. Civ. App.) 295.

An instruction that if a driver was negligent plaintiff could not recover, even if defendant railroad company was negligent, was properly refused, where no negligence on the part of plaintiff was charged.—*Texas & P. Ry. Co. v. Curlin* (Tex. Civ. App.) 1003.

Where a complaint alleged permanent injuries, and no more specific information was asked, it was not error to refuse to instruct the jury to disregard evidence as to the character of the injuries.—*Gulf, C. & S. F. Ry. Co. v. Pendery* (Tex. Civ. App.) 792.

The burden is on plaintiff to prove the facts as alleged, and he cannot recover if the accident happened otherwise than as alleged.—*Thompson v. Metropolitan St. Ry. Co. (Mo.)* 625.

What constitutes.

Instruction as to what constitutes negligence *held* proper.—*Texas & P. Ry. Co. v. Curlin* (Tex. Civ. App.) 1003.

A request to charge that if the jury found certain facts to exist such facts would in law be negligence was properly denied.—*Galveston, H. & S. A. Ry. Co. v. Harris* (Tex. Civ. App.) 776.

An owner of a city lot on which surface water has collected *held* not liable by failure to fence for the death of a child bathing therein.—*Moran v. Pullman Palace-Car Co. (Mo.)* 659.

A lot owner *held* not liable for negligence of his adjoining lot owner and a contractor building houses on such lots under a several contract.—*City of Independence v. Ott* (Mo.) 624.

A railroad company *held* not liable for an injury to a child, received while playing in a yard used for storing ties and bridge materials.—*Missouri, K. & T. Ry. Co. of Texas v. Edwards* (Tex. Sup.) 430.

When defendant was bound to use only ordinary care, it should be defined in the charge.—*St. Louis S. W. Ry. Co. v. Fenlaw* (Tex. Civ. App.) 295.

When railroad company not liable for injuries resulting from a collision caused by a defective brake.—*St. Louis S. W. Ry. Co. v. Fenlaw* (Tex. Civ. App.) 296.

Proximate and remote cause.

Where a defect in the track contributes to the accident, the railroad company is liable, though the accident is precipitated by collision with an animal on the track.—*New York, T. & M. Ry. Co. v. Green* (Tex. Civ. App.) 812.

Whether, in any given cause of an accident, the act charged was negligent, and whether the injury suffered was, within the relation of cause and effect, legally attributable to it, are questions for the jury.—*Galveston, H. & S. A. Ry. Co. v. Sweeney* (Tex. Civ. App.) 800.

Where a collision occurred between the rear and middle sections of a train, resulting from

breaks in a freight train,—the first caused by a defective coupling, the second by the negligence of the engineer,—*held*, that the defective coupling was a proximate cause of the collision.—*Galveston, H. & S. A. Ry. Co. v. Sweeney* (Tex. Civ. App.) 800.

A proximate cause of an injury must, if other causes existed, be regarded as concurring with these causes to produce the accident.—*Galveston, H. & S. A. Ry. Co. v. Sweeney* (Tex. Civ. App.) 800.

Where cattle were frightened by a passing train, and broke through a stock-pen gate, which was out of repair, *held*, that negligence in permitting the gate to remain out of repair was the proximate cause of injuries received by the cattle.—*Texas & P. Ry. Co. v. Bigham* (Tex. Civ. App.) 1111.

Contributory negligence.

An instruction as to what constituted contributory negligence *held* correct.—*Texas & P. Ry. Co. v. Curlin* (Tex. Civ. App.) 1003.

The burden of showing contributory negligence *held* on defendant.—*Lee v. International & G. N. R. Co. (Tex. Sup.)* 63.

Instruction as to degree of care required of a minor in attempting to board a moving car *held* properly given.—*Sly v. Union Depot Ry. Co. (Mo.)* 235.

Contributory negligence not having been pleaded or proved, *held* that defendant was not entitled to an instruction on the subject.—*Texas & P. Ry. Co. v. Bigham* (Tex. Civ. App.) 1111.

Negotiable Instruments.

See "Bills and Notes."

Newly-Discovered Evidence.

As ground for new trial, see "Criminal Law"; "Homicide"; "New Trial."

NEW TRIAL.

In criminal cases, see "Criminal Law."

Necessity of motion for, see "Appeal and Error."

A new trial *held* properly granted where judgment has been obtained by publication, it appearing that plaintiff could have obtained information as to the residence of defendant, which he had stated in his application was unknown.—*Miles v. Dana* (Tex. Civ. App.) 848.

To entitle defendant to a new trial in trespass to try title, it is sufficient if he can show that plaintiffs were not entitled to recover.—*Miles v. Dana* (Tex. Civ. App.) 848.

A new trial for newly-discovered evidence *held* properly denied for want of diligence.—*Castleman v. Norwood* (Tex. Civ. App.) 941.

Granting of new trial on the ground of mistake or perjury is largely discretionary.—*Sly v. Union Depot Ry. Co. (Mo.)* 235.

That a witness has testified in actions of a similar character contrary to his testimony on the trial in question does not tend to sustain a charge of perjury.—*Sly v. Union Depot Ry. Co. (Mo.)* 235.

Where the court withheld a ruling on certain evidence, and excluded it in the decree, the remedy was by motion for new trial.—*Moeckel v. Heim* (Mo.) 226.

Showing *held* sufficient to authorize the setting aside, at a succeeding term of a judgment, of dismissal for want of prosecution.—*Smith v. Patrick* (Tex. Civ. App.) 762.

Notaries.

Acknowledgment of probate of deed, see "Acknowledgment."

Notes.

See "Bills and Notes."

Notice.

Of adverse possession, see "Adverse Possession."

NUISANCE.

Evidence that the municipal authorities have taken no action to abate a matter as a nuisance is not admissible on an issue as to whether it is such.—*Corsicana Cotton Oil Co. v. Valley* (Tex. Civ. App.) 999.

In an action by a widow to recover damages for a nuisance, for her own use and benefit, only personal injuries to herself can be shown.—*Corsicana Cotton Oil Co. v. Valley* (Tex. Civ. App.) 999.

One assisting in the purchase of land for defendant for a certain purpose cannot sue for a nuisance on its use for such purpose, unless before suit he gives notice that such use is offensive.—*Louisville & N. R. Co. v. Daugherty* (Ky.) 5.

Objections.

First raised on appeal, see "Appeal and Error."

Obstructions.

Of highway, see "Highways."

OFFICERS.

See, also, "Judges"; "Receivers"; "Sheriffs and Constables."

City officers, see "Municipal Corporations."

County officers, see "Counties."

Of building association, see "Building and Loan Associations."

State officers, see "States."

Under Const. § 152, the general assembly can provide for vacancies in elective offices only in the manner provided by such section.—*Todd v. Johnson* (Ky.) 987.

The failure of a recorder to produce his account books in an action to recover any excess of salary is not a suppression of evidence authorizing a penalty where the amount can be shown from records.—*State, to Use of Vernon County, v. King* (Mo.) 681.

The fraudulent payment by a candidate for school director of a tax for which he was not liable, for the purpose of qualifying himself to hold the office, does not render him eligible.—*State ex rel. Walker v. Rebenack* (Mo.) 803.

The offices of deputy sheriff and school director in St. Louis are not incompatible.—*State ex rel. Walker v. Bus* (Mo.) 636.

The acceptance by one holding a public office of a second public office incompatible therewith operates as a resignation of the first office, and his resignation thereafter of the second office will not restore him to the original office vacated.—*State ex rel. Walker v. Bus* (Mo.) 636.

Deputy sheriffs are public officers.—*State ex rel. Walker v. Bus* (Mo.) 636.

Const. art. 9, § 18, does not apply to a deputy sheriff of the city of St. Louis, also holding the office of school director.—*State ex rel. Walker v. Bus* (Mo.) 636.

A deputy sheriff of St. Louis does not "hold office under the city," within the act providing that no office holder shall be a member of the board of school directors.—*State ex rel. Walker v. Bus* (Mo.) 636.

A deputy sheriff is not a state officer, within Const. art. 9, § 18.—*State ex rel. Walker v. Bus* (Mo.) 636.

Opinion Evidence.

See "Evidence."

Ordinance.

See "Municipal Corporations."

Parol Contract.

See "Frauds, Statute of."

Parol Evidence.

See "Evidence."

Parties.

Death of party, abatement of action, see "Abatement and Revival."

In equity, see "Equity."

On appeal, see "Appeal and Error."

PARTITION.

Where plaintiff showed title by devise from his deceased mother, who with her husband was at her death in peaceable possession, *held*, that the burden was on defendant to show the superiority of his title.—*Foster v. Johnson* (Tex. Sup.) 67.

PARTNERSHIP.

An action against partners may be dismissed as to one without affecting it as against others.—*Kingsland & Douglass Manuf'g Co. v. Mitchell* (Tex. Civ. App.) 757.

Evidence *held* sufficient to show the existence of a partnership.—*Reed v. Brewer* (Tex. Civ. App.) 99.

A partner will not be entitled to credit for the amount paid by him to another for the latter's position in the firm.—*Grubbs v. McIlvain* (Ky.) 16.

Evidence examined, and *held* sufficient to show that a partnership existed.—*Edwards v. Buchanan* (Tex. Civ. App.) 1022.

A note given by a partner in the firm name after dissolution, in settlement of a partnership debt, may be enforced where the creditor was not notified of the want of authority.—*White v. Hudson* (Tex. Civ. App.) 332.

On dissolution and sale of a business, the old firm *held* not liable for goods purchased by its successor in the old firm name.—*Jackson v. Lee* (Tex. Civ. App.) 286.

Where a partner leaves his capital on retirement, he should not be allowed compound interest, in the absence of a contract.—*Gilmour's Adm'x v. Kerr's Ex'r* (Ky.) 554.

Part Performance.

Of parol contract relating to land, see "Frauds, Statute of."

Passengers.

See "Carriers."

Patents.

To public lands, see "Public Lands."

Pawn.

See "Pledges."

PAYMENT.

Of bills and notes, see "Bills and Notes."
Of mortgage, see "Mortgages."

Evidence examined, and *held* not to show that a note was taken in payment of a pre-existing debt.—Blue Springs Min. Co. v. McIlvein (Tenn. Sup.) 1004.

PERJURY.

An indictment *held* defective for failing to negative the truth of defendant's testimony.—Commonwealth v. Compton (Ky.) 1116.

The falsity of what statements must be shown on a trial for perjury.—Whitaker v. State (Tex. Cr. App.) 253.

An instruction as to the corroboration required on a trial for perjury *held* erroneous.—Whitaker v. State (Tex. Cr. App.) 253.

Personal Injuries.

See "Assault and Battery"; "Carriers"; "Counties"; "Damages"; "Death"; "Landlord and Tenant"; "Master and Servant"; "Municipal Corporations"; "Negligence"; "Railroads."

Personal Liberty.

See "Constitutional Law."

Petition.

See "Pleading."

PLEADING.

Assignments of error in rulings on, see "Appeal and Error."

Estoppel, see "Estoppel."

Harmless error in rulings on, see "Appeal and Error."

In action on bills and notes, see "Bills and Notes."

In equity, see "Equity."

Pleadings as evidence, see "Evidence."

Set-off, see "Set-Off and Counterclaim."

Statute of frauds, see "Frauds, Statute of."

It is error to allow plaintiff to recover on a claim not declared on.—Mize v. Godsey (Ky.) 160.

Judgment cannot legally be rendered against defendants as individuals on a replevy bond signed by a firm name, without a pleading alleging that they were members of the firm.—Laing v. Craig (Tex. Civ. App.) 142.

As to questions of pleading and practice, courts are governed by the laws of their own state, though the cause of action arose in another.—Lyons v. Texas & P. Ry. Co. (Tex. Civ. App.) 1007.

Complaint.

Petition to have mortgage declared preferential and to operate as a general assignment *held* insufficient.—Kelley v. Yandell (Ky.) 1127.

A petition is not demurrable for failure to state whether a contract is written or oral, where the fact is not essential to the cause of action.—Smith v. Patrick (Tex. Civ. App.) 762.

Petition *held* bad on general demurrer.—Burr v. Davis (Tex. Civ. App.) 137.

Complaint *held* good as against general demurrer.—Fuqua v. Pabst Brewing Co. (Tex. Civ. App.) 479.

Demurrer.

A demurrer to a petition is properly sustained where, by its own terms, it denies the cause of action alleged.—Hoffman v. Trustees of Town of Shepherdsville (Ky.) 522.

A special demurrer, interposed after announcement of ready for trial, a term of court having intervened after the answer was filed, comes too late.—Missouri, K. & T. Ry. Co. of Texas v. Doss (Tex. Civ. App.) 497.

Answer.

Defects on the face of the petition which are grounds for demurrer cannot be raised by answer.—Bender v. Zimmerman (Mo.) 210.

Where several defendants are charged as partners, a verified plea of one defendant denying the partnership applies to all.—Hayden Saddlery Hardware Co. v. Ramsay (Tex. Civ. App.) 595.

Where an answer denying the execution of a contract is not verified as required by statute, evidence offered thereunder was properly excluded.—Pioneer Savings & Loan Co. v. Nail (Tex. Civ. App.) 322.

An affidavit to a plea *held* to comply with Rev. St. art. 1265, subd. 8.—Stephens v. Anderson (Tex. Civ. App.) 1000.

Defense that a suit on an insurance is prematurely brought, for noncompliance with a condition precedent, is properly raised by answer.—Doxey v. Royal Ins. Co. (Tenn. Ch. App.) 950.

Amendment.

Where a complaint declares for commissions due for sale of land, an amendment alleging that they were due when a certain portion of the price was paid, and that such portion was paid, does not state a new cause of action.—Burnett v. Casteel (Tex. Civ. App.) 782.

Where the statute requires a pleading to be sworn to, an amendment must be sworn to also.—Bland v. State (Tex. Civ. App.) 914.

Where an amended answer offered at the close of the evidence discloses no facts that could not have been known before trial, refusal of leave to amend was proper.—Louisville Ins. Co. v. Monarch (Ky.) 563.

Where several defendants charged as partners answer to the merits, they could subsequently interpose an amendment denying partnership.—Hayden Saddlery Hardware Co. v. Ramsay (Tex. Civ. App.) 595.

Amended petition, in trial of right to property, *held* to state a new cause of action.—Jones v. Bull (Tex. Civ. App.) 501.

Defendant, after answering an amended petition, cannot object to evidence on the ground that a new cause of action was set up.—Bender v. Zimmerman (Mo.) 210.

Amended petition for personal injuries *held* not to state a new cause of action.—Mexican Cent. Ry. Co. v. Mitten (Tex. Civ. App.) 282.

An amendment setting up the desertion of plaintiff by her husband *held* not to change the cause of action.—Texas & P. Ry. Co. v. Fuller (Tex. Civ. App.) 319.

An amendment *held* properly allowed, it not setting up a new cause of action.—Southern Pac. Co. v. Wellington (Tex. Civ. App.) 1114.

Pleading and proof.

Under a petition seeking to recover on the theory that plaintiff was ejected from a railroad train while a passenger thereon, evidence of a custom to eject trespassers is inadmissible.—Lyons v. Texas & P. Ry. Co. (Tex. Civ. App.) 1007.

In an action for injuries caused by derailment of the engine through defects in the track, evidence that such condition, coupled with a collision, caused the accident, was no variance.—New York, T. & M. Ry. Co. v. Green (Tex. Civ. App.) 812.

Where acts of negligence have been specially pleaded, evidence of negligence of a different character from that alleged is inadmissible.

ble.—Galveston, H. & S. A. Ry. Co. v. Herring (Tex. Civ. App.) 120.

PLEDGES.

A contract for the pledge of two notes for \$1,200 each, as security for a note of \$5,500. construed.—Malone v. Wright (Tex. Sup.) 420.

Where an agent makes a loan and receives a note with collaterals, knowing that the collaterals are to be held for the benefit of the indorser, and surrenders them to the maker of the note, he and his principal are liable for any loss to the indorser thereby.—Hughes v. Settle (Tenn. Ch. App.) 577.

Possession.

See "Adverse Possession."

Postponement.

See "Continuance."

POWERS.

Power to sell or to locate certain headright certificates construed.—Hennessee v. Johnson (Tex. Civ. App.) 774.

Power to receive certain headright certificates construed, and held to be coupled with an interest not revoked by the death of the person executing it.—Hennessee v. Johnson (Tex. Civ. App.) 774.

Practice in Civil Cases.

See "Assumpsit, Action of"; "Attachment"; "Costs"; "Courts"; "Damages"; "Death"; "Depositions"; "Dismissal and Nonsuit"; "Ejectment"; "Limitation of Actions"; "Mandamus"; "New Trial"; "Pleading"; "Process"; "Quieting Title"; "Set-Off and Counterclaim"; "Specific Performance"; "Trespass to Try Title"; "Trial"; "Trove and Conversion"; "Venue"; "Witnesses."

Prescription.

See "Adverse Possession"; "Limitation of Actions."

Highways by, see "Highways."

Presumptions.

On appeal, see "Appeal and Error."

PRINCIPAL AND AGENT.

See, also, "Attorney and Client"; "Master and Servant."

Municipal agents, see "Municipal Corporations."

Ratification of the suing out of a writ of attachment held not to ratify unknown malice on the part of the agent.—Gimbel v. Gomprecht (Tex. Civ. App.) 781.

Whether the agency of defendant was known to plaintiff, where the evidence is conflicting, is for the jury.—Huston v. Tyler (Mo.) 654.

Where defendant discloses to plaintiff that he was acting as agent of the maker of a note in procuring a loan, he is not responsible for the fraud of the maker.—Huston v. Tyler (Mo.) 654.

An instruction that, if defendants' general agent ratified an act of an inferior agent, it was a ratification by the company, held erroneous where there was testimony that such agent had no authority for that purpose.—

Pabst Brewing Co. v. Emerson (Tex. Civ. App.) 342.

Rights of agent under contract for sale of machinery on commission determined.—Odum v. J. I. Case Threshing-Mach. Co. (Tenn. Ch. App.) 191.

A landowner cannot be bound by an unauthorized agreement of a tenant concerning boundaries.—Cox v. Daugherty (Ark.) 184.

Payment by a principal of part of the price before discovering the double agency of his broker held not a ratification of his agent's acts.—McDoel v. Ohio Val. Improvement & Contract Co.'s Assignee (Ky.) 175.

An agreement to purchase held voidable at the election of the principal because of the double agency of his broker.—McDoel v. Ohio Val. Improvement & Contract Co.'s Assignee (Ky.) 175.

Power of attorney construed, and held, that the grantee was authorized only to sell certain headright certificates, and not the land located thereunder.—Hennessee v. Johnson (Tex. Civ. App.) 774.

PRINCIPAL AND SURETY.

Liability of sureties on bond of guardian, see "Guardian and Ward."

—of sheriff, see "Sheriffs and Constables." Sureties on appeal bonds, see "Appeal and Error."

Liability of sureties on bond of county trustee.—Maddox v. Shacklett (Tenn. Ch. App.) 731.

The amount of default for school revenues should be apportioned pro rata between the solvent sureties on the school bonds in proportion to the penalties of the respective bonds.—Maddox v. Shacklett (Tenn. Ch. App.) 731.

The surrender to the debtor of property securing the debt will release a surety on a note given for a part thereof.—Kiam v. Cummings (Tex. Civ. App.) 770.

Allowing a credit of more than \$1,000 on a contract allowing a credit "to at least the amount of \$1,000," held not to release sureties.—Fuqua v. Pabst Brewing Co. (Tex. Civ. App.) 479.

Sureties on a note held discharged by breach of condition as to delivery, though without their knowledge the maker had executed a chattel mortgage to secure them from loss.—Campbell Printing Press & Manufg Co. v. Powell (Tex. Civ. App.) 1005.

Conditional sureties on a note held discharged by delivery without compliance with such condition, the payee of the note having knowledge thereof.—Campbell Printing Press & Manufg Co. v. Powell (Tex. Civ. App.) 1005.

Priorities.

Of mortgage lien, see "Mortgages."

PRISONS.

Under St. §§ 356, 1730, allowing the jailer certain fees for attendance on the courts, and for supplying them with light and fuel, he is not authorized to furnish such supplies to county officers.—Stone v. Pfanz (Ky.) 1128.

Fees received by jailer for attendance upon courts must be included in the statement of fees received, as required by St. Ky. § 1773, in counties having a population of 75,000.—Stone v. Pfanz (Ky.) 1128.

Commonwealth is allowed to retain 25 per cent. of fees reported by jailer each month for attendance on courts, and supplying them with

fuel and light, in counties having a population of 75,000.—*Stone v. Pflanz* (Ky.) 1128.

Privileged Communications.

See "Witnesses."

Probable Cause.

See "Malicious Prosecution."

For issuing attachment, see "Attachment."

PROCESS.

The misspelling of a defendant's name in an officer's return, when it is correctly spelled in the citation, will not invalidate the service.—*Dunn v. Hughes* (Tex. Civ. App.) 1084.

Under the Texas statute (Rev. St. 1895, art. 1214) service of a citation misstating the date of the filing of the petition will not authorize a judgment by default.—*Dunn v. Hughes* (Tex. Civ. App.) 1084.

A return over the official signature of the sheriff is good though the deputy who made the return simply writes the letter "C." for his own signature.—*Hays v. Byrd* (Tex. Civ. App.) 777.

A return otherwise sufficient is not invalid merely because the officer describes himself as "Sheriff of S. J. county."—*Hays v. Byrd* (Tex. Civ. App.) 777.

Under Code, §§ 5097, 5100, an entry on service by publication need not show the grounds on which the order was made, and one stating the grounds is not conclusive.—*Finch v. Frymire* (Tenn. Ch. App.) 883.

Under Const. art. 5, § 12, a court cannot issue process running in the name and by the authority of, and concluding against the peace and dignity of, a certain city.—*Leach v. State* (Tex. Cr. App.) 471.

PROHIBITION.

A writ of prohibition will lie to prevent the enforcement of court rules made without jurisdiction.—*State ex rel. St. Louis, K. & N. W. Ry. Co. v. Withrow* (Mo.) 43.

A circuit court will not prohibit the police court of a city from prosecuting under an invalid city ordinance, under Cr. Code, § 25.—*City of Owensboro v. Sparks* (Ky.) 4.

After judgment in prohibition proceedings to check an order appointing a receiver, the receiver cannot object that he was an improper party, so as to claim attorney's fees.—*St. Louis, K. & S. R. Co. v. Wear* (Mo.) 658.

Where the record shows a failure of jurisdiction, or a wrongful invasion of property rights, prohibition will issue.—*St. Louis, K. & S. R. Co. v. Wear* (Mo.) 357.

Promissory Notes.

See "Bills and Notes."

Proof.

See "Insurance."

Property.

Subject to attachment, see "Attachment."

Protest.

See "Bills and Notes."

Proximate Cause.

See "Negligence."

Publication.

Of libel or slander, see "Libel and Slander."
Service of process by, see "Process."

Public Improvements.

See "Municipal Corporations."

PUBLIC LANDS.

Failure to record the field notes will not invalidate a patent as against those who failed to acquire any title in the land.—*Thompson v. Ford* (Tex. Civ. App.) 783.

Under Act of 1839 of the Republic of Texas, relating to land donated to emigrants, a bond or contract for the sale of a claim to land to be located under a conditional headright certificate executed in 1840 was invalid.—*Buchanan v. Park* (Tex. Civ. App.) 807.

Act Aug. 15, 1870, merging two railroad companies, held not to give the right to public lands for every mile constructed, since Const. 1869, art. 10, § 6, forbade such donations.—*Houston & T. C. Ry. Co. v. State* (Tex. Civ. App.) 819.

A railroad company held not to have acquired the right to 16 sections of land a mile for branch roads, under Act June 30, 1854.—*Houston & T. C. Ry. Co. v. State* (Tex. Civ. App.) 819.

Where a Spanish grant of land in Texas was executed in 1816 by the justice of Palafo, pursuant to a decree of the governor of Monclova, it will be presumed that those officers had authority to make the grant.—*Sheldon v. Milmo* (Tex. Sup.) 413.

The royal cedula of Spain of August 22, 1814, did not annul the decree of the cortes of January 4, 1813, relating to the sale and distribution of public lands.—*Sheldon v. Milmo* (Tex. Sup.) 413.

The royal cedula of Spain of July 8, 1814, did not abrogate the decree of the cortes of January 4, 1813, relative to the sale and distribution of public lands.—*Sheldon v. Milmo* (Tex. Sup.) 413.

The documents evidencing a Spanish grant of Mexican lands held to sufficiently establish the extension of the final title.—*Sheldon v. Milmo* (Tex. Sup.) 413.

The approval of an intendente was not necessary to a Spanish grant of public land in Mexico in 1816.—*Sheldon v. Milmo* (Tex. Sup.) 413.

When lands have been recovered by the state in a suit annulling a void patent, the lands become a part of the public domain, and location may be made upon them.—*Faulk v. Sanderson* (Tex. Sup.) 403.

After a decree in favor of the state annulling a void patent, a certificate holder may at once locate upon the lands, subject to the setting aside of the decree by some legal proceeding.—*Faulk v. Sanderson* (Tex. Sup.) 403.

Public Policy.

See "Contracts."

QUIETING TITLE.

See, also, "Ejectment"; "Trespass to Try Title."

Where defendant claims he has improved the land and paid the taxes, he is not entitled to recover for the same without evidence of the value of the improvements and the amount of taxes.—*Hunter v. Clayton* (Tex. Civ. App.) 326.

Under St. § 11, plaintiff must have both the legal title, and the possession to maintain an action to quiet title.—*Brandenburgh v. Louisville Tin & Stove Co.* (Ky.) 7.

RAILROADS.

See, also, "Carriers"; "Corporations"; "Eminent Domain"; "Master and Servant."
Land grants in aid of, see "Public Lands."
Municipal aid, see "Municipal Corporations."

A railroad company is not obliged to remove from its right of way trees which shade and injure the crops upon adjacent land.—*Galveston, H. & S. A. R. Co. v. Spinks* (Tex. Civ. App.) 780.

Notice of failure to post freight schedules, as required by Act March 24, 1887 (Sand. & H. Dig. §§ 6307, 6312), and demand for reparation, must show the extent of claimant's grievance, and the damages arising therefrom.—*Arkansas & L. Ry. Co. v. Harris* (Ark.) 186.

Only a person injuriously affected by failure of a railroad company to post printed freight schedules, as required by Act March 24, 1887 (Sand. & H. Dig. §§ 6307, 6312), is entitled to the penalty.—*Arkansas & L. Ry. Co. v. Harris* (Ark.) 186.

Liability of company reorganized by purchasers at foreclosure sale, who made part of their payments at such sale with judgments which they were to receive in exchange for bonds to be assigned to the judgment creditors.—*Houston, E. & W. T. Ry. Co. v. Keller* (Tex. Civ. App.) 859.

Lease and consolidation.

A contract between lessees *held* not a sublease, but an operating contract, creating no privity of estate between one and the other's lessor.—*St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. Ry. Co.* (Mo.) 602.

Under Rev. St. 1889, § 2588, a railroad company may contract with another to operate its entire system for a term of years.—*St. Joseph & St. L. R. Co. v. St. Louis, I. M. & S. Ry. Co.* (Mo.) 602.

Authority given one railroad company to consolidate with any other company does not confer authority on another company to unite with it.—*Morrill v. Smith County* (Tex. Sup.) 56.

Authority given a railroad company by its charter to unite with any other company is exhausted by its consolidation with another company.—*Morrill v. Smith County* (Tex. Sup.) 56.

Insolvency and receivers.

Where a railroad is in the hands of a receiver, the court can appropriate the corpus of the property to claims for operating expenses in preference to a prior mortgage debt.—*Farmers' & Merchants' Nat. Bank v. Waco Electric Railway & Light Co.* (Tex. Civ. App.) 131; *Metropolitan Trust Co. v. Farmers' & Merchants' Nat. Bank, Id.*

A railroad company is liable for injuries to stock caused while the road was in the hands of a receiver, where the road is subsequently turned over to it after large expenditures of current revenues in betterment.—*Texas & P. Ry. Co. v. Watson* (Tex. Civ. App.) 290.

Liability for negligence.

When railroad company liable under pleadings which allege that deceased, "when killed, was lying on defendant's track, asleep and unconscious, in a helpless condition, being in a state of intoxication."—*Sullivan v. St. Louis S. W. Ry. Co.* (Tex. Civ. App.) 1020.

It was error to submit the issue of defendant's negligence in not discovering the presence of deceased on the track in time to avoid injuring him, where negligence in that respect is not alleged.—*Galveston, H. & S. A. Ry. Co. v. Harris* (Tex. Civ. App.) 776.

In an action for the negligent killing of plaintiff's husband, where the evidence was insuffi-

cient to entitle plaintiff to recover even if deceased had been a licensee, it was unnecessary to determine whether he was such a licensee or a mere trespasser.—*Washington v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 778.

Under the evidence, a verdict for defendant was properly directed in an action for alleged negligence in killing plaintiff's husband, who was walking upon defendant's right of way.—*Washington v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 778.

In an action for injuries to a child on the track, *held* that there was no evidence of defendant's negligence to submit to the jury.—*Central Texas & N. W. Ry. Co. v. Douglass* (Tex. Civ. App.) 120.

One killed because of the catching of his foot in an unblocked frog *held* not guilty of contributory negligence as a matter of law.—*Lee v. International & G. N. R. Co.* (Tex. Sup.) 63.

Where defendant ran its train faster than allowed by ordinance, and plaintiff was injured thereby, he could recover, whether the injury occurred at the place named in the petition, or elsewhere within the city.—*Prewitt v. Missouri, K. & T. Ry. Co.* (Mo.) 667.

Evidence *held* sufficient to warrant a finding that plaintiff injured on a railroad track was free from negligence.—*Prewitt v. Missouri, K. & T. Ry. Co.* (Mo.) 667.

The violation of an ordinance as to the rate of speed in a city is negligence per se.—*Prewitt v. Missouri, K. & T. Ry. Co.* (Mo.) 667.

Contributory negligence of a traveler in walking on a railway track *held* to prevent recovery for his death.—*Texas & P. Ry. Co. v. Breadow* (Tex. Sup.) 410.

Person injured while walking on a switch, by a timber projecting from a passing train on the main track, *held* not entitled to damages.—*Louisville & N. R. Co. v. Wade* (Ky.) 1125.

A railroad company is not liable to a trespasser for an injury received by being struck by a passing train while sitting beside the track asleep, where no negligence is shown on the part of those in charge of the train after the trespasser was discovered.—*Embry v. Louisville & N. R. Co.* (Ky.) 1123.

— Accidents at crossings.

Instruction as to the duty of a railroad company at a crossing *held* properly refused, as it relieved the company of the duty of exercising reasonable care.—*Texas & P. Ry. Co. v. Curlin* (Tex. Civ. App.) 1003.

In an action for causing death at a crossing, testimony to show the points at which signals were usually given was admissible where there was previous evidence that the usual signals were given before deceased was struck.—*Galveston, H. & S. A. Ry. Co. v. Harris* (Tex. Civ. App.) 776.

When a statute requires signals to be given "at least" at a certain distance from the crossing, defendant has the right to have the words "at least" inserted in a charge on said statute.—*Galveston, H. & S. A. Ry. Co. v. Harris* (Tex. Civ. App.) 776.

A railroad company should keep such a lookout at a street crossing as a reasonably prudent person would keep under similar circumstances.—*Gulf, C. & S. F. Ry. Co. v. Penderly* (Tex. Civ. App.) 793.

The violation of a city ordinance regulating the speed of trains is negligence per se.—*Gulf, C. & S. F. Ry. Co. v. Penderly* (Tex. Civ. App.) 793.

A railroad company *held* liable for bumping a car on a crossing, injuring a child thereon.—*Gulf, C. & S. F. Ry. Co. v. West* (Tex. Civ. App.) 101.

Sufficiency of the evidence to entitle plaintiff to go to the jury in an action for injuries sustained at a crossing.—Newport News & M. V. Co. v. Stewart's Adm'r (Ky.) 528; Same v. Stewart, Id.; Same v. Wyatt, Id.

In an action for injuries sustained at a crossing, an instruction which submitted to the jury the question of the intelligence of the intestate of one of the plaintiffs who drove the wagon was not prejudicial, where plaintiff's evidence showed that said intestate was a remarkably bright and intelligent boy, and was familiar with the road.—Newport News & M. V. Co. v. Stewart's Adm'r (Ky.) 528; Same v. Stewart, Id.; Same v. Wyatt, Id.

An instruction submitting to the jury the question as to whether it was negligence to fail to provide an effectual mode of warning travelers of the approach of trains at a crossing was not erroneous.—Newport News & M. V. Co. v. Stewart's Adm'r (Ky.) 528; Same v. Stewart, Id.; Same v. Wyatt, Id.

An instruction submitting to the jury the question as to whether it was negligence to fail to adopt means to warn travelers of the approach of trains at a crossing did not make it incumbent upon defendant to adopt some mode that would make it impossible for a person to be injured.—Newport News & M. V. Co. v. Stewart's Adm'r (Ky.) 528; Same v. Stewart, Id.; Same v. Wyatt, Id.

In an action for the killing of plaintiff's husband at a crossing, *held*, that a demurrer to the evidence should have been sustained.—Huggart v. Missouri Pac. Ry. Co. (Mo.) 220.

Evidence examined, and *held*, that plaintiff injured at a street crossing was not, as a matter of law, guilty of contributory negligence.—Texas & P. Ry. Co. v. Fuller (Tex. Civ. App.) 319.

A person injured at a railroad crossing *held* guilty of contributory negligence.—Vogg v. Missouri Pac. Ry. Co. (Mo.) 646.

RAPE.

A conviction of assault with intent to rape, where defendant is at no time within reach of prosecuting witness, cannot be sustained.—Marshall v. State (Tex. Cr. App.) 1062.

Ratification.

Of unauthorized act of agent, see "Principal and Agent."

Real Estate.

See "Deeds"; "Mechanics' Liens"; "Mortgages"; "Public Lands."

RECEIVERS.

Contempt for refusing to turn over property to receiver, see "Contempt."
Of corporations, see "Corporations."
Of railroads, see "Railroads."

The appointment of a receiver for a cemetery association for misapplication of the funds and destruction of the property *held* proper.—Houston Cemetery Co. v. Drew (Tex. Civ. App.) 802.

The appointment of a receiver on conflicting affidavits *held* conclusive.—Houston Cemetery Co. v. Drew (Tex. Civ. App.) 802.

When there are grounds of relief prayed for that would authorize the appointment of a receiver, it need not conclusively appear that plaintiff is entitled to recover thereon.—Houston Cemetery Co. v. Drew (Tex. Civ. App.) 802.

The court may in its discretion order a sale by a receiver, and not by the sheriff under pro-

cess.—Farmers' & Merchants' Nat. Bank v. Waco Electric Railway & Light Co. (Tex. Civ. App.) 131; Metropolitan Trust Co. v. Farmers' & Merchants' Nat. Bank, Id.

A receiver unlawfully appointed *held* not entitled to compensation from the funds coming into his hands.—St. Louis, K. & S. R. Co. v. Wear (Mo.) 658.

Where appointment of a receiver at the request of the holder of bonds under a divisional mortgage has been revoked, and a receiver for the entire line appointed by another court, the appointment by the first court of a receiver for the whole road on amendment of the original petition *held* improper.—Merriam v. St. Louis, C. G. & Ft. S. Ry. Co. (Mo.) 630.

The insolvency of a railroad company and default in interest on mortgage bonds do not authorize the appointment of a receiver without notice.—Merriam v. St. Louis, C. G. & Ft. S. Ry. Co. (Mo.) 630.

The appointment of a receiver for the entire road, at the instance of the holder of railroad bonds secured on one-fourth of the mileage of the road, is erroneous.—Merriam v. St. Louis, C. G. & Ft. S. Ry. Co. (Mo.) 630.

Evidence *held* to show, *prima facie*, that court of a foreign state had jurisdiction to place property in hands of a receiver.—Robertson v. Stead (Mo.) 610.

Appointment of a receiver in Mexico, and possession of personal property there, authorize the receiver to maintain replevin for such property in courts of the United States.—Robertson v. Stead (Mo.) 610.

Where a receiver is appointed on an *ex parte* application without notice, the procedure should be such as to allow a speedy review of such interlocutory order.—St. Louis, K. & S. R. Co. v. Wear (Mo.) 357.

Under Rev. St. 1839, § 2193, a judge can appoint a receiver in vacation out of the county in which the case is pending.—St. Louis, K. & S. R. Co. v. Wear (Mo.) 357.

Under Const. 1875, art. 12, § 17, the president of a railroad company cannot act as a receiver for a company operating a competing line.—St. Louis, K. & S. R. Co. v. Wear (Mo.) 357.

A judgment rendered against a receiver after his discharge and the property has been restored by him does not bind either the property or the owner thereof.—Texas & P. Ry. Co. v. Watson (Tex. Civ. App.) 290.

Recognizance.

See "Bail."

Records.

Compensation of county recorder, see "Counties."
On appeal, see "Appeal and Error."

Recoupment.

See "Set-Off and Counterclaim."

REFORMATION OF INSTRUMENTS.

Complaint construed in action to amend an agreement, and *held* to sufficiently allege a mutual mistake therein.—Keating v. McCutcheon (Tex. Civ. App.) 597.

Evidence examined, and *held* insufficient for the reformation of a deed so as to change a life estate to a fee simple.—Graziana v. Graziana (Ky.) 175.

A deed *held* properly reformed for mutual mistake.—Ezell v. Peyton (Mo.) 35.

Right of plaintiffs to have a deed which conveyed an estate in fee reformed so as to convey only a life estate.—*Hancock v. Dodd* (Tenn. Ch. App.) 742.

Right to correct a chattel mortgage so as to include an article omitted by mutual mistake as against one who claimed that the article was subject to his prior vendor's lien.—*Willis v. Munger Improved Cotton Machine Manuf'g Co.* (Tex. Civ. App.) 1010.

Registration.

Of foreign assignment, see "Assignments for Benefit of Creditors."
Of voters, see "Elections."

Rehearing.

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Relationship.

As affecting competency of juror, see "Jury."
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Religious Societies.

Exemption from taxation, see "Taxation."

REMAINDERS.

Where a remainder-man purchases the life estate, and leases the land, and the tenants expend money in boring for gas, other remainder-men, with knowledge thereof, cannot enjoin the removal of the gas.—*Gerkins v. Kentucky Salt Co.* (Ky.) 1.

Remainder-men cannot be substituted to the state's lien for taxes assessed in the name of the life tenant, and paid by them before the life estate was exhausted.—*Ferguson v. Quinn* (Tenn. Sup.) 575.

Remote Cause.

See "Negligence."

REMOVAL OF CAUSES.

An action against a United States marshal is not removable where the amount of damages is less than the jurisdiction of the federal court.—*Hunt v. Hardin* (Tex. Civ. App.) 1028.

A cause cannot be removed to a federal court because a construction of the federal constitution becomes necessary.—*Galveston, H. & S. A. Ry. Co. v. State* (Tex. Civ. App.) 111.

Where the fact that the action arises under the federal laws is not shown by the complaint, it cannot be removed.—*Texas & P. Ry. Co. v. Caples* (Tex. Civ. App.) 516.

A petition for removal cannot be used to show that a federal question is involved, where it is not shown in the complaint.—*Texas & P. Ry. Co. v. Caples* (Tex. Civ. App.) 516.

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See "Landlord and Tenant."

Repairs.

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Repeal.

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REPLEVIN.

Where a trustee replevied property seized under a sequestration, and turned the property over to a receiver on order of the court, his liability on the replevin bond was not discharged.—*Levy v. Lee* (Tex. Civ. App.) 309.

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Illegal liquor sales, see "Intoxicating Liquors."

On execution, see "Execution."

On mortgage foreclosure, see "Mortgages."

Evidence examined, and held not to show an implied warranty that a furnace sold would successfully smelt lead ores.—*Blue Springs Min. Co. v. McIlvein* (Tenn. Sup.) 1094.

A warranty requiring notice of defects in the machine sold, if it failed to perform as warranted within one week, held to require notice within a reasonable time.—*Gaar, Scott & Co. v. Stark* (Tenn. Ch. App.) 149.

Under Rev. St. art. 2547, the possession of chattels for the period of two years after delivery may be by the loanee or vendee or those claiming under him.—*Hastings v. Kellogg* (Tex. Civ. App.) 821.

Rights and remedies of parties.

Where the contract required notice of defects to be given, it was not necessary that it should come directly from the purchaser.—

Gaar, Scott & Co. v. Stark (Tenn. Ch. App.) 149.

The purchaser of a defective machine *held* not entitled to recover for the loss sustained by running it, or the amount paid out for repairs.—Gaar, Scott & Co. v. Stark (Tenn. Ch. App.) 149.

Storage of a defective machine by the purchaser for the vendor *held* a sufficient redelivery.—Gaar, Scott & Co. v. Stark (Tenn. Ch. App.) 149.

Keeping a machine after giving notice of its defects *held* not an acceptance.—Gaar, Scott & Co. v. Stark (Tenn. Ch. App.) 149.

A purchaser cannot recover back money paid on the price after discovery of defects in the property sold.—Gaar, Scott & Co. v. Stark (Tenn. Ch. App.) 149.

In an action between a buyer and an attaching creditor of the seller to determine the right to property, a request to charge as to the meaning of the word "delivery" as used in a prior charge *held* properly refused.—Dallas Nat. Bank v. Davis (Tex. Civ. App.) 144.

An offer to return machinery that fails to comply with the warranty of the seller should be made within a reasonable time after the defect is known, and is too late after suit brought for the purchase price.—Bernard Leas Manuf'g Co. v. Waller (Ky.) 531.

One ordering goods may refuse to take them when shipped with a draft, unless allowed a reasonable time for inspection.—Charles v. Carter (Tenn. Sup.) 396.

A petition alleging a sale by false representations of the purchaser as to his insolvency and a revocation of the sale *held* to state a cause of action entitling plaintiff to recover as against the purchaser and one to whom he had sold with knowledge of the fraud.—Fargo v. Rider (Tex. Civ. App.) 340.

False representations *held* insufficient to justify rescission where the buyer tested the property several weeks before completing the purchase.—American Harrow Co. v. Martin (Ky.) 178.

It is the duty of a purchaser who takes the interest of the seller in property charged with a debt on which both seller and purchaser are contingently liable to see that the property is devoted to that purpose.—Meguiar v. Walsh (Ky.) 1124.

Conditional sales.

A parol reservation of title is a parol chattel mortgage, and invalid.—Hastings v. Kellogg (Tex. Civ. App.) 821.

Under Rev. St. art. 2547, the title of a purchaser from one in possession of goods conditionally sold is not affected by the character of the consideration if it is valid between the parties.—Hastings v. Kellogg (Tex. Civ. App.) 821.

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Certain evidence examined, and *held* admissible.—Snodgrass v. State (Tex. Cr. App.) 477.

The testimony of the woman seduced, to warrant conviction, must be corroborated.—McCullar v. State (Tex. Cr. App.) 585.

A girl under 18 years of age, who is a member of a man's family, working for her support, is confided to his care and protection, within the meaning of the statute; and he is subject to prosecution thereunder for her defilement.—State v. Hill (Mo.) 223.

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When defendant can set off debt due from plaintiff in statutory action of trial of right to personal property.—Fleming v. Stansell (Tex. Civ. App.) 504.

In an action for goods furnished under a contract of agency, a plea of reconvention examined, and *held* sufficient.—Deutschman v. Battaille (Tex. Civ. App.) 489.

Equitable set-off cannot be pleaded by way of answer.—American Nat. Bank v. Nashville Warehouse & Elevator Co. (Tenn. Ch. App.) 960.

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Sureties on the bond of a constable who shot the horse under an escaping prisoner *held* liable to the owner of the horse.—Stephenson v. Sinclair (Tex. Civ. App.) 137.

Judgment against an officer for conversion by seizure under execution against a third person *held* erroneous, where such person transferred it to plaintiff to defraud creditors.—Hunt v. Hardin (Tex. Civ. App.) 1028.

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Contract providing that on expiration of the lease the lessor should convey to the lessee the fee at a price to be determined by arbitrators held capable of enforcement.—*Schneider v. Hil-denbrand* (Tex. Civ. App.) 784.

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A settlement of accounts by the state through its authorized officers held binding.—*Mason & Foard Co. v. Commonwealth* (Ky.) 570.

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So far as intended to apply to St. Louis county, Act April 1, 1893, held in violation of Const. art. 4, § 28, for insufficient title.—*State ex rel. Town of Kirkwood v. Heege* (Mo.) 614.

The penalties imposed on the contractor of prison labor for failure to return escaping prisoners cannot be enforced after the repeal of the statute.—*Mason & Foard Co. v. Commonwealth* (Ky.) 570.

The act of June 10, 1893, passed pursuant to Const. § 142, relative to the jurisdiction of justices, does not repeal the local option law of Logan county (Acts 1889-90, c. 549), in so far as the latter confers jurisdiction on any court inferior to the circuit court.—*Lowry v. Commonwealth* (Ky.) 1117.

The creation by special act of a levee district to protect from overflow the large area of land embraced therein is constitutional.—*Reelfoot Lake Levee Dist. v. Dawson* (Tenn. Sup.) 1041.

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The fact that deceased was signaled by defendant's watchman to cross the tracks did not relieve him of the duty to use ordinary care.—Culbertson v. Metropolitan St. Ry. Co. (Mo.) 834.

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A taxpayer cannot recover taxes as paid under duress, unless they were paid either to escape arrest or seizure of property.—*Robins v. Latham* (Mo.) 33.

A petition to enjoin the disbursement of a tax as invalid must show the amount of the tax paid by petitioner.—*Robins v. Latham* (Mo.) 33.

A tax on property within a large district subject to overflow to maintain a levee is for an object of a public nature.—*Reelfoot Lake Levee Dist. v. Dawson* (Tenn. Sup.) 1041.

Where the real property in a county has been assessed at one-half its market value, with but few exceptions, and the board of equalization refuses relief, the court should reduce the valuation of the other real estate to the same basis.—*Ex parte Ft. Smith & Van Buren Bridge Co.* (Ark.) 1060.

A life tenant in possession of realty is the owner, within the meaning of Mill. & V. Code, § 625, requiring taxes to be assessed in the name of the owner.—*Ferguson v. Quinn* (Tenn. Sup.) 576.

A sheet of paper folded up is not a book, within Rev. St. 1889, § 7733, requiring a separate tax book, to be known as the "Railroad Tax Book."—*State ex rel. Wheat v. St. Louis & S. F. Ry. Co.* (Mo.) 211.

Under Rev. St. 1889, §§ 7730, 7731, unless the certificate from the authorities of a city as to railroad property located therein was made at the time and within the year required, the county court cannot levy a tax.—*State ex rel. Wheat v. St. Louis & S. F. Ry. Co.* (Mo.) 211.

Acts 1895, providing for taxation for levee purposes, is unconstitutional.—*Reelfoot Lake Levee Dist. v. Dawson* (Tenn. Sup.) 1041.

Act April 1, 1891, relating to the assessment of shares of banks, is constitutional.—*Ward v. Board of Equalization of Gentry County* (Mo.) 648.

Power of the legislature to tax cannot be delegated to a levee district, as attempted by Acts 1895.—*Reelfoot Lake Levee Dist. v. Dawson* (Tenn. Sup.) 1041.

Const. 1870, art. 2, § 28, providing that all property shall be taxed according to its value, applies to special assessments as well as the general taxes.—*Reelfoot Lake Levee Dist. v. Dawson* (Tenn. Sup.) 1041.

Exemptions.

Where the charter of a corporation provides that it shall pay a state tax on each share of its capital stock in lieu of all other taxes, it does not exempt the capital stock from further taxation.—*State v. Hernando Ins. Co.* (Tenn. Sup.) 721; *Same v. Bluff City Ins. Co.*, Id.

The Kentucky Female Orphan School is an "institution of purely public charity," within the constitutional provision; and the corporation and its property is exempt from taxation.—*Trustees of Kentucky Female Orphan School v. City of Louisville* (Ky.) 921; *Same v. Bell*, Id.

Institutions where general education is given without regard to creed held exempt from taxation, under the constitution, though conducted by a particular denomination or sect.—*City of Louisville v. Board of Trustees of Nazareth Literary & Benevolent Institution* (Ky.) 994; *Same v. St. Xavier's College, Id.*; *Commonwealth v. St. Mary's College, Id.*; *Same v. Loretto Literary & Benevolent Institution, Id.*; *Board of Education of Common-School Dist. No. 1, Pike County, v. Trustees of Pikeville Collegiate Institute, Id.*

A house owned by a practicing attorney, in which he lives with his wife, she conducting therein a school, held not exempt, within Rev. St. 1895, art. 5065.—*Edmonds v. City of San Antonio* (Tex. Civ. App.) 495.

TELEGRAPHS AND TELEPHONES.

A telegraph company held liable for failure to deliver a message by special messenger according to agreement with its agent.—*Western Union Tel. Co. v. Drake* (Tex. Civ. App.) 786.

A telegraph company held liable for failure to deliver a message at a place where it had no office.—*Western Union Tel. Co. v. Hargrove* (Tex. Civ. App.) 1077.

Complaint in an action for negligence in delivery of a telegram held sufficient.—*Western Union Tel. Co. v. Warren* (Tex. Civ. App.) 314.

A son may recover for negligence in delivering a message to him announcing the death of his father.—*Western Union Tel. Co. v. Warren* (Tex. Civ. App.) 314.

Evidence held sufficient to sustain a judgment for plaintiff for delay in delivery of telegram.—*Western Union Tel. Co. v. Teague* (Tex. Civ. App.) 301.

TENANCY IN COMMON.

The fact that a tenant in common has himself inclosed the land owned in common will not excuse him from payment of rent to his co-tenant whom he has excluded from possession.—*Stephens v. Taylor* (Tex. Civ. App.) 1083.

A tenant in common cannot recover exemplary damages from his co-tenant for his eviction by the judgment of a court having jurisdiction.—*Stephens v. Taylor* (Tex. Civ. App.) 1083.

TENDER.

A tender to the attorneys of the pledgee of the amount to redeem held ineffectual, the party making it knowing that the attorneys did not have the pledge in their possession.—*Malone v. Wright* (Tex. Sup.) 420.

In an action to recover land to be conveyed on payment of the price, a tender of the amount due is necessary.—*Hunter v. Clayton* (Tex. Civ. App.) 326.

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See, also, "Assault and Battery"; "Death"; "Intoxicating Liquors"; "Trove and Conversion."

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TRESPASS TO TRY TITLE.

See, also, "Ejectment"; "Quieting Title."

Certain deeds examined, and held inadmissible to show title.—*Buchanan v. Park* (Tex. Civ. App.) 807.

Where the purchaser of a land certificate locates the same, he acquires the legal title, though the patent is issued to the original owner, and the defense of stale demand cannot be set up against his claim.—*Edwards v. Humphreys* (Tex. Civ. App.) 333.

When transfer of land certificate will be presumed in support of defendant's title after lapse of 45 years, during which defendant held possession.—*Baldwin v. Roberts* (Tex. Civ. App.) 789.

Records of former proceedings involving the title held admissible.—*Baldwin v. Roberts* (Tex. Civ. App.) 789.

An unrecommended land certificate held not to establish prima facie title.—*Baldwin v. Roberts* (Tex. Civ. App.) 789.

Judgment for plaintiff held against the weight of the evidence on the question of title.—*League v. Trepagnier* (Tex. Civ. App.) 772.

Answer setting up parol contract for the use of lands as a defense held defective in not sufficiently showing the terms of such contract.—*Anderson v. Anderson* (Tex. Civ. App.) 816.

Execution of a contract relied on as defense in an action for trespass to try title held a question for the jury.—*Anderson v. Anderson* (Tex. Civ. App.) 816.

Instruction on the burden of proof held erroneous for requiring plaintiff to establish title by more than a preponderance of evidence.—*Moore v. Stone* (Tex. Civ. App.) 909.

Mortgagees are not necessary parties to actions brought against mortgagors.—*Galveston, H. & S. A. Ry. Co. v. State* (Tex. Civ. App.) 111.

An application for a loan, containing a sworn statement that the applicant owned the property offered as security, held inadmissible on an issue of ownership.—*Atwell v. Watkins* (Tex. Civ. App.) 103.

A judgment held to divest plaintiff and interveners of their interest in land in suit.—*Foster v. Johnson* (Tex. Sup.) 67.

Defendant cannot recover for improvements on mere proof of their value, there being no evidence of the value of the land with and without the improvements.—*McCown v. McCafferty* (Tex. Civ. App.) 517.

Where plaintiff alleged that the land had been left vacant between two surveys, and claimed under patent, the burden was on him to show that the land was vacant.—*McKinney v. Baldwin* (Tex. Civ. App.) 348.

TRIAL.

See, also, "Appeal and Error"; "Continuance"; "Evidence"; "Judgment"; "New Trial"; "Pleading"; "Process"; "Witnesses."

Conduct in criminal cases, see "Criminal Law"; "Homicide."

Right to jury trial, see "Jury."

A refusal to put witnesses under the rule held within the discretion of the court.—*Gulf, C. & S. F. R. Co. v. West* (Tex. Civ. App.) 101.

It is error to allow any one not a member of the jury to be present during their deliberations.—*Kilgore v. Moore* (Tex. Civ. App.) 317.

An exception stating that defendant objected to the reading of a mortgage, without specifying grounds of objection, is insufficient.—*Jones v. Melindy* (Ark.) 22.

A trial court should not permit counsel to read and comment on authorities to the jury.—*George Knapp & Co. v. Campbell* (Tex. Civ. App.) 765.

Remarks of counsel not based on evidence held erroneous.—*Davis v. Brown* (Ky.) 534.

Error in admitting evidence of plaintiff's conviction of a misdemeanor to impeach him is not waived by plaintiff's introducing like evidence as to a witness.—*Gardner v. St. Louis & S. F. Ry. Co. (Mo.)* 214.

Instructions.

It is not error to omit to give a proper instruction, in the absence of a request.—*Stephens v. Anderson* (Tex. Civ. App.) 1000.

It is not error to refuse a correct instruction, where it has been substantially given.—*Stephens v. Anderson* (Tex. Civ. App.) 1000.

The repetition in two special instructions of a charge already given in the general charge, held ground for reversal.—*Chisum v. Chesnutt* (Tex. Civ. App.) 758.

An instruction held erroneous as excluding an issue.—*Atwell v. Watkins* (Tex. Civ. App.) 103.

Failure to charge is not error where no request was made.—*Rackley v. Fowlkes* (Tex. Civ. App.) 75.

Instruction in an action to set aside a conveyance held without prejudice.—*Edwards v. Edwards* (Tex. Civ. App.) 1080.

An instruction which is not erroneous, but misleading because of matters omitted, is not ground for reversal, where the omission is supplied by an instruction given at the request of the adverse party.—*Meyer v. Southern Ry. Co. (Mo.)* 367.

Instruction for jury to state any and all credits on notes other than those named, to which defendant might be entitled, held sufficient to cover the issues of certain credits claimed by defendant not to have been allowed.—*Kilgore v. Moore* (Tex. Civ. App.) 317.

An instruction sufficiently covered by the charge is properly refused.—*Texas & P. Ry. Co. v. Padgett* (Tex. Civ. App.) 300.

A charge which is conflicting on material issues is erroneous, and necessitates a reversal, unless appellant's rights could not have been prejudiced thereby.—*Harter v. City of Marshall* (Tex. Civ. App.) 294.

An erroneous charge is not cured by giving one which contradicts it, but the erroneous one should be withdrawn.—*Missouri, K. & T. Ry. Co. of Texas v. Rodgers* (Tex. Sup.) 243.

An instruction assuming a point in issue held erroneous.—*Merzbacher v. State* (Tex. Civ. App.) 308.

It is the duty of a trial court to instruct on a material issue when requested, though the instructions asked may be erroneous.—*Leeds v. Reed* (Tex. Civ. App.) 347.

A general instruction held sufficient in the absence of a request for a fuller instruction.—*Texas & P. Ry. Co. v. Bigham* (Tex. Civ. App.) 1111.

An erroneous instruction is harmless if the verdict is for the right party.—*Vogg v. Missouri Pac. Ry. Co.* (Mo.) 646.

Verdict.

Where plaintiff claimed \$500 per year for services, and defendant claimed that he was entitled to \$500 for the whole time, a verdict for \$850 was responsive to the issues.—*Tobin v. South's Adm'r* (Ky.) 1039.

Where a cause is submitted on special issues, every material issuable fact must be submitted.—*Mulcahy v. State* (Tex. Civ. App.) 1014.

In an action for breach of warranty in a deed, a finding that certain defendants were not liable held necessarily to include a finding that certain land was not included in the deed.—*Chisum v. Chesnutt* (Tex. Civ. App.) 758.

Evidence held to warrant the submission of an issue as to whether certain land was included in a deed to plaintiff.—*Chisum v. Chesnutt* (Tex. Civ. App.) 758.

Issue must have been raised by pleading or proof, to warrant its submission.—*Galveston, H. & S. A. Ry. Co. v. Herring* (Tex. Civ. App.) 129.

A verdict for a less amount than plaintiff was entitled to will be reversed.—*Henry v. Sansom* (Tex. Civ. App.) 122.

Where a question under the undisputed facts was purely one of law, it should not have been submitted to the jury.—*Gulf, C. & S. F. Ry. Co. v. Warner* (Tex. Civ. App.) 118.

A special verdict failing to find all the facts in issue is defective, though the existence of the facts is clearly shown.—*Stephenson v. Chapell* (Tex. Civ. App.) 482.

In an action for damages in overflowing land, it is not error to refuse to require the jury to specify the several items of damage allowed.—*Texas & P. Ry. Co. v. Padgett* (Tex. Civ. App.) 300.

It is error to submit an issue unsupported by any evidence.—*Harter v. City of Marshall* (Tex. Civ. App.) 294.

The court cannot look to the evidence for facts on which to base a judgment where there has been a special verdict.—*Texas & P. Ry. Co. v. Watson* (Tex. Civ. App.) 290.

Under Civ. Code, § 329, the court cannot render judgment on a verdict for a party entitled to recover money where the amount is not assessed.—*Louisville & N. R. Co. v. Hartwell* (Ky.) 183.

Where special issues are submitted, all of the issues of fact made by the pleadings must be submitted and determined.—*Kilgore v. Moore* (Tex. Civ. App.) 317.

Where an indebtedness has been denied by defendant in his testimony, the issue is for the jury.—*Kilgore v. Moore* (Tex. Civ. App.) 317.

Taking case from jury.

A peremptory instruction, where the evidence is conflicting, is erroneous.—*Huston v. Tyler* (Mo.) 654.

When the evidence is not sufficient in law to authorize a finding for plaintiff, the jury should be peremptorily instructed to find for defendant.—*Washington v. Missouri, K. & T. Ry. Co. of Texas* (Tex. Civ. App.) 778.

Where all the testimony of plaintiff is by parol and conflicting, it is error to direct a verdict.—*Cleveland & A. Mineral Land Co. v. Ross* (Mo.) 216.

Trial of Right of Property.

Right to set-off, see "Set-Off and Counterclaim."

TROVER AND CONVERSION.

Evidence of a conveyance to plaintiff in trust for creditors, with possession and an acceptance of the trust by creditors, held sufficient to support an averment of ownership.—*Cooper v. Hiner* (Tex. Civ. App.) 915.

Trustee Process.

See "Garnishment."

TRUSTS.

See, also, "Executors and Administrators"; "Guardian and Ward."

Charitable trusts, see "Charities."

Creation by will, see "Wills."

Liability of surety on bond of trustee, see "Principal and Surety."

Where a husband invested his wife's money in land, in his own name, stating to her that he invested it in her name, held not to create a resulting trust.—*Nashville Trust Co. v. Lannom's Heirs* (Tenn. Ch. App.) 977.

Deed construed, and held to create an active trust, and to prohibit the conveyance of the trust property by the beneficiaries and the trustee.—*Hart v. Bayliss* (Tenn. Sup.) 691.

Transaction held to create the relation of debtor and creditor, and not to entitle a claimant to recover an amount from an assignee as a trust fund.—*Downing v. Lellyett* (Tenn. Ch. App.) 890.

Money borrowed through fraud cannot be followed into property owned by a third person not chargeable with knowledge of the fraud.—*Atwell v. Watkins* (Tex. Civ. App.) 103.

TURNPIKES AND TOLL ROADS.

A county road of great convenience to the public held not a turnpike, though it would decrease the business of a turnpike company.—*Clarksville & R. Turnpike Co. v. City of Clarksville* (Tenn. Ch. App.) 979.

USURY.

Usurious notes given to extend the payment of valid notes secured by collaterals held not to render the security void.—*Hynes v. Stevens* (Ark.) 689.

Where the court could separate the interest and the principal of a note, and the interest was usurious, it should be stricken out.—*Willis v. Holland* (Tex. Civ. App.) 329.

A purchaser at foreclosure under a deed of trust, executed to secure both principal and interest of a usurious loan, obtains title if the principal sum due was not tendered before sale.—*Vaughn v. Mutual Bldg. Ass'n* (Tex. Civ. App.) 1013.

One who assumes the payment of a loan secured by trust deed is not entitled to be relieved from payment thereof by reason of its being tainted with usury.—*Vaughn v. Mutual Bldg. Ass'n* (Tex. Civ. App.) 1013.

Vacancy.

In public office, see "Officers."

Vacation.

Of judgment by default, see "Judgment."

VAGRANCY.

Without some overt act done, the law will not attempt to discern and to determine the intent or purpose which actuates a person to associate with vagrants.—*Ex parte Smith* (Mo.) 628.

Variance.

Between pleading and proof, see "Pleading."

VENDOR AND PURCHASER.

See, also, "Fraudulent Conveyances"; "Judicial Sales"; "Specific Performance."

Parol contracts relating to lands, see "Frauds, Statute of."

Sufficiency of the pleading in an action on a note secured by vendor's lien, to entitle the maker thereof to relief against one who assumed the payment thereof.—*Tinsley v. Houston Land & Trust Co.* (Tex. Civ. App.) 815.

In an action by a bona fide purchaser of a note secured by vendor's lien, one who assumed payment thereof cannot assert that he did not know that it provided for attorney's fees.—*Tinsley v. Houston Land & Trust Co.* (Tex. Civ. App.) 815.

One who is compelled to pay off taxes on land conveyed by warranty against incumbrances is not entitled to credit therefor in an action by a bona fide purchaser of a note secured by vendor's lien, executed for the price.—*Tinsley v. Houston Land & Trust Co.* (Tex. Civ. App.) 815.

It is error to refuse to instruct a jury as to what constitutes an "open house," under the definition given by the statute.—*Merzbacher v. State* (Tex. Civ. App.) 308.

Copies of grants and surveys by the governors of Mexican state, authenticated by the seal of the state, appearing in the archives as a certified copy by the commissioner of the general land office, held constructive notice to claimants under a patent from the state of the prior grant.—*Murchison v. Mexia* (Tex. Civ. App.) 828.

Purchasers of land subject to vendor's lien are entitled to have a foreclosure sale to which they were not parties set aside upon payment of the amount for which the land was sold, and to have the interest of their vendor sold to reimburse them for the amount so paid.—*Wilson v. Houston* (Tex. Civ. App.) 832.

A purchaser, though in undisputed possession under a general warranty deed, is entitled to relief where actual fraud in representing the title is shown on the part of the vendor.—*Fristoe v. Latham* (Ky.) 920.

On a rescission of a contract for the purchase of land, for the default of the vendor, the purchaser is entitled to a lien on the land for payments made, though not in possession.—*Bullitt v. Eastern Kentucky Land Co.* (Ky.) 16.

A vendor who contracts to convey by a good title cannot compel the acceptance of a deed conveying but an undivided interest, though he offers to indemnify against the outstanding in-

terest.—*Wilson v. Zajicek* (Tex. Civ. App.) 1080.

Release of subsequent grantee on purchase-money notes releases principal.—*Mays v. Sanders* (Tex. Civ. App.) 108.

Where, through the negligence of one holding a mortgage on certain property, the records show a good title, a purchaser relying on such records acquires a good title as against such mortgage.—*Freeman v. Moffitt* (Mo.) 640.

Consideration named in deed held fully paid, and that no vendor's lien remained.—*Leonard v. Read* (Tenn. Ch. App.) 581.

Rights of a railroad company which has acquired a right of way by permission of a vendee on foreclosure of a vendor's lien determined.—*Finnell v. Louisville & S. R. Co.* (Ky.) 553.

Enforcement against a homestead alone of a vendor's lien held as collateral to a mortgage, after the foreclosure of the mortgage as to other property also covered by the lien, denied.—*Morrison v. Lazarus* (Tex. Sup.) 428.

Where a contract provided that a vendee should pay a certain sum when a portion of the land bought was sold by him requires a sale within a reasonable time.—*Cook v. Arnold* (Tex. Civ. App.) 343.

A grantee assuming notes for the price of land is bound by a recital in the deed under which the grantor holds that such notes are secured by a deed of trust.—*Christian v. Hughes* (Tex. Civ. App.) 298.

The record of an instrument conveying an expectant interest with warranty of title is notice to subsequent purchasers.—*Hale v. Hollon* (Tex. Civ. App.) 288.

Purchasers from a married woman, without knowledge of her coverture, protected as innocent purchasers.—*Daniel v. Mason* (Tex. Civ. App.) 1113.

Vendor's Lien.

See "Vendor and Purchaser."

Venire.

See "Jury."

VENUE.

In criminal cases, see "Criminal Law."

The fact that a county is formed and courts established does not authorize the transfer to the new county of cases pending.—*McNew v. Williams* (Ky.) 887.

That plaintiff acts in good faith in alleging a joint tort by defendants will not enable him to sue in the county in which only one defendant lives, where no joint tort is proven.—*Edwards v. Buchanan* (Tex. Civ. App.) 1022.

The venue of an action of trespass is properly laid in the county in which the trespass is committed.—*Hunt v. Hardin* (Tex. Civ. App.) 1028.

An action by a vendee for the rescission of a contract for the sale of land, and to establish a lien thereon for payments made, is local, and may be brought in the county where the land is situated.—*Bullitt v. Eastern Kentucky Land Co.* (Ky.) 16.

Under Sayles' Civ. St. art. 1198, plaintiff may sue a defendant whose residence is unknown outside of the latter's county, without using due diligence to discover his residence.—*Hopson v. Caswell* (Tex. Civ. App.) 312.

Verdict.

See "Trial."

Vice Principal.

See "Master and Servant."

Voluntary Conveyance.

See "Fraudulent Conveyances."

Waiver.

Of conditions in policy, see "Insurance."

WAREHOUSEMEN.

In an action for services as warehouseman, evidence of other business in which plaintiff was engaged was inadmissible.—*Tobin v. South's Adm'r* (Ky.) 1039.

Warrant.

County warrants, see "Counties."

Warranty.

See "Sales."

In application for insurance, see "Insurance."

Water Companies.

Contracts with cities, see "Municipal Corporations."

Widow.

See "Dower"; "Executors and Administrators"; "Homestead."

Estate during widowhood, see "Estates."

Wife.

See "Husband and Wife."

WILLS.

Where the widow renounced the will and was allotted dower in lands specifically devised to others, the devisees, after her death, were entitled to contribution out of the residuary estate.—*Treasy v. Treasy* (Ky.) 3.

Where a will is contested, the legacies do not bear interest until the contest is decided.—*Trustees of Church Home for Females and Infirmary for Sick v. Morris* (Ky.) 2.

A devise to a wife during widowhood is not void as in restraint of marriage.—*Wooten v. House* (Tenn. Ch. App.) 932.

Construction.

Will construed, and *held*, that certain words in a devise were merely precatory, and not equivalent to a command.—*Hill v. Page* (Tenn. Ch. App.) 735.

Under a bequest to a wife of "all my estate for and during her natural life or widowhood," with remainder "to my three children," the widow takes a limited estate, determinable on death or marriage.—*Wooten v. House* (Tenn. Ch. App.) 932.

A devise of land to testator's children for life, with power to dispose of it at their death, though not before, vests them with the full title, and the restriction on their power to alienate is ineffectual.—*Fristoe v. Latham* (Ky.) 920.

Will construed, and *held* that certain lands owned by testator were not disposed of by the will.—*Hornsby v. Davis* (Tenn. Ch. App.) 159.

Will construed, and *held* that, where the wife elected to take under the law, payment of other legacies should not be postponed until her death.—*Trustees of Church Home for Females and Infirmary for Sick v. Morris* (Ky.) 2.

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Devise to "my present wife and her children," *held* to exclude a child of the wife by a former marriage.—*Blankenbaker v. Snyder* (Ky.) 1124.

Contingent devise construed, and *held* that the property devised did not pass under the residuary clause.—*Loving v. Rainey* (Tex. Civ. App.) 335.

To create a trust it must appear that the estate vested in the first taker was not absolute, that the subject of the devise, and the devisees therein, are certain, and the trust definite.—*Hill v. Page* (Tenn. Ch. App.) 735.

WITNESSES.

See, also, "Depositions"; "Evidence."

After a party has testified for himself in chief, the fact that he has introduced other testimony does not bar his right to be recalled, under Civ. Code, § 606, subd. 4.—*Louisville Ins. Co. v. Monarch* (Ky.) 563.

In a murder case, where there was evidence that a witness for the state had made statements out of court contrary to his testimony, it was proper to admit, in rebuttal, extracts from his testimony at the inquest which corresponded with his testimony on the trial.—*Sims v. State* (Tex. Cr. App.) 256.

Bantering questions to a witness are properly stricken out.—*Gulf, C. & S. F. Ry. Co. v. Pendery* (Tex. Civ. App.) 793.

Competency.

As against the administrator of the payee of a note, a person appearing by indorsement to be the assignee, and who has reassigned the note during the life of the payee, *held* incompetent to testify as to the assignment to himself.—*Neale's Adm'r v. Neale* (Ky.) 526.

Husband and wife *held* competent as to conversations between them in regard to a fraud perpetrated by the husband and others on the wife.—*Moekkel v. Heim* (Mo.) 226.

In an action by a warehouseman against an administrator, he cannot testify as to the amount it was agreed he should receive.—*Tobin v. South's Adm'r* (Ky.) 1039.

It was error to allow a witness who had stated that he did not know defendant's general reputation as a dangerous man to state that he was dangerous.—*Woods v. State* (Tex. Cr. App.) 96.

Credibility.

Prior statements of witness made in the presence of accused, though denied at the time and at the trial by accused, are admissible to support the credibility of the witnesses.—*Green v. State* (Tenn. Sup.) 700.

It was proper to refuse to permit a grand juror to state what deceased's wife said before the grand jury as to a certain matter, where no foundation for the impeachment had been laid.—*Carpenter v. State* (Ark.) 900.

A witness may be questioned on cross-examination as to specific acts of moral turpitude to affect his credibility.—*Zanone v. State* (Tenn. Sup.) 711.

The fact that other indictments have been found against a defendant may be shown to discredit his testimony where he is a witness.—*Ryan v. State* (Tenn. Sup.) 930.

Where testimony is admissible only for the purpose of contradicting a witness, it was error to refuse to charge that it should be considered only for that purpose.—*Halsell v. Decatur Cotton Seed Oil Co.* (Tex. Civ. App.) 848.

Contradictory statements of a witness *held* admissible for purpose of impeachment.—*Phipps v. State* (Tex. Cr. App.) 753.

Where it is attempted to lay a predicate for the impeachment of a witness, the entire conver-

sation in which alleged inconsistent statements were made may be given.—*Ball v. State* (Tex. Cr. App.) 448.

Though the state shows that defendant, when he borrowed the gun with which he killed deceased, stated that he wanted to shoot ducks, it may show that such statement was false.—*Hamilton v. State* (Ark.) 1054.

On cross-examination of a woman who was a witness for defendant, it was admissible, as showing her interest, to prove that she was living with him, though not married.—*Holly v. Commonwealth* (Ky.) 532.

Evidence which might have been admissible, as laying a predicate for impeachment, *held* inadmissible as original evidence.—*Ray v. State* (Tex. Cr. App.) 446.

Defendant in a criminal case cannot be examined as to a confession made without warn-

ing for the purpose of impeachment.—*Morales v. State* (Tex. Cr. App.) 435.

Evidence that a witness had been convicted of a misdemeanor was inadmissible for impeachment.—*Gardner v. St. Louis & S. F. Ry. Co.* (Mo.) 214

An instruction that the credibility of the witnesses was for the jury was not error, though testimony had been introduced tending to impeach the witnesses.—*Trotter v. State* (Tex. Cr. App.) 278.

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